PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2009

DUE DILIGENCE AND CORPORATE COMPLIANCE MANAGEMENT

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *Answer SIX questions including Question No. 1 which is COMPULSORY.*

Question 1

(a) State, with reasons in brief, whether the following statements are correct or incorrect :

(i) Private companies are not required to employ the whole-time Company Secretary.

(ii) A member of the Institute of Company Secretaries of India (ICSI) in whole-time practice can issue compliance certificate in respect of any number of companies without any ceiling whatsoever.

(iii) Unlisted companies cannot float global depository receipts (GDRs) in India under the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993.

(iv) The provisions regarding number of Board meetings and periodicity of Board meetings contained in clause 49 of the listing agreement and section 285 of the Companies Act, 1956 are identical.

(v) Investment in Indian depository receipts (IDRs) is an investment opportunity for foreign investors to invest in Indian companies.

(2 marks each)

(b) Suraj, a Practising Company Secretary ignored some material discrepancies while issuing compliance certificate to a company. Explain the professional responsibility involved and state whether any penal provisions are prescribed for taking action in such circumstances. *(5 marks)*

(c) Explain the significance of securities management and compliances by a Company Secretary under the Companies Act, 1956. *(5 marks)*

Answer 1(a)(i)

Incorrect

As per section 383A(1) of the Companies Act 1956 every company having paid up capital exceeding a prescribed amount is required to appoint a whole-time company secretary. This is applicable to a private companies also if the paid up capital exceeds the prescribed amount.

Answer 1(a)(ii)

Incorrect

A member of the Institute in practice who is entitled to issue compliance certificate pursuant to the proviso to sub-section (1) of section 383A of the Companies Act, 1956 (1 of 1956) shall be deemed to be guilty of professional misconduct if he issues compliance certificates and/or signs Annual Return for more than eighty companies in aggregate i.e. (total number of companies in respect of which compliance certificate is issued or Annual Return is signed) in a calendar year. However, in the case of a firm of Company Secretaries, the ceiling of eighty companies aforesaid would apply to each partner therein who is entitled to sign the compliance certificate.

Answer 1(a)(iii)

Correct

Unlisted companies, which have not yet accessed the Global Depositary Receipt / Foreign Currency Convertible Bond route for raising capital in the international market would require prior or simultaneous listing in the domestic market, while seeking to issue (i) Foreign Currency Convertible Bonds and (ii) Ordinary Shares through Global Depositary Receipts under the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993.

Answer 1(a)(iv)

Incorrect

As per Clause 49 of the listing agreement, the Board shall meet at least four times a year with a maximum time gap of four months between any two meetings.

As per Section 285 of the Companies Act, 1956, the meeting of Board of Directors shall be held atleast once in every three months and atleast four such meetings shall be held in a year.

Hence Section 285 of the Companies Act, 1956 and provisions of clause 49 pertaining to Board Meting are not identical, as the companies Act does not specify the maximum gap between two Board Meeting.

Answer 1(a)(v)

Incorrect

Indian Depository Receipts provide an investing opportunity for Indian investors to invest in foreign equity. They are meant for foreign companies who intend to raise money in India.

Answer 1(b)

Company Secretaries must take adequate care while issuing Compliance Certificate. It is based on this certificate that confidence of the company, Government and trade and industry will build-up vis-a-vis our profession. Any failure or lapse on the part of a Practising Company Secretary in issuing a Compliance Certificate may not only attract penalty for false statement under Section 628 and disciplinary action for professional or other misconduct under the provisions of the Company Secretaries Act, 1980 but also make him liable for any injury caused to any person due to his negligence in issuing the Compliance Certificate. Therefore, it becomes imperative for the Practising Company Secretary that he exercises great care and caution while issuing the Compliance Certificate and also adheres to the highest standards of professional ethics and excellence in providing his services.

Section 628 of the Companies Act, 1956 deals with penalty for false statements. According to said Section, if in any return, report, certificate, balance sheet, prospectus, statement or other document, required by or for the purpose of any of the provisions of the Act, any person makes a statement

(a) which is false in any material particular, knowing it to be false, or

(b) which omits any material fact, knowing it to be material;

he shall, except as otherwise expressly provided in the Act, be punishable with imprisonment for a term which may extend to two years and shall also be liable to fine.

In view of this, a Practising Company Secretary will be attracting the penal provisions of Section 628, for any false statement in any material particular or omission of any material fact in the Compliance Certificate. However, a person will be penalised under Section 628 in case he makes a statement, which is false in any material particular, knowing it to be false, or which omits any material fact knowing it to be material.

Answer 1(c)

The company has to issue various types of securities to meet its requirement of funds. The issuance of any kind of security is again subject to the compliances of various Acts, Rules, Regulations and Guidelines. Once the securities have come into existence, the transactions in the securities are also governed by various Acts, Rules, and Regulations. Not only the issuer of the securities but also the holder of the securities are required to comply with the statutory provisions to transact in the securities of the company.

The concept of securities management and compliances thus signifies and includes in its ambit examination, verification or checking of registers, records, forms, returns and documents relating to securities issued by a company and certification of timely and proper compliance of all statutory provisions related to securities applicable to a company.

Thus, securities management and compliances, can provide an umbrella mechanism to ensure better compliances of all the statutory provisions relating to securities by the companies.

The company secretary has a big role to play because it is he who has to ensure the management of securities issued by the company, timely compliance of relevant provision of law applicable to the securities so issued and maintain all records and documents relating to securities issued by the company under the Companies Act, 1956 and other regulations.

Question 2

(a) Choose the most appropriate answer from the given options in respect of the following :

(i) According to SEBI guidelines relating to issue of capital, the draft prospectus is required to be filed with SEBI at least —

(a) 30 days prior to the filing of prospectus with the Registrar of Companies

(b) 45 days prior to the filing of prospectus with the Registrar of Companies

(c) 60 days prior to the filing of prospectus with the Registrar of Companies

(d) 90 days prior to the filing of prospectus with the Registrar of Companies.

(ii) Retail individual shareholder means a shareholder whose shareholding is not more than —

(a) Rs. 1,000

(b) Rs.10,000

(c) Rs.1,00,000

(d) Rs.99,000.

(iii) Under the Employees' Stock Option Scheme, a director is not eligible to participate in the scheme if he is directly or indirectly holding the equity shares in that company more than —

(a) 1% of the issued capital of the company at the time of issuance

(b) 2% of the issued capital of the company at the time of issuance

(c) 5% of the issued capital of the company at the time of issuance

(d) 10% of the issued capital of the company at the time of issuance.

(iv) The stock exchange may delist such companies whch have been suspended for non-compliance with the listing agreement for a minimum period of —

(a) 1 month

(b) 2 months

(c) 3 months

(d) 6 months.

(v) Out of the following, which is not required to be credited to the Investor Education and Protection Fund —

(a) Application money received by the company for allotment of any securities and due for refund

(b) Matured deposits with the company

(c) Matured debentures with the company

(d) Matured loans with the company.

(vi) Section 295 of the Companies Act, 1956 deals with —

(a) Appointment of sole selling agents

(b) Loans to directors

(c) Remuneration to directors

(d) Disclosure of interest by directors. *(1 mark each)*

(b) State the circumstances when a company is —

(i) required to file the return of allotment with the Registrar of Companies; and

(ii) not required to file the return of allotment. *(2 marks each)*

(c) Distinguish between any two of the following :

(i) 'Compliance certificate' and 'secretarial audit'.

(ii) 'Technical collaboration' and 'financial collaboration' involving foreign investment in India.

(iii) 'Global depository receipts' (GDRs) and 'Indian depository receipts' (IDRs). *(3 marks each)*

Answer 2(a)(i)

(a) 30 days prior to the filing of prospectus with the Registrar of Companies

Answer 2(a)(ii)

(c) Rs. 1,00,000

Answer 2(a)(iii)

(d) 10% of the issued capital of the company at the time of issuance.

Answer 2(a)(iv)

(d) 6 Months

Answer 2(a)(v)

(d) Matured loans with the company

Answer 2(a)(vi)

(b) Loans to director

Answer 2(b)(i)

The return of allotment in e-Form No. 2 has to be filed with the Registrar of Companies within 30 days from the date of allotment in the following cases:

(a) The company has made any allotment of its shares. If shares were allotted at a discount then relevant documents also to be attached.

(b) Shares were issued for consideration other than cash.

(c) Issue of bonus shares

(d) Allotment in pursuance of the order of the court under section 391/394.

Answer 2(b)(ii)

The return of allotment is not required to be filed:

(a) In case the allotment of forfeited shares

(b) Allotment to the subscribers to the Memorandum & Articles of Association.

(c) Issue of debentures.

Answer 2(c)(i)

Compliance Certificate and Secretarial Audit

As per Section 383A read with Rule 2 of the Companies (Appointment and Qualifications of Secretary) Rules, 1988, every company having a paid up share capital of rupees 10 lakhs or more and not required to appoint a whole-time Secretary is required to file with the Registrar of Companies, a compliance certificate from a company secretary in practice and also attach a copy of that certificate with the Board's Report. In terms of proviso to Section 383A(1), the Central Government has prescribed the Companies (Compliance Certificate) Rules, 2001 for issue of Compliance Certificate by a practicing company secretary.

Secretarial Audit is wider in ambit and denotes a check on numerous legal compliances and also the process carried out by concerned company. The scope of Compliance Certificate would comprise of certification of the compliance of various requirements under the Companies Act, 1956 where as Secretarial Audit is a much wider term. Secretarial Audit Report should setout in detail the scope of the work, his observations on irregularities noticed, weakness in the policies and procedures etc. Secretarial audit is voluntarily adopted by companies, as a good governance practice.

Answer 2(c)(ii)

Technical collaboration and financial collaboration

Foreign investment can be taken in the form of technical collaboration/financial collaboration. Financial Collaboration involves Foreign Direct investments in the form of Equity, FCCBs etc. Technical collaboration involves transfer of technology and payment of royalty, technical know-how fee etc. Both forms of investment may take place under automatic route where post facto approval of RBI is obtained when the investment/ payments are within the limits. When it exceeds the specified limits, it requires prior approval of central government.

Answer 2(c)(iii)

Indian Depository Receipt means any instrument in the form of a depository receipt created by Domestic Depository in India against the underlying equity shares of issuing company which is located outside India. The Indian IDR holders would thus indirectly own the equity shares of overseas issuer company. IDRs are to be listed and denominated in Indian Currency. An issuing company cannot raise funds in India by issuing IDRs unless it has obtained prior permission from SEBI.

Global Depositary Receipts (GDRs) are negotiable securities issued outside India by a Depositary Bank, on behalf of an Indian company, which represent the local Rupee denominated equity shares of the company held as deposit by a Custodian Bank in India.

Question 3

(a) You are working as the whole-time Company Secretary in a large listed company.

Draft a note to the Audit Committee of the Board highlighting the need for the appointment of Secretarial Auditor in the company. *(6 marks)*

(b) A foreign company engaged in automobile manufacturing activities is interested in setting-up a branch office in India. As a Company Secretary, advise the foreign company the purposes for which a branch office can be set-up under the Foreign Exchange Management Act, 1999. *(6 marks)*

(c) Explain the following terms used in takeovers and acquisitions :

(i) Conglomerate merger.

(ii) Reverse merger. *(2 marks each)*

Answer 3(a)

To

The Audit Committee of the Board of Directors
XYZ Ltd

Need for appointment of Secretarial Auditor

Secretarial audit not only acts as an effective mechanism to ensure that the legal and procedural requirements are duly complied with but also instills professional discipline in the working of the company besides building up the necessary confidence in the state of affairs of the company.

Several industrial and corporate laws need to be complied with by companies, non-compliance of which attracts prosecution. Secretarial Audit has a capability to provide an in-built mechanism for ensuring corporate compliance generally and will specifically help restore this confidence of investors through greater transparency.

Secretarial audit extends professional help to the company in carrying out effective compliances and establishment of proper systems with appropriate checks and balances. Secretarial Audit is inherently useful, especially to small and medium sized companies and in particular, to the professional/nominee directors.

It relieves the company and its directors including the independent/nominee directors, from the consequences of unintended non-compliances of the provisions of the Companies Act and other important corporate laws. It further curbs the tendency on the part of the smaller companies to short cut the procedural requirements which is primarily due to ignorance or lack of professional support. Secretarial audit essentially acts as a pre emptive check to monitor compliance with requirements of the Companies Act and other important corporate laws.

Secretarial audit also assists the government in ensuring better compliance of law and reduces litigation.

Further, with the growing reliance of companies on institutional finance/working capital from All-India and State level financial corporations and banks, it has become imperative for such agencies to know that the company has complied with the core legislations. Secretarial audit provides the much needed case due to proper maintenance of statutory records and compliance with the legal and procedural requirements.

Secretarial audit not only ensures that the company has complied with the provisions of various laws but also extends professional help to the company in carrying out effective compliance and establishment of proper systems with appropriate checks and balances.

In order to ensure better self-regulation on the part of companies and due compliance with the provision of law, secretarial audit of those companies which are not subject to the production of compliance certificate, is an imperative necessity.

Considering the above facts, it is felt that the appointment of Secretarial auditor is necessary as it would be an effective mitigation measure of regulatory risks.

Answer 3(b)

Purposes for which a branch office can be set up.

Foreign companies engaged in manufacturing and trading activities abroad are allowed to set up Branch Offices in India for the following purposes:

— Export/Import of goods

— Rendering professional or consultancy services

— Carrying out research work, in which the parent company is engaged.

— Promoting technical or financial collaborations between Indian companies and parent or overseas group company.

— Representing the parent company in India and acting as buying/selling agents in India.

— Rendering services in Information Technology and development of software in India.

— Rendering technical support to the products supplied by the parent/ group companies.

— Foreign Airline/Shipping Company

It may be noted that retail trading activities of any nature is not allowed for a branch office in India.

Answer 3(c)(i)

A conglomerate merger involves coming together of two companies in different industries i.e., the businesses of the two companies are not related to each other, neither horizontally nor vertically. They lack any uniformity either in their end product, or in the rendering of any specific type of service to the society. This is the type of merger of companies which are neither competitors, nor complementaries nor suppliers of a particular raw material nor consumers of a particular product or consumable.

Answer 3(c)(ii)

Reverse merger takes place when a healthy company amalgamates with a financially weak company. In the context of the provisions of the Companies Act, 1956, there is no difference between regular merger and reverse merger. It is like any other amalgamation.

Question 4

(a) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :

(i) _______________ is a process of conversion of physical certificates into electronic balances.

(ii) The orders of SEBI under the securities laws are appealable before ____________ .

(iii) A _________________ is a product whose value is derived from the value of underlying asset, index, etc.

(iv) When a charge on the assets of the company is satisfied, the fact is intimated in Form No. ____________ to the Registrar of Companies.

(v) At the time of opening of a new demat account, the _________ should ensure that the application form has been filled in all respects and the client has been introduced by a well-known person.

(vi) A company cannot register a transfer unless ___________ duly stamped and executed by both the transferor and transferee is delivered to the company. *(1 mark each)*

(b) While carrying out the secretarial audit of Daisy Ltd., you have found that a resolution was passed by the shareholders authorising the company to buy-back its shares. Intimation regarding the buy-back was also given to the recognised stock exchange in due course. However, no further steps were taken by the company in this regard. Meanwhile, a notice has been received by the company from the Securities and Exchange Board of India holding it guilty for not implementing the resolution of buy-back. Decide whether the company is bound to implement the resolution of buy-back of its shares. *(5 marks)*

(c) What do you mean by an 'independent director' ? Mention the criteria for considering a director as an independent director ? *(5 marks)*

Answer 4(a)

(i) **Dematerialization** is a process of conversion of physical certificates into electronic balances.

(ii) The orders of SEBI under the securities laws are appealable before **Securities Appellate Tribunal** .

(iii) A **Derivative** is a product whose value is derived from the value of underlying asset, index, etc.

(iv) When a charge on the assets of the company is satisfied, the fact is intimated in Form No. **17/e form 17** to the Registrar of Companies.

(v) At the time of opening of a new demat account, the **Depository Participant** should ensure that the application form has been filled in all respects and the client has been introduced by a well-known person.

(vi) A company cannot register a transfer unless **Proper instrument of transfer** duly stamped and executed by both the transferor and transferee is delivered to the company.

Answer 4(b)

As per the provisions of Section 77 A and the relevant provisions of the buy-back regulations, it is clear that a company is under no obligation to buy-back its securities even if its shareholders have passed a special resolution authorizing it to buy-back on the terms and conditions mentioned in the resolution. Section 77 A is only an enabling provision and all that it mandates is that no company shall buy-back its own securities unless it is authorized by its Articles and also by its share holders. The next step on the part of the company is to make a public announcement if it wanted to buy-back and the public announcement would then have been the offer which the company would have made to its shareholders. From the Question it seems that it did not come out with a public announcement and consequently, no offer to buy-back was made to the shareholders. It may be noted that failure if any to complete buy-back has to be reported in the Board's report with reasons thereof. Accordingly the same has to be reported in Directors' Report.

Answer 4(c)

Independent Directors are known to bring an objective view in board deliberations. They bring a valuable outside perspective to the deliberations.

'Independent director' means a non-executive director of the company who:

(a) apart from receiving director's remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates which may affect independence of the director;

(b) is not related to promoters or persons occupying management positions at the board level or at one level below the board;

(c) has not been an executive of the company in the immediately preceding three financial years;

(d) is not a partner or an executive or was not partner or an executive during the preceding three years, of any of the following:

  (i) the statutory audit firm or the internal audit firm that is associated with the company, and

  (ii) the legal firm(s) and consulting firm(s) that have a material association with the company.

(e) is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect independence of the director;

(f) is not a substantial shareholder of the company i.e. owning two percent or more of the block of voting shares.

(g) is not less than twenty one years of age.

Question 5

(a) *Jai Hind Ltd. made a public issue of 12 crore shares @ Rs.260 per share. 3 crore shares were offered to retail category of investors. Response of public to the issue was overwhelming and the entire issue was oversubscribed by 4.5 times whereas for the retail category the oversubscription was 6 times. The allotment procedure was finalised as per the SEBI guidelines. Three retail investors Ramesh, Suresh and Tushar who applied for 80 shares, 64 shares and 40 shares respectively, are interested in ascertaining the number of shares likely to be allotted to them. As per the issue document, applications could be made for a minimum of 8 shares and in multiples thereof. What will be their respective actual entitlements ? Explain with reasons. (5 marks)*

(b) *State the compliances required under the listing agreement regarding publication of financial results in newspapers. (5 marks)*

(c) *As a Practising Company Secretary, prepare a check-list for the purpose of compliance certificate under section 383A of the Companies Act, 1956 with regard to declaration, payment and transfer of dividend. (6 marks)*

Answer 5(a)

As per allotment procedure, the allotment to retail individual investors would be on proportionate basis i.e. at 1/6 of the total number of shares applied for. The actual entitlement shall be as follows:

Name of Investor	*Number of shares applied*	*Total number of shares eligible to be allotted (No. of shares applied for/6)*
R	80	80/6 = 13.33 = rounded off to 13 shares
S	64	64/6 = 10.66 rounded off to 11 shares
T	40	40/6 = 6.66 rounded off to 7 shares (application of T is liable to be rejected because the entitlement is less than the minimum application size)

Allotment shall be on proportionate basis within specified categories, rounded off to the nearest integer subject to a minimum allotment being equal to the minimum application size as fixed and disclosed by the issuer.

Answer 5(b)

The company shall, within 48 hours of conclusion of the Board or Committee meeting at which the financial results were approved, publish a copy of the financial results which were submitted to the stock exchange in at least in one English daily newspaper circulating in the whole or substantially the whole of India and in one daily newspaper published in the language of the region, where the registered office of the company is situated.

Where the company has opted to submit audited financial results, it shall also publish the qualifications or reservations, if any, expressed by the auditor together with the audited results.

Where the company has submitted consolidated financial results in addition to stand-alone financial results, it shall have an option to publish either stand-alone financial results or consolidated financial results in the newspapers, subject to the following:

(i) It shall intimate the stock exchange in the first quarter of the financial year or within such extended period as may be specified by SEBI in this regard and shall not change the same during the financial year;

(ii) In case the company changes its option in any subsequent year, it shall furnish comparable figures for the previous year in accordance with the option exercised for the current year;

(iii) It shall give a reference in the newspaper publication, to the places, such as the company's website and stock exchanges' websites, where the standalone results of the company are available.

Answer 5(c)

Checklist for Declaration, payment and transfer of dividend

Check whether:

(i) dividends were declared out of profits after providing for depreciation according to the provisions of Section 205(2) (unless an exemption in this regard was obtained);

(ii) specified minimum amount has been transferred to reserves according to the Companies (Transfer of Profits to Reserves) Rules, 1975;

(iii) board resolution recommending dividend has been passed;

(iv) the Board has authorised the opening of a separate Bank Account for payment of dividend;

(v) the amount of dividend including interim dividend was deposited in the separate Bank Account within 5 days from the date of declaration of such dividend;

(vi) register of members was closed as per the provisions of Section 154;

(vii) interim dividend, if any, declared by the Board of directors has been confirmed/ noted at the annual general meeting;

(viii) dividend recommended by the Board was declared at the annual general meeting;

(ix) dividend warrants were printed, signed and despatched to the registered shareholders within 30 days of declaration;

(x) permission of Reserve Bank of India, if required was obtained before dividend was remitted to foreigners/non resident Indians;

(xi) stock exchanges were duly intimated, in case of listed company;

(xii) voluntary transfer to reserves, if any, was made according to the Companies (Transfer of Profits to Reserves) Rules, 1975;

(xiii) in case of inadequacy of profits, the Companies (Declaration of Dividends out of Reserves) Rules, 1975, were complied with or previous approval of the

Central Government was obtained, before such declaration by (e-filing) of form pursuant to such rules, duly precertified;

(xiv) dividends were paid in accordance with Section 206 only to the registered shareholder or his order or to his bankers. In case of a share warrant, dividend has been paid to the bearer of such warrant or to his bankers;

(xv) unpaid or unclaimed dividend was transferred to the unpaid dividend account within 7 days after the expiry of 30 days from the date of declaration (Section 205A);

(xvi) amount of dividend remaining unpaid and unclaimed for seven years from the date they became due for payment has been transferred to the Investor Education and Protection Fund, established by the Central Government pursuant to Section 205C and while transferring the amount, the company furnished a statement in the prescribed form under Section 205A(6).

(xvii) where duplicate dividend warrants were issued, whether indemnity in lieu of dividend warrants lost/defaced were obtained.

Question 6

(a) A member of Rosy Ltd. is interested in inspecting and taking copies of minutes of Board meetings and of the annual general meeting held in the year 2008. Draft a suitable reply to be sent to the member. *(6 marks)*

(b) You are in the process of preparing compliance certificate of Koncept Ltd. You find that a Board resolution has been passed to grant a loan of Rs.80 lakh to another company, Rocket Ltd. The information about Koncept Ltd. as on 31st March, 2009 is as under :

	Rs. in Lakhs
Paid-up share capital :	
— Equity	*50*
— Preference	*10*
General reserves	*100*
Debentures redemption reserve	*5*
Loans already given to :	
— Xel Ltd.	*5*
— Yetin Ltd.	*10*

Koncept Ltd. has already given a guarantee of Rs.10 lakh to Zohar Ltd.

Prepare a note commenting on the decision of the Board and indicating whether it has complied with the relevant provisions of the Companies Act, 1956. *(6 marks)*

(c) Janta Power Ltd. was incorporated on 30th November, 2008. The certificate of commencement of business was issued by the Registrar of Companies on 31st December, 2008. Explain the provisions of the Companies Act, 1956 regarding holding of statutory meeting by the company. *(4 marks)*

Answer 6(a)

The reply would be in the following lines:

The shareholders have no right to see and seek copies of minutes of Board Meeting. However, they can have access to the minutes of general meetings.

Minutes book of general meetings are kept open at the registered office of company during business hours for inspection of members that too without any charge, subject to such reasonable restrictions as the company may by Articles or in general meeting impose.

The copies of minutes of general meetings are to be furnished within 7 days of the receipt of request on payment of Re. 1 for every 100 words or fractional part thereof or such other fee as may be prescribed.

Answer 6(b)

According to Section 372 A of the Companies Act, 1956, a company cannot grant any loans or inter-corporate investment exceeding 60% of its paid up capital and free reserves or 100% of its free reserves, whichever is more.

In the given situation, the position is as under:

Paid up Capital (50+10)	60 Lakh
General Reserves	100 Lakh
Total	160 Lakh

60% of Rs. 160 lakh	=	Rs. 96 Lakh
100% of Reserves & surplus	=	100 Lakh

Therefore, higher of he two i.e. Rs. 100 Lakh will be the overall limit of inter-corporate loans.

The existing loans of the company amount to Rs. 25 lakh (Xel Ltd. 5 lakh, Yetin Ltd. 10 Lakh and Koncept Ltd. Rs. 10 Lakh for guarantee). Hence only upto 75 lakh (100-25 Lakh) can be granted as loan by the company.

If the company wants to give loan as proposed i.e. of Rs. 80 Lakh to another company, it has to pass special resolution in company's general meeting as required under Section 372 A of the Companies Act.

Thus Board of Directors should have complied with the said provisions for grant of loan to another company by passing special resolution.

Answer 6(c)

A company limited by shares and a company limited by guarantee and having a share capital shall, within a period of not less than one month and not more than six months from the date of obtaining certificate of commencement of business hold a general meeting of the members of the company. This meeting is called the statutory meeting.

The Board of directors shall, at least twenty-one days before the day on which the meeting is held, forward the statutory report to every member of the company. The Act obligatory that the Statutory Report be certified by at least two directors, including the managing director, if there is one, and also by the company's auditors in so far as the report relates to the shares allotted by the company, cash received in respect of the shares and the receipts and payments of the company. The Board of directors must file a copy of the Statutory Report duly certified, with the Registrar of Companies for registration, after copies thereof have been sent to the shareholders of the company.

Further, in accordance with the provisions of Section 171 of the Act, notice for calling every general meeting of a company, including a statutory meeting, must be given at least twenty-one clear days before the meeting unless consent is accorded to a shorter notice by members, holding not less than 95% of such paid-up capital as gives right to vote or not less than 95% of the total voting power exercisable at the meeting. The notice convening the meeting should state it to be the statutory meeting. The Board shall cause a list showing the names, addresses and occupations of the members of the company and the number of shares held by them respectively, to be produced at the commencement of the Statutory meeting. The list shall remain open and accessible to any member of the company during the continuance of the meeting

Failure to hold such a meeting renders the company liable to be wound up under Section 433 (b)

Question 7

(a) Write notes on any two of the following :

(i) CEO/CFO certification under listing agreement.

(ii) Pledge of shares held in dematerialised form and the role of depository participant.

(iii) Search and status report on the position of borrowings made by a company. *(4 marks each)*

(b) Distinguish between any two of the following :

(i) 'Friendly takeover' and 'hostile takeover',

(ii) 'Share transfer audit' and 'statutory audit',

(iii) 'Audit committee' and 'remuneration committee'. *(4 marks each)*

Answer 7(a)(i)

As per clause 49(IV)(F) of the listing agreement details the following provisions regarding CEO/CFO certification.

The CEO, i.e. the Managing Director or Manager appointed in terms of the Companies Act, 1956 and the CFO i.e. the whole-time Finance Director or any other person heading the finance function discharging that function shall certify to the Board that:

(a) They have reviewed financial statements and the cash flow statement for the year and that to the best of their knowledge and belief :

(i) these statements do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading;

(ii) these statements together present a true and fair view of the company's affairs and are in compliance with existing accounting standards, applicable laws and regulations.

(b) There are, to the best of their knowledge and belief, no transactions entered into by the company during the year which are fraudulent, illegal or violative of the company's code of conduct.

(c) They accept responsibility for establishing and maintaining internal controls for financial reporting and that they have evaluated the effectiveness of internal control systems of the company pertaining to financial reporting and they have disclosed to the auditors and the Audit Committee, deficiencies in the design or operation of such internal controls, if any, of which they are aware and the steps they have taken or propose to take to rectify these deficiencies.

(d) They have indicated to the auditors and the Audit committee

(i) significant changes in internal control over financial reporting during the year;

(ii) significant changes in accounting policies during the year and that the same have been disclosed in the notes to the financial statements; and

(iii) instances of significant fraud of which they have become aware and the involvement therein, if any, of the management or an employee having a significant role in the company's internal control system over financial reporting.

Answer 7(a)(ii)

The shares held in dematerialized form can be pledged by clients for the purpose of obtaining loans from banks. For the purpose of creating pledge the Depository Participant should ensure that: (a) an application is submitted by the client (b) notice of pledge should be noted in the records if sufficient balances are available for pledge and forward the application to Depository (c) Depository Participants should inform the pledger as well as pledgee about creation of pledge, on intimation from the depository and (d) The participant shall make note in its records about invocation of pledge.

Answer 7(a)(iii)

Search involves physical inspection of documents and status comprises of reporting of the information as made available by the search. A search report prepared by the company secretary in practice enables the Bank/Financial Institution to evaluate the extent up to which the company has already borrowed moneys and created changes on the security of its movable and immoveable properties. This information is very vital for considering the company's request for grant of loans and other credit facilities. The search report enables the Bank/Financial Institution to study the credit-worthiness of the borrowing company.

Answer 7(b)(i)

A friendly take over is with the consent of taken over company. There is an agreement between the management of two companies through negotiations and the take over bid may be with the consent of majority or all shareholders of the target company. On the other hand when an acquirer company does not offer the target company the proposal to acquire its undertaking but silently and unilaterally pursues its efforts to gain control against the wishes of existing management, such acts of acquirer are known as take over raids or hostile take over bids.

The main distinction between a friendly take over and hostile take over is whether there is a mutual understanding between the acquirer and the taken over company. Where there is mutual understanding, it is friendly take over otherwise it is termed as hostile take over.

Answer 7(b)(ii)

Registration of transfer of shares is one area where investors have interaction with the company and also judge its functioning. A company cannot register a transfer unless a proper instrument of transfer duly stamped and executed both by the transferor and transferee is delivered to the company within the time limit laid down in Section 108 of the Companies Act, 1956. SEBI has laid down guidelines to be followed by the listed companies in the matter of processing of transfers and norms for objection to transfer the shares. Share transfer audit involves checking of all the said Acts and guidelines and the said work can be performed by a secretarial auditor who need not be a statutory auditor. On the other hand statutory audit can only be performed by a statutory auditor appointed by the company in the general meeting as provided in Section 224 of the Companies Act, 1956. The statutory auditor has to submit his report to the shareholders of the company in the manner provided in Section 227 of the Act.

Answer 7(b)(iii)

As per clause 49 of the listing agreement, all listed companies shall have a qualified and independent audit committee. The said committee shall meet at least four times in a year and not more than four months shall elapse between two meetings. The audit committee shall have minimum of three directors as members. Two thirds of the members of audit committee shall be independent directors. The Chairman of the Audit Committee shall be an independent director and shall be present at annual general meeting to answer shareholders queries. The company secretary shall act as the secretary to the audit committee. The audit committee shall have powers to investigate any activity within its terms of reference and review the financial statements of the company.

The Board of Directors may set up a remuneration committee to determine on behalf of the board and the shareholders about the remuneration package payable to the executive directors. The remuneration committee should normally consist of at least three directors all of whom should be non-executive directors. The constitution of remuneration committee is recommendatory under Clause 49.

Question 8

Critically examine and comment on any four of the following :

(i) All listed companies are required to ensure minimum level of public shareholding of 25% of the total number of issued shares of a class/kind for the purpose of continuous listing on a recognised stock exchange.

(ii) While the newly inserted provision under section 383A(1) has opened much awaited area of practice for Company Secretaries, it casts onerous responsibility and poses a great challenge to the profession.

(iii) Company Secretary of a listed company, in addition to complying with the provisions of Companies Act, 1956, is also expected to perform certain activities relating to securities laws and compliances.

(iv) Public announcement is not required for inter-se transfers.

(v) The objectives of a legal due diligence exercise may vary from case to case.

(4 marks each)

Answer 8(i)

All listed company are required to ensure minimum level of public shareholding at 25% of the total member of issued shares of a class or kind for the purpose of continuous listing. However, where the company offers or has in the past offered a particular class or kind of its shares to the public to the extent of at least 10% of the issue size in terms of Rule 19(2)(b) of the Securities Contracts (Regulations) Rules, 1957, it has to maintain on a continuous basis, public shareholding of at least 10% of the total number of issued shares of such class or kind. Further, where the number of outstanding listed shares of any class or kind of the company are two crore or more and the market capitalization of such company in respect of shares of such class or kind is Rs. 1000 crore or more, it has to maintain on a continuous basis, public shareholding of at least 10% of the total number of issued shares of such class or kind

Answer 8(ii)

As per Section 383 (A)(1) Companies having paid up capital of 10 lacs or more are not required to appoint whole time secretary should obtain compliance certificate as to compliance of provisions of the Companies Act from a Practising Company Secretary.

While issuing the certificate the Company Secretary should exercise great diligence and care. Any failure or lapse on the part of the company secretary will:

(a) attract penalty under Section 628 of the Companies Act for false statement omission of material particulars involve imprisonment which may extend to 2 years and fine.

(b) attract disciplinary action for professional misconduct under Company Secretaries Act 1980

(c) make him liable to third parties for injury caused to them due to negligence.

Answer 8(iii)

As Compliance Officer, the company secretary of a listed Company is liable to perform certain activities relating to securities laws and compliances in addition to the Companies Act, 1956, as a Compliance officer. It includes maintenance, examination, verification of registers, records, returns and other documents relating to securities issued by a company and ensuring of timely and proper compliance various Acts and Regulations. Company Secretary has to do certain activities like:

— Publication of financial results

— Compliance with SEBI & Listing Agreement

— Intimations/Disclosures to Stock Exchanges/SEBI.

— Implementation of Employees Stock Option Scheme

— Cautious about takeovers

— Watch on Stock Price Movements

— Watch on Insider Trading

— Take steps to prevent money laundering

— As Compliance Officer certify to stock exchanges.

Answer 8(iv)

SEBI (SAST) Regulations, 1997 requires the acquirer to make a public announcement and a public offer on acquisition of a certain percentage of shares or voting rights in a company. However, certain circumstances have been provided in regulation 3, subject to which if an acquirer acquires the specified percentage of shares or voting rights, he would be exempted from the requirement of making an open offer to the existing shareholders of the company. It exempts inter se transfer of shares amongst certain specified groups.

Answer 8(v)

A legal due diligence is scrutiny of all, or specific parts, of the legal affairs of the target company depending on the purpose of legal due diligence which may be mergers, acquisition or any major investment decision, with a view of uncovering any legal risks and provide the buyer with an extensive insight into the company's legal matters. It also improves the buyer's bargaining position and ensures that necessary precautions are taken in relation to the transaction proposed.

The objectives of a legal due diligence exercise may vary from case to case. However some of the common objectives in most of the cases would be as follows:

1. Gathering of information from the target company.
2. Uncovering of the risks of target company through a SWOT analysis.
3. Improving the bargaining position.
4. Cost benefit analysis.
5. Effect of risk and liability on the cost of the transaction.
6. Mapping of compliance requirements of the target company and the actual status.