

PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2011

COMPANY SECRETARIAL PRACTICE

Time allowed : 3 hours

Maximum marks : 100

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

2. All references to sections relate to the Companies Act, 1956 unless stated otherwise.

Question 1

Draft Board resolutions for a listed company for any five of the following businesses:

- (i) A resolution of Aditya Ltd. for providing guarantee for `89 lakh in respect of a loan to be obtained by Mrs. Shankari, a director thereof from a housing finance company for construction of a residential house for her own use.*
- (ii) A resolution for filing of declaration of solvency in voluntary winding-up.*
- (iii) A resolution for approval of annual accounts and recommendation of dividend.*
- (iv) A resolution for vacation of office by director for contravening section 299.*
- (v) A resolution for appointment of the compliance officer of the company.*
- (vi) A resolution for obtaining a certificate of commencement of business under section 149(3). (4 marks each)*

Answer 1(i)

Board Resolution for providing guarantee

“RESOLVED THAT subject to the approval of the Central Government, sanction be and is hereby accorded to the proposal of furnishing the guarantee in respect of a loan of `89 lakhs to be obtained by Mrs. Shankari, a director of the company from M/s. a housing finance company as per terms and conditions contained in the draft loan agreement to be entered into between the said housing finance company and Mrs. Shankari, a copy of which is placed before this meeting and initiated by the Chairman for the purpose of identification.”

RESOLVED FURTHER THAT Mr., Company Secretary of the company be and is hereby authorized to digitally sign the e-form 24AB, submit the application to the ROC and comply with all other formalities in this regard.”

Answer 1(ii)

Board Resolution for filing of declaration of solvency

“RESOLVED THAT having made a full enquiry into the affairs of the company and formed the opinion that the company has no debts, the consent of the Board of Directors of the company be and is hereby accorded to wound up the company as members’ voluntary winding up.”

“RESOLVED FURTHER THAT Mr. X and Mr. Y, Directors of the company be and are hereby authorized to make sign and verify by an affidavit declaration of solvency

consisting these facts and opinions and that the Secretary be and is hereby authorized to digitally sign the e-form 62, deliver the said declaration of solvency to the ROC forthwith alongwith a copy of the report of the auditors of the company in accordance with the provisions of section 488 of the Companies Act, 1956.”

Answer 1(iii)

Board Resolution for approval of annual accounts

“**RESOLVED** that draft of the audited Balance Sheet as at _____, Profit and Loss Account for the year ended on that date alongwith schedules and notes thereon as placed before the Board be and are hereby approved and the same be authenticated by the directors of the company as required under Section 215 of the Companies Act, 1956 and be sent to the Statutory Auditors of the company for their report thereon and thereafter be sent to the members of the company for adoption at the ensuing Annual General Meeting of the Company.”

Board Resolution for recommendation of dividend

“**RESOLVED THAT** in accordance with the provisions of Section 205 and other applicable provisions, if any, of the Companies Act, 1956 and the Companies (Transfer of Profits to Reserves) Rules, 1975, the Board of directors of the company do hereby recommend a dividend at the rate of Rs. per equity share out of the current profits of the company for the year ended on 31st March 2011 on the fully paid equity shares of the company absorbing Rs. out of the profits of the year and that, subject to the declaration by the members of the company at the ensuing annual general meeting, such dividend be paid to the registered holders of the equity shares whose names would appear on the register of members on 2011.”

Answer 1(iv)

Board Resolution for vacation of office

“**RESOLVED THAT** Mr. P, a Director, having failed to disclose the nature of his interest under section 299 of the Companies Act, 1956, in the contracts entered into by the company with “XYZ Private Ltd.”, pursuant to section 283(1)(i) of the Companies Act, 1956, be and is hereby declared that his office of the director of the company has been deemed vacated w.e.f.....”.

“**RESOLVED FURTHER THAT** Mr. KY, Company Secretary of the company be and is hereby authorized to file e-form 32 with the ROC and communicate the above said status to the Bank, Stock Exchange and all the concerned authorities and make necessary entries in the statutory registers as per the requirement of the Companies Act, 1956.”

Answer 1(v)

Board Resolution for appointment of Compliance Officer

“**RESOLVED** that the company do hereby appoint Mr., Deputy Company Secretary of the company who has ten years experience in Listed Companies, as Compliance Officer of the company who shall be responsible for monitoring the share transfer process (both physical and demat mode) and report to the Board in its each meeting and liase directly with the authorities of the SEBI, Stock Exchanges, Registrar

of Companies etc, the shareholders of the company and investors with respect to implementation of various clauses, rules, regulations and other directives of such authorities and investors services and complaints related matters and in compliance with the provisions of the Companies Act, 1956, Listing Agreement and Rules and Regulations framed thereunder.”

Answer 1(vi)

Board Resolution for obtaining a certificate of commencement of business

“RESOLVED THAT the draft of the Statement in Lieu of Prospectus made in accordance with the provisions of Schedule III of the Companies Act, 1956, Parts I, II and III, as placed before the Board duly initialed by the Chairman for the purpose of identification be and is hereby approved and that the same be signed by all the directors of the company and delivered to the Registrar of Companies, Delhi & Haryana, for obtaining the Certificate of Commencement of Business.

FURTHER RESOLVED THAT Mr., Director of the Company be and is hereby authorised to sign and file e-Form 20 to the Registrar of Companies, Delhi & Haryana.

FURTHER RESOLVED THAT the directors of the company be and is hereby authorised to give Power of Attorney in favour of Mr., the Director and/or Mr., Advocate to do all such acts, deeds and things for filing of the above said Statement in Lieu of Prospectus and to make any additions, corrections, alterations, etc. for and on behalf of the Board of directors of the company as may be required or directed by the Registrar of Companies for taking on record and to issue the certificate for Commencement of Business.”

Question 2

Explain any four of the following pair of terms to bring out their distinctions :

- (i) *‘Voidable allotment’ and ‘void allotment’.*
- (ii) *‘Registrar of Companies’ and ‘Regional Director’ of Ministry of Corporate Affairs.*
- (iii) *‘Reduction of share capital’ and ‘buy-back of shares’.*
- (iv) *‘Corporate governance’ and ‘corporate social responsibility’.*
- (v) *‘Section 25 company’ and ‘producer company’.* (4 marks each)

Answer 2(i)

Voidable Allotment

According to Section 71 of the Companies Act, 1956, an allotment made by a company to an applicant in contravention of the provisions of Section 69, which prohibits allotment unless minimum subscription has been received by the company or in contravention of the provisions of Section 70, which prohibits allotment in certain cases unless statement in lieu of prospectus has been delivered to the Registrar, is irregular allotment and shall be voidable at the instance of the applicant—

- (a) within two months after the holding of the statutory meeting of the company, and not later, or

- (b) in any case where the company is not required to hold a statutory meeting or where the allotment is made after holding of the statutory meeting, within two months after the date of the allotment, and not later.

The allotment shall be voidable, notwithstanding that the company is in course of being wound-up.

Void Allotment

According to Sub-section (1A) of Section 73, where a prospectus states that an application has been made for permission for the shares or debentures offered thereby to be dealt in one or more designated stock exchanges, such prospectus shall state the name(s) of the stock exchange(s) and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription list.

However, where an appeal against the decision of any stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred to Securities Appellate Tribunal under Section 22A of the Securities Contracts (Regulation) Act, 1956, such allotment shall not be void until the dismissal of the appeal.

Answer 2(ii)

Registrar of Companies – As per the definition given in section 2(40) of the Companies Act, 1956. 'Registrar' means a Registrar or an additional, a joint, a deputy or an Assistant Registrar having the duty of registering companies under the Act. ROCs are the field officers who deal directly with companies registered or going to be registered within their jurisdiction. They not only register companies but are also responsible for overlooking the affairs of companies registered with them by receiving information by way of returns, resolutions etc. on a continuous basis. They are officers of Govt. of India under the Ministry of Corporate Affairs although operating on State level.

Regional Director (RD) – He is also an officer of the Ministry of Corporate Affairs having jurisdiction over a region earmarked by the Ministry. His role is primarily to discharge the functions allotted to it by the Companies Act or delegated to it by the Central Government in administering the corporate sector. The Central Government's powers and functions in respect of following sections have been delegated to the Regional Director – 22, 224, 297(1), 394A, 400, 439, 496, 508 etc.

Answer 2(iii)

	<i>Reduction of Capital</i>	<i>Buy Back of Shares</i>
Approval	Requires confirmation of Court*	Does not require confirmation of Court*
Process	In this case the company has to submit petition before High Court* supported with other documents / reason and if court satisfied it can issue an order for reduction of share capital.	Buy-back is a process which enables a Company to go back to the holders of its shares and offer to purchase from them the shares that they hold and to reduce capital to that extent of purchase.

	<i>Reduction of Capital</i>	<i>Buy Back of Shares</i>
Basic conditions	Reduction must be authorised by the Articles of association, if not, then amendment is required.	If authorised by the articles of associations the company may purchase its own shares or other specified securities out of :- i. its free reserves; or ii. Securities premium account; or iii. the proceeds of any shares or other specified securities.
Applicable provisions	Section 100 of the Companies Act, 1956 and Rules of Companies (court) Rules, 1959. FEMA Regulations.	Section 77A, 77AA, 77B of the Companies Act, 1956. Private Ltd. Company and Unlisted Public Company (Buy Back of Securities) Rules, 1999 FEMA Regulations
Methodology/ Limitation	Where the company is over capitalized:- 1. Pay off part of the paid-up capital not wanted for the purpose of the company which is in excess. 2. Where company has suffered loss of capital, in such situation the company can write off or cancel the share capital which has been lost or is unrepresented by available assets. Other methods are:- 3. It may extinguish or reduce the liability of member in respect of uncalled or unpaid capital. 4. Pay off part of the paid up share capital on the footing that it may be called up again. 5. Reduce by a combination of the aforesaid methods.	No company can purchase its own shares or other specified securities unless :- a. the buy - back is of less than 25 % of the total paid-up capital and free reserves of the company. b. the buy-back of 'equity shares' in any financial year shall not exceed 25% per cent of its total paid-up equity capital in that financial year. c. the ratio of the debt owned by the company is not more than twice the capital + free reserves after such buy-back. d. all the shares or other specified securities for buy-back are fully paid-up; e. Every buy-back must be completed within 12 months. f. No further issue of the same kind of shares or other specified securities within a period of 06 months of completion. g. Destroy securities so bought back within 07days of completion of buy-back.

* Tribunal, vide Companies (Second Amendment) Act, 2002

Answer 2(iv)

Corporate Governance – There is no universal definition of Corporate Governance. Simply stated it encompasses whole canvas of the corporate activities so that the corporates can achieve their set objectives by following a proper structure of management, decision making and implementation based on the principles of ethics, fairness, legal compliance and sound management. The process is far wide and it impacts on stakeholders, people dealing with the corporates, country's economic objectives and wider societal expectations. However, the process is essentially internal to the corporate.

Corporate Social Responsibility – Stands for response of the corporate in acknowledging and accepting that the corporates work for the economy and public good with a conscious programme for removing/mitigating harms inflicted on the environmental society at a large/it's various segments and to help the immediate and also the wider society to make progress in health/education/culture etc., which are elements of a healthy, progressive and enlightened society. There is no single commonly accepted definition of Corporate Social Responsibility.

Distinction – Corporate Governance, essentially relates to activities of the organizational keeping in view certain principles like business ethics, fair play to various stakeholders, own-exploitation of workers and employees. As against the corporate social responsibility which is based on the classical social contract theory where the corporates are to consider that they too are an integral part of the society and have come to existence for providing goods and services to the society against a compensation known as profit earned in fair manner and holding them to compensate the society for damage to the mother earth with all her resources like land, air, water, vegetation etc. Any corporate activity, specially manufacturing activity, has the potential to harm the earth and her resources. The corporate activities can also damage, the health, culture and integrity in the society.

In India, 'corporate governance' as a concept has been recognized under SEBI's Listing Agreement. Similarly, Corporate Social Responsibility is recognized as a concept by way of Guidelines issued by the Ministry of Corporate Affairs.

Answer 2(v)

Section 25 Company – There are companies which come to existence for promoting commerce, art, science, religion, charity or other useful social activities and not for earning profits. If in the process of carrying out there activities, the entity earns revenue as service charge or in similar form, which results into a surplus, the same can not be distributed to the members of the companies and can only be utilized to further promote its objects.

Producer company – Section 581A(6) has defined a producer company as a body corporate having objects or activities specified in section 581B and registered as producer company. The term 'producer' has been defined as "any person engaged in any activity connected with or relatable to any primary produce" which in turn encompasses agricultural and farm activities resulting in production or in aid of production produce of cottage industries, handloom, handicraft etc.

Distinction – In order to be incorporated as a section 25 company, a license from the Central Government is necessary and that Government has the statutory right to

revoke the license may allow it to dispense with use of words 'Limited' or 'Private Limited' at the end of its name. Accordingly, its number of members will be reckoned. Usually, Chambers of Commerce, Art/Educational societies, clubs etc. are formed as section 25 company, which enjoys some relaxation of regulatory provisions of the Act e.g. not required to pay stamp duty for registration of its Memorandum and Articles, besides other relaxations. It may be limited by share or by guarantee a Producer Company has to engage itself either in production of primary produce or aiding in such production. It has to use the words 'Producer Company Limited' as the last words of its name. Therefore, it will be a limited liability company which needs at least 10 individuals who are producers or atleast two Producer Institution to form. Unlike section 25 company, it is not to hold a licence from the Central Government but have to get registered as producer company. A co-operative society may also get itself registered as a producer company.

Question 3

(a) Your company has total 12 directors as under :

Non-retiring directors	3
Retiring directors	5
Additional directors	4

State the number of directors liable to retire by rotation at the annual general meeting (AGM) and the total number of directors who shall vacate the office at the AGM. (4 marks)

(b) In regard to e-form 25C, state —

- (i) The purpose;
- (ii) Attachment(s) required;
- (iii) Contents of the certificate required; and
- (iv) Declaration required. (1 mark each)

(c) State, with reasons in brief, whether the following statements are true or false:

- (i) Auditors of a government company are appointed by the Central Government.
- (ii) Private limited companies shall be excluded in reckoning the maximum number of companies that the statutory auditor can hold at any point of time.
- (iii) A special resolution is required for removal of a nominee director.
- (iv) It is mandatory to constitute an audit committee in all public limited companies. (2 marks each)

Answer 3(a)

Section 255 of the Companies Act, 1956 provides that unless the articles provide for retirement of all the directors at every annual general meeting not less than two-third of the total number of directors shall be persons whose period of office shall be liable to determination by retirement of directors by rotation.

In the given problem, the total number of directors excluding the additional directors is 8. Therefore, not less 2/3rd of 8 directors shall be persons liable to retire by rotation. 2/3rd of 8 comes to 5.33. As the provision provides for the term 'not less than two-third',

so 6 directors shall be the directors whose period of office shall be liable to retire by rotation at the AGM.

Further in terms of section 256 one-third of the directors liable to retire by rotation shall retire at the AGM. Therefore, $\frac{1}{3}$ rd of 6 i.e. 2 shall retire from office.

In terms of section 260 the additional directors hold office till the next AGM. So 4 additional directors shall vacate the office at AGM.

Thus, total number of directors who shall vacate office at the AGM shall be 6 i.e. 2 retiring directors plus 4 additional directors.

Answer 3(b)

E-form 25C

(i) Purpose

Return of appointment of managing director or whole-time director or manager pursuant to section 269(2) and schedule XIII of the Companies Act, 1956

(ii) Attachments

- Copy of Board resolution is to be attached.
- Copy of share holder resolution-if any.
- Any other information can be provided as an optional attachment.

(iii) Certificate

Certified that the requirements of schedule read with section 269 of the Companies Act, 1956 have been complied with.

(iv) Declaration

To the best of our knowledge and belief, the information given in this form and its attachments is correct and complete.

We have been authorised by the board of directors' resolution dated (DD/MM/YYYY) to sign and submit this form.

Answer 3(c)

- (i) False** – Under section 619 (2) of the Companies Act, 1956, the auditor of a Government company is required to be appointed or re-appointed by the Comptroller & Auditor General of India (CAG).
- (ii) True** – Section 224(1B) of the Companies Act provide that private limited companies shall be excluded in reckoning the number of companies that an auditor can hold.
- (iii) False** – Nominee Directors hold office at the pleasure of their nominating agencies. They cannot be removed by the members by special resolution.
- (iv) False** – Section 292A mandates that every public limited having a paid up capital of not less than Rs.5 crores is required to constitute an Audit Committee.

Thus public limited companies with paid up capital of less than Rs.5 crores is not mandatorily required to constitute an Audit Committee.

Question 4

- (a) *The Board of directors of Ujwal Pvt. Ltd. having a paid-up share capital of ₹ 1 crore consists of two directors, one of them, viz., Bimal, possesses membership of the Institute of Company Secretaries of India. The company desires to appoint him as a Company Secretary also. Would the provisions of section 314 come into effect ? State the legal position. (4 marks)*
- (b) *Indicate any eight items of business necessarily required to be transacted through postal ballot. Also indicate the type of resolution to be passed — ordinary or special for these items. (4 marks)*
- (c) *Write the most appropriate answer from the given options in respect of the following :*
- (i) *In terms of section 179 in respect of a public company limited by shares, demand for poll can be made by —*
- (a) *Members present in person or by proxy and holding paid-up shares of ₹ 50,000 or more*
- (b) *Any two members having a right to vote on the resolution*
- (c) *Any director present at the meeting*
- (d) *members present in person or by proxy and holding 20% or more voting power in respect of the resolution.*
- (ii) *Annual return of a company not having share capital is to be filed with Registrar of Companies in e-form —*
- (a) *20B*
- (b) *21A*
- (c) *66*
- (d) *23AC.*
- (iii) *Application form for DIN is available on MCA portal on the link —*
- (a) *DIN Application Site*
- (b) *MCA-SRN*
- (c) *Apply For DIN*
- (d) *DIN-1 Form.*
- (iv) *In respect of half-yearly certification of listed debt securities, the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 authorises —*
- (a) *The managing director of the company*
- (b) *Company Secretary in whole-time employment with the company*
- (c) *A Practising Company Secretary*
- (d) *None of the above.*
- (1 mark each)*
- (d) *Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :*
- (i) *Where impracticability for holding extra-ordinary general meeting arises in*

a company having just two members, one of whom is not available as his whereabouts have become unknown, the remaining one member is _____ to call extra-ordinary general meeting under section 186.

- (ii) E-form _____ has to be filed with Registrar of Companies for extension of period for holding annual general meeting by two months.*
- (iii) Without the authorisation from the articles of association, the Board of directors _____ approve/recommend payment of interim dividend inspite of provisions of section 205(1A).*
- (iv) The declaration of bonus issue in lieu of _____ is not permitted.
(1 mark each)*

Answer 4(a)

Section 383A (1) stipulates that every company having such paid-up share capital as may be prescribed i.e. Rs. 5 crore or more, shall have a whole-time secretary and where the Board of Directors of any such company comprises only 2 Directors, neither of them shall be the secretary of the Company.

In the instant case, Ujwal Private limited has a paid-up share capital of Rs. 1 crore. Hence, it is not compulsorily required to have a company secretary. The condition that “in case of two directors, neither of them shall be secretary”, is for such companies only. Therefore, Board of Ujwal private limited may appoint, any one of its directors as company secretary.

Further, provisions of section 314 shall be applicable as such director shall be deemed to hold an office or place of profit and therefore, consent of company by a special resolution shall be required.

Answer 4(b)

According to rule 5 of Companies (passing of the resolution by postal ballot) Rules, 2011, the list of businesses in which the resolutions shall be passed through Postal Ballot is as follows:-

- (a) Alteration in the Object Clause of Memorandum by special resolution;
- (b) Alteration of Articles of Associations in relation to insertion of provisions defining private company by special resolution;
- (c) Buy-back of own shares by the company under sub-section (1) of section 77A by special resolution;
- (d) Issue of shares with differential voting rights as to voting or dividend or other wise under sub-clause (ii) of clause (a) of section 86 by ordinary resolution;
- (e) Change in place of Registered Office out side local limits of any city, town or village as specified in sub-section (2) of section 146 by passing special resolution;
- (f) Sale of whole or substantially the whole of undertaking of a company as specified under sub-clause (a) of sub-section (1) of section 293 by ordinary resolution;
- (g) Giving loans or extending guarantee or providing security in excess of the limit prescribed under sub-section (1) of section 372A by special resolution;

- (h) Election of a director under proviso to sub-section (1) of section 252 of the Act by ordinary resolution;
- (i) Variation in the rights attached to a class of shares or debentures or other securities as specified under section 106 by special resolution.

Answer 4(c)(i)

- (a) Members present in person or by proxy and holding paid-up shares of '50,000 or more

Answer 4(c)(ii)

- (b) 21A

Answer 4(c)(iii)

- (d) DIN-1 Form

Answer 4(c)(iv)

- (c) A Practising Company Secretary

Answer 4(d)

- (i) Where impracticability for holding extra-ordinary general meeting arises in a company having just two members, one of whom is not available as his whereabouts have become unknown, the remaining one member is **Competent/ eligible** to call extra-ordinary general meeting under section 186.
- (ii) E-form **61** has to be filed with Registrar of Companies for extension of period for holding annual general meeting by two months.
- (iii) Without the authorisation from the articles of association, the Board of directors **cannot** approve/recommend payment of interim dividend inspite of provisions of section 205(1A).
- (iv) The declaration of bonus issue in lieu of **dividend** is not permitted.

Question 5

- (a) *Draft a report of the scrutineers to the Chairman on conduct of poll in annual general meeting.* (8 marks)
- (b) *Explain the effects of change of name of a company.* (4 marks)
- (c) *What are the advantages for companies for adopting the secretarial standards issued by the Institute of Company Secretaries of India ?* (4 marks)

Answer 5(a)**REPORT OF THE SCRUTINEERS TO THE CHAIRMAN**

From : Mr _____ & Mr _____

To :

The Chairman of the _____ th Meeting of XYZ Limited, held on _____.

Dear Sir,

In terms of your directions, we the Scrutineers appointed for the conduct of the Poll, had conducted the Poll on the Resolution at Item No. _____ of the Notice dated _____ on the subject _____ and we report that:

1. The Poll commenced at _____ a.m.
2. The Ballot Boxes were verified by us to be empty and were locked and sealed under our supervision
3. The Poll voting papers, duly initialled by one of us, were issued to the Members/ Proxies/Authorised Representatives who were present and were willing to vote.
4. After all of them had exercised their votes, the polling was declared concluded at _____ a.m.
5. The sealed ballot boxes were opened in our presence thereafter and the poll voting papers were scrutinized by us with the assistance of the staff of the Secretarial Department of the Company.
6. We give hereunder the voting details:

Total number of votes cast : _____ (consisting of _____ voting papers) {state number}

Less : Invalid votes : _____ (consisting of _____ voting papers) {state number}

Total valid votes : _____ (consisting of _____ voting papers) {state number}

Votes FOR the Resolution : _____

Votes AGAINST the Resolution : _____

7. All the _____ {state number} poll voting papers are submitted herewith in an envelope duly sealed in our presence and initialled by us.

Thanking you,

Yours faithfully,

1. _____ 2. _____

(Signature and name of Scrutineer) (Signature and name of Scrutineer)

Date : _____

Time : _____

Answer 5(b)

Effect of change of name

1. The change of name shall not affect any rights/obligations of the company or render the same defective in legal proceedings by or against it. Moreover, any

legal proceedings which might have been continued or commenced by or against the company by its former name may be continued by or against the company by its new name [Section 23(3)].

2. However, if any legal proceeding is commenced, after change of name, against the company, in its old name, it is a case of mere misdescription and not a case of proceeding against a person not in existence. It is not an incurable defect and plaint can be amended to substitute the new name.
3. By change of name constitution of company does not change.

Answer 5(c)

The ultimate goal of Secretarial Standards Board issued by the ICSI is to promote good corporate practice leading to better corporate governance. The Standards are for good practices and desirable corporate governance with a view to ensuring full play of shareholders democracy and utmost transparency, integrity and fair play, going beyond the minimum requirements of law. The adoption of Secretarial Standards will have a substantial impact on the improvement of quality of secretarial practices being followed by companies.

By following the Secretarial Standards in letter and spirit companies will be able to ensure adoption of uniform, consistent and best secretarial practices with corporate sector. Such uniformity of best practices, consistently applied will result in furthering the shareholders' democracy by laying down principles for better corporate disclosures thus adding value to the general endeavour to strive for good governance.

Question 6

- (a) XYZ Ltd. proposes to acquire 12.5% of shares of Progressive (P) Ltd. for ₹20 lakh, which have a face value of ₹ 15 lakh. XYZ Ltd. has an outstanding loan of ₹ 10 lakh payable to a public financial institution covered under section 4A. The investing company (XYZ Ltd.) has not defaulted in payment of the loan instalments stipulated in the loan agreement. Based on the following data, advise XYZ Ltd. about the legal position in this respect and allowability of the proposed investment :

	XYZ Ltd. (₹)	Progressive (P) Ltd. (₹)
Authorised capital	50 lakh	2 crore
Issued, subscribed and paid-up capital	25 lakh	1.2 crore
Free reserves	5 lakh	1.5 crore

As on the date of proposed acquisition, XYZ Ltd. does not hold any shares of Progressive (P) Ltd. or any other company. (8 marks)

- (b) What type of information shall mandatorily be reviewed by the audit committee? (4 marks)
- (c) State the requirements under the UK Companies Act, 2006 for audited accounts and the duties of an auditor. (4 marks)

Answer 6(a)

Section 372A of the Act governs inter-corporate investments.

In the given case,

Amount of Investment : ₹ 20 lakh

Limit provided under section 372A is 60% of paid up share capital and free reserves.

Here, 60% of paid up share capital and free reserves = 60% of ₹ 30 lakhs = ₹ 18 lakhs

Since the amount proposed for investment is exceeding the limit provided under section 372A, following steps shall be necessary:

1. Prior approval by way of unanimous resolution of the Board of directors.
2. Prior approval of concerned public financial institution. (As the investment amount exceeds aforesaid 60%, consent of the public financial institution is also required.
3. Passing of special resolution through postal ballot [rule 4 of the Companies (Passing of Resolution by Postal Ballot) Rules, 2001] – section 372A read alongwith section 192A.
4. Enter the prescribed particulars in the Register of Loans and Investments maintained by the company.
5. File copy of the special resolution with ROC within 30 days of its passing (section 192).

It is assumed that XYZ Ltd. has not extended any loan, guarantee etc. to any other body corporate.

Answer 6(b)

As per section 292A (6) of the Companies Act, 1956, the Audit Committee should review the half-yearly and annual financial statements before submission to the Board.

According to clause 49 of the Listing Agreement, the Audit Committee shall mandatorily review the following information:

1. Management discussion and analysis of financial condition and results of operations;
2. Statement of significant related party transactions (as defined by the audit committee), submitted by management;
3. Management letters/letters of internal control weaknesses issued by the statutory auditors;
4. Internal audit reports relating to internal control weaknesses; and
5. The appointment, removal and terms of remuneration of the Chief internal auditor shall be subject to review by the Audit Committee

Answer 6(c)

According to section 475 of UK Act, 2006, a company's annual accounts for a financial year must be audited unless the company is exempt from audit under

section 477 (small companies), or section 480 (dormant companies); or is exempt from the requirements under section 482 (non-profit-making companies subject to public sector audit).

A company is not entitled to any such exemption unless its balance sheet contains a statement by the directors to the effect that (a) the members have not required the company to obtain an audit of its accounts for the year in question and the directors acknowledge their responsibilities for complying with the requirements of this Act with respect to accounting records and the preparation of accounts.

Section 498 specifies the duties of auditor. According to it, a company's auditor, in preparing his report, must carry out such investigations as will enable him to form an opinion as to—

- (a) whether adequate accounting records have been kept by the company and returns adequate for their audit have been received from branches not visited by him, and
- (b) whether the company's individual accounts are in agreement with the accounting records and returns, and
- (c) in the case of a quoted company, whether the auditable part of the company's directors' remuneration report is in agreement with the accounting records and returns.

The auditor shall state that fact in his report according to his opinion on the above.

He shall state the following facts in his report:

- If the auditor fails to obtain all the information and explanations which, to the best of his knowledge and belief, are necessary for the purposes of his audit.
- If the requirements of regulations under section 412 (disclosure of directors' benefits: remuneration, pensions and compensation for loss of office) are not complied with in the annual accounts, or in the case of a quoted company, the requirements of regulations under section 421 as to information forming the auditable part of the directors' remuneration report are not complied with in that report.
- If the directors of the company have prepared accounts in accordance with the small companies regime, or have taken advantage of small companies exemption in preparing the directors' report, and in the auditor's opinion they were not entitled to do so.

As per section 498A, where the company is required to prepare a corporate governance statement in respect of a financial year and no such statement is included in the directors' report, the company's auditor, in preparing his report on the company's annual accounts for that year, must ascertain whether a corporate governance statement has been prepared, and if it appears to the auditor that no such statement has been prepared, he must state that fact in his report.

Question 7

- (a) *Give broad outline of Employees' Stock Option Scheme with elaboration on objectives of the scheme.* (8 marks)

- (b) *Mention any four grounds for rejection of application for Director Identification Number (DIN).* (4 marks)
- (c) *There is a condition that a private limited company should always adhere to the conditions laid down in section 3(1)(iii). Comment on the consequences of non-compliance of the same. Is there any relief available for the default?* (4 marks)

Answer 7(a)

Employees' Stock Option Scheme is regulated by Securities And Exchange Board Of India (Employee Stock Option Scheme And Employee Stock Purchase Scheme) Guidelines, 1999.

As per Regulation 2A, "employee stock option" means the option given to the whole-time Directors, Officers or employees of a company which gives such Directors, Officers or employees, the benefit or right to purchase or subscribe at a future date, the securities offered by the company at a predetermined price.

As per Regulation 3 "employee stock option scheme (ESOS)" means a scheme under which a company grants employee stock option.

Regulation 4 specifies the eligibility to participate in ESOS. According to it, an employee shall be eligible to participate in ESOS of the company. An employee who is a promoter or belongs to the promoter group shall not be eligible to participate in the ESOS. 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 shall not be eligible to participate in the ESOS.

As per Regulation 5, no ESOS shall be offered unless the specified disclosures are made by the company to the prospective option grantees and the company constitutes a Compensation Committee for administration and superintendence of the ESOS.

The Compensation Committee shall be a Committee of the Board of directors consisting of a majority of independent directors. The Committee shall, inter alia, formulate the detailed terms and conditions of the ESOS. The Compensation Committee shall frame suitable policies and systems to ensure that there is no violation of ;-

- (a) Securities and Exchange Board of India (Insider Trading) Regulations, 1992; and
- (b) Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market) Regulations, 1995, by any employee.

Approval from Shareholders is required. The companies granting option to its employees pursuant to ESOS will have the freedom to determine the exercise price subject to conforming to the accounting policies. The Board of Directors, shall, inter alia, disclose either in the Directors Report or in the annexure to the Director's Report, the following details of the ESOS:

- (a) options granted;
- (b) the pricing formula;

- (c) options vested;
- (d) options exercised;
- (e) the total number of shares arising as a result of exercise of option;
- (f) options lapsed;
- (g) variation of terms of options;
- (h) money realised by exercise of options;
- (i) total number of options in force;
- (j) employee wise details of options granted to;-
 - (i) senior managerial personnel;
 - (ii) any other employee who receives a grant in any one year of option amounting to 5% or more of option granted during that year.
 - (iii) identified employees who were granted option, during any one year, equal to or exceeding 1% of the issued capital (excluding outstanding warrants and conversions) of the company at the time of grant;
- (k) diluted Earnings Per Share (EPS) pursuant to issue of shares on exercise of option calculated in accordance with International Accounting Standard (IAS) 33.
- (l) Where the company has calculated the employee compensation cost using the intrinsic value of the stock options, the difference between the employee compensation cost so computed and the employee compensation cost that shall have been recognized if it had used the fair value of the options, shall be disclosed.
 The impact of this difference on profits and on EPS of the company shall also be disclosed.
- (m) Weighted-average exercise prices and weighted-average fair values of options shall be disclosed separately for options whose exercise price either equals or exceeds or is less than the market price of the stock on the grant date.
- (n) A description of the method and significant assumptions used during the year to estimate the fair values of options, including the following weighted-average information:
 - (1) risk-free interest rate,
 - (2) expected life,
 - (3) expected volatility,
 - (4) expected dividends, and
 - (5) the price of the underlying share in market at the time of option grant

Objective of ESOS

The objective is to achieve the objective of increasing efficiency, productivity and profitability of the enterprises, and in order to encourage a sense of involvement and mutuality of interests of the enterprises and their employees

Answer 7(b)**Common Causes of Rejection of application for Director identification number (DIN)**

- The applicant details (name, father's name, date of birth) are not as per the PAN details.
- The particulars filled in form DIN-1 do not match with the details given in the supporting documents submitted along with DIN application.
- Residence proofs like: Bank Statements, Electricity Bill, Telephone Bill, Utility bills etc. submitted are older than 2 months of submitting the application for verification OR such documents are in the name of some other person, for example father or spouse.
- The supporting documents are not duly attested i.e. Name, Designation, Membership/ Practicing certificate number etc. are not clearly indicated. – If the seal/ stamp does not contain membership/ practicing certificate number, same may be recorded by hand.
- Passport / Driving License / Identity proofs etc attached are expired. – Only such documents which are currently valid should be attached.

Answer 7(c)

Where a private company makes a default in compliance with the statutory requirement as laid down in section 3(1)(iii) of the Act (i.e. if its membership exceeds 50 or it permits free transferability of shares or extends invitation to public to subscribe to shares or debentures or to make deposit), it becomes a public company automatically. As a consequence, the company shall cease to enjoy the privileges and exemptions conferred on a private company and the provisions of the Companies Act shall apply to it as if it were a public company. However, the Company Law Board (now Central Government vide Companies (Second Amendment) Act, 2002) on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, may grant relief from such consequence as aforesaid. The relief may be granted on grounds which the Company Law Board (now Central Government) feels are just and equitable.

Petition praying for relief is required to be made in Form No.1 of Annexure II to the CLB Regulations, 1991 along with prescribed application fee accompanied by the following documents:

1. copy of memorandum and articles of association;
2. copy of document showing that the default has been committed in complying with the conditions laid down in section 3(1)(iii);
3. affidavit verifying the petition;
4. bank draft evidencing the payment of prescribed fee;
5. memorandum of appearance.

Question 8

- (a) Give a comparison between the requirements on audit committee under the provisions of the Companies Act, 1956 and under the listing agreement given in clause 49, insofar as meeting of the audit committee and powers of the audit committee are concerned. (8 marks)
- (b) What is meant by 'price sensitive information' ? What is the duty cast upon listed companies in this regard ? (4 marks)
- (c) Susodiya Textiles Ltd. is having a foreign subsidiary company. The said Indian holding company failed to furnish particulars of its foreign subsidiary company in its balance sheet. Decide the liability of Susodiya Textiles Ltd. under the Companies Act, 1956. (4 marks)

Answer 8(a)

	<i>Companies Act, 1956</i>	<i>Clause 49 of Listing Agreement</i>
292A	(5) The auditors, the internal auditor, if any, and the director-in-charge of finance shall attend and participate at meetings of the Audit Committee but shall not have the right to vote. (6) The Audit Committee should have discussions with the auditors periodically about internal control systems, the scope of audit including the observations of the auditors and review the half-yearly and annual financial statements before submission to the Board and also ensure compliance of internal control systems.	II (B) Meeting of Audit Committee: The audit committee should meet at least four times in a year and not more than four months shall elapse between two meetings. The quorum shall be either two members or one third of the members of the audit committee whichever is greater, but there should be a minimum of two independent members present.
292A	(7) The Audit Committee shall have authority to investigate into any matter in relation to the items specified in this section or referred to it by the Board and for this purpose, shall have full access to information contained in the records of the company and external professional advice, if necessary. (8) The recommendations of the Audit Committee on any	II(C) Powers of Audit Committee: The audit committee shall have powers, which should include the following: 1. To investigate any activity within its terms of reference. 2. To seek information from any employee. 3. To obtain outside legal or other professional advice. 4. To secure attendance of outsiders with relevant expertise, if it considers necessary.

*Companies Act, 1956**Clause 49 of Listing Agreement*

matter relating to financial management, including the audit report, shall be binding on the Board.

(9) If the Board does not accept the recommendations of the Audit Committee, it shall record the reasons therefor and communicate such reasons to the shareholders.

Answer 8(b)

According to section 2(ha) of SEBI (Prohibition of Insider Trading) Regulations, 1992, 'price sensitive information' means any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of company.

As per its Explanation, the following shall be deemed to be price sensitive information:-

- (i) periodical financial results of the company;
- (ii) intended declaration of dividends (both interim and final);
- (iii) issue of securities or buy-back of securities;
- (iv) any major expansion plans or execution of new projects;
- (v) amalgamation, mergers or takeovers;
- (vi) disposal of the whole or substantial part of the undertaking;
- (vii) any significant changes in policies, plans or operations of the company.

According to Regulation 12 (2) of the Regulations, all listed companies should abide by the Code of Corporate Disclosure Practices as specified in Schedule II. It provides that:

- Price sensitive information should be given by listed companies to stock exchanges and disseminated on a continuous and immediate basis. Listed companies may also consider ways of supplementing information released to stock exchanges by improving investor access to their public announcements.
- Listed companies should designate a senior official to oversee corporate disclosure who shall be responsible for ensuring that the company complies with continuous disclosure requirements, overseeing and co-ordinating disclosure of price sensitive information to stock exchanges, analysts, shareholders and media, and educating staff on disclosure policies and procedure.
- Information disclosure/ dissemination may normally be approved in advance by the official designated for the purpose.
- Listed companies shall have clearly laid down procedures for responding to any queries or requests for verification of market rumours by exchanges.

- The designated official for corporate disclosure shall be responsible for deciding whether a public announcement is necessary for verifying or denying rumours and then making the disclosure.
- Disclosure of shareholdings/ ownership by major shareholders and disclosure of changes in ownership as provided under any Regulations and the listing agreement should be made in a timely and adequate manner.
- Listed companies should follow the guidelines given hereunder while dealing with analysts and institutional investors:-
 - Only Public information to be provided to the analyst/ research persons/ large investors like institutions. Alternatively, the information given to the analyst should be simultaneously made public at the earliest.
 - In order to avoid misquoting or misrepresentation, it is desirable that at least two company representatives be present at meetings with them and discussion should preferably be recorded.
 - A listed company should be careful when dealing with analysts' questions that raise issues outside the intended scope of discussion. Unanticipated questions may be taken on notice and a considered response given later. If the answer includes price sensitive information, a public announcement should be made before responding.
 - When a company organises meetings with analysts, the company should make a press release or post relevant information on its website after every such meet. The company may also consider live webcasting of analyst meets.

Answer 8(c)

Attachment of documents in relation to foreign subsidiary company: Section 212 of the Companies Act, 1956, does not make any distinction between a local subsidiary company and an overseas subsidiary company. Under section 4(4), a company shall be deemed to be the holding company of another, if, but only, if that other is its subsidiary. Under section 4(5), the expression company includes any body corporate and the definition of body corporate in section 2(7) includes a company incorporated outside India. In view of the aforesaid position, the Indian holding company is legally bound to attach to its balance sheet the documents mentioned under section 212 prepared in accordance with the requirements of the Companies Act. However, there may be some practical difficulty in attaching the documents of foreign subsidiary. The Central Government under section 212(8) has exempted through a circular such holding companies from provisions of section 212 in relation to subsidiaries, which fulfil the conditions provided in the circular specified.

Hence, the company has violated the provisions of section 212 in not furnishing the particulars of the foreign subsidiary and has not fulfilled the condition for exemption shall be liable for imprisonment upto 6 months or fine upto Rs.10,000/- or both. Further, no person shall be sentenced to imprisonment for any such offence unless committed willfully.
