

PAPER – 4 : CORPORATE LAWS AND SECRETARIAL PRACTICE

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. 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.

III. 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

Board Meetings & Proceedings-Notice for the Meeting

1. The Articles of Association of a company provide that the meeting of the Board of Directors of the company will be held on the last Friday of every month. The Secretary of the company as a result does not serve the notice to the individual directors of the company. Consequently, a meeting of the Board of Directors was held on 20th February, 2008. The meeting was attended by all the directors with the exception of two directors out of a total of 10 directors and certain resolution were passed. The two absentee directors object to the meeting and the proceedings of the meeting for want of notice. Referring to the provisions of the Companies Act, 1956, decide:
 - (i) Whether the objection raised by the two absentee directors is valid?
 - (ii) Would your answer be the same in case the Secretary of the company, instead of sending notice on a usual format to the individual directors, sent a copy of the Articles of Association to each one of the directors?

Board Meetings & Proceedings-Quorum of the Meeting

2. When an interested director can be counted for the purpose of quorum of meetings of the Board?

Board Meetings & Proceedings-Notice for the Meeting

3. Advise the company with reference to the relevant provisions of the Companies Act about sending notice of board meetings to the following directors:
 - (i) Mr. Manoj, a director, states that he will not be able to attend the next board meeting.
 - (ii) Mr. Sharma goes abroad for four months from 5-1-2009 and an alternate director has been appointed in his place.
 - (iii) Mr. Samuel is a director residing abroad representing the foreign collaborator and the Articles of Association of the company provide for sending notice to such directors.

Board Meetings & Proceedings-Frequency of a Board Meeting

4. During the year 2008, XYZ Ltd. held four meetings of the Board on 6th February, 2008, 12th May, 2008, 24th Oct, 2008 and 31st Dec., 2008. Examine whether this was in accordance with the provisions of the Companies Act, 1956?

Directors-Office or Place of Profit

5. The Board of Directors of M/s Star Motors Ltd. made the following appointments at its meeting held on 1st January, 2008:
- (i) Mr. Amit, a director of its subsidiary company, namely, M/s Star Forgings Ltd. was appointed as Purchase Manager on a consolidated salary of Rs. 11,000 per month with effect from 1st January, 2008.
 - (ii) Mr. Mudit was appointed as the Sales Manager on a consolidated salary of Rs. 11,000 per month with effect from 1st January, 2008. Answer the following explaining the relevant provisions of the Companies Act, 1956:
 - (a) Does the appointment of Mr. Amit require the approval of the members in a general meeting of any company? Will your answer be different if M/s Star Motors Ltd. is the subsidiary of M/s Star Forgings Ltd.?
 - (b) Mr. Rakesh, a relative of Mr. Mudit was appointed as a Director of M/s Star Motors Ltd. on 1st January, 2009. Does it affect the continuation of Mr. Mudit as the Sales Manager?

Directors-Managerial Remuneration

6. State briefly the legal requirements to be complied with by a public company to give effect to the following proposals:
- (i) Payment of Rs. 50,000 as minimum remuneration to the ordinary directors in a financial year when the company has suffered a loss. The directors have been receiving remuneration by way of commission on net profits within the prescribed limits.
 - (ii) Payment of minimum remuneration to a whole-time director in a financial year when the company has suffered a loss. The appointment has been made in accordance with the conditions specified in Schedule XIII to the Companies Act and he is being remunerated by way of commission on net profits.
 - (iii) Appointment of a person as Managing Director without remuneration in accordance with the conditions specified in Schedule XIII to the Companies Act and he is already holding position of a Managing Director in a Private Company.

Directors-Removal of Director

7. M, a director of a public company has been removed by the company, before the expiry of his period of office, by passing under section 284, an ordinary resolution in a general meeting. The director seeks your advice for claiming compensation from the company, for loss of his office. Advice.

Directors-Managerial Remuneration

8. Board of Directors of Packsafe Cotton Ltd. having an effective capital of Rs. 4 Crores propose to appoint one of its Directors, Mr. Mohan, as managing director for 5 years with effect from 1st December, 2008 on a consolidated monthly salary of Rs. 40,000 per month. Mr. Mohan is already the managing director of Surprise Fabric Ltd. receiving a consolidated salary of Rs. 35,000 per month. The effective capital of Surprise Fabric Ltd. is Rs. 2 crores. What are the legal requirements to be complied with by Packsafe Cotton Ltd. to give effect to the proposed appointment? Will your answer be different if Surprise Fabric Ltd. is a private company?

Directors-Appointment of Director

9. The Board of Directors of Color Private Ltd., having a paid-up share capital of Rs. 3 Crore, consists of two Directors, one of them, viz., Mr. John possesses membership of the Institute of Company Secretaries of India. The company desired to appoint him as a company secretary also. State the legal position as per the Companies Act.

Directors-Relevant Provisions

10. (a) The Articles of Association of a company have fixed the maximum strength of the board as 12 directors. At present the Board has 9 directors of whom 6 are liable to retire by rotation and 3 not liable to retire by rotation. The Board wishes to appoint 3 additional directors. Can they appoint as desired?
- (b) The managing director of a company is convicted of an offence involving moral turpitude. He prefers an appeal against conviction. Can he continue as managing director pending disposal of the appeal? Can the appellate court remove the disqualification or stay the same pending the disposal of the appeal?
- (c) A, one of the shareholders of the company, filed a civil suit in a court for removal of directors B, C & E. Is the suit maintainable?
- (d) The Board wants to appoint X as a director in a casual vacancy. Due to certain exigencies, the Board could not meet. Advise the company.

Directors-Loans to Director

11. The wife of the managing director, who was a chartered accountant and the financial advisor in the company, was given a salary advance of Rs. 10,000. Advise

Inter Corporate Loans and Investments-Section 372A

12. The Board of Directors of M/s. High Tech Limited, a company whose shares are listed on the Delhi Stock Exchange proposes to give loans to a sister company in excess of the limit prescribed under section 372A(1) of the Companies Act, 1956. The next annual general meeting of the company is due only after six months. Since the Board is anxious

to complete the formalities quickly without waiting for the date of next annual general meeting, advise the Board about the steps to be taken to comply with the legal requirements under the Companies Act, 1956.

Inter Corporate Loans and Investments-Oppression and Mismanagement

13. What is meant by 'oppression'? State whether the aggrieved party would succeed in obtaining relief from company law board on the ground of oppression in the following cases:
- (i) The majority of the Board of Directors overrides the minority directors and the minority directors apply to Company Law Board complaining oppression by majority directors.
 - (ii) A petition by majority shareholders complaining oppression by minority shareholders.

Winding-up of Companies

14. M/s. Fashion Apparels Limited is being wound up by the court. The Official Liquidator after realization of the assets has an amount of Rs. 28,00,000 at his disposal towards payment to the creditors of the company.

The list of creditors is given below:

	Rs.
(i) Dues to secured creditors	20,00,000
(ii) Dues to workers	15,00,000
(iii) Taxes, etc., payable to the Government authorities	2,00,000
(iv) Unsecured creditors	40,00,000

Since the available amount is insufficient to meet the claims of all the creditors, explain the procedure to be followed for payment of dues as provided in the Companies Act, 1956 assuming that the company has created a charge on all the assets of the company in favour of the secured creditors.

Winding-up of Companies

15. Write short notes on:
- (i) Preferential Payments;
 - (ii) Fraudulent Preference.

Miscellaneous Provisions-Sole Selling Agent

16. The Board of Directors of Sun Shine Ltd. having a paid-up share capital of Rs. 40 Lakhs appointed Moon Shine Ltd. as sole selling agent for a period of five years with effect from

1st April, 2008 and the said appointment was approved by the company in the next Annual General Meeting held on 30th September, 2008. The Directors of Moon Shine Ltd. were holding fully paid-up shares of face value of Rs. 3 Lakhs in Sun Shine Ltd. Answer the following explaining the relevant provisions of the Companies Act:

- (i) Is the appointment of the sole selling agent in order?
- (ii) Will your answer be different if both are private companies or if the Directors of Moon Shine Ltd. acquired the aforesaid shares in Sun Shine Ltd., on 1st September, 2008?

Miscellaneous Provisions- Foreign Company

17. Under Section 603 of the Companies Act, 1956, what are particulars required for incorporating a prospectus to be issued by an existing foreign company?

Producer Companies

18. What are the difference between a Producer Company and a Private Company with respect to
- (i) Management
 - (ii) Finance, Accounts and Audit
 - (iii) Reconversion of Companies

Producer Companies

19. What is the procedure for resolution of disputes arising in the formation, management or business of a producer company?

Foreign Exchange Management Act, 1999

20. Mr. Yash had resided in India during the financial year 2007-2008 for less than 183 days. He had come to India on April 1, 2008 for employment. What would be his residential status during the financial year 2008-2009?

(SEBI) Act, 1992.

21. State in brief the guidelines to the following
- (a) Green shoe option.
 - (b) E- IPO.
 - (c) Book building process.

The Competition Act 2002

22. Define the following terms
- (i) Vertical and Horizontal Agreements

(ii) Relevant Market

(iii) Combination

Securities Contracts (Regulation) Act, 1956

23. Certain shares were transferred by Mr. P to Q. However, the transfer process could not be completed before the declaration of dividend and the name of the transferor appeared in the books of the company. With reference to the provision contained in the SCR Act, 1956, what are the obligations of the company, transferor and transferee?

Interpretation of Statutes, Deeds and Documents

24. Explain the principles of grammatical interpretation vis-à-vis logical interpretation especially in the context that the duty of the court is to administer the law as it stand and not to find out whether the law is just or reasonable.

Corporate Secretarial Practice

25. Draft a Board Resolution for appointment of Managing Director or a person who is already a Managing Director of another company.

SUGGESTED ANSWERS/HINTS

1. Period and form of notice: Section 286 of the Companies Act, 1956 does not specify any form of notice or period of notice. Usually, a week's notice is considered sufficient. However, if the Articles provide that Board Meetings will be held on fixed days of every month or where the directors are duly informed that in future all meetings of the Board will be held on a fixed day of every month (say, first Saturday of every month), it will be sufficient compliance with the statute [A. Chettiar Firm v. Kaleshwar Mills (1957) I.L.R. Mad.302]. But, even where meetings are held on a fixed day of every month, a notice is usually sent to the directors as a reminder.
2. Interested directors are excluded from the computation of the quorum under Section 300(1). However, in the terms of Section 300(2), the interested directors can be counted for the purpose of quorum in the following cases, namely – (a) where the company is a private company which is neither a subsidiary nor a holding company of a public company; (b) where the company is a private company which is a subsidiary of a public company, in respect of any contract or arrangement thereof; (c) where there is any contract of indemnity against any loss which the directors or any one or more of them may suffer by reason of becoming or being sureties or surety for the company; (d) in respect of any contract or arrangement entered or to be entered into with a public company, or a private company, which is a subsidiary of a public company in which the director's interest consist solely (i) in his being a director holding shares of such number

or value as to be just enough and not more than enough to qualify him for appointment as director, or (ii) in his being a member holding not more than 20% of the paid-up share capital of the company; (e) where it is a public company in respect of which the Central government has, through a notification in the official Gazette, waived the necessity to comply with the requirements of Section 300(1) on considerations of establishing or promoting any industry, business or trade in the public interest.

3. According to Section 286 of the Companies Act, 1956, notice of every board meeting 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.
 - (i) Notice should be given even if Mr. Manoj expressed his inability to attend the next board meeting. Otherwise section 286(1) will be violated. [In Re: Portuguese Consolidated Copper Mines Ltd. [1889] 42 Ch. D. 160 (CA)].
 - (ii) Although there is no legal precedent in this regard, it would be a prudent practice (under section 286) that notice should be served to both, the alternate director as well as the original director Mr. Sharma, who is outside India, at his usual address in India.
 - (iii) In the case of a company having foreign collaboration, Articles generally provide that notice of Board Meeting should be sent by Air mail. But a question crops up whether such provision is valid as section 286(1) requires service of such notice to a director to be sent at his usual address in India.

It may be noted that Articles cannot contain a provision contrary to the specific provisions of the Act. Any such stipulation shall be void. Again, section 36 of the Companies Act, 1956 constitutes a binding relationship between the company and the members; not between the company and the directors. Thus, under the present law, service of notice to Samuel at his foreign address is not mandatory. However, in view of the present liberalized scenario, law needs to be amended.

4. As per Section 285 of the Companies Act, 1956, in case of every company, a meeting of its Board of Directors shall be held at least once in every three calendar months and at least four such meetings shall be held in every year. In the present case no meeting was held during the quarter July-September, 2008. Hence Section 285 has been violated.
5. (a) No, the appointment of Mr. Amit is not hit by section 314(1) and therefore shall not require the approval of general meeting by way of special resolution. Section 314(1) forbids the specified persons to be appointed to an office or place of profit: (i) under the company, or (ii) under any of its subsidiaries. Since Mr. amit is not a director of Star Motors Ltd., his appointment is not affected by the section.

Section 314(1) does not prohibit a director of a subsidiary company from holding an office or place of profit in its holding company.

However, it will require the aforesaid approval if M/s Star Motors Ltd. is the subsidiary of M/s Star Forgings Ltd.

- (b) Section 314(1) does not apply since at the time of appointment of Mudit as the sales manager, his relative Rakesh was not the director of the company [Section 314(1A)].
- 6. (i) Remuneration by way of commission can be paid to an ordinary director only with the sanction of a special resolution [Sec. 309(4)]

Fresh special resolution is required to be passed after every five years [Section 309(7)].

The concept of minimum remuneration, however, has no relevance with reference to ordinary directors.
- (ii) Depending upon the effective capital of the company, a whole-time director can be paid @ Rs. 75,000 p.m. to Rs. 2,00,000 p.m. as per Schedule. XIII.
- (iii) According to Section 316 read along with Schedule. XIII, the following shall be necessary:
 - (a) Unanimous resolution of the Board of Directors passed at its meeting;
 - (b) Approval of the Central Government [Clause (d) Schedule. XIII].

- 7. Director R shall not be entitled to any compensation for loss of office since he is not a managing director or a director in the wholetime employment or a director holding the office of a manager [Sub-sections (1) & (2) of section 318].
- 8. Schedule XIII allows a company to pay its managing director upto 5% of its net profits for a financial year. Monetary ceilings have been removed except for loss-making companies or companies with inadequate profits. Presently in case a person is managing director in more than one company, he may draw remuneration from both or from any one of them 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.

Thus, assuming that the two companies in question do not have adequate profits, the managing director, Mr. Mohan, cannot receive more than Rs. 57,000 p.m. as salary from both the companies, taken together. Accordingly, if he is to be paid anything beyond Rs. 22,000 p.m. by Packsafe Cotton Ltd., approval of the Central Government shall be required to be obtained.

Also, please note that the approval of the Central Government shall be necessary for his appointment as per conditions of Sch. XIII, Mr. Mohan being already the managing director of another company.

Answer will not be different even if Surprise Fabric Ltd. is a private company since the appointment is sought to be made in a public company. Sch XIII shall, therefore apply.

9. Under section 383A, 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 above, Mr. John cannot be appointed as a company secretary unless the company first raises the strength of its Board to minimum of three directors.

10. (a) As per Section 260 of the Companies Act, 1956, Board can appoint additional directors provided the Articles give power to the Board to appoint such directors, and provided the number of directors and additional directors shall not exceed the maximum strength fixed by the Articles. In the instant case, after the appointment of 3 additional directors, the total strength of the Board will go up to 12, which is within the maximum fixed by the Articles. Hence, Board can appoint the additional directors.
- (b) The managing director cannot continue as such, as he is disqualified to act as managing director, pursuant to section 267 of the Companies Act, 1956. The purpose of section 267 is to ensure that the management and affairs of the company and its control is not in the hands of a person who has been found by a competent Court to be guilty of an offence involving moral turpitude. Section 267 enacts that any person who has suffered a conviction by a Court of an offence involving moral turpitude shall not be appointed or employed or continue in employment or appointment by any company as its managing director. Thus, the provisions are stringent. Under Criminal Procedure Code (CrPC), an appeal against the order of conviction may either be dismissed summarily or heard by an Appellate Court. However, order of conviction does not on the mere filing of an appeal disappear and it is difficult to hold that Section 267 of the Companies Act must be read to apply only to final order of conviction as such interpretation may defeat the very object and purpose for which it came to be enacted. In view of the above observation, the Appellate court will not be inclined to stay the operation of section 267 pending disposal of appeal [See *Roma Narang v. Ramesh Narang* (1995)SCALE 276]
- (c) The Civil Court has no jurisdiction to entertain the removal of directors of a limited company as it relates to the internal management of the company which is governed by the Companies Act. In *Ketan Industries Private Ltd. v. Manju Ravindra Prasad Ketan*, one of the two issues before one High Court was the same as appears here. The Court held that the shareholder has a right to remove directors under section 284 of the Companies Act, which provides a machinery for enforcement of the right and Civil Court has no jurisdiction to entertain a suit for removal of directors.

- (d) If the Articles empower directors to appoint additional directors, Board can appoint additional directors under section 260 of the Companies Act. In the absence of any provision in the Articles requiring that additional directors are to be appointed only at a meeting of the Board, additional directors can be appointed by circular resolution. But the power should be exercised bona fide and in the interests of the company and not for extraneous considerations like strengthening of the majority.
11. As per section 295, without obtaining approval of the Central Government, a public limited company or a subsidiary company of a public limited company cannot give loan or provide guarantee or provide security in connection with a loan taken by any other person to or, to any other person by, inter alia, a relative of such director.

In view of the above, it is clear that the loan given to the wife of the Managing Director attracts the provisions of section 295.

However, since the wife of the Managing Director is the financial advisor of the company and working as an employee, she, as an employee, should be entitled to a salary advance, in accordance with the scheme of salary advance with respect to the employees of the company. If the amount so given is not disproportionate to the salary, it should not be treated as loan and the provisions of section 295 may not be attracted, as was held by the Madras High Court in *M.R. Electronic Ltd. Vs. Asstt. ROC*.

Thus, an amount of Rs. 10,000 given as salary advance, recoverable from salary does not seem to be disproportionate to salary of a financial advisor (appointed by virtue of her own qualification as Chartered Accountant) and the provisions of section 295 may not be attracted.

12. As per Section 372A of the Companies Act, 1956, following steps shall be necessary:
- (i) Prior approval by way of unanimous resolution of the Board of directors.
 - (ii) Prior approval of concerned public financial institution.
 - (iii) Passing of special resolution through postal ballot [rule 4 of Companies (Passing of Resolution by Postal Ballot) Rules, 2001]-section 372A read alongwith section 192A.
 - (iv) Interest must not be less than the prevailing bank rate.
 - (v) Enter the prescribed particulars in the Register of Loans and Investments maintained by the company.
 - (vi) File copy of the special resolution with ROC within 30 days of its passing (Section 192).
 - (vii) There is no short cut available in case of loans.

13. Oppression: The term 'oppression' is not defined in the Companies Act, 1956. Oppression, according to the Dictionary meaning of the word, is any act exercised in a manner burdensome, harsh and wrongful. The meaning of the term 'oppression' was explained by Lord Cooper in the Scottish case of *Elder v. Elder and Watson Ltd.* As given below:

"The conduct complained of should be at the lowest involve or visible departure from the standards of fair dealing and a violation of the conditions of fair play or which every shareholder who entrusts his money to a company is entitled to rely.

- (i) Oppression of a member as a director: The oppression dealt with by section 397 of the Companies Act, 1956 is only oppression of members in their character as such; and it is only in that character they can involve section 397. The harsh treatment, for instance, of a member who is a director or other officer or employee, by the Board of Directors or management does not come within (section 397). It has been held in *Re. Bellador Silk Ltd.* That if the majority of the Board of Directors override the minority directors the latter cannot resort to section 397 and hence the minority directors will not succeed in getting relief from CLB on the ground of oppression.
 - (ii) Right not confined to minority: According to section 399 of the Companies Act, 1956, the right to apply for relief under section 397/398 is given to 100 members or 1/10th of the total number of members or any member or members holding not less than 1/10th of the issued share capital of the company. There is nothing in this section which suggests even indirectly that unless the application is made by minority shareholders it is not maintainable. The right to apply is, therefore, not confined to oppressed minority of the shareholders along. It was held by Calcutta High Court in *Re. Sindhri Iron Foundry (P) Ltd.*, that the oppressed majority also might apply for relief under section 397. Therefore, the petitioners are likely to succeed in getting relief provided the other condition laid down in section 397 (i.e. that to wind up the company would unfairly prejudice such members, but that otherwise the facts would justify the making of a winding-up order on just and equitable ground) is satisfied, even though the Delhi High Court held a contrary view in *Suresh Kumar Sanghi v. Supreme Motors Ltd.*
14. Section 530 of the Companies Act, 1956 lays down the procedure for payment of debts out of the available funds with the Official Liquidator. However, section 529A provide for overriding of the preferential payments as mentioned in section 530. According to section 529A, 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.
- (a) Workmen's dues and
 - (b) Debts due to secured creditors shall be paid in priority to all other debts.

The above debts have to be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

In the light of the legal provisions explained, the funds available with the Official Liquidator are not even sufficient to meet fully the dues payable to secured creditors and workers. Thus, tax dues to the tune of Rs. 2,00,000 payable to Government authorities will not get any payment even though they are to be considered as preferential payments as per section 530 of the Act, The secured creditors dues and workers dues will get abated in their respective proportion and they get Rs. 16 lakhs and Rs. 12 lakhs respectively. The other creditors will get nothing.

15. (i) Preferential payments: Subject to the provisions of Section 529A of the Companies Act, 1956 the following debts must 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 Rs. 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
 - (f) Expenses payable by any company in respect of an investigation held under Section 235 or 237 of the Act.
- (ii) 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.:

- (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, 2008. On October 15, 2008, a winding-up petition is presented to the Court, which passes an order of winding-up on 30th November, 2008. 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].

- 16. (i) No; the appointment is not in order since approval of the Central Government as per Section 294AA(2) of the Companies Act, 1956 has not been obtained.
- (ii) Again approval of the Central Government shall be necessary even if both the companies are private companies, Section 294AA applies to private companies also.

However, if Moon Shine Ltd., has acquired shares in Sun Shine Ltd., on 1st September, 2008, the provisions of Section 294AA shall not apply.

- 17. Under Section 603 of the Companies Act, 1956, the prospectus to be issued by an existing or intended Foreign Company in India must be dated and contain the following particulars:
 - (a) the instrument constituting or defining the constitution of the company;
 - (b) the enactment's or provisions under which the company was incorporated;

- (c) the address of the place in India where the said instrument, enactments etc. translation thereof in English if they are in some other foreign language, can be inspected;
- (d) the date on which and the country in which the company was incorporated; and
- (e) whether there is a place of business in India and if so, the address of its principal office.

The provision contained in (a), (b) and (c) above, shall not be applicable if the prospectus is issued more than 2 years after the company had become entitled to commence business.

The prospectus of Foreign Company must contain the matters laid down in Part-I of the Schedule II and set out the report specified in Part II of the Schedule subject always to the provisions of Part-III of the Schedule.

18. The major distinction between these two classes of companies are as follows:

Producer Company	Private Company
(i) 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 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 then in contravention of the provisions of the Act shall be joint concern. 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 and the maximum may be specified by the articles (any increase in the maximum beyond 12 directors requires approval of the Central Government). A 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.
(ii) Finance, Accounts and Audit Producer companies shall keep proper books of accounts and internal audit shall be	Proper books of accounts shall be kept in those companies engaged in industrial

carried out by a chartered accountant. Apart from the matters provided in Section 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.	activity. Internal audit need not be carried out and auditor's report shall be subject to the provisions as specified in Section 227. A 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.
(iii) 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.

19. Where any dispute relating to the formation, management or business of a producer company arises—

- (a) amongst member, former member or persons claiming to be member or nominees of deceased member; or
- (b) 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
- (c) 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 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.

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.
20. Mr. Yash had come to India for taking up employment. However, during the financial year 2007-2008, he was in India for less than 183 days. Since he has not fulfilled the condition of staying in India for more than 182 days, he cannot be considered as person resident in India during the financial year 2008-2009 notwithstanding the purpose or duration of his stay.
21. (a) Green Shoe Option: The basic purpose of 'green shoe option' is not to make available additional share capital to company, but to act as stabilizing force, if issue is over subscribed. The shares held by promoters are lent to Stabilising Agent (SA) and returned by SA to them after the purpose is over. Promoters do not get any profit in this transaction.

The green shoe option is available only in case of IPO and not for subsequent issues.

"Green Shoe option" means an option of the allocating shares in excess of the shares included in the public issue and operating a post-listing price stabilizing mechanism, which is granted to a company to be exercised through a Stabilising Agent [clause 1.2.1(xiii-a)].

A company desirous of availing the option shall in the resolution of the general meeting authorizing the public issue; seek authorization also for the possibility of allotment of further shares to the 'stabilizing agent' (SA) at the end of the stabilization period in terms of clause 8A.15. [Clause 8A.1].

The company shall appoint one of the Lead book runners as the "stabilizing agent" (SA), who will be responsible for the price stabilization process, if required. The SA shall enter into an agreement with the issuer company [clause 8A.2].

The SA shall also enter into an agreement with the promoters who will lend their shares Maximum number of shares that may be borrowed from the promoters shall not be in excess of 15% of the total issue size. [Clause 8A.3].

- (b) E-IPO: A company proposing to issue capital to public through the on-line system of the stock exchange for offer of securities shall comply with the requirements as contained in the guidelines on Initial Public Offer through the Stock Exchange online System (E-IPO) in addition to other requirements for public issues as given in these Guidelines, wherever applicable.
 - (i) Agreement with the stock exchange.

- (ii) Appointment of brokers.
 - (iii) Appointment of Registrar to the Issue.
 - (iv) Listing.
 - (v) Responsibility of the Lead Manager
- (c) Book Building Process: The changes that have been made in the book-building process are:
- (i) The companies now have been given a flexibility of indicating a movable price band or a fixed floor price in Red Herring prospectus.
 - (ii) Definition of QIBs has been enlarged to include Insurance companies, Provident and Pension funds with minimum corpus of Rs.25 crores.
 - (iii) Gap between the closure of books and listing/trading of securities is reduced to 6 days.
 - (iv) The book building process is being integrated with stock exchange procedures. Transactions will be routed through brokers. Brokers will be responsible for defaults in payment of their clients.
 - (v) The issuer company shall enter into an agreement with one or more of the Stock Exchange(s) which have the requisite system of on-line offer of securities [clause 11.3.1(iv)(a)]. Company does not have much choice. It will have to go to National Stock Exchange or Bombay Stock Exchange.
 - (vi) The Book Runner(s)/syndicate members shall appoint brokers of the exchange, who are registered with SEBI, for the purpose of accepting bids, applications and placing orders with the company. They will ensure that the brokers so appointed are financially capable of honouring their commitments arising out of defaults of their clients/investors, if any, [clause 11.2.1(vii)(a)]. The brokers, appointed for accepting applications and application monies, shall be considered as 'bidding/collection centres' for purpose of book building process. [Clause 11.2.1(vii)(b)].
 - (vii) The broker may collect an amount to the extent of 100% of the application money as margin money from the clients/investors before he places an order on their behalf. The margin collected from categories other than Qualified Institutional Buyers shall be uniform across the book runner(s)/Syndicate members, for each such category [clause 11.3-1(xvii)(a)].
22. (i) Vertical and Horizontal Agreements: Agreements may be horizontal agreements and vertical agreements. Horizontal agreements referred to agreements among competitors and vertical agreements to an actual or potential relationship buying or

selling to each other. Horizontal agreements relating to prices quantities, bids and market sharing are particularly anti-competitive. Vertical agreements like tie in arrangements; exclusive supply/distribution agreements and refusal to deal are also generally anti-competitive. Section 3 of the Competition Act, 2002 regulates and prohibits all types of agreements, which have the effect to restrict competition, and prevents those, which have such likely effect.

Here horizontal agreements are those agreements among competitors operating at the same level in the economic process i.e. enterprises engaged in the same activity. For example, the agreements between producers or between whole sellers or between retailers, dealing in similar kind of products.

Vertical agreements are those agreements between Non-competing undertakings operating at different levels of manufacturing and distribution process. For example, the agreements between manufacturers of components, manufacturers of products, between producers and whole-sellers or between producers, whole-sellers and retailers.

Horizontal agreements or agreement between two or more enterprises that are at the same stage of the production chain and in the same market. Horizontal agreements and membership of cartels lead to unreasonable restrictions of competition and may be presumed to have an appreciable adverse effect on competition.

Vertical agreements are agreements between enterprises that are at different stages or levels of the production chain and therefore in different markets. An example of this would be an agreement between a producer and a distributor. This includes, Tie in arrangements, Exclusive Supply Agreements, Exclusive Distribution Agreements, Refusal to Deal and Resale Price Maintenance (RPM).

- (ii) Relevant Market [Section 2(r)]: "Relevant Market" means the market, which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

It includes all reasonable substitutable goods or services of all competitors. The determination of the relevant market is a crucial aspect. In wider sense relevant market means that the Government or a private have greater difficulty in demonstrating expected anti-competitive effect from a challenged merger.

- (iii) Combination (Section 5): The Section 5 deals with combination of enterprises and persons. The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—
 - (a) any acquisition where—

- (i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—
 - (A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or
 - (ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—
 - (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or
- (b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable service, if:-
- (i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,-
 - (A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million dollars; or
 - (ii) the group, to which enterprise whose control has been acquired, or is being acquired would belong after the acquisition, jointly have or would jointly have,-

- (A) either in India the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
- (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or
- (c) any merger or amalgamation in which—
 - (i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—
 - (A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees, three thousand crores; or
 - (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or
 - (ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,—
 - (A) either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or
 - (B) in India or outside India, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars.

23. TITLE TO DIVIDENDS (SECTION 27)

- (1) It shall be lawful for the holder of any security whose name appears on the books of the company issuing the said security to receive and retain any dividend declared by the company in respect thereof for any year, notwithstanding that the said security has already been transferred by him for consideration, unless the transferee who claims the dividend from the transferor has lodged the security and all other documents relating to the transfer which may be required by the company with the company for being registered in his name within fifteen days of the date on which the dividend became due.

Explanation.—The period specified in this section shall be extended—

- (i) in case of death of the transferee, by the actual period taken by his legal representative to establish his claim to the dividend;
 - (ii) in case of loss of the transferee, by the actual period taken for the replacement thereof; and
 - (iii) in case of delay in the lodging of any security and other documents relating to the transfer due to causes connected with the post, by the actual period of the delay.
- (2) Nothing contained in sub-section (1) shall affect—
- (a) the right of a company to pay any dividend which has become due to any person whose name is for the time being registered in the books of the company as the holder of the security in respect of which the dividend has become due; or
 - (b) the right of the transferee of any security to enforce against the transferor or any other person his rights, if any, in relation to the transfer in any case where the company has refused to register the transfer of the security in the name of the transferee.
24. Interpretation may be either grammatical or logical. Grammatical interpretation concerns itself exclusively with the verbal expression of law. It does not go beyond the letter of the law. Logical interpretation on the other hand, seeks more satisfactory evidence of the true intention of the legislature. In all ordinary cases, the grammatical interpretation is the sole form allowable. The court cannot take from or add to modify the letter of the law. However, where the letter of the law is logically defective on account of ambiguity, inconsistency or incompleteness, the court is under a duty to travel beyond the letter of law so as to determine from the other sources, the true intentions of the legislature. Further a statute is enforceable at law, however, unreasonable it may be. The duty of the court is to administer the law as it stands. It is not within its jurisdiction to see whether the law is just or unreasonable. However, if there are two possible constructions of a clause, one a mere mechanical construction based on the rules of grammar and the other which emerges from the setting in which the clause appears and the circumstances in which it came to be enacted and also the words used therein, the courts may prefer the second construction which though may not be literal may be a better one.
25. Board Resolution for appointment of Managing Director or a person who is already Managing Director of another company :
- “Resolved that subject to the approval of the Central Government to Sub-section (4) of Section 316, Mr. XYZ who is already the Managing Director of two companies, namely M/s ABC Limited and M/s BCD Limited, be and is hereby appointed as Managing Director of the company for a period of five years commencing from 1st October, 2008, with the

consent of all the Directors present at the meeting of which meeting and the resolution to be moved there at specific notice was given to all the directors then in India, on the terms and conditions in the draft agreement tabled before the meeting and initialled by the Chairman for purposes of identification and that Shri SPM, the Secretary of the company be and is hereby authorised to apply to the Central Government for seeking their approval.

Resolved further that Shri LMD, Director and Shri SPM the Secretary of the company be and are hereby authorised to execute the said agreement subject to such modifications/alterations made by the Central Government while giving their approval and to affix the common seal of the company thereon."