

Updates

- I. SEBI (DIP) Guidelines, 2000, August 4, 2008 (applicable for May, 2009 examinations)
- (a) Amendments to SEBI (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.

The full text of the amendments is given in Annexure I and the amendments are explained in brief as under:

- (i) Eligibility of nominee directors for ESOS
 - (a) Presently, as per SEBI (ESOS & ESPS) Guidelines, an employee (including a director of a company / its holding company / its subsidiary, whether such director is a whole- time director or not) is eligible to participate in the ESOS of the company, if such employee is not a promoter, does not belong to the promoter group and is not a director, who, either by himself or through his relative or through any body corporate, directly or indirectly holds more than 10% of the outstanding equity shares of the company.
 - (b) It has been decided to clarify that a director, nominated by an institution as its representative on the Board of Directors of a company, is eligible to participate in the ESOS of the company, if the contract / agreement entered into between the nominating institution and the director so appointed specifically provides for acceptance of ESOS of the company by such director and a copy thereof is filed with the company.
- (ii) Accounting treatment for options granted under graded vesting schemes
 - (a) Presently, as per SEBI (ESOS & ESPS) Guidelines, where an employee stock option scheme provides for graded vesting of options, the vesting period is determined separately for each portion of the option and the accounting value of each such portion is amortised on a straight-line basis over the vesting period of that portion.
 - (b) The Institute of Chartered Accountants of India (ICAI), which also prescribes the accounting treatment for employee stock options through its Guidance Note on “Employee Shared Based Payments”, has, vide its Announcement issued in March 2007, revised the accounting treatment, reorganisation and measurement of options granted under graded vesting schedule.
 - (c) It has been decided to amend SEBI (ESOS & ESPS) Guidelines to bring the accounting treatment prescribed by SEBI, for options granted under graded vesting, in line with the accounting treatment provided by ICAI in this regard.

ANNEXURE I

AMENDMENTS TO SEBI (ESOS & ESPS) GUIDELINES, 1999

1. After clause 4.1, the following Explanation shall be inserted, namely:-

“Explanation: Where such employee is a director nominated by an institution as its representative on the Board of Directors of the company –

(i) the contract/ agreement entered into between the institution nominating its employee as the director of a company and the director so appointed shall, inter-alia, specify the following:

- (a) whether options granted by the company under its ESOS can be accepted by the said employee in his capacity as director of the company;
- (b) that options, if granted to the director, shall not be renounced in favour of the nominating institution; and
- (c) the conditions subject to which fees, commissions, ESOSs, other incentives, etc. can be accepted by the director from the company.

(ii) the institution nominating its employee as a director of a company shall file a copy of the contract/ agreement with the said company, which shall, in turn, file the copy with all the stock exchanges on which its shares are listed.

(iii) the director so appointed shall furnish a copy of the contract/ agreement at the first Board meeting of the company attended by him after his nomination.”

2. After clause 11.6, the following new clause shall be inserted, namely:-

“11.7 The options granted to a director, who is an employee of an institution and has been nominated by the said institution, shall not be renounced in favour of the institution nominating him.”

3. Clause 13.2 shall be omitted.

4. In Schedule I, for clause (c), the following clause shall be substituted, namely:-

“(c) Where the accounting value is accounted for as employee compensation in accordance with clause (b), the amount shall be amortised as under :

- (i) Where the scheme does not provide for graded vesting, the amount shall be amortised on a straight-line basis over the vesting period.
- (ii) Where the scheme provides for graded vesting -

(1) the vesting period shall be determined separately for each separate vesting portion of the option, as if the option was, in substance, multiple option and the amount of employee compensation cost shall be accounted for and amortised accordingly on a straight-line basis over the vesting period; or

(2) the amount of employee compensation cost shall be accounted for and amortised on a straight-line basis over the aggregate vesting period of the entire option (that is, over the vesting period of the last separately vesting portion of the option):

Provided that the amount of employee compensation cost recognized at any date at least equals the fair value or the intrinsic value, as the case may be, of the vested portion of the option at that date.”

(b) SEBI (DIP) Guidelines, 2000, August, 2008 (applicable for May, 2009 examinations)

The amendments are given in brief as under:

(i) Reduction in timelines for rights issue

- (a) At present, timelines for listed companies making rights issues are stipulated in the SEBI (DIP) Guidelines and Equity Listing Agreement. It is understood that the current timelines expose investors and issuers to market risks.
- (b) In order to mitigate these risks and to enable listed companies to raise funds from its shareholders in a more time effective manner, it has been decided to reduce the current timelines, starting from the notice period required for calling a board meeting of the issuer to consider the rights issue up to the period stipulated for completion of allotment and commencement of listing and trading of the shares so issued.

(ii) Definition of “Qualified Institutional Buyers (QIBs)”

- (a) Presently, foreign institutional investors (FIIs) registered with SEBI are included in the definition of QIBs. These FIIs invest in securities in the primary market, either on their account or on behalf of their sub-account(s), in terms of the SEBI (Foreign Institutional Investors) Regulations, 1995. It has been decided to exclude sub-accounts falling in the categories of “foreign corporate” and “foreign individual” from the definition of QIBs.
- (b) Further, it has been decided to include the definition of “QIB” in the definition clause of the SEBI (DIP) Guidelines, for the purpose of clarity.

(iii) Eligibility for making Qualified Institutions Placement (QIP)

- (a) Presently, the eligibility criteria for listed companies desirous of making QIP include a condition that the equity shares of the same class of such companies shall have been listed on a stock exchange having nationwide terminals, for a period of at least one year as on the date of issuance of notice to shareholders for considering the QIP.
- (b) It is noted that companies, which have been listed during the preceding one year pursuant to approved scheme(s) of merger/ demerger/ arrangement entered into by such companies with companies which have been listed for more than one year in such stock exchange(s), are not able to use the QIP

route for raising funds. In order to enable such companies to raise funds through QIP route, it has been decided that for the purpose of fulfilment of the abovementioned eligibility criterion, such companies may take into account the listing history of the listed companies with which they have entered into the approved scheme(s) of merger/ demerger/ arrangement.

(iv) Pricing norms for QIP

In order to facilitate eligible listed companies to raise funds through QIP route, it has been decided to modify the pricing guidelines for QIP by bringing the issue price of the securities offered closer to their market price. This has been effected through change in the floor price formula and definition of relevant date

(v) Pricing norms for preferential allotment to QIBs

In order to facilitate eligible listed companies to raise funds from QIBs without having to go through the elaborate documentation process required for QIP, it has been decided to extend the modified pricing guidelines of QIP to preferential allotment to QIBs, provided that the number of QIB allottees in such preferential allotment does not exceed five.

(vi) Lock-in on shares on exercise of warrants issued on preferential basis

Presently, as per the guidelines on preferential allotment, warrants issued on preferential basis are subject to lock-in for a period of one year or three years, as the case may be and lock-in on shares allotted on exercise of such warrants is reduced to the extent such warrants have already been locked-in. It has been decided to subject the shares so allotted pursuant to exercise of warrants to full lock-in period of one year or three years, as the case may be, from the date of allotment of such shares.

(vii) Eligibility of shares for promoters' contribution and offer for sale

- (a) Presently, the SEBI (DIP) Guidelines provide that only those shares, which are held by shareholders for a period of at least one year at the time of filing of draft offer document with SEBI, are eligible (i) to be offered for sale and (ii) to be included for the purpose of promoters' contribution (except in cases where the shares have been issued at the same issue price during the preceding one year).
- (b) It has been decided to permit offer for sale and inclusion in the promoters' contribution of those shares which have been acquired pursuant to a restructuring exercise approved by High Court(s), in lieu of business and invested capital which had been in existence for a period of more than one year prior to the restructuring exercise.

(viii) Filing of offer documents at SEBI Regional Offices

At present, draft offer documents of issue size up to Rs.20 crores can be filed by lead merchant bankers with such Regional Office of SEBI under the jurisdiction of which the registered office of the issuer company falls. It has been decided to increase this limit to Rs.50 crores.

(ix) Miscellaneous amendments

The SEBI (Issue and Listing of Debt Securities) Regulations, 2008 were notified on June 6, 2008 and are applicable to public issue of debt securities and listing of debt securities issued through public issue or on private placement basis on a recognised stock exchange. As per regulation 33(1) of these regulations, the provisions of the SEBI (DIP) Guidelines, in so far as these relate to issue and listing of debt securities, shall stand rescinded on the commencement of these regulations. Consequential amendments have accordingly been made in the SEBI (DIP) Guidelines.

CHAPTER I PRELIMINARY

1. In clause 1.2.1:-

(a) after sub-clause (viii), the following sub-clause shall be inserted, namely:-

“viii-a) Convertible Debt Instrument” means an instrument or security which creates or acknowledges indebtedness and is convertible into equity shares at a later date, at or without the option of the holder of the instrument or the security of a body corporate, whether constituting a charge on the assets of the body corporate or not;”

(b) sub-clause (xi) shall be omitted;

(c) sub-clause (xxiva), sub-clause (xxiv aa) and sub-clause (xxiv b) shall be renumbered as sub-clause “(xxiv b)”, sub-clause “(xxiv c)” and sub-clause

“(xxiv d)” respectively;

(d) after sub-clause (xxiv), the following sub-clause shall be inserted, namely:-

“xxiv a) “Qualified Institutional Buyer” means

a) a public financial institution as defined in section 4A of the Companies Act, 1956;

b) a scheduled commercial bank;

c) a mutual fund registered with the Board;

d) a foreign institutional investor and sub-account registered with SEBI, other than a sub-account which is a foreign corporate or foreign individual;

- e) a multilateral and bilateral development financial institution;
- f) a venture capital fund registered with SEBI;
- g) a foreign venture capital investor registered with SEBI;
- h) a state industrial development corporation;
- i) an insurance company registered with the Insurance Regulatory and Development Authority (IRDA);
- j) a provident fund with minimum corpus of Rs. 25 crores;
- k) a pension fund with minimum corpus of Rs. 25 crores);
- l) National Investment Fund set up by resolution no. F. No. 2/3/2005- DDII dated November 23, 2005 of Government of India published in the Gazette of India."

CHAPTER II

ELIGIBILITY NORMS FOR COMPANIES ISSUING SECURITIES

- 2. In clause 2.2.2B, sub-clause (v) shall be omitted.
- 3. In clause 2.5.1A, for the words and brackets "debt instruments (whether convertible or not)", the words "convertible debt instruments" shall be substituted.
- 4. Clause 2.5.1B shall be omitted.

CHAPTER IV

PROMOTERS' CONTRIBUTION AND LOCK-IN REQUIREMENTS

PART I – PROMOTERS' CONTRIBUTION

- 5. In clause 4.6.2, after 3rd proviso and before Explanation to the clause, the following proviso shall be inserted, namely:-

"Provided further that nothing contained in clause 4.6.2 shall apply to shares acquired by promoters in lieu of business and invested capital which had been in existence for a period of more than one year prior to the restructuring scheme under sections 391-394 of the Companies Act, 1956, as approved by a High Court, which entitled the promoters to acquire such shares."

- 6. In 4.14.2, in sub-clause (ii):-

(a) after 1st proviso and before Explanation, the following proviso shall be inserted, namely:-

"Provided further that the minimum holding requirement of pre-issue capital shall also not apply to shares which have been acquired during one year preceding the date of filing draft

offer document with the Board in lieu of business and invested capital which had been in existence for a period of more than one year prior to the restructuring scheme under sections 391- 394 of the Companies Act, 1956, as approved by a High Court, which entitled acquisition of such shares.”

(b) in the para below the heading “Explanation”, for the words “this proviso”, the words “1st proviso above” shall be inserted.

CHAPTER V

PRE- ISSUE OBLIGATIONS

7. In clause 5.11.1, for the words and figure “7 days”, the words and figures “3 days” shall be substituted.

CHAPTER VI

CONTENTS OF OFFER DOCUMENT

SECTION III - CONTENTS OF THE LETTER OF OFFER

8. In clause 6.41.8, for the words and figures “7 weeks”, the words and figures “15 days” shall be substituted.

9. In clause 6.41.10.1 –

(a) in sub-clause (i), for the words “forty two days”, the words “fifteen days” shall be substituted; and

(b) in sub-clause (ii), for the words “forty two days”, the words “fifteen days” shall be substituted.

10. In clause 6.41.10.2 –

(a) in sub-clause (i), for the words “forty two days”, the words “fifteen days” shall be substituted; and

(b) in sub-clause (ii), for the words “forty two days”, the words “fifteen days” shall be substituted.

CHAPTER VIII

OTHER ISSUE REQUIREMENTS

11. For clause 8.2, the following shall be substituted, namely:-

“8.2 Public issue and listing of Convertible Debt Instruments”

12. Clause 8.2.1 and clause 8.2.2 shall be omitted.

13. In clause 8.2.3, for the words "DSCE", the words "Convertible Debt Instruments" shall be substituted.

14. In clause 8.2.3:-

(a) sub-clauses (b), (c) and (d) shall be renumbered as sub-clauses "(f)", "(g)" and "(h)" respectively;

(b) for sub-clause (a), the following shall be substituted, namely:-

"a) a credit rating is obtained from at least one credit rating agency registered with the Board."

(c) after sub-clause (a) and before the renumbered sub-clauses (f), (g) and (h), the following sub-clauses and proviso shall be inserted, namely:-

"b) A contribution of at least 20% of the project cost, i.e., objects proposed to be, inter alia, financed through the issue, shall be brought in the form of equity. Such equity participation may be brought by the promoter from his own funds or from other sources, subject to the condition that at least 20% of the issue size is brought by way of equity by the promoter from his own funds. If the project is to be implemented in stages, the promoters' contribution as per these requirements shall be with respect to total equity participation till the respective stage vis-à-vis the debt raised or proposed to be raised through the issue."

"c) The issuer company shall agree to comply with the requirements of continuing disclosures as specified under the listing agreement to be entered into with concerned stock exchanges as is applicable for listing of equity shares."

"d) The issuer company shall agree to obtain prior consent of the holders of the Convertible Debt Instruments, through special resolution to be passed at the general meeting of the Convertible Debt Instrument holders, for change in terms of issue, change in capital structure and change in shareholding pattern."

"e) There shall be no partly paid up shares/ other securities at the time of filing of draft offer document with the Board and also at time of filing Red Herring Prospectus and Prospectus with ROC.

Provided that in case of a public issue of securities by a listed company satisfying all the requirements specified in clause 2.1.2A, there shall be no partly paid up shares/ other securities at the time of filing Red Herring Prospectus and Prospectus with ROC."

(d) in the renumbered sub-clause (f) and its proviso, for the word "DSCE", wherever it appears, the words "Convertible Debt Instruments" shall be substituted;

(e) in the renumbered sub-clause (g), for the word "DSCE", the words "Convertible Debt Instruments" shall be substituted; and

(f) in the renumbered sub-clause (h), for the word "DSCE", wherever it appears, the words "Convertible Debt Instruments" shall be substituted.

(c) In clause 8.2.5, for the words “NCDS/ DSCE”, the words “Convertible Debt Instruments” shall be substituted.

(d) In clause 8.8.2.1, for the words and figures “30 days and not more than 60 days”, the words and figures “15 days and not more than 30 days” shall be substituted.

CHAPTER X

15. In Chapter X, for the Chapter heading “GUIDELINES FOR ISSUE OF DEBT INSTRUMENTS”, the following shall be substituted, namely:-

“GUIDELINES FOR ISSUE OF CONVERTIBLE DEBT INSTRUMENTS”

16. In clause 10.0, the mark and words “/ Non Convertible”, appearing after the words “company offering Convertible” and before the words “debt instruments”, shall be omitted.

17. In clause 10.1.1, for the words and parentheses “debt instruments (whether convertible or not)”, the words “convertible debt instruments” shall be substituted.

18. In clause 10.1.4, for the words and parentheses “debt instrument (including convertible instruments)”, the words “convertible debt instrument” shall be substituted.

19. In clause 10.7.1.1, the mark and words “/ Non Convertible Debentures (NCDs),”, appearing after the words and brackets “Partly Convertible Debentures (PCDs)” and before the words “by company not being in default”, shall be omitted.

20. In clause 10.7.1.1A:-

(a) in the heading, the mark and words “/ Non Convertible Debentures (NCDs),”, appearing after the words and parentheses “Partly Convertible Debentures (PCDs)” and before the words “by company being in default”, shall be omitted; and

(b) in the body, the words “and the NCDs”, appearing after the words “portions of PCDs” and before the words “issued by a listed company” shall be omitted.

21. In sub-clause (b) of clause 10.9, the word “PCDs/”, wherever it appears, shall be omitted.

CHAPTER XIII

GUIDELINES FOR PREFERENTIAL ISSUES

22. In clause 13.1.1.1, after the words “on preferential basis” and before the words “shall be made at”, the following shall be inserted, namely:-

“, other than an issue of shares on preferential basis to Qualified Institutional Buyers not exceeding five in number,”

23. In clause 13.1.1.2, after the words "on preferential basis" and before the words "can be made at", the following shall be inserted, namely:-

" , other than an issue of shares on preferential basis to Qualified Institutional Buyers not exceeding five in number,"

24. After clause 13.1.1.2 and before Explanation, the following clause shall be inserted, namely:-

"13.1.1.3 An issue of shares on preferential basis to Qualified Institutional Buyers not exceeding five in number shall be made at a price not less than the average of the weekly high and low of the closing prices of the related shares quoted on a stock exchange during the two weeks preceding the relevant date."

25. In the Explanation appearing after the newly inserted clause 13.1.1.3:-

(a) in Explanation (a), for the words and figures "for the purpose of clauses 13.1.1.1 and 13.1.1.2", the words and figures "for the purpose of clause 13.1.1" shall be substituted; and

(b) in Explanation (b), for the words and figures "for the purpose of clauses 13.1.1.1 and 13.1.1.2", the words and figures "for the purpose of clause 13.1.1" shall be substituted.

26. In clause 13.1.2.1:-

(a) in sub-clause (a), for the words and figures "Clause 13.1.1.1", the words and figures "clause 13.1.1" shall be substituted; and

(b) in sub-clause (b), for the words and figures "Clause 13.1.1.1", the words and figures "clause 13.1.1" shall be substituted.

27. In clause 13.3.1:-

(a) in sub-clause (a), after the words "clause 6.8.3.2 of these guidelines" and before the words " , shall be subject to lock-in" the following words shall be inserted, namely:-

"and the shares allotted to such promoter / promoter group pursuant to exercise of options attached to warrants issued on preferential basis"

(b) in sub-clause (c), after the words "preferential basis to promoters/ promoter group" and before the words "as per clause 13.3.1 (a) and (b)", the following words shall be inserted, namely:-

"and shares allotted to such promoters/ promoter group pursuant to exercise of options attached to warrants issued on preferential basis"

(c) in sub-clause (d):-

(i) the mark and words "/exercise of warrants," appearing after the words "conversion of the convertible instrument" and before the words "shall be reduced", shall be omitted; and

(ii) the word "warrants", appearing after the words "to the extent the convertible instrument" and before the words "have already been locked-in", shall be omitted.

CHAPTER XIII-A

GUIDELINES FOR QUALIFIED INSTITUTIONS PLACEMENT

28. In clause 13A.1.1:-

(a) after sub-clause (a), the following shall be inserted, namely:-

“Provided that in case of a listed company, being the transferee company in a scheme of merger/ demerger/ amalgamation/ arrangement sanctioned by Court(s) under sections 391 to 394 of the Companies Act, 1956, the period for which the equity shares of the transferor company were listed on a stock exchange having nation wide trading terminals shall also be considered for the purpose of computation of the period of one year.”

(b) Explanation (i) shall be omitted; and

(c) In Explanation (ii), after the words “nation wide trading terminals” and before the words “, shall be deemed”, the following shall be inserted, namely:- “and satisfy the conditions laid down in Explanation to Rule 19(4) of the Securities Contracts (Regulation) Rules, 1957”

29. In clause 13A.3.1, along with its Explanation:-

(a) for clause 13A.3.1, the following shall be substituted, namely:- “13A.3.1 An issue of specified securities made under this Chapter shall be made at a price not less than the average of the weekly high and low of the closing prices of the related shares quoted on the stock exchange during the two weeks preceding the relevant date.”

(b) For Explanation (a), the following shall be substituted, namely:-

“a) “relevant date” for the purpose of this clause means the date of the meeting in which the Board of the company or the Committee of Directors duly authorised by the Board of the company decides to open the proposed issue.”

(c) In Explanation (b), for the words “six months”, the words “two weeks” may be substituted.

30. In clause 13A.3.2.2, the words “a day thirty days prior to”, appearing after the words “clause 13A.3.1” and before the words “the date on which”, shall be omitted.

CHAPTER XVI

OPERATIONAL GUIDELINES

31. In clause 16.1.1, in sub-clause (a), for the words and figure “Rs. 20 crores”, the words and figure “Rs.50 crores” shall be substituted.

II Applicability of Accounting Standards 1 to 7 and 9 to 29 as recommended by Institute of Chartered Accountants of India through Notification by Ministry of Corporate Affairs, New Delhi

The full text of the amendments is given in Annexure II

ANNEXURE II

Ministry of Company Affairs NOTIFICATION

New Delhi, the 7th December, 2006

ACCOUNTING STANDARDS

G.S.R. 739 (E). – In exercise of the powers conferred by clause (a) of sub-section (1) of section 642 of the Companies Act, 1956 (1 of 1956), read with sub-section (3C) of section 211 and sub-section (1) of section 210A of the said Act, the Central Government, in consultation with National Advisory Committee on Accounting Standards, hereby makes the following rules, namely:-

1. Short title and commencement.-
 - (1) These rules may be called the Companies (Accounting Standards) Rules, 2006.
 - (2) They shall come into force on the date of their publication in the Official Gazette.
2. Definitions.- In these rules, unless the context otherwise requires,-
 - (a) "Accounting Standards" means the Accounting Standards as specified in rule 3 of these rules;
 - (b) "Act" means the Companies Act, 1956 (1 of 1956);
 - (c) "Annexure" means an Annexure to these rules;
 - (d) "General Purpose Financial Statements" include balance sheet, statement of profit and loss, cash flow statement (wherever applicable), and other statements and explanatory notes which form part thereof.
 - (e) "Enterprise" means a company as defined in section 3 of the Companies Act, 1956.
 - (f) "Small and Medium Sized Company" (SMC) means, a company-
 - (i) whose equity or debt securities are not listed or are not in the process of listing on any stock exchange, whether in India or outside India;
 - (ii) which is not a bank, financial institution or an insurance company;
 - (iii) whose turnover (excluding other income) does not exceed rupees fifty crore in the immediately preceding accounting year;
 - (iv) which does not have borrowings (including public deposits) in excess of rupees ten crore at any time during the immediately preceding accounting year; and
 - (v) which is not a holding or subsidiary company of a company which is not a small and medium-sized company.

Explanation: For the purposes of clause (f), a company shall qualify as a Small and Medium Sized Company, if the conditions mentioned therein are satisfied as at the end of the relevant accounting period.

(2) Words and expressions used herein and not defined in these rules but defined in the Act shall have the same meaning respectively assigned to them in the Act.

3. Accounting Standards.- (1) The Central Government hereby prescribes Accounting Standards 1 to 7 and 9 to 29 as recommended by the Institute of Chartered Accountants of India, which are specified in the Annexure to these rules.

(2) The Accounting Standards shall come into effect in respect of accounting periods commencing on or after the publication of these Accounting Standards.

4. Obligation to comply with the Accounting Standards.- (1) Every company and its auditor(s) shall comply with the Accounting Standards in the manner specified in Annexure to these rules.

(2) The Accounting Standards shall be applied in the preparation of General Purpose Financial Statements.

5. An existing company, which was previously not a Small and Medium Sized Company (SMC) and subsequently becomes an SMC, shall not be qualified for exemption or relaxation in respect of Accounting Standards available to an SMC until the company remains an SMC for two consecutive accounting periods.

III. Companies Bill, 2008 (not applicable for the May, 2009 examinations)

Students are aware that the Bill No.57 of 2008 i.e. The Companies Bill, 2008 which was introduced in the Lok Sabha has made extensive changes in the existing Companies Act, 1956. At present, it is in the form of a Bill only and hence it is not applicable for the May, 2009 examinations.

IV. Prevention of Money Laundering (Amendment) Bill, 2008 (not applicable for the May, 2009 examinations)

V. Applicability of Competition Commission of India (Term of the Selection Committee and the manner of selection of panel of names) Rules, 2008 (Applicable for May, 2009 examination)

The full text of the Rules are given in Annexure III

ANNEXURE III

MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, 27 February 2008

G.S.R. 111(E) – In exercise of the powers conferred by clause (a) of sub-section (2) of section 63 read with sub-section (2) of section 9, of the Competition Act, 2002 (12 of 2003) and in supersession of the Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules, 2003 the Central Government hereby makes the following rules, namely:-

1. Short title and commencement – (i) These rules may be called the Competition Commission of India (Term of the Selection Committee and the manner of selection of panel of names) Rules, 2008.

(ii) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions – (i) In these rules, unless the context otherwise requires, –

(a) 'Act' means the Competition Act, 2002 (12 of 2003);

(b) 'Committee' means the Selection Committee constituted under sub-section (1) of section 9 of the Act.

(ii) Words and expressions used but not defined in these rules and defined in the Competition Act, 2002 (12 of 2003) shall have the same meaning assigned to them in that Act.

3 Term of the Committee – The term of the Committee constituted under sub-section (1) of section 9 shall be for a period of one year from the date of its constitution.

4 Manner of Selection of a panel of names – (i) Whenever any vacancy of Chairperson or other Members of the Commission exists or as and when such vacancy arises or is likely to arise, the Central Government may make a reference to the Committee in respect of such vacancy or vacancies for recommendation of a panel of names.

(ii) The Committee shall devise its own procedure for selecting the persons for inclusion in the panel of names to be recommended for appointment as the Chairperson or a Member of the Commission.

(iii) The Committee shall make its recommendations to the Central Government, within a period not exceeding one hundred and twenty days from the date of reference made under sub-rule (1).

(iv) The Joint Secretary nominated by the Ministry of Corporate Affairs shall be the Convener of the Committee.

5 Functions of Committee – On a reference made by the Central Government;

(i) The Committee shall recommend a panel of not more than three persons, selected under sub-rule (ii) of rule 4, in respect of each vacancy that has been referred to the Committee.

(ii) The Committee shall review the appointments made to the Competition Commission of India before the commencement of these rules and make appropriate recommendations, in respect of such appointments.

QUESTIONS

COMPANIES ACT, 1956

Accounts and Audit-Ceiling on number of audits

1. Mr. Independent who is an individual auditor wants to compute the specified number of audits under the Companies Act, 1956 and for this purpose, he has drawn out a list of which identify, the company which shall be/not be taken into account for the purpose of calculating specified number of audits:
 - (i) Audit of Private Company
 - (ii) Guarantee companies not having share capital
 - (iii) Audit of non-profit companies
 - (iv) Special Audits
 - (v) Audits- of Foreign Companies
 - (vi) Branch Audits
 - (vii) Company audit where he is appointed as a joint auditor

Further, he wants to know that as a member of the Institute of Chartered Accountants of India, whether there are any other restrictions on him as a member in the matter of inclusion/exclusion of audit of private companies for the purpose of calculating specified number of audit assignments. Advice.

Accounts and Audit-Filing with the Registrar

2. A Public Company sought extension of time from the ROC for holding AGM upto a period of 3 months and it was granted. However, when the actual AGM was to be held, the company faced a situation that the annual accounts were upto a period beyond which it is permissible. The Company contended that since ROC granted extension of time for holding AGM, the same would also be applicable for presentation of accounts as well. Referring to the relevant provisions of the Companies Act, 1956, state whether the contention of the company hold good?

Declaration of dividend

3. Advise on the following situations:
 - (i) A company wants to transfer more percentage of profits to reserves.
 - (ii) A company wants to declare dividends out of past reserves instead of current year profits.
 - (iii) A company wants to provide depreciation higher than the rates provided in Schedule XIV.

Directors-Powers

4. Decide on the following:
- (a) A Managing Director who has completed 70 years of age is to be re-appointed for 5 years. The remuneration will be the limits prescribed under Schedule-XIII.
 - (b) X the Managing Director of Y Limited is also the Managing Director of Z Limited wants to draw remuneration from both the companies.
 - (c) The Directors' wish to increase the sitting fees payable for attending board meetings from Rs.2,000/- to Rs.20,000/- by passing the resolution in the Board Meeting.
 - (d) The Board of XYZ Ltd. has received an attractive offer for sale for one of the sugar mills owned by the company. The transaction should be completed within a month.

Directors-Political Contribution

5. The Board of Directors of Sun Star Ltd. are contributing every year to a charitable organization a sum of Rs.1 lac. In a particular year, the company suffered losses and the directors are contemplating to contribute the said amount in spite of the losses. In this connection, state whether the directors can do so?

Directors-Delegation of Power

6. Out of the powers exercisable by the Board under Section 292, the board wants to delegate to the Managing Director of the company the power to borrow monies otherwise than on debentures. Advise whether such a delegation is possible? Would your answer be different, if the delegation is given to the manager or any other principal officer including a branch officer of the company?

Meetings-Quorum for Board Meetings

7. In a public company the total number of directors are 12 and 2 office of the directors have fallen vacant. Referring to the relevant provisions of the Companies Act, 1956.
- (a) What would be the quorum for the Board meeting?
 - (b) Can the articles of a company fix the quorum (higher or lower) for the Board meeting?
 - (c) Assuming if there are 15 directors in the company and of which 13 happen to be interested directors, what would be the quorum?
 - (d) How do you resolve the situation if all the directors are interested in a particular transaction?

Meetings-Frequency of Board Meeting

8. The Board meeting of Fortune Ltd. has the following schedules for the year 2009:

1st Meeting	- 1st January, 2009
2nd Meeting	- 30th June, 2009
3rd Meeting	- 1st July, 2009
4th Meeting	- 31st December, 2009

State whether the Board Meetings schedules are as per compliance with the provisions of the Companies Act, 1956. What would be your views if the meeting to be held on 30th June, 2009 is adjourned due to lack of quorum?

Inspection and Investigation-Investigation by Central Government

9. State the circumstances on the basis of which Central Government may order investigation into the affairs of a company.

Compromise, Arrangement and Reconstruction

10. A scheme of merger of XYZ Ltd with ABC Ltd was approved by the shareholders at an extraordinary general meeting and the exchange ratio of 3 shares of ABC Ltd for 20 shares in XYZ Ltd was approved. The proposal was also okayed by a lending financial institution which held 45% shares in XYZ Ltd. The valuation was carried out by one of the directors of XYZ Ltd who is a member of the Institute of Chartered Accountants of India. The valuation was affirmed by three independent valuers nominated by the shareholders in general meeting. However, certain leaseholder properties, under license, which were not transferable, were not taken into account in the valuation. While the scheme was awaiting the Court's sanction, it was challenged by certain shareholders on the ground that the exclusion of leasehold assets in the valuation made the scheme 'Unfair'. Decide giving reasons:
 - (i) Whether the contention of the shareholders is tenable?
 - (ii) What factors would the Court take into account in approving the exchange ratio?

Compromise, Arrangement and Reconstruction

11. Alpha Ltd. and Beta Ltd. entered into a scheme of amalgamation by which Alpha Ltd. would transfer its entire undertaking to Beta Ltd. However, the Central Government raised an objection that unless the objects clause of the companies are similar, and memorandum empowers to do so, the scheme of amalgamation cannot be permitted. Is the contention of the Central Government correct?

Prevention of oppression and mismanagement

12. A Group of shareholders of a company while filing a petition for relief against mismanagement in the conduct of the affairs of the company feel that since the matter has become so serious that they feel that the ultimate relief for mismanagement will be

by way of filing a petition for winding up and hence they prefer to file two petitions, one for relief against mismanagement and the other for winding up. State whether simultaneous petitions or composite petition is maintainable.

Prevention of oppression and mismanagement

13. A group of shareholders consisting of 25 members decide to file a petition before the Company Law Board for relief against oppression and mismanagement by the Board of Directors of M/s Fly By Night Operators Ltd. The company has a total of 300 members and the group of 25 members holds one-tenth of the total paid-up share capital accounting for one-fifteenth of the issued share capital. The main grievance of the group is that due to mismanagement by the board of directors, the company is incurring losses and the company has not declared any dividends even when profits were available in the past years for declaration of dividend. Advise the group of shareholders regarding the success of (i) getting the petition admitted and (ii) obtaining relief from the Company Law Board.

Revival and Rehabilitation Of Sick Industrial Companies

14. What is the procedure for winding up of a sick industrial company?

Corporate Winding Up and Dissolution

15. XYZ Limited has its subsidiary company PRM Ltd, which is formed to carry out some of the objectives of XYZ Limited. XYZ Limited suspends one of its several businesses, by passing a resolution at the company's extraordinary general meeting, with effect from 1st January 2008. The business so suspended continues to be suspended until March 2008. On 1st April 2008, a group of shareholders of XYZ Limited file a petition in the court for winding of the company on the ground of suspension of business by the company.

Referring to the provisions of the Companies Act, 1956, decide:

- (i) Whether the shareholders' contention shall be tenable?
- (ii) What would be your answer in case XYZ Limited suspends all its business?

Companies Incorporated Outside India

16. What are the various documents to be delivered to the Registrar by the Foreign Company?

E-Governance

17. MCA 21 seeks to fulfill the requirements of the various stakeholders. Please explain the various benefit of it.

Corporate Secretarial Practice

18. State the legal position in the following circumstances:

The Board of Directors of ABC Private Limited having a paid-up share capital of Rs. 1 Crore consists of two directors, one of them, viz, Mr. S possesses membership of the Institute of Company Secretaries of India. The company desires to appoint him as a company secretary also.

ALLIED LAWS

SEBI Act, 1992

19. What are the penalties prescribed under the SEBI Act, 1992 in respect of the following offences?

- (a) Penalty for failure by any person to enter into agreement with clients.
- (b) Penalty for non-disclosure of acquisition of shares and takeovers.

Securities Contracts (Regulation) Act, 1956

20. Kutch Stock Exchange is an Association of Persons, registered and recognized under the Securities Contracts (Regulation) Act, 1956. The Central Government wants that persons should manage the stock exchange that does not have role that of a trading or a clearing member and that the stock exchange should be corporatised and de-mutualised. Advise the stock exchange as to how it should reorganize as per the latest amendments in the Securities Contracts (Regulation) Act, 1956.

Foreign Exchange Management Act, 1999

21. State whether following transactions are prohibited under act/ require prior approval of the Government /RBI for drawal of foreign exchange.

- (a) Remittance out of lottery winnings.
- (b) Payment related to call back services of telephone.
- (c) Remittance under technical collaboration agreements.
- (d) Remittance of prize money / sponsorship of sports activity abroad.

The Competition Act, 2002

22. The Association of Truck Operators of India by agreement insisted that members of the association shall not deal with the non-members in transportation of goods. The Association claims that this agreement is entered for the welfare of trade and not for any other purpose. In your opinion whether the agreement would be under the purview of the Competition Act, 2002. Whether your answer would be different if the association attempts to control the provisioning of services rendered by its members.

The Banking Regulation Act, 1949

23. What do you understand by asset reconstruction and non-performing asset under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Prevention Of Money Laundering Act, 2002

24. What is the punishment in respect of money laundering under PMLA, 2002?

Interpretation Of Statutes, Deeds And Documents

25. Explain the significance of the definitional clause in a statute. The definition of a word may be either restrictive or extensive? Elaborate this with particular reference to the following definition of book and paper as contained in the Companies Act, 1956; "Book and Paper" include accounts, vouchers, writings and documents?

SUGGESTED ANSWERS/HINTS

1. In computing the specified number of audits for the purpose of Section 224(1B), the following audit shall not be taken into account:
- (a) Audit of private company.
 - (b) Audit of Guarantee Companies not having share capital.
 - (c) Special Audits.
 - (d) Audit of Foreign Companies.
 - (e) Branch Audits.

Though the audit of private companies has been excluded for the purpose of calculating the specified number of audits, as a member of Institute of Chartered Accountants of India, the Audit of Private Companies will come under the purview of calculating the ceiling limit as a matter of self-regulation.

2. While a company may hold its AGM in a year within the time limit of 15 months as provided by Section 166(1), it may still contravene Section 210. A company and its director may commit offences if it does not fulfil the three requirements and failure to comply with any of them unless an extension of time has been granted for holding the meeting by the ROC. However, the extension of time for holding the AGM is only with reference to the meeting and not to that of submission of accounts.
3. (i) A company can make a transfer of more than 10% to reserves provided it ensures the minimum distribution specified in Rule 3 of the Companies (Transfer of Profits to Reserves) Rules, 1975. The minimum distribution is the rate of dividend equal to

the average of the rates of dividend for the last 3 financial years. Where bonus shares have been issued during the financial year, minimum distribution would be the average of the amount of dividend for the last three financial years. Where, however, the net profits after tax for the financial year are lower by 20% or more than the average net profits after tax for the last two financial years, it will not be necessary to ensure the minimum distribution for making a higher transfer to reserve.

- (ii) Dividends may be declared out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with Section 205 of the Companies Act, 1956. However, the Central Government may in the public interest relax the payment of the profits without providing for depreciation. The Companies (Declaration of Dividend out of reserves) Rules, 1975 provided that-
 - (a) The rate of dividend declared does not exceed the average of the rates at which dividend was declared by it in the 5 years immediately preceding that year or 10% of its paid-up capital, whichever is less.
 - (b) The total amount to be drawn from the accumulated profits earned in previous years and transferred to the reserves does not exceed an amount equal to 1/10th of the sum of its paid-up capital and free reserves and the amount so drawn must first be utilised to set off losses incurred in the financial year before any dividend in respect of preference or equity shares is declared.
 - (c) The balance of reserves after such drawal does not fall below 15% of its paid-up capital.
 - (iii) The rates contained in Schedule XIV are the minimum rates below which companies are not permitted to charge for depreciation and therefore there is no bar in providing a higher rate by the companies.
4. (a) As per the notification dated 12th September, 1996, a person who is otherwise qualified but has attained the age of 70 years can be appointed as Managing Director without Central Government's approval if his appointment is approved by a special resolution passed by the company in general meeting. So Mr. Y can be reappointed for a period of five years if the approval of the shareholders is obtained by special resolution.
- (b) As per the notification dated 12th September, 1996, if the appointee is managerial person of more than one company, he shall draw remuneration from one or both companies provided that the total remuneration drawn from both the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is the Managing Director. Accordingly, Mr. X can draw remuneration from both the companies provided the same is within the overall ceiling mentioned in the notification as stated above.

- (c) Rule 10B of Companies (Central Government's) General Rules and Forms, 1956, permits sitting fees to be paid upto Rs. 20,000 to Directors if paid-up share capital and free reserves of Rs.10 crore and above or turnover of Rs.50 crores and above. For others not to exceed Rs.10,000/-.

In the instant case, increase in sitting fees is within the ceiling of Rule 10B, no approval of the Central Government is required. However, the company has to see the limits prescribed.

- (d) As per Section 293(1)(a) of the Companies Act, 1956, Board has to obtain the approval of shareholders for sale or disposal of any undertaking of the company. Any decision by the Board to sell the sugar mill will not be valid unless it is approved by the shareholders in general meeting. In the instance case the Board cannot accept the offer even if it is attractive. The acceptance is ultra vires the Board. Section 293 speaks about "Consent" of the shareholders. The consent implies only prior consent. Directors cannot sell the undertaking with the hope that it will be ratified by members.
5. The power to donate to general charities is not conditional to existence of any profit. In such a case they may contribute up to the limit given in Section. 293(1) (e), even though the company may be working at a loss. Under the section a public company can contribute in any financial year not exceeding Rs 50,000 or 5% of its average net profits during the three preceding financial years whichever is greater.
6. Powers to be exercised by Board only at its meeting: According to Section 292, the following powers can be exercised by the Board only by means of resolution passed at its meetings:
- (a) to make calls;
 - (aa) to authorise the buy back of shares
 - (b) to issue debentures;
 - (c) to borrow money otherwise than on debentures;
 - (d) to invest the funds of the company;
 - (e) to make loans.

The Board may, however, by resolution passed at meeting, delegate the last three powers mentioned above to the extent specified hereunder. Such a delegation can be made to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, a principal officer thereof. Every resolution delegating the power referred to in (c), (d) and (e) above shall specify: (i) the total amount outstanding at any time up to which money may be borrowed by the delegate; (ii) the total amount up to which the funds may be invested as well as the nature of investment; and (iii) the total amount of loans and the

purpose thereof up to which and for which loans may be raised respectively. It is to these extents that the delegate may exercise the aforesaid three powers. The company in general meeting may impose restrictions and conditions on the exercise by the Board of any of the five powers mentioned above.

In connection with the power mentioned in (c) above, a question may arise whether borrowing on a promissory note is within the powers of the directors.

It has been held in [P. Rangaswami Reddiar and Another vs. R. Krishnaswami Reddiar and another (1971) 43 Comp. Case 232] that where such a borrowing permissible under the company's articles and moneys were borrowed on promissory notes, such transaction would come within the powers of the director. It has also been held in the same case that where a person was appointed as the managing director of the company by the Board's resolution vested with full powers of the management of the affairs of the company and authorised to sign all the papers of the company, he would have full powers to borrow money on a promissory note even without a resolution of the Board as contemplated by Section 292(c) of the Act.

7. Where total number of directors are 12 and 2 offices of the directors have fallen vacant, we find: $\frac{1}{3}$ of $(12-2) = \frac{1}{3}$ of 10 = 3 $\frac{1}{3}$ directors. If the fraction of 3rd were to be rounded off as one then 4, i.e. 3+1 directors would constitute the quorum for the Board meetings. If at any time the number of the remaining directors exceeds or is equal to two thirds of the total strength, the number of the remaining directors who are non-interested but present at the meeting, not being less than two shall constitute the quorum. For example, there are in all 15 directors and the Board meeting commences with all the 15 directors. During the currency of the meeting, an item comes up for discussion in respect of which 13 happen to be "interested" directors. In this case, in spite of the excess of the interested directors being more than two-thirds, the prescribed minimum number of non-interested directors constituting the quorum, namely, 2 present at the meeting are to transact the particular item of business.
8. As per Section 285, in the case of every company, a meeting of the Board of Directors shall be held at least once in every three months and at least four such meetings shall be held in every year. The section does not state the gap between two board meetings. In the present case four meetings have been scheduled for the year 2009 even though the gap between two board meetings is more than 3 months. However, as per the section there appear to be no contravention.

If the Board meeting to be held on 30th June, is adjourned due to lack of quorum, again a meeting is held on some other date, the company shall not be deemed to have contravened the provisions of Section 285. If the said meeting is proposed to be held on 30th June, 2009 and assumingly to be adjourned for want of quorum, the meeting

automatically stand adjourned by virtue of Section 288 (1) till the same day in the next week, at the same time and place. And if the same day is a public holiday, then the meeting stands adjourned till the next succeeding day which is not a public holiday.

9. Section 237(b) of the Companies Act, 1956 provides that the Central Government may appoint inspectors if, 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 to 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 relating to the calculation of the commission payable to a managing or other director, or the manager, of the company.
10. (i) The contention of the shareholders in this case shall not be tenable. The court is not to disturb a scheme unless the person who challenges the valuation satisfies the court that the valuation arrived at was grossly unfair. Valuation in this case was approved by the shareholders and also okayed by the lending institution(s) which are usually well-informed and scrutinize the scheme with expert's eye and which are also presumed to act bonafide. In the similar case of *Tata Oil Mills Ltd. Re.* (1994), the court held that the presumption of fairness was writ large on the face of the scheme. The Court did not attach importance to the fact that certain leasehold assets and properties held under license were excluded from valuation. Such assets, the court said, were neither transferable nor heritable. They are in the nature of a personal privilege. The Supreme Court affirmed this decision in *Hindustan Lever Employee's Union v. Hindustan Lever Ltd.*, (1994) and accepted the exchange ratio proposed. The Supreme Court found no objection to the valuation being done by one of the directors of TOMCO (XYZ Co. in this case). His report did not show any prejudice and was also affirmed by the independent valuers. Supreme Court also enumerated all the possible methods of valuation such as, market price, book value and yield basis and pointed out that a combination of all or some of the methods, may have to be adopted in circumstances of a particular case. Thus based on the above explanation and the decisions given by the Supreme Court, it can be concluded that the contention of the shareholders that the exclusion of certain leasehold assets in the valuation has made the scheme unfair, shall not be tenable.

- (ii) The court would take into account the following factors in determining the final share exchange ratio:
1. The stock exchange prices of the shares of the two companies before the commencement of negotiations or the announcement of the bid.
 2. The dividends presently paid on the shares of the two companies.
 3. The relative growth prospects of the two companies.
 4. The cover for the present dividends of the two companies.
 5. The relative gearing of the shares of the two companies.
 6. The values of the net assets of the two companies.
 7. The voting strength in the merged enterprise of the shareholders of the two companies.
 8. The past history of the prices of the shares of the companies.
11. The power to amalgamate may flow from the memorandum or it may be acquired by resorting to the statute. Section 17 of the Companies Act, 1956 indicates that a company which desires to amalgamate with another company will take necessary steps to come before a court for alteration of its memorandum in aid of such amalgamation. The statute confers a right on a company to alter its memorandum in aid of amalgamation with another company. The provisions contained in sections 391 to 396 and 494, illustrate instances of statutory power of amalgamating a company with another company without any specific power in the memorandum. [Hari Krishna Lokia (v) Hoolungooree Tea Co. Ltd, 1996].
- Section 391 is not only a complete code, but it is in the nature of a single window clearance system to ensure that parties are not put to avoidable, unnecessary and cumbersome procedure for making repeated applications to court for various alterations and changes. What is to be seen is the overall fairness and feasibility of the scheme of amalgamation and there need not be any unison of objects of both transferor and the transferee company. [R. Morarjee Gokuldas Spg. & Wrg. Co., 1995].
- To amalgamate with another company is the power of the company and not an object of the company. [Re. Hari Krishna Lohia, 1996]. Irrespective of the objects clause, the court is empowered to sanction the scheme of amalgamation provided it does not prejudice the interest of the public. Therefore, based on the above judicial rulings, the contention of the central government is not correct. [Golkunda Engg. Enterprises Ltd (v) the G. V. Ltd, 1997].
12. The Madhya Pradesh High Court in [Kilpest (P) Ltd. v. Shekhar Mehra] held that the petition, if initially made under Sections 397 and 398, cannot be converted into a winding up petition under section 433(f) and even no composite petition can be filed. The

aforesaid decision of the Madhya Pradesh High Court was overruled by the Supreme Court in *Worldwide Agencies (P) Ltd. v. Mrs. Margaret T. Desor* [1990] 67 The Comp.Cas. 607 (SC). The Supreme Court in this case observed that "though there may be some differences in the procedure to be adopted, it is not such which is irreconcilable and cannot simultaneously be gone into. The Supreme Court held that "a composite petition under sections 397, 398 and 433(f) of the Act is maintainable."

13. (a) Section 399 of the Companies Act, 1956 provides the right to apply to the Company Law Board for relief against oppression and mis-management. This right is available only when the petitioners hold the prescribed limit of shares as indicated below:
 - (i) In the case of company having a share capital, not less than 100 members of the Company or not less than one tenth of the total number of its members whichever is less or any member or members holding not less than one tenth of the issued share capital of the company, provided that the applicant(s) have paid all calls and other dues on the shares.
 - (ii) In the case of company not having share capital not less than one-fifth of the total number of its members.

Since the group of shareholders do not number 100 or hold 1/10th of the issued share capital or constitute 1/10th of the total number of members, they have no right to approach the CLB for relief. However, the Central Government, if it is of the view that circumstances exist which make it just and equitable so to do, may authorize any member(s) to apply to the CLB (Section 399(4)). So, members may approach Central Government to authorize them to approach CLB in spite of deficiency in numbers.

As regards obtaining relief from CLB, continuous losses cannot, by itself, be regarded as Oppression (*Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth*).

Similarly, failure to declare dividends or payment of low dividends also does not amount to oppression. (*Thomas Veddon V.J. (v) Kuttanad Robber Co. Ltd.*)

Thus the shareholders may not succeed in getting any relief from CLB.

14. 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.

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.

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.

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.

15. The problem relates to suspension of business by a company. Section 433 provides that if a company does not commence its business within a year from its incorporation or suspends its business for a whole year, it may be wound up by the court. The contention of the shareholders of XYZ Ltd that the company is liable to be wound up on the ground of suspensions of business, is not tenable for the following reasons:
 - (i) (a) A company may be wound up by court if a company suspends its business for a whole year. Here the business was suspended only on 1. 1.2008. Hence on 1st April, 2008 the business has not been suspended for the whole year to attract Section 433(c)
 - (b) Where a company having much business discontinues one of them, it cannot be said to have suspended business within the meaning of Section 433(c).
 - (c) Where a company ceases to do any business but is a holding company of subsidiaries engaged in the pursuit of the business, which it was previously doing, it cannot be said that the company has suspended its business (Ref; Eastern Telegraph Company Ltd).
 - (ii) Even if XYZ Ltd suspended all its business the suspension was not for a period of more than 1 year as on 1.4.1997 and hence the provisions of Section 433(c) are not applicable. Again for the reasons stated in (i) (c) above XYZ Ltd cannot be said to have suspended its business as its subsidiary in carrying on the business.
16. Foreign companies which after April 1, 1956 established a place of business in India must, within 30 days, from the date, file with the Registrar having jurisdiction over New Delhi (Section 597) and also with the Registrar of the State in which the principal place of business of the company is situated:
 - (a) a certified copy of the charter, statutes or memorandum and articles of the company or other instruments constituting or defining the constitution of the company, and if the instrument is not in English language certified translation thereof;

- (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 the particulars mentioned in Section 592(2)
 - (d) the name and address or the names and addresses of some 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, and
 - (e) the full address of the office of the company in India, which is to be deemed its principal place of business in India.
17. MCA 21 seeks to fulfill the requirements of the various stakeholders. The key benefits of MCA 21 project are the back office process relates to:
- (i) Expeditious incorporation of companies
 - (ii) Simplified and ease of convenience in filing of Forms/ Returns
 - (iii) Better compliance management
 - (iv) Total transparency through e-Governance
 - (v) Customer centric approach
 - (vi) Increased usage of professional certificate for ensuring authenticity and reliability of the Forms / Returns
 - (vii) Building up a centralised database repository of corporate operating
 - (viii) Enhanced service level fulfillment
 - (ix) Inspection of public documents of companies anytime from anywhere
 - (x) Registration as well as verification of charges anytime from anywhere
 - (xi) Timely redressal of investor grievances
 - (xii) Availability of more time for MCA employees for monitoring and supervision
18. Under Section 383A of the Companies Act, 1956, in case of a company having only two directors, none of them can be appointed company secretary in spite of possessing the requisite qualification.
- In view of the overriding effect of Section 383A, consideration of section 314 is unnecessary.
19. (a) Penalty for failure by any person to enter into agreement with clients (Section 15B): If any person who, is registered as an intermediary and is required under this Act or any rules or regulations made thereunder, to enter into an agreement with his client, fails to enter into such agreement, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

(b) Penalty for non-disclosure of acquisition of shares and takeovers (Section 15H): If any person who, is required under this Act or any rules or regulations made thereunder fails to,

- (i) disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or
- (ii) make a public announcement to acquire shares at a minimum price, he shall be liable to a penalty twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.
- (iii) make a public offer by sending letter of offer to the shareholders of the concerned company; or
- (iv) make payment of consideration to the shareholders who sold their shares pursuant to letter of offer.

he shall be liable to a penalty of twenty five crores or three times the amount of profits made out of such failure, whichever is higher.

20. Corporatisation & Demutualisation

The Corporatisation intends to make a stock exchange as a corporate entity limited by shares. In the new legislation under Section 2 (aa) of the Securities Contracts (Regulation) Act, 1956, the term corporatisation has been defined as “the succession of a recognised stock exchange, being a body of individuals or a society registered under the Societies Registration Act, 1860, by another stock exchange, being a company incorporated for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities carried on by such individuals or society”.

Further, Demutualisation is the process of separating ownership, trading and management in a stock exchange. This process shall prevent conflict of interests, which may arise when stockbrokers involved in the management of the stock exchanges. It is defined under section 2(ab) as “the segregation of ownership and management from the trading rights of the members of a recognised stock exchange in accordance with a scheme approved by the Securities and Exchange Board of India”. Until the legislation came into effect only two exchanges i.e., National Stock Exchange and OTCEI in our country were in demutualised structure. Very recently the Bombay Stock Exchange (BSE) got the approval of SEBI for its corporatisation and demutualisation.

Procedure for corporatisation and demutualisation.(Section 4B)

It provides

- (1) All recognised stock exchanges referred to in section 4A shall, within such time as may be specified by the Securities and Exchange Board of India, submit a scheme for corporatisation and demutualisation for its approval:

Provided that the Securities and Exchange Board of India may, by notification in the Official Gazette, specify name of the recognised stock exchange, which had already been corporatised and demutualised, and such stock exchange, shall not be required to submit the scheme under this section.

- (2) On receipt of the scheme referred to in sub-section (1), the Securities and Exchange Board of India may, after making such enquiry as may be necessary in this behalf and obtaining such further information, if any, as it may require and if it is satisfied that it would be in the interest of the trade and also in the public interest, approve the scheme with or without modification.
- (3) No scheme under sub-section (2) shall be approved by the Securities and Exchange Board of India if the issue of shares for a lawful consideration or provision of trading rights in lieu of membership card of the members of a recognised stock exchange or payment of dividends to members have been proposed out of any reserves or assets of that stock exchange.
- (4) Where the scheme is approved under sub-section (2), the scheme so approved shall be published immediately by –

- (a) the Securities and Exchange Board of India in the Official Gazette;
- (b) the recognised stock exchange in such two daily newspapers circulating in India, as may be specified by the Securities and Exchange Board of India,

and upon such publication, notwithstanding anything to the contrary contained in this Act or any other law for the time being in force or any agreement, award, judgment, decree or other instrument for the time being in force, the scheme shall have effect and be binding on all persons and authorities including all members, creditors, depositors and employees of the recognised stock exchange and on all persons having any contract, right, power, obligation or liability with, against, over, to, or in connection with, the recognised stock exchange or its members.

- (5) Where the Securities and Exchange Board of India is satisfied that it would not be in the interest of the trade and also in the public interest to approve the scheme under sub-section (2), it may, by an order, reject the scheme and such order of rejection shall be published by it in the Official Gazette:

Provided that the Securities and Exchange Board of India shall give a reasonable opportunity of being heard to all the persons concerned and the recognised stock exchange concerned before passing an order rejecting the scheme.

- (6) The Securities and Exchange Board of India may, while approving the scheme under sub-section (2), by an order in writing, restrict-
 - (a) the voting rights of the shareholders who are also stock brokers of the recognised stock exchange;

- (b) the right of shareholders or a stock broker of the recognised stock exchange to appoint the representatives on the governing board of the stock exchange;
 - (c) the maximum number of representatives of the stock brokers of the recognised stock exchange to be appointed on the governing board of the recognised stock exchange, which shall not exceed one-fourth of the total strength of the governing board.
- (7) The order made under sub-section (6) shall be published in the Official Gazette and on the publication thereof, the order shall, notwithstanding anything to the contrary contained in the Companies Act, 1956, or any other law for the time being in force, have full effect.
- (8) Every recognised stock exchange, in respect of which the scheme for corporatisation or demutualisation has been approved under sub-section (2), shall, either by fresh issue of equity shares to the public or in any other manner as may be specified by the regulations made by the Securities and Exchange Board of India, ensure that at least fifty-one per cent. of its equity share capital is held, within twelve months from the date of publication of the order under sub-section (7), by the public other than shareholders having trading rights:
- Provided that the Securities and Exchange Board of India may, on sufficient cause being shown to it and in the public interest, extend the said period by another twelve months.'
21. Current account transactions for which drawal of foreign exchange is prohibited: (FEMA, 1999)
- (a) Remittance out of lottery winnings.
 - (b) Payment related to call back services of telephones.
- Current Account transactions, which requires prior approval of the government:
- (a) Remittance under technical collaboration agreements where payment of royalty exceeds 5% on local sales and 8% on exports and lump sum payment exceeds US\$ 2 Millions.
 - (b) Remittance of prize money/sponsorship of sports activity abroad by a person other than International, National, State level, Sport Bodies, if the amount involved exceeds US \$1 lakh.
- Current Account transactions, which requires RBI approval:
- (a) Exchange facilities exceeding US \$1 lakh for person going abroad;
 - (b) Exchange facilities for immigration exceeding US \$1 lakh or amount prescribed by the country of immigration.

22. Cartel [Section 2(c) Competition Act, 2002]: "Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services; The term cartel like agreement has been given an inclusive meaning. Thus an association for the welfare of the trade or formed for any other purpose not mentioned in the aforesaid definition will not be a cartel. It is only when an association, by agreement amongst themselves, limits control or attempts to control the production, distribution, sale or price of, or, trade in goods or provision of services, that it will be a cartel.
23. "Asset reconstruction" means acquisition by any securitisation company or reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realization of such financial assistance. [Section 2(b)]. "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard doubtful or loss asset, in accordance with the directions or under guidelines relating to asset classifications issued by the Reserve Bank [Section 2(o)]
24. Prevention of Money Laundering Act, 2002: Chapter II comprises of Sections 3 and 4. Section 3 deals with the offence of money laundering which has been discussed in the definition part above. Section 4 provides for the punishment for Money-Laundering. Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees. But where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to ten years instead of seven years.
25. Where the meaning of a word or expression is defined in a Statute, it is that meaning alone which must be given to it. The Court cannot ignore the statutory definition and speculate as to what should be the true meaning of the expression, unless there is anything repugnant in the context. Where an expression defined to 'include' something, the definition is prima facie extensive and its meaning can also include something else in addition to the meaning assigned to it in the definitional clause. Section 2(8) reads as under:

'Book and paper' and 'book or paper' includes accounts, deeds, vouchers, writing, and documents. The definition given in section 2(8) is an inclusive definition. The definition is very wide and it must be provided an extensive meaning. Accordingly, it would include all kinds of documents, records, registers, books and papers maintained by the company.