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UNIT1: INTRODUCTION

APPLICABILITY OF THE ACT	Section 1 provides that the Companies Act, 2013 applies on whole of India. Companies Act, 1956 also applies on whole of India. However, proviso to Section 1(3) of the Companies Act, 1956 empowers the Central Government to modify the provisions of the Act, while applying this Act on the State of Nagaland. Similarly, 620B and 620C of the Companies Act, 1956 empowers the Central Government to, modify, or exempt from, the provisions of the Act, while applying this Act on the States of Goa, Daman, Diu and Jammu & Kashmir respectively. These kind of powers of the Central Government has been taken away by the Companies Act, 2013. Thus, the 2013 Act puts an end to the power of the Central Government under the 1956 Act to exempt companies from provisions of Companies Act based on regional considerations.
SECTION 1 OF COMPANIES ACT	<u>Short Title, Extent, Commencement and Application:</u> (1) This Act may be called the Companies Act, 2013. (2) It extends to the whole of India. (3) This section shall come into force at once and the remaining provisions of this Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and any reference in any provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision. (4) The provisions of this Act shall apply to— (a) companies incorporated under this Act or under any previous company law; (b) insurance companies, except in so far as the said provisions are inconsistent with the provisions of the Insurance Act, 1938 (4 of 1938) or the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999); (c) banking companies, except in so far as the said provisions are inconsistent with the provisions of the Banking Regulation Act, 1949 (10 of 1949); (d) companies engaged in the generation or supply of electricity, except in so far as the said provisions are inconsistent with the provisions of the Electricity Act, 2003 (36 of 2003); (e) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act; and (f) such body corporate, incorporated by any Act for the time being in force, as the Central Government may, by notification, specify in this behalf, subject to such exceptions, modifications or adaptation, as may be specified in the notification.
ADMINISTRATION OF COMPANY LAW	The Companies Act, 2013 is administered by the Ministry of Corporate Affairs and it has the jurisdiction over the entire country. Further under the Ministry of Corporate Affairs, there are seven Regional Directors, one for each region i. e. north, east, west, south, north-east, north-west and south-east located at Noida, Kolkata, Mumbai, Chennai, Shillong, Ahmadabad and Hyderabad respectively. All the states lying in one particular region come under the jurisdiction of Regional Director of that region. Hence, all the Registrar of Companies (ROC) of all the states falling under one particular region of India act as sub-ordinate to the Regional Director (RD) of that region. In addition to aforesaid structure, National Company Law Tribunal (NCLT) is also one quasi-judicial authority with regard to the Companies Act, 2013. NCLT & NCLAT has been constituted by Central Government with effect from 1st June 2016. This would effectively dissolve the Company Law Board (CLB) as constituted under Companies Act, 1956 from the same day.
MEANING OF COMPANY	The word “Corporation” is derived from the Latin Word “Corpus” which means “Body”. Accordingly, <i>Corporation is a legal person created by a process other than Natural Birth</i>. As a legal person, a corporate is capable of enjoying many of the rights and incurring many of the liabilities of a natural person.

DEFINITION OF COMPANY	The term 'company' has been defined under Section 2(20) of the Companies Act, 2013. As per this, 'company' means a company incorporated under Companies Act, 2013 or under any of the previous laws relating to companies.						
CHARACTERISTICS OF COMPANY							
SEPARATE LEGAL ENTITY	A Company has a corporate personality, so it bears its own Name, Acts under Separate Name, has a Seal of its own and its Assets are separate and distinct from those of its members. Therefore, it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an Individual. Its members are its owners however; they can be its creditors simultaneously. A Shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital. The shareholders are not the agents of the company so they cannot bind it by their acts. Thus, Incorporation is the act of forming a legal corporation as a Juristic Person. A Juristic Person is in law also conferred with rights and obligations and is dealt with in accordance with law. [Shiromani Gurdwara Prabandhak Committee vs. Shri Sam Nath Dass] <u>The Case of Salomon Vs. Salomon & Co. Ltd</u> The above case has clearly established the principle of separate legal entity. Salomon has, for some years, carried on a prosperous business as a leather merchant and boot manufacturer. He formed a limited company consisting of himself, his wife and a daughter, and his four sons as the shareholders, all of whom subscribed for one share of 1 pound each. Salomon was the managing director and two of his sons were other directors. Salomon sold his business (which was perfectly solvent at that time) to the Company for the sum of 38,782 pounds. He got the following payments :- <table border="1"> <tr> <td>10,000 Secured Debentures of 1 pound each</td><td>10,000 pounds</td></tr> <tr> <td>20,000 Fully – paid Shares of 1 pound each</td><td>20,000 pounds</td></tr> <tr> <td>Cash</td><td>8,782 pounds</td></tr> </table> The company soon ran into difficulties and the debenture holders appointed a receiver and the company went into liquidation. The total assets of the company amounted to 6,050 pounds, its liabilities were 10,000 pounds secured debentures and 8,000 pounds owing to unsecured trade creditors. The unsecured trade creditors claimed the whole of the company's assets, viz. 6,050 pounds on the ground that as the company was a mere agent for Salomon and thus they were entitled to payment of their debts in priority to debentures. The House of Lords rejected these contentions and held that a company, on registration, has its own existence or personality separate and distinct from its members and, as a result, a shareholder cannot be equated with a company, even if he holds virtually the entire share capital of the company.	10,000 Secured Debentures of 1 pound each	10,000 pounds	20,000 Fully – paid Shares of 1 pound each	20,000 pounds	Cash	8,782 pounds
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LIMITED LIABILITY	A company limited by shares is a registered company having the liability of its members limited to the amount if any, unpaid on the shares respectively held by them. If his shares are fully paid – up, he has nothing more to pay. However, there are exceptions to their general rule where liability of company is treated as Unlimited.						
PERPETUAL SUCCESSION	An incorporated company never dies. Perpetual succession, therefore, means that the membership of a company may keep changing from time to time but does not affect its continuity. Members may come and members may go but the company can go forever. The company will remain the same entity, despite total change in the membership. Thus, perpetual succession denotes the ability of a company to maintain its existence by the constant succession of new individuals who step into the shoes of those who cease to be members of the company.						
SEPARATE PROPERTY	No member can claim himself to be the owner of the company's properties either during its existence or in its winding up. A member does not even have an insurable						

	interest in the property of the company. A person, for example, for the holder of nearly all the shares except one of a timber company and he was also a substantial creditor, he insured the company's timber in his own name. The timber having been destroyed by fire, the insurance company was held not liable to him. <u>[Macaure v. Northern Assurance Company Ltd.]</u> Shareholders are not in the eye of the law, part owners of the undertaking. The undertaking is something different from the totality of shareholders. <u>[Short v. Treasury Commissioners]</u>
TRANSFERABILITY OF SHARES	The capital of a company is divided into parts called shares. The shares are said to be movable property and subject to certain conditions, freely transferable for that. No shareholder is permanently or necessarily wedded to a company. It may be noted that this right of shareholder is restricted in the case of a private company. Section 44 of the Companies Act, 2013 provides that the shares held by members are movable property and can be transferred from one person to another in the manner provided by the articles of association of a company. If the articles do not provide anything for the transfer of shares and the regulations contained in Table F are also expressly excluded, the transfer of shares will be governed by the general law relating to transfer of movable property.
COMMON SEAL	Since a company has no physical existence, it must act through its agents. All the important documents of a company must be under the common seal if any of the company. The common seal, thus, acts as the official signature of a company. As per Companies Act, 2013, only certain important documents such as share certificate and authorization to any person to act as attorney of the company for the purpose of execution of any deeds on behalf of the company shall be issued under the common seal, if any, of the company. Apart from this, articles of a company may also require for certain other documents to be under the common seal. Thus, all documents need not be under the common seal of a company. It may be noted that Companies (Amendment) Act, 2015 had made it optional for the companies to have the common seal. The Board shall provide for the safe custody of the seal. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the Board or of a committee of the Board authorized by it in that behalf, and except in the presence of at least two directors and of the secretary or such other person as the Board may appoint for the purpose; and those two directors and the secretary or other person aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.
CAPACITY TO SUE AND BE SUE	A company, being a body corporate, can sue and be sued in its own name. To sue, means to institute legal proceedings against a person or to bring a suit in a court of law. All legal proceedings against the company are to be instituted in its name. Similarly, a company may bring an action against anyone in its own name. A company's right to sue arises when some loss is caused to the company i.e. to the property or the personality of the company. A company, as a person distinct from its members, may even sue on one of its own members. <u>[Floating Services Ltd vs. MV San Fransceco Dipalao]</u>
CONTRACTUAL RIGHTS	A company, being a legal entity different from its members, can enter into contracts for the conduct of the business in its own name. A member of a company cannot sue in respect of torts committed against it, nor can he be sued for torts committed by the company. <u>[British Thomson-Houston Company v. Sterling Accessories Ltd.]</u>
LIMITATION OF ACTION	A company cannot go beyond the powers of its Charter – the Memorandum of Association. The action and objects of the company are limited within the scope of its memorandum of association. However, it can amend the MOA itself prior to doing any act not contained in it.

SEPARATE MANAGEMENT	The members of a company may derive profits without being burdened with the management of the company. The company is administered and managed by its own managerial personnel.
VOLUNTARY ASSOCIATION FOR PROFIT	A company is a voluntary association for profit. It is formed for the accomplishment of some public goals and whatsoever profit is gained is divided among its shareholders.
TERMINATION OF EXISTENCE	It has the existence only in contemplation of law. It is created by law, carries on its affairs according to law throughout its life and ultimately is effaced by law. Generally, existence of a company is terminated by means of winding up.
IS COMPANY A CITIZEN?	- Although, a company is regarded as a legal person (though artificial), it is not a citizen either under the Constitution of India or the Citizenship Act, 1955. This is also the conclusion of the special bench of the Supreme Court in <u>STC. v. Commercial Tax Officer</u>. - However, where shareholder rights are equally affected if the rights of the company are affected, it can claim the protection of all such rights, which are guaranteed to citizens through shareholders or directors of the company. <u>R. C. Cooper v. Union of India</u>
HAS COMPANY A NATIONALITY AND RESIDENCE?	- It is established through judicial decisions that a company cannot be a citizen, yet it has nationality, domicile and residence. - A joint stock company resides where its place of incorporation is, where the meetings of the whole company or those who represent it are held and where its governing body meets in bodily presence for the purposes of the company and exercises the powers conferred upon it by statute and by the articles of the association. <u>Tulika v. Parry & Co.</u> - Residence is an important connecting factor between a company and the governing legal system. It is on this basis that a liability of a company to pay income-tax is determined. Though the place of incorporation is considered as the primary evidence of a company, it is by no means the conclusive test. So, an alternative test is applied to bring a company within the purview of a legal system in which it operates business and earns a fabulous income.
LIFTING OF CORPORATE VEIL (December 2015)	When the corporate entity is being abused for an unjust and inequitable purpose, the Courts have lifted the veil of corporate personality and looked into the realities and have held the persons behind the company, guilty and liable. Where the Courts have done it, the doctrine has been described as the doctrine of the "lifting of corporate veil".
LIFTING OF CORPORATE VEIL UNDER JUDICIAL INTERPRETATION	
1.FRAUD	Fraud vitiates everything. In <u>Gilford Motor Co. v. Horne</u>, a former employee of a company covenanted not to solicit its customers. He formed a company to carry on his business and it undertook the solicitation. An injunction was granted against him and the company to restrain them. In another case, <u>Jones v. Lipman</u>, Lipman agreed to sell certain land to Jones. Pending completion of formalities of the said deal, Lipman sold and transferred the land to a company, which he had incorporated with a nominal capital of 100 pounds and of which he and a clerk were the only shareholders and directors. This was done in order to escape a decree for specific performance in a suit brought by Jones. The Court asked the company to transfer its land to Jones.
2.PUBLIC POLICY	Where there is a conflict with the public policy, the courts will pay regard to the substance and ignore the form. The courts will invariably lift the corporate veil for

	the purpose of protecting the public policy and prevent transactions contrary to public policy. [Connors Bros. v. Connors]
3.FOR DETERMINING RESIDENCE AND CHARACTER	The Courts also look behind the façade of the company and its place of registration in order to determine its residence for the purposes of taxation or the character of the company, for example whether it is enemy. [Daimler Co. Ltd. v. Continental Tyre & Rubber Co.]
4.IN THE INTEREST OF REVENUE	The Court has a power to disregard corporate entity if it is used for tax evasion or to circumvent tax obligations. [CIT v. Meenakshi Mills Ltd.]
5.FORMATION OF COMPANIES TO DIVIDE INCOME AND AVOID TAX	Where it was found that the sole purpose for which the company was formed was to evade taxes, the Court will ignore the concept of separate entity and make the individuals liable to pay the taxes which they would have paid but for the formation of the company. [Re. Sir Dinshav Manakjee Petit]
6.AVOIDANCE OF WELFARE LEGISLATION	Where it was found that the sole purpose for the formation of the new company was to use it as a device to reduce the amount of bonus to be paid to workmen, the Supreme Court upheld the piercing of the veil to look at the real transaction. [The Workmen Employed in Associated Rubber Industries Limited v. Associated Rubber Industries Limited]
PUBLIC FINANCIAL INSTITUTION (June 2016)	“public financial institution” means— (i) the Life Insurance Corporation of India, established under section 3 of the Life Insurance Corporation Act, 1956; (ii) the Infrastructure Development Finance Company Limited, referred to in clause (vi) of sub-section (1) of section 4A of the Companies Act, 1956 so repealed under section 465 of this Act; (iii) specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002; (iv) institutions notified by the Central Government under sub-section (2) of section 4A of the Companies Act, 1956 so repealed under section 465 of this Act; (v) such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India: Provided that no institution shall be so notified unless— (A) it has been established or constituted by or under any Central or State Act *other than this act or previous company law; or (B) not less than fifty-one per cent. of the paid-up share capital is held or controlled by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments; * Inserted by Companies Amendment Act, 2017
BODY CORPORATE OR CORPORATION:	‘Body Corporate’ or ‘Corporation’, includes a company incorporated outside India, but does not include the following: (a) A co-operative society registered under any law relating to co-operative societies; and (b) Any other body corporate, not being a company, which the Central Government may, by notification in the Official Gazette, specify in this behalf. [Section 2(11)] A society registered under the Societies Registration Act, 1860 has been held by the Supreme Court not to come within the term ‘body corporate’ under the Companies Act. [Board of Trustees v. State of Delhi]. Thus, the term body corporate, being an inclusive definition, includes not only companies within the meaning of Companies Act, 2013 and corporations established under Special Acts of Parliament but also foreign companies. It will further include all public financial institutions as well as nationalized banks.

	Thus, the term 'body corporate' is wider than the expression company.
ILLEGAL ASSOCIATION (Section 464)	Section 464 of the Companies Act provides that not more than 100 persons (Rules has prescribed 50 persons) can combine together for carrying on any business, <u>the object of which is acquisition of gain</u>, unless the association is registered under the Companies Act or is formed under any other Indian Law. An association formed in contravention of Section 464 will be regarded as an illegal association. The sole test to determine an illegal association is whether it carries on business for the purpose of gain. Associations like charitable, religious or scientific, which are not formed for the purpose of gain, are excluded from the scope of this section. This section does not apply to a Joint Hindu Undivided Family business but where two or more such joint families form partnership, they will come within the scope of this section but in counting the number of persons, the minor members of such families will be excluded. The Karta's of two HUFs formed a partnership to carry on business for the acquisition of gain. Each of the families consisted more than 25 adult members. Is this partnership a legal one? Yes. The partnership is legal as it consists of only two partners. When the Karta of HUF enters with outsiders in business, the other members of such family do not ipso facto become partners but only such of the members as in fact enter into a contracting relation with the outsiders. [Re. Gangayya v. Venkataramiah] EFFECTS OF NON-REGISTRATION OF AN ASSOCIATION The effect of non-registration of an association is that such association is illegal and has no existence in the eyes of law. The law does not recognize it so much so no relief can be granted either to the association or to any of its members, as the contractual relationship on which it is founded is illegal. [Badri Prasad v. Nagarmal] The law does not recognize illegal association and therefore it cannot be wound up by order of court. In fact, the Court cannot entertain a petition for its winding up of a company formed in contravention of the provision of Section 464. The winding up of unregistered companies though lawfully formed cannot be done under the provisions of this Act. [Raghubar Dayal v. The Sarafa Chamber and others]. Every member of an illegal association is : (a) Personally liable for all liabilities incurred in carrying on the business of, or by, the illegal association; and (b) Punishable with fine up to ₹ 1,00,000/-.
MEMBERS SEVERALLY LIABLE IN CERTAIN CASES (SECTION 3A) (INSERTED COMPANIES AMENDMENT ACT 2017)	If at any time the number of members of a company is reduced, in the case of a public company, below seven, in the case of a private company, below two, and the company carries on business for more than six months while the number of members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with less than seven members or two members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

UNIT 2: TYPES OF COMPANIES

INTRODUCTION	The Companies Act, 2013 provides for the kind of companies that can be promoted and registered under the Act. The three basic types of companies which may be registered under the Act are: - Private Companies; - Public Companies; - One Person Company (to be formed as Private Limited)
PRIVATE COMPANY Section 2(68)	<u>Definition and Meaning of Private Company</u> A private company means a company, which by its articles provides the following:- - Restricts the right to transfer its shares; - Except in the case of one person company (OPC), limits the number of its members to two hundred (200) excluding present and past employees who continue to be the members of the company (here joint members shall be counted as one); and - Prohibits any invitation to the public to subscribe for any securities of the company. There should be at least two persons to form a private company i. e., the minimum no. of members in a private company is two. A private company should have at least two directors. The name of a private limited company must end with the words "Private Limited".
PUBLIC COMPANY Section 2(71)	A 'public company' means a company which is not a private company. Further, a private company which is a subsidiary of a public company shall also be deemed to be a public company for the purposes of this Act, even where such subsidiary company continues to be a private company in its articles (Three restrictions). All requirements of public company shall apply to such company except that such company can continue with same name; at least two members & at least two director's criteria & maximum members shall be 200. <u>Features of Public Company:</u> ❖ Membership: Minimum 7 members are required to form a Public Company & there is no limit on the Maximum Number of Members in a Public Company. ❖ Directors: Minimum 3 Directors are required to be appointed by a Public Company. Maximum 15 Directors can be appointed. ❖ Transferability of Shares: Shares of Public Company are freely transferable and there is no restriction. ❖ Listing: Securities of a Public Company can be listed on any Recognized Stock Exchange. ❖ Name: Name of a Public Company must end with the words "Limited"
ONE PERSON COMPANY (OPC) [Section 2(62)]	<u>Definition and Meaning:</u> 'One Person Company' means a company which has only one person as a member. It is basically a private company with some unique features. As regards the name of a One Person Company, the Act provides that the words "One Person Company" or 'OPC' shall be mentioned in brackets below the name of such Company, wherever its name is printed, affixed or engraved. The concept of OPC provides a more flexible structure and less compliance requirements of a company. <u>NOMINATION BY THE SUBSCRIBER OR MEMBER OF ONE PERSON COMPANY</u> The subscriber to the memorandum of a One Person Company shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of that One Person Company. The name of the person nominated shall be mentioned in the memorandum of One Person Company and such nomination in Form No INC.2 along with consent of such nominee obtained in Form No INC. 3 and fee as provided in the Companies

	(Registration offices and fees) Rules, 2014 shall be filed with the Registrar at the time of incorporation of the company along with its memorandum and articles. It may be noted that only a natural person who is an Indian citizen and resident in India – - Shall be eligible to incorporate a One Person Company; - Shall be a nominee for the sole member of a One Person Company. Explanation I - For the purposes of this rule, the term "resident in India" means a person who has stayed in India for a period of not less than one hundred and eighty two days during the immediately preceding financial year. Explanation II.- For the purposes of this rule, while counting the number of days of stay of a director in India for the financial year 20-18-2019, any period of stay between 01.01.2018 till the date of notification of this rule shall also be counted. MISCELLANEOUS PROVISIONS ➤ No person shall be eligible to incorporate more than a One Person Company or become nominee in more than one such company. ➤ No minor shall become member or nominee of the One Person Company. ➤ Such Company cannot be incorporated or converted into a company under Section 8 (Non-Profit Companies) of the Act. ➤ OPC cannot carry out non-banking financial investment activities. ➤ OPC cannot invest in securities of a body corporate.
PRIVILEGES OF ONE PERSON COMPANY	• The financial statement, with respect to One Person Company, may not include the cash flow statement; • Need not hold annual general meeting • Need not prepare a report on Annual General Meeting • The annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company. In other words it need not be signed by a company secretary in practice. • Financial statement and Board's report can be signed only by one director • Need not to appoint Independent directors on its Board • Retirement by rotation is not applicable • One person company need not to have more than one director on its Board.
CLASSIFICATION OF COMPANIES ON THE BASIS OF LIABILITY OF MEMBERS	Companies (both Private and Public Companies) can be classified into following three categories, on the basis of liability of members towards the company: <u>COMPANIES LIMITED BY SHARES</u> A company limited by shares is a registered company having the liability of its members limited to the amount, if any, unpaid on the shares respectively held by them. If his shares are fully paid – up, he has nothing more to pay. <u>COMPANIES LIMITED BY GUARANTEE</u> A company limited by guarantee or a “guarantee company” is a company having the liability of its members limited to such an amount as the members may respectively thereby undertake, by the memorandum of association of the company, to contribute to the assets of the company. A special feature of this type of company is that the liability of members to pay their guaranteed amounts arises only when the company has gone into liquidation and not when it is a going concern. Club, trade associations and societies for promoting different objects are examples of companies limited by guarantee. A guarantee company without share capital does not obtain its initial and working funds, from its members, but from some other source or sources e. g. grants, endowments, fees, subscriptions and the like. But a guarantee company having a share capital raises its initial capital from its members, while the normal working funds would be provided from other sources, such as fees, charges, subscriptions. If a guarantee company has share capital, the shareholders have two-fold liability; to pay the amount which remains unpaid on their share whenever called upon to

	pay, and secondly, to pay the amount payable under the guarantee when the company goes into liquidation. The voting power of a guarantee company having a share capital is determined by the shareholding and not by the guarantee. UNLIMITED COMPANIES [SECTION 2(92)] In the case of an unlimited company, there is no limit on the liability of its members. Thus, the maximum liability of the members of such a company could extend to their entire personal property to meet the debts and obligations of the company. The members of an unlimited company are not liable directly to the creditors of the company, unlike in the case of partners of a firm. The liability of the members is only towards the company, so long it is a going concern; and in the event of its being wound up, only the Liquidation can ask the members to contribute to the assets of the company. It may be noted that the name of an unlimited company does not end with the word(s) 'Limited' or 'Private Limited', as the case may be. However, it is separately mentioned along with the name that it is a Public or Private Company, as the case may be, with unlimited liability of members.
COMPANY NOT FOR PROFIT/NON-PROFIT COMPANIES [SECTION 8]	The name of a company must end with word 'Limited', in the case of a public limited company, and with the words 'Private Limited', in the case of a private limited company. But Section 8 permits the registration, under a license granted by the Central Government (Power delegated to ROC), of associations not for profit with limited liability without adding the word 'Limited' or words 'Private Limited' to their names. An association not for profit must satisfy the following two conditions :- ➤ It is formed for promoting commerce, science, art, religion, charity, sports, education, research, social welfare, protection of environment or other useful objects; and ➤ It does not intend to pay any dividend to its members but apply its profit or other income in the promotion of its object. Section 8 Companies, since working without motive of earning any profit, may be exempted from certain provisions of the Companies Act, 2013, which shall be prescribed by the Central Government from time to time, pursuant to powers conferred by Section 462 of the Companies Act, 2013. A company which has been granted license under Section 8 cannot alter any of the provisions of its memorandum as well as the articles of association except with the previous approval of the Central Government. It may be noted that a Section 8 Company shall amalgamate, only with another company registered under this section and having similar objects. It may further be noted that in general a partnership firm, not being a person in the eyes of law, cannot become a member of a company. However, it can become a member of a Section 8 Company.
HOLDING, SUBSIDIARY COMPANIES & ASSOCIATE COMPANIES:	Section 2(87) of the Companies Act, 2013 states the circumstances, any of which must exist to constitute the relationship of holding and subsidiary companies. Section 2(87) provides that a company shall be deemed to be a subsidiary of another, if any of the following conditions are satisfied :- (a) That other controls the composition of its Board of Directors; (b) That other exercises or controls more than one-half of the total Voting power either at its own or together with one or more of its subsidiary companies; or (c) The first-mentioned company is a subsidiary of any company which is that other's subsidiary. For the purpose of clause (a) above, the control of the composition of the Board of directors of a company means that the holding company has power, at its

	discretion, to appoint or remove all or majority of the directors of the subsidiary company without the consent of the other persons. It should be noted that holding and subsidiary companies are incorporated companies and each is a separate legal entity. <u>[Hungerford Investment Ltd. v. Turner Morison & Co. Ltd.]</u> For the purpose of this clause, the term ‘company’ includes anybody corporate. Thus, holding and subsidiary relationship can be established between an Indian Company and a Foreign Company. Further, ‘Holding Company’, in relation to one or more other companies, means a company of which such companies are subsidiary companies. [Section 2(46)] ASSOCIATE COMPANY As per Section 2(6), Associate Company in relation to another company means a company in which that other company has a significant influence, but which is not a Subsidiary Company of the company having such influence and includes a Joint Venture Company. * Explanation to Section 2(6) provides that “Significant Influence” means control of at least 20% of the total Voting Power, or Control of or Participation in business decisions under an agreement. * The Expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement. * Explanation substituted by Companies Amendment Act, 2017 To add more governance and transparency in the working of the company, the concept of associate company has been introduced. It will provide a more rational and objective framework of associate relationship between the companies. Further as per Section 2(76), Related Party includes Associate Company. Hence contracts with Associate Company will require disclosure in the Statutory Register as is applicable to contract with related parties.
GOVERNMENT COMPANY	Definition and Meaning of Government Company [Section 2(45)] Section 2(45) of the Companies Act, 2013 defines the Government Company. A Government Company means a company in which 51% or more paid-up share capital is held by the Central Government; or by one or more State Government(s); or partly by the Central Government and partly by one or more State Governments. It may be noted that a subsidiary company of a government company is also a government company. Annual Report of Government Companies [Sections 394 & 395] Section 394 provides that the where the Central Government is a member of the Government Company, Central Government must place before both the Houses of Parliament an annual report on the working and affairs of each Government Company within three (3) months of its annual general meeting together with a copy of the audit report and any comments upon or supplement to such report made by the Comptroller and Auditor General of India. Section 395 further provides that where a State Government is a member of Government company, the annual report is likewise to be placed before the State Legislature.
SMALL COMPANY	Definition and Meaning of Small Company The term ‘small company’ has been defined under Section 2(85). As per this, small company means a company, other than a public company, - (i) Paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than Ten Crores rupees; AND

	(ii) Turnover of which as per profit and loss account for immediately preceding financial year does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than One Hundred Crores rupees. Provided that nothing in this clause shall apply to – (A) A holding company or a subsidiary company; (B) A company registered under section 8; or (C) A company or body corporate governed by any special Act. It is basically a private company meeting prescribed threshold. PRIVILEGES OF SMALL COMPANY • The financial statement, with respect to One Person Company, may not include the cash flow statement; • Small company need not have more than two directors in its Board. • Need not appoint Independent directors on its Board • A proportion of directors need not to retire every year. • Need not prepare a report on Annual General Meeting • The annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company. In other words it need not be signed by the company secretary in practice.
DORMANT COMPANY (SECTION 455)	(1) Where a company is formed and registered under this Act for: • a future projector • to hold an asset or intellectual property and • has no significant accounting transaction, Such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company. <i>Explanation.</i>—For the purposes of this section,— (i) “inactive company” means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years; (ii) “significant accounting transaction” means any transaction other than— (a) payment of fees by a company to the Registrar; (b) payments made by it to fulfill the requirements of this Act or any other law; (c) allotment of shares to fulfill the requirements of this Act; and (d) Payments for maintenance of its office and records. (2) The Registrar on consideration of the application shall allow the status of a dormant company to the applicant and issue a certificate in such form as may be prescribed to that effect. (3) The Registrar shall maintain a register of dormant companies in such form as maybe prescribed. (4) In case of a company which has not filed financial statements or annual returns for two financial years consecutively, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies. (Deemed Dormant Company) (5) A dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed to the Registrar to retain its dormant status in the register and may become an active company on an application made in this behalf accompanied by such documents and fee as may be prescribed. (Public Company: 3, Private Company: 2 & OPC: 1) A dormant company shall file an annual “Return of Dormant Company” in form MSC-3 which indicates the financial position of the company and which shall be duly audited by a chartered accountant in practice. This should be filed within 30 days from the end of each financial year i.e. on or before 30th April every year.

	(6) The Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements of this section. (7) Rotation of auditors shall not apply to a dormant company. (8) Proviso to Rule 8 of the Companies (Miscellaneous) Rules, 2014 says that a dormant company cannot remain as a dormant company for more than 5 consecutive financial years. If it remains so, then the Registrar shall commence the process of striking off the name of the company from the Records, i.e. the company will be removed. So maximum tenure for a dormant company is 5 consecutive financial years.
INVESTMENT COMPANY	As per explanation (a) to section 186, “investment company” means a company whose principal business is the acquisition of shares, debentures or other securities. An investment company is a company, the principal business of which consists in acquiring, holding and dealing in shares and securities. The word ‘investment’, no doubt, suggests only the acquisition and holding of shares and securities and thereby earning income by way of interest or dividend etc. But investment companies in actual practice earn their income not only through the acquisition and holding but also by dealing in shares and securities i.e. to buy with a view to sell later on at higher prices and to sell with a view to buy later on at lower prices.
PRODUCER COMPANY	According to the provisions as prescribed under Section 581A(l) of the Companies Act, 1956, a producer company is a body corporate having objects or activities specified in Section 581B and which is registered as such under the provisions of the Act. The membership of producer companies is open to such people who themselves are the primary producers, which is an activity by which some agricultural produce is produced by such primary producers.
LESSER PENALTIES FOR ONE PERSON COMPANIES OR SMALL COMPANIES (SECTION 446B)	<i>Notwithstanding anything contained in this Act, if a One Person Company or a small company fails to comply with the provisions of sub-section (5) of section 92, clause (c) of sub-section (2) of section 117, sub-section (3) of section 137, such company and officer in default of such company shall be liable to a penalty which shall <u>not be more than one-half of the penalty</u> specified in such sections.</i> (Substituted by Companies Amendment Ordinance 2018)

UNIT 3: PROMOTION AND INCORPORATION OF COMPANY

PROMOTERS

DEFINITION OF PROMOTER	As per Section 2(69), promoter means a person: (a) Who has been named as such in a prospectus or is identified by the company in the annual return; or (b) Who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or (c) In accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act (but does not include a person who is acting merely in a professional capacity).
MEANING OF PROMOTER	❖ A promoter is a one (i. e. individual firm, company etc.) who performs the preliminary duties necessary to bring the company into being and float it, i. e. who brings the company into existence. ❖ He conceives the idea, develops it and induces others to join the enterprise. Thus, promoter is neither a term of law nor of art; but of business. ❖ The promoter originates the scheme for the formation of a company, ○ gets together the subscribes to the memorandum, ○ gets the memorandum and articles prepared, executed and registered; ○ finds the bankers, brokers and legal advisers, ○ finds the first directors, ○ settles the terms of preliminary contracts with vendors and ○ makes arrangements for preparation, advertisement and circulation of the prospectus and placement of the capital. ❖ The question whether a person is or is not a promoter is a question of fact depending upon the role performed by him in the formation of the company. But a person who merely acts in a professional capacity on behalf of the promoter, such as a solicitor or an accountant and who is paid by him is not a promoter. The most important criteria, for a person being treated as promoter, is that he should have personal business interest in the company. <u>[Lydney and Wigpool Iron Ore Co. v. Bird]</u>
LEGAL POSITION OF PROMOTER	The Company not being in existence, a promoter is neither an agent of, nor a trustee for, the company. But he occupies a fiduciary position (i. e. position of trust & confidence) in relation to the company he promotes. The fiduciary relation requires full disclosure of the relevant facts, including any profits made. <u>[Erlanger vs. New Sombrero Phosphate & Co.]</u>
RIGHTS OF PROMOTER	❖ Right to receive Preliminary Expenses: A promoter has no legal right to claim promotional expenses for his services unless there is a valid contract. Without such a contract he is not even entitled to recover his preliminary expense. <u>[Re. English & Colonial Produce Company]</u> The Promoters are entitled to receive all the expenses incurred for setting up and registering the company from board of directors. The articles will have provision for payment of preliminary expenses to the promoters. The company may pay the expenses to the promoters even after its formation, but such payments should not be ultra vires the articles of the company. The articles may have provision regarding payment of fixed sum to the promoters. ❖ Right to recover proportionate amount from the Co-Promoters: The promoters are held jointly and severally liable for the secret profits made by them in the formation of a company. (as they are joint promisor's). Therefore, if the entire amount of secret profits are paid to the company by a

		single promoter, he is entitled to recover the proportionate amount from co-promoters. Likewise, if the entire amount of liability arising out of misstatement in the prospectus is borne by one of the promoters; he is entitled to recover proportionately from the co-promoters.
DUTIES OF PROMOTER	OF	Following are the two important duties of a promoter of a company:- 1. The promoters, being in a fiduciary position, cannot make, either directly or indirectly, any profit at the expense of the company he promotes, <u>without the knowledge and consent</u> of the company and that if he does make a profit in disregard of this rule, the company can compel him to account for it. 2. Promoter is not allowed to derive a profit from the sale of his own property to the company, <u>unless all material facts are disclosed</u>. Thus, it is not the profit made by the promoter, which the law forbids but the non – disclosure of it. The disclosure must be made to an independent Board of directors and where there is no independent Board of directors, disclosure must be made to the shareholders as a whole.
REMEDIES AVAILABLE TO THE COMPANY AGAINST PROMOTER		If a promoter makes a secret profit or does not disclose any profit, the company has a remedy against him. Secret profit may be made by purchasing property or a business himself and selling it to the company at a higher price. The difference between the two prices amounts to secret profit, if he promotes the company at the time he buys the property or business. Where, the promoter bought the property with a view to sell it to the company he promotes, the company has the following remedies: 1. Rescind the contract and if he has made a profit on some ancillary transaction that may also be recovered. 2. Retain the property, paying no more for it than what the promoter has paid depriving him of his profit. 3. Where the above remedies would be inappropriate, such as when the property has been altered so as to render rescission impossible and the promoter has already received his inflated price, the company may sue him for misfeasance (breach of duty to disclose). The measure of damages will be the difference between the market value of the property and the contract price.
REMUNERATION OF PROMOTERS	OF	When a promoter makes proper disclosure, he may expect to be rewarded for his efforts. Therefore, when the company is registered, it may agree to pay some remuneration for services rendered. In practice, a promoter is remunerated in any of the following ways :- (a) He may sell his own property to the company for cash at an over valuation after making full disclosure to an independent Board of directors or to the intended shareholders. (b) He may sell his property for fully-paid shares in the company, after making full disclosure. (c) He may be given an option to buy further shares in the company at par. (d) He may take commission on the shares sold. (e) He may be paid a lump sum by the company.
LIABILITIES OF PROMOTER	OF A	❖ <u>Incorporation Company by furnishing False Information:</u> if it is proved that company has been incorporated by: ○ Furnishing any false or incorrect information or representation; or ○ Suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company; or ○ By any fraudulent action;

	The promoters, persons named as the first directors of the company and persons making declaration shall be liable for fraud u/s 447. <i>Any person who is found guilty of fraud involving an amount of at least 10 Lakhs or 1% of turnover of company, whichever is lower, shall be punishable with imprisonment not less than 6 months but not more than 10 years and shall also be liable for fine of not less than the amount involved in the mis-statement, but not more than 3 times the amount involved.</i> <i>If the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years.</i> <i>Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to FIFTY lakh rupees or with both.</i> (Amended by Companies Amendment Act, 2017) GENERAL PENALTY U/S 450 In case no penalty is specified in case of any contravention, Fine up to ₹10,000 and further fine up to ₹1,000 for each day of default in case of contravention continues can be levied. ❖ Civil Liability for misstatements in Prospectus: A promoter is liable for any misleading statement in the prospectus to a person who has subscribed for any securities of the company on the faith of prospectus. Where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company including a promoter of the company shall be liable to pay compensation to every person who has sustained such loss or damage. <i>No promoter shall be liable under this section, if he proves that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.</i> ❖ Contravention of provisions relating to private placement: If a company makes any default of the provisions of the Companies Act, 2013, the company, its promoters and directors shall be liable for a penalty which may extend to the amount raised through the private placement or two crore rupees, whichever is lower, and the company shall also refund all monies to subscribers within a period of 30 days of the order imposing the penalty.
INCORPORATION PROCESS OF COMPANIES Companies (Incorporation) Rules, 2014	
REGISTRATION PROCEDURE	I. Apply for Name Approval (RUN) - An application for reservation of name shall be made through the web service available at www.mca.gov.in by using [form RUN](Reserve Unique Name) along with fee Rs. 1000/- which may either be approved or rejected, as the case may be, by the Registrar, Central Registration Centre after allowing re--submission of such application within fifteen days for rectification of the defects, if any. DSC & DIN not required for filing of RUN form for reservation of Name. Only account of MCA portal is mandatory. - The name shall not: (a) be identical with or resemble too nearly to the name of an existing company registered under this act; or (b) be such that its use by the company:

- Will constitute an offence under any law;
- Is undesirable in the opinion of the central government.

- **Reserved name shall be valid for 20 days from the date of approval of Name. Reserved name shall be valid for 60 days in case of allotment of name for existing Company (Change of Name).**
- Only one Name can be mentioned in RUN form.
- **Approval of Name through “RUN” is an optional way. Companies can also Directly apply for the Name in SPICE form.**

II. Preparation of the documents for Incorporation

- **Declaration by Professionals:** For the purposes of clause (b) of sub-section (1) of section 7, the declaration by an advocate, a Chartered Accountant, Cost accountant or Company Secretary in practice shall be in **Form No. INC.8.**
- **Declaration from Subscribers and First Directors**
For the purposes of clause (c) of sub-section (1) of section 7, the affidavit shall be submitted by each of the subscribers to the memorandum and each of the first directors named in the articles in **Form No. INC.9**

* Word Affidavit replaced by the Word Declaration w.e.f 27th July 2018 by Companies Amendment Act, 2017.

- **Particulars of Every Subscriber to be Filed With the Registrar at the Time of Incorporation.**
(1) The following particulars of every subscriber to the memorandum shall be filed with the Registrar-
(a) Name (including surname or family name) and recent Photograph affixed and scan with MOA and AOA;
(b) Father's/Mother's/ name:
(c) Nationality:
(d) Date of Birth:
(e) Place of Birth (District and State):
(f) Educational qualification:
(g) Occupation:
(h) Income-tax permanent account number:
(i) Permanent residential address and also Present address (Time since residing at present address and address of previous residence address (es) if stay of present address is less than one year) similarly the office/business addresses :
(j) Email id of Subscriber;
(k) Phone No. of Subscriber;
(l) Fax no. of Subscriber (optional)
(m) Proof of Identity:

Explanation.- In case the subscriber is already holding a valid DIN, and the particulars provided therein have been updated as on the date of application, and the declaration to this effect is given in the application, the proof of identity and residence need not be attached.

(n) Residential proof such as Bank Statement, Electricity Bill, Telephone / Mobile Bill:

Provided that Bank statement Electricity bill, Telephone or Mobile bill shall not be more than two months old;

(o) Proof of nationality in case the subscriber is a foreign national.

(p) If the subscriber is already a director or promoter of a company(s), the particulars relating to-

(i) Name of the company;

(ii) Corporate Identity Number;

(iii) Whether interested as a director or promoter;

(2) Where the subscriber to the memorandum is a **body corporate**, then the following particulars shall be filed with the Registrar-

- (a) Corporate Identity Number of the Company or Registration number of the body corporate, if any
- (b) GLN, if any;
- (c) the name of the body corporate
- (d) the registered office address or principal place of business;
- (e) E-mail Id;

- **Particulars of First Directors of the Company and their Consent to Act as Such**
The particulars of each person mentioned in the articles as first director of the company and his interest in other firms or bodies corporate along with his consent to act as director of the company shall be filed in **Form No.DIR.12** along with the fee as provided in the **Companies (Registration offices and fees) Rules, 2014.**

III. Application for Incorporation of Company:

Once all the above mentioned documents/ information are available. Applicant has to fill the information in the e-form "Spice" INC-32.

Features of SPICe (inc-32) Form:

- (a) Maximum details of subscribers are SEVEN (7). In case of more subscribers, physically signed MOA & AOA shall be attaching in the Form.
- (b) Maximum details of directors are TWENTY (20).
- (c) Maximum THREE (3) directors are allowed for filing application of allotment of DIN while incorporating a Company.
- (d) Person can apply the Name also in this form.
- (e) By affixation of DSC of the subscriber on the INC-33 (e-moa) date of signing will be appear automatically by the form.
- (f) Applying for PAN / TAN will be compulsory for all fresh incorporation applications filed in the new version of the SPICe form.
- (g) In case of companies incorporated, with effect from the 26th day of January, 2018, with a nominal capital of less than or equal to rupees 15 lakhs or in respect of companies not having a share capital whose number of members as stated in the articles of association does not exceed twenty, fee on INC-32 (SPICe) shall not be applicable

Single Window Form:

Earlier if a Person wants to incorporate Company then it has to apply for the DIN, Approval of the Name Availability, Separate form for first Director, Registered office address, PAN, TAN etc. But this form is a single window for Incorporation of Company.

This form can be used for the following purposes:

- Application of DIN (upto 3 Directors)
- Application for Availability of Name
- No need to file separate form for first Director (DIR-12)
- No need to file separate form for address of registered office (INC-22)
- No need to file separate form for PAN & TAN

IV. Signing of the Memorandum of Association and Articles of Association

After proper filing of SPICE form applicant has to download the e-form INC-33 (MOA) and IN-34 (AOA) form the MCA site. After downloading of form fill all the information in the forms as per requirement of Table A to J of Schedule I.

After completely filing of the form affix DSC of all the subscribers and professional on subscriber sheet of the MOA & AOA.

The Memorandum and Articles of Association of the company shall be signed in the following manner, namely:-

- (1) The memorandum and articles of association of the company shall be signed by **each subscriber** to the memorandum, who shall add his name, address, description and occupation, if any, in the presence of at least **one witness** who shall attest the signature and shall likewise sign and add his name, address,

description and occupation, if any and *the witness shall state that "I witness to subscriber/ subscriber(s), who has/have subscribed and signed in my presence (date and place to be given); further I have verified his or their Identity Details (ID) for their identification and satisfied myself of his/her/their identification particulars as filled in"*

(2) Where a subscriber to the memorandum is **illiterate**, he shall affix his **thumb impression** or mark which shall be described as such by the person, writing for him, who shall place the name of the subscriber against or below the mark and authenticate it by his own signature and he shall also write against the name of the subscriber, the number of shares taken by him.

(3) Such person shall also read and explain the contents of the memorandum and articles of association to the subscriber and make an endorsement to that effect on the memorandum and articles of association.

(4) Where the subscriber to the memorandum is a **body corporate**, the memorandum and articles of association shall be signed by **director, officer or employee** of the body corporate duly authorized in this behalf by a resolution of the board of directors of the body corporate and where the subscriber is a **Limited Liability Partnership**, it shall be signed by a **partner** of the Limited Liability Partnership, duly authorized by a resolution approved by all the partners of the Limited Liability Partnership:

Provided that in either case, the person so authorized shall not, at the same time, be a subscriber to the memorandum and articles of Association.

V. Submission of INC-32,33,34 on MCA:

Once all the 3 forms ready with the applicant, upload all three documents as Linked form on MCA website and make the payment of the same.

VI. Certificate of Incorporation and allotment of Corporate Identity Number

The Certificate of Incorporation shall be issued by the Registrar in Form No.INC-11 and the Certificate of Incorporation shall mention permanent account number of the company where if it is issued by the Income-tax Department.

VII. Publication of name by company.-

(1) Every company which has a website for conducting online business or otherwise, shall disclose/publish its name, address of its registered office, the Corporate Identity Number, Telephone number, fax number if any, email and the name of the person who may be contacted in case of any queries or grievances on the landing/home page of the said website.

(2) The Central Government may as and when required, notify the other documents on which the name of the company shall be printed.

VIII. Effect of Registration [Sec.9]

Section 9 provides that from the date of incorporation, the subscribers become the members of the company. The company shall be a body corporate with a name, capable of exercising all the functions of an incorporated company under this Act and shall have perpetual succession with power to acquire, hold and dispose of property, to contract, to sue and be sued, by the said name.

COMMENCEMENT OF BUSINESS ETC. (Section 10A)

(Inserted by Companies Amendment Ordinance, 2018)

(1) A company incorporated after the commencement of the Companies (Amendment) Ordinance, 2018 and having a share capital shall not commence any business or exercise any borrowing powers unless—

(a) a declaration is filed by a director within a period of one hundred and eighty days of the date of incorporation of the company in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration; and

(b) The company has filed with the Registrar a verification of its registered office as provided in sub--section (2) of section 12.

	(2) If any default is made in complying with the requirements of this section, the company shall be liable to a penalty of fifty thousand rupees and every officer who is in default shall be liable to a penalty of one thousand rupees for each day during which such default continues but not exceeding an amount of one lakh rupees. (3) Where no declaration has been filed with the Registrar under clause (a) of sub-section (1) within a period of one hundred and eighty days of the date of incorporation of the company and the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may, without prejudice to the provisions of sub-section (2), initiate action for the removal of the name of the company from the register of companies under Chapter XVIII.] The declaration under section 10A by a director shall be in Form No, INC-20A and shall be filed as provided in the Companies (Registration Offices and Fees) Rules, 2014 and the contents of the said form shall be verified by a company Secretary or a chartered Accountant or a cost Accountant. in practice: Provided that in the case of a company pursuing objects requiring registration or approval from any sectoral regulators such as the Reserve Bank of India, Securities and Exchange Board of India, etc., the registration or approval, as the case may be from such regulator shall also be obtained and attached with the declaration. (Rule 23A) (w.e.f. 18th December 2018)
Active Tagging and (ACTIVE) Rule 25A of Companies Incorporation Rules, 2014 w.e.f 25.02.2019	(1) Every company incorporated on or before the 31st December, 2017 shall file the particulars of the company and its registered office, in e-Form ACTIVE (Active Company Tagging Identities and Verification) on or before 15.06.2019. Provided that any company which has not filed its due financial statements under section 137 or due annual returns under section 92 or both with the Registrar shall be restricted from filing e-Form-ACTIVE, unless such company is under management dispute and the Registrar has recorded the same on the register: Provided further that companies which have been struck off or are under process of striking off or under liquidation or amalgamated or dissolved, as recorded in the register, shall not be required to file e-Form ACTIVE: Provided also that in case a company does not intimate the said particulars, the Company shall be marked as “ACTIVE-non-compliant” on or after 16th June, 2019 and shall be liable for action under sub-section (9) of section 12 of the Act: Provided also that no request for recording the following event based information or changes shall be accepted by the Registrar from such companies marked as “ACTIVE-non-compliant”, unless “e-Form ACTIVE” is filed - (i) SH-07 (Change in Authorized Capital); (ii) PAS-03 (Change in Paid-up Capital); (iii) DIR-12 (Changes in Director except cessation); (iv) INC-22 (Change in Registered Office); (v) INC-28 (Amalgamation, de-merger) (2) Where a company files “e-Form ACTIVE”, on or after 16th June, 2019, the company shall be marked as “ACTIVE Compliant”, on payment of fee of ten thousand rupees.
Rule 38A of Companies Incorporation Rules 2014 w.e.f 29.03.2019	Application for registration of Goods and Service Tax Identification Number (GSTIN), Employee State Insurance Corporation (ESIC) registration and Employees' Provident Fund Organisation (EPFO) registration The application for incorporation of a company under rule 38 shall be accompanied by e-form AGILE (INC-35) containing an application for registration of the following numbers, namely:- (a) GSTIN with effect from 31st March, 2019 (b) EPFO with effect from 8th April, 2019 (c) ESIC with effect from 15th April, 2019

PRE – INCORPORATION/PRELIMINARY/PROMOTERS' CONTRACT	Pre-incorporation Contracts are contracts purported to be made on behalf of a company before its incorporation. Before incorporation, a company is non-existent and has no capacity to contract. Hence a contract, by a promoter purporting to act on behalf of a company prior to its incorporation, never binds the company because at the time the contract was concluded, the company was not in existence. The promoters alone, therefore, remain personally liable for any contract they purport to make on behalf of the company. Even a company cannot ratify a pre-incorporation contract. However, it is always open for a company to enter into a new contract after its incorporation to give effect to a contract made before its formation. This is called Novation of promoters' contracts. Since the pre – incorporation contract is a nullity, even the Company cannot sue the vendor of property, if he fails to carry out such contract. In India, however, Section 15 and 19 of the Specific Relief Act, 1963 have considerably alleviated the difficulty. Section 15(h) provides that where a pre – incorporation contract is warranted by the terms of incorporation of company, the Company may, if it has accepted the contract and has communicated such acceptance to the other party to the contract, obtain specific performance of the contract. Similarly, Section 19(e) provides that specific performance may be enforced against the Company by other party to the contract under similar circumstances. If company adopts a pre-incorporation contract then: - Contract can be enforced by the company. - Contract becomes binding on the company as well. - Promoters are not personally liable on such a contract. However, if company does not adopt a Pre-Incorporation Contract Then: - Contract shall not be a binding on the company. - Even if the company takes the benefits of the pre-incorporation contract, it will not be bound by it. - A company cannot ratify a pre-incorporation contract. - The promoters shall be personally liable on pre-incorporation contract.
POWERS OF TRIBUNAL IN CASE A COMPANY IS INCORPORATED BY FURNISHING FALSE INFORMATION	As per Section 7(7), where a company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants:- - pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or - direct that liability of the members shall be unlimited; or - direct removal of the name of the company from the register of companies; or - pass an order for the winding up of the company; or - pass such other orders as it may deem fit: Provided that before making any order under this sub-section,— - the company shall be given a reasonable opportunity of being heard in the matter; and - the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.

UNIT 4: MEMORANDUM AND ARTICLES OF ASSOCIATION

MEMORANDUM OF ASSOCIATION		
DEFINITION MEANING MEMORANDUM	AND OF	According to Section 2(56), “Memorandum” means Memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous Companies law or of this Act. The memorandum of association is a document, which contains the fundamental provisions of the company’s constitution. It contains the essential conditions upon which alone the company can be incorporated. In this respect, it is company’s charter of its existence and operations and is of supreme importance in determining its powers. It defines as well as confines the powers of the company. It not only shows the objects of formation but also determines the utmost possible scope of its operations beyond which its action cannot go.
PURPOSE MEMORANDUM	OF	The purpose of memorandum is two-fold. First, the intending shareholder who contemplates the investment of his savings, should know the field in, or the purpose for which it is going to be used and what risk he is taking in making the investment. The second purpose is that anyone dealing with the company will know without reasonable doubt whether the contractual relation into which he contemplated entering with the company is one relating to a matter within its corporate objects. In short, the memorandum enables shareholders, creditors and all those who deal with the company to know what its powers are and what the range of its activities is. <u>[Egyptian Salt and Soda Co. v. Port Said Salt Association Ltd.]</u>
PRINTING SIGNING MEMORANDUM [SECTION 3 & 4]	AND OF	The memorandum of association must be printed, divided into paragraphs, numbered consecutively and signed by each subscriber (7 in the case of a public company; 2 in the case of a private company and 1 in the case of OPC) in the presence of at least one witness who shall attest the signatures of the subscribers. In the case of one person company (OPC), the memorandum shall indicate the name of the other person (nominee), with his prior written consent, who shall, in the event of the subscriber’s death or his incapacity to contract become the member of the company. Each subscriber must state his address, occupation and the number of shares he takes opposite his name. Only a person <i>sui juris</i> i. e., capable of entering into contract on his own can subscribe to the memorandum. Both artificial and natural persons can subscribe to memorandum.
CONTENTS OF MEMORANDUM		
NAME CLAUSE		The first clause in the memorandum must state the name by which a company is known. It may be noted that the name of a company shall not be identical with or too nearly resembles the name of an existing company. It further provides that no company shall have a name which, in the opinion of the Central Government, is undesirable. The name should not be such that its use by the company will constitute an offence under any law. The object is to prevent the use of name likely to mislead the public. For example, a company will not be allowed to use a name, which is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950. Unless the previous approval of the Central Government is obtained, a company shall not be registered with a name which contains any word or expression which suggest of any connection with Government or of State patronage or which contain such word or expression, as may be prescribed. It may be noted that ROCs may allow names starting with small alphabets (like i2 Technologies Ltd., etc.) as such names are being increasingly used by many companies in other countries. It should, however, be ensured that the

	names starting with small alphabets does not have phonetic or visual resemblance to the name of a company in existence.
DOMICILE OR REGISTERED OFFICE CLAUSE	The name of the State in which the registered office of the company is to be situated must be given in the memorandum. But the exact address of the registered office is not required to be stated therein. As per Section 12, a company shall within 30 days of its incorporation have a registered office. The company shall furnish to the Registrar verification of its registered office within a period of 30 days of its incorporation.
OBJECTS CLAUSE	The objects clause is of great importance because it determines the purpose and the capacity of the company. It indicates the purposes for which the company has been set up and its actual capability, besides its sphere of activities. <i>*The object clause of memorandum shall state “that the company may engage in any lawful act or activity or business, or any act or activity or business to pursue any specific object or objects, as per the law for the time being in force:</i> *Inserted by Companies Amendment Act 2017 The subscribers to the memorandum of association enjoy almost unrestricted freedom to choose the objects. The only restriction is that objects should not be illegal and against the provisions of the Companies Act, 2013.
LIABILITY CLAUSE	The fourth clause of memorandum of every company must state whether the liability of its members is limited by shares or limited by guarantee or is unlimited. In a company limited by shares, no member can be called upon to pay more than what remains unpaid. If his shares are fully paid-up, his liability is nil. In a company limited by guarantee, the liability clause will state the amount, which each member should undertake to contribute to the assets of the company in the event of liquidation of the company, He cannot be called upon to pay anything before the company goes into liquidation. In an unlimited company, the clause shall specify that the liability of members is unlimited and can extend to personal assets of the members.
CAPITAL CLAUSE (ONLY IN THE CASE OF A COMPANY HAVING A SHARE CAPITAL)	This clause must state the amount of the capital with which the company is registered. The shares into which the capital is divided must be of fixed value, which is commonly known as the nominal value of the share. The capital is variously described as “nominal”, “ <u>authorized</u> ” or “registered”.
SUBSCRIPTION CLAUSE	In this clause, the persons (includes a body corporate) subscribing to the memorandum declare their desire to be formed into a company and agree to take the shares indicated opposite their respective names. Following are the statutory requirements regarding subscription of memorandum :- (i) The memorandum must be signed by each subscriber in the presence of at least one witness who must attest the signatures; (ii) Each subscriber must take at least one share; if any and (iii) Each subscriber must write opposite his name the number of shares (if any) which he agrees to take. <u>Succession Clause (only in the case of OPC):</u> This clause shall state the name of the person who, in the event of the death or incapacity to contract of the subscriber, shall become the member of the company. [This clause shall be the part of Association and Subscription Clause].

	The above clauses are compulsory and are designated by the Companies Act as “conditions”, on the basis of which alone a company is incorporated.
ARTICLES OF ASSOCIATION	
DEFINITION AND MEANING OF ARTICLES	According to Section 2(5) of the Companies Act, 2013, ‘articles’ means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this Act. The articles of a company are its bye – laws or rules and regulations that govern the management of its internal affairs and the conduct of its business. The articles of a company are sub – ordinate to and are controlled by the memorandum of association. The memorandum lays down the scope and powers of the company, and the articles govern the ways in which the objects of the company are to be carried out. It may be noted that Companies Act, 2013 makes it compulsory for every company to have its own articles and file the same with ROC for registration.
ENTRENCHMENT PROVISIONS IN THE ARTICLES [SECTION 5]	❖ A new provision on entrenchment has been provided under the Companies Act, 2013 which provides that articles may contain provision for entrenchment to the effect that the specified provisions of articles can be altered only if the more restrictive conditions or procedures as compared to those applicable in case of special resolution are met or complied with. ❖ Such provision for entrenchment in the articles shall only be made: ○ Either at the time of formation of a company, or ○ By an amendment in the articles agreed by: ▪ all the members of the company in the case of a private company and ▪ by a special resolution in the case of a public company. ❖ It is further provided that the company shall give notice to the ROC of entrenchment provisions in the prescribed form.
ACT TO OVERRIDE MEMORANDUM, ARTICLES, ETC. [SECTION 6]	Section 6 provides that the provisions of the sections of Companies Act, 2013 shall have overriding effect over the provisions contained in memorandum and articles of the company, <u>unless a particular section expressly provides otherwise</u>. Any provision, contained in the memorandum or articles, which is contrary to the provisions of the Act, shall be void. It may, however, be noted that the provisions of the articles will prevail over the provisions of the Act, provided they are more stringent or more strict than what is specified in the Act and that there is no inconsistency with the provisions of the Act. For example, where the Act specifies that for a particular act an ordinary resolution is to be passed, but the articles specify for a special resolution, in such a case, provision of the articles will prevail.
COPIES OF MEMORANDUM, ARTICLES, ETC., TO BE GIVEN TO MEMBERS (Section 17)	(1) A company shall, on being so requested by a member, send to him within seven days of the request and subject to the payment of such fees as may be prescribed, a copy of each of the following documents, namely:— (a) the memorandum; (b) the articles; and (c) every agreement and every resolution referred to in sub-section (1) of section 117, if and in so far as they have not been embodied in the memorandum or articles. (2) If a company makes any default in complying with the provisions of this section, the company and every officer of the company who is in default shall be liable for each default, to a penalty of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

ALTERATION OF MEMORANDUM OF ASSOCIATION

CHANGE OF NAME [SECTION 13]	The name of the company can be changed by a special resolution and with the written approval of the Central Government. The powers of the Central Government for approving change in the name have been delegated to the Registrar of Companies. Approval of the Central Government is not necessary if the change relates to the addition/deletion of the word 'private' to the name. Form MGT.14 shall be filed to the Registrar of Companies within 30 days of passing the special resolution. Further, a copy of the approval of the Central Government shall also be filed with ROC. Any change in the name shall be subject to the following: (i). The name of a company shall not be identical with or too nearly resembles the name of an existing company. It further provides that no company shall have a name which, in the opinion of the Central Government, is undesirable. The name should not be such that its use by the company will constitute an offence under any law. (ii). Unless the previous approval of the Central Government is obtained, a company shall not have a name which contains any word or expression which suggest of any connection with Government or of State patronage or which contain such word or expression, as may be prescribed. Rectification of Name (Sec. 16): This section empowers the Central Government to give directions to the company to rectify its name if in its opinion, the name registered is identical with or too nearly resembles the name, by which a company in existence has been previously registered. The company shall change its name within a period of three months from the issue of such directions after passing an ordinary resolution. Further also, on an application made to the Central Government by the registered proprietor of a trade mark that the name is identical with or too nearly resembles to an existing trade mark, the Central Government may direct the company to change its name. The company shall change its name within a period of six months from the issue of such directions after passing an ordinary resolution. A registered trade mark owner has to file an application to the Central Government for rectification of name which is similar to name of its trade mark within 3 years of incorporation of company or change of name. Where a company changes its name or obtains a new name, it shall within a period of fifteen days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum. If a company makes default in complying with any direction given under sub-section (1), the company shall be punishable with fine of one thousand rupees for every day during which the default continues and every officer who is in default shall be punishable with fine which shall not be less than five thousand rupees but which may extend to one lakh rupees.
CHANGE OF REGISTERED OFFICE * The Words "on and from 15th day of its incorporation" has been replaced by the words "within 30 days of its incorporation".	Section 12 provides that a company shall *within 30 days of its incorporation shall have a registered office. The company shall furnish to the Registrar verification of its registered office within a period of 30 days of its incorporation in Form INC.22. Every company is required to affix or paint its name and the address of the registered office in any of the language in general use in the locality where the company's registered office is situated, besides any other language if the company chooses to have it painted or affixed in such other language. Name and address is to be affixed and painted outside every office or place in which business is carried on at a conspicuous position. Every company is required to print name, address of its registered office and corporate identity number (CIN) along with telephone number, fax number, if any, e-mail and website addresses if any, on all its business letters, bill heads, letter

papers and in all its notices and other official publications. Where a company has changed its name in last two years, the company shall paint or affix its former names along with the name of the company.

A private company which is OPC shall mention the words "One Person Company" in bracket below its name.

Notice of every change of the situation of the registered office, shall be given to the ROC within 15 days of the change in Form INC.22.

If the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may cause a physical verification of the registered office of the company in such manner as may be prescribed and if any default is found to be made in complying with the requirements of sub-section (1), he may without prejudice to the provisions of sub-section (8), initiate action for the removal of the name of the company from the register of companies under Chapter XVIII. **(Inserted by Companies Amendment Ordinance, 2018 w.e.f 2nd November 2018)**

Methods of shifting of Registered Office

(I) Change within the local limits of same town [Sec. 12]: A company can change its registered office from one place to another within the local limits of the city, town or village, where it is situated by passing a Board Resolution. This change of registered office does not involve alternation of memorandum.

A notice of the change is to be given to the Registrar of Companies in Form INC.22 within 30 days of such change.

(II) Change from one city to another within the same State [Sec. 12]: If the registered office is to be shifted from one city, town or village to another city, town or village within the same State and which does not involve the change of jurisdiction of Registrar of Companies, a special resolution has to be passed in the general meeting of the company. This change of registered office also does not involve alternation of memorandum.

Form No. MGT.14 shall be filed to the Registrar of Companies within 30 days of passing the special resolution. Also within **30 days** of the change of the registered office, a notice to the Registrar should be given of the new location of the office in Form No. INC.22.

(III) Change from one city to another within the same State involving change of jurisdiction of Registrar of Companies [Sec. 12]:

- (1) An application seeking confirmation from Regional Director for shifting the registered office within the same State from the Jurisdiction of one ROC to the Jurisdiction of another ROC, shall be filed by company with Regional Director in Form INC 23 along with the fee and following Documents:
- (a) Board Resolution for shifting of registered office;
 - (b) Special Resolution of the members of the company approving the shifting of Registered office;
 - (c) A Declaration given by Key Managerial Personnel or any two directors authorized by Board, that the company has not defaulted in payment of dues to its workmen and has either the consent of its creditors for the proposed shifting or has made necessary provision for the payment thereof;
 - (d) A Declaration not to seek change in the Jurisdiction of the Court where cases for prosecution are pending;
 - (e) Acknowledged copy of intimation to the Chief Secretary of the State as to the proposed shifting and that the employees interest is not adversely affected consequent to the proposed shifting.

(IV) Change from one State to another State [Sec. 13]:

- (1) An application under Sub Section 4 of section 13 for the purpose of seeking approval for alteration of Memorandum with regard to the change of place of registered office from one state government or Union Territory to another, shall be filed with Central Government in Form INC 23 along with the fee and shall be

accompanied by following documents;

- (a) A copy of MOA with proposed alterations;
- (b) A copy of minutes of general meeting at which the resolution authorizing such alteration was passed, giving details of the number of votes cast in favor or against the resolution;
- (c) A copy of Board Resolution or Power of Attorney or the Executed Vakalatnama, as the case may be;

(2) There shall be attached to the application, a list of creditors and debenture holders, drawn up to the latest practicable date preceding the date of filing of application by not more than one month, setting forth the following details, namely:

- (a) The names and address of every creditor and debenture holder of company;
- (b) The nature and respective amounts due to them in respect of debts, claims or liabilities;

Provided that the list of creditors and debenture holders, accompanied by declaration signed by Company Secretary of the company, if any, not less than two directors of the company, one of whom shall be a Managing Director, where there is one, stating that

- (i) they have made a full enquiry into the affairs of the company and having done so, have concluded that the list of creditors are correct and that the estimated value as given in the list of debts or claims payable on a contingency or not ascertained are proper estimates of the values of such debts and claims and that there are no other debts or claims against the company to their knowledge and
- (ii) no employee shall be retrenched as a consequence of shifting of the registered office from one state to another state and also there shall be an application filed by the company to the Chief Secretary of the Concerned State Government or Union Territory;

(3) A duly authenticated copy of list of creditors shall be kept at the registered office of the company and any person desirous of inspecting the same may, at any time during the ordinary hours of business, inspect and take extracts from the same on payment of a sum not exceeding ten rupees per page to the company;

(4) There shall also be attached to the application a copy of acknowledgment of service of a copy of the application with complete annexures to the Registrar and Chief Secretary of State Government or Union Territory where the registered office is situated at the time of filing the application;

(5) The company shall, not more than 30 days before the date of filing the application in Form INC 23:

- (a) Advertise in form INC 26 in vernacular newspaper in the principal vernacular language in the district and in English language in an English Newspaper with the widest circulation in the state in which the registered office of company is situated;

Provided that a copy of advertisement shall be served on the Central Government immediately on its publication;

- (b) Serve, by registered post with acknowledgment due, individual notice, to the effect set out in Clause (a) on each debenture holder and creditor of the company; and
- (c) Serve, by Registered post with acknowledgment due, a notice together with the copy of the application to the Registrar and to SEBI in case of listed companies and to the regulatory body, if the company is regulated under any special act or law for time being in force;

(6) There shall be attached to the application a duly authenticated copy of the advertisement and notices issued under Sub Rule 5, a copy of each of the objection received by the applicant, and tabulated details of responses along with the counter response from the company received either in electronic mode or in physical mode in response to the advertisements and notices issued under sub rule 5;

	(7) Where no objection has been received from any person in response to the advertisement or notice under sub rule 5 or otherwise, the application may be put up for orders without hearing and the order either approving or rejecting the application shall be passed within 15 days of the receipt of application; (8) Where no objection has been received; (i) The CG shall hold a hearing or hearings, as required and direct the company to file an affidavit to record the consensus reached at the hearing, upon executing which, the CG shall pass an order approving the shifting, within 60 days of filing the application; (ii) Where no consensus is reached at the hearings the company shall file an affidavit specifying the manner in which objection is to be resolved within a definite time frame, duly reserving the original jurisdiction to the objector for pursuing its legal remedies, even after the registered office is shifted, upon execution of which CG shall pass an order confirming or rejecting the alteration within 60 days of filing the application; (9) The order passed by the CG confirming the alteration may be on such terms and conditions, if any, as it thinks fit, and may include such order as to costs as it thinks proper; Provided that the shifting of registered office shall not be allowed, if any enquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act. (10) On completion of such enquiry, inspection or investigation as a consequence of which no prosecution is envisaged or no prosecution is pending, shifting of registered office shall be allowed.
ALTERATION OF OBJECT CLAUSE [SECTIONS 13]	A company may, by passing a special resolution in the general meeting, alter the objects of the Company. The company shall file a copy of the special resolution in Form No. MGT.14 with the ROC, within 30 days from the date of such resolution, together with a copy of Memorandum of Association as altered. The ROC shall register the same and certify the registration under his hand within 30 days from the date of filing of such documents. The effective date of alternation of object clause is the date when the Registrar of Companies registers the alteration. It may be noted that, any alteration made in the memorandum of association as per the provisions of Section 13 (Name Clause, Situation Clause and Object Clause) shall not have any effect, until it has been duly registered by the Registrar of Companies. To protect the minority interest, restriction has been imposed on the change of object clause. Now a company, which has raised money from public through prospectus and still has any unutilized amount out of the money so raised, shall not change its object for which it raised the money through prospectus unless a special resolution is passed by the company and an exit option is given to the dissenting shareholders in terms of the regulations prescribed by SEBI and prescribed details are published in one English and one vernacular language newspapers which is in circulation at a place where registered office of the company is situated and also placed on company's website indicating justification for such change.
ALTERATION OF LIABILITY CLAUSE	In general, liability clause of a company cannot be altered. However, Section 18 permits a company of any class registered under this Act to convert itself in some other class of company by altering its memorandum and articles of association. By using these provisions, if an unlimited company gets converted into a limited company or vice-versa, the liability of the members will be changed and thereby leading to alteration of liability clause of memorandum.
ALTERATION OF CAPITAL CLAUSE	Section 61 of the Companies Act, 2013 provides that a limited company having a share capital may, by passing an ordinary resolution in a general meeting, alter the capital clause of its memorandum; provided authority to alter is given to it by its articles of association. A notice of alteration is required to be filed with the ROC in

Form No. SH.7 within 30 days.

Section 61(1) provides that Capital Clause can be altered in any of the following ways :-

- (a) By increasing its authorized share capital by such amount as the company requires;
- (b) By consolidating existing shares into shares of larger denomination;
- (c) By converting fully – paid shares into stock or vice – versa;
- (d) By sub-dividing its existing shares into shares of smaller denomination; and
- (e) By cancelling shares which have not been taken up or agreed to be taken up and diminishing the amount of its share capital by the amount of the shares cancelled. Such cancellation is known as diminution of share capital and shall not, however, be deemed as reduction of share capital within the meaning of Sec. 66.

However no consolidation and division which results in changes in the voting percentage of shareholders shall take effect, it is approved by the NCLT on an application made in the prescribed manner.

Reduction of Capital : Section 66 of the Companies Act, 2013 provides that a company can reduce its share capital only when the following conditions are fulfilled :-

- (i) The company passes a special resolution for reducing share capital.
- (ii) The company also obtains confirmation of the resolution by the NCLT.
- (iii) The company is not in arrears in the repayment of any deposits or the interest payable thereon.

Share Capital of a company can be reduced in any of the following ways :-

- (i) By extinguishing or reducing the liability of members in respect of uncalled capital.
- (ii) By refunding surplus of the fully paid-up capital.
- (iii) By refunding part of the fully paid-up capital on this condition that it may be called up again.
- (iv) By writing off the lost capital not represented by the available assets.
- (v) By any other method approved by the NCLT.

It may be noted that the following also amounts to reduction of share capital in general sense but not in technical sense as provided under Section 66 of the Companies Act, 2013 and hence no nclt confirmation is required :

1. Forfeiture of shares and not re-issuing them;
2. Surrender of Shares;
3. Diminution of Share Capital within the meaning of Section 61(1)(e) of the Companies Act, 2013;'
4. Buy-back of shares of a member by a Company pursuant to an order of the National Company Law Tribunal u/s 242 of the Companies Act, 2013;
5. Redemption of Redeemable Preference Shares as per the provisions of Section 55 of the Companies Act, 2013;
6. Buy-back of its own shares and other specified securities as per the provisions of Sections 68 of the Companies Act, 2013; and
7. Payment of interest out of capital on calls in advance as per Section 50.

ALTERATION OF ARTICLES OF ASSOCIATION

PROVISIONS FOR ALTERATION OF ARTICLES

Earlier permission of Tribunal was required. But now power taken by Central Government.

Section 14 of the Companies Act, 2013 provides that a company may, by passing a special resolution in the general meeting, alter its articles of association. However, where articles are altered in such a way that it has the effect of converting a public company into a private company (i. e., the three restrictions of a private company are being added in the articles of a public company), then approval of the NCLT is also required, in addition to special resolution.

Every alteration of the articles and a copy of the order of the Central Government approving the alteration shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of 15 days.

Provided further that any alteration having the effect of conversion of a public

		company into a private company shall not be valid unless it is approved by an order of the Central Government on an application made in such form and manner as may be prescribed: Provided also that any application pending before the Tribunal, as on the date of commencement of the Companies (Amendment) Ordinance, 2018, shall be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement. <u>(Inserted by Companies Amendment Ordinance, 2018 w.e.f 2nd November 2018)</u>
LIMITATION ON ALTERATION OF ARTICLES	ON OF	Following are some of the limitation on power to alter articles of association :- 1. The articles must not exceed the powers given by the memorandum or conflict with its provisions. 2. It must not be inconsistent with any of the provisions of the Companies Act, 2013 or any other Statue/Law. 3. The alteration must be bona fide for the benefit of the company as a whole. 4. The altered articles must not contain anything illegal or against public policy. 5. The articles cannot be altered in a way providing for expulsion of a member.
LEGAL EFFECT OF REGISTRATION OF MOA & AOA		Section 10 of the Companies Act, 2013 provides that, subject to the provisions of the Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member; and contained a covenant on its and his part to observe all the provisions of the memorandum and of the articles.
MEMBERS BOUND TO THE COMPANY		The memorandum and articles constitute a contract binding the members to the company. The company can, therefore, enforce articles against any member. In <u>Boreland's Trustee v. Steel Brother and Co. Ltd.</u>, the articles of a company contained a clause that on the bankruptcy of a member his shares would be sold to other persons at a price fixed by the directors. Boreland, a shareholder, was adjudicated bankrupt. His trustee in bankruptcy claimed that he was not bound by these provisions and should be at liberty to sell the shares at their true value. It was held that the trustee was bound by the articles as the shares were purchased by Boreland in terms of the articles of the company.
COMPANY BOUND TO THE MEMBERS		Just as the members are bound to the company, so also the company is bound to the members to observe and follow the articles. In <u>Wood v. Odessa Waterworks Co.</u>, the articles provided that the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members. Instead of paying the dividend in cash to the shareholders a resolution was passed to give them debentures/bonds. The directors were restrained from acting on the resolution.
MEMBER BOUND TO MEMBER		As between the members inter-se, each member is bound by the articles to the other members. In <u>Rayfield v. Hands</u>, the plaintiff was a shareholder of a company. The articles required him to inform the directors of his intention to transfer his shares and the directors (who were also members) were to take those shares at a fair price. The plaintiff notified the directors, who contended that they were not bound to take the shares and pay for them. It was held that the articles were binding upon the plaintiff as a member and the directors as members, so that the member-directors were bound to purchase plaintiff's shares and pay for them.
COMPANY BOUND TO OUTSIDER	NOT TO	The term "outsider" signifies a person who is not a member of the company, even if he is a director of or solicitor to the company. The articles do not constitute a contract between a company and an outsider. No outsider can acquire any enforceable rights by virtue of articles. The articles do not confer any contractual rights even upon a member, in a capacity other than that of a member. To succeed, the party suing must prove a contract outside and independent of the articles of association of the company.

	In <u>Eely v. Positive Life Insurance Co.</u>, the articles provided that Eely should act as a solicitor for life to the company and should not be removed from office except for misconduct. Eely acted as a solicitor to the company and also became a member of the company. The company, however, discontinued his services, whereupon he sued the company for damages for breach of contract. It was held that he had no cause of action because the articles did not constitute any contract between the company and himself as solicitor. His action was dismissed.
DOCTRINE OF ULTRA VIRES	
MEANING	The meaning of the term 'ultra vires' is 'beyond the powers of'. Anything which is outside the specified objects and powers or not reasonably incidental to or necessary for the attainment of objects of the company is ultra vires the company and therefore is void. No rights and liabilities on the part of the company, arise out of such transactions and it remains nullity even if every member assents to it. Consequently, an act, which is ultra vires the company, does not bind the company and neither the company nor the other contracting party can sue on it.
CASE LAW	The doctrine of 'ultra vires' was first enunciated by the House of Lords in a classic case, <u>Ashbury Railway Carriage and Iron Co. Ltd. v. Riche</u>. The company entered into a contract with M/S. Riche, a firm of railway contractors to finance the construction of a railway line in Belgium. On subsequent repudiation of this contract by the company on the ground of its being 'ultra vires', Riche brought a case for damages on the ground of breach of contract, as according to him the words "general contractors" in the objects clause gave power to the company to enter into such a contract and therefore, it was within the powers of the company. More so, because the contract was ratified by majority of shareholders. The House of Lords held that the contract was 'ultra vires' the company and, therefore, null and void. The term "general contractor" was interpreted to indicate as the making generally of such contracts as are connected with the business of mechanical engineers. Further, the Court held that the company cannot make an "ultra vires" act to be valid, even if every shareholder of the company assents to it.
EXCEPTIONS	Following are the exceptions to the doctrine of ultra vires :- (1.) If an act is ultra vires the directors but intra vires (within the powers of) the company, the company is liable and it can ratify the act. (2.) If an act is ultra vires the articles but intra vires the memorandum of the company, the company can alter its articles in the proper way to ratify the act. (3.) If an act is within the powers of the company, but is irregularly done, then the consent of all the shareholders can validate it. (4.) If a company takes an 'ultra vires' loan and uses it to discharge 'intro vires' debts, then the lender on the ultra vires contract is substituted in the position of first creditor and can recover the money. He is entitled to rank as creditor to the extent to which the money has been so applied. (5.) The lender of money to a company under an ultra vires contract has a right to make the directors personally liable on the ground of implied warranty of authority, if their act amounts to an implied misrepresentation of fact. (6.) If a director of a company makes payment ultra vires the company, he can be compelled to refund it to the company, although he has a right to be indemnified by the persons receiving the money, knowing it to be ultra vires.
DOCTRINE OF CONSTRUCTIVE NOTICE	
MEANING	When the memorandum and articles of association of a company are registered, they become public documents and are open to inspection by anyone on payment of nominal fee. Hence, every person dealing with the company is under an obligation to know the contents of these documents.
CASE LAW	In <u>Kotla Venkata Swamy v. Ramamurthy</u>, the articles required that all deeds etc. should be signed by the managing director and the secretary but the plaintiff accepted the deed not signed by the managing director. It was held that the plaintiff could not claim under this deed and thus every person dealing with the company is deemed to

	have notice of the contents of its memorandum and articles and also to have understood them according to their proper meaning.
DOCTRINE OF INDOOR MANAGEMENT	
MEANING	While persons dealing with a company are presumed to have read the public documents and understood their contents and ascertain that the transaction is not inconsistent therewith, they are entitled to assume that the provisions of the articles have been observed by the officers of the company. It is no part of the duty of an outsider to see how the company carries out its own internal proceedings or indoor management. He can assume that all is being done regularly. The doctrine of indoor management, thus, imposes an important restrictions on the scope of doctrine of constructive notice. While the doctrine of “constructive notice” seeks to protect the company against the outsiders, the principle of indoor management operates to protect the outsiders against the company.
CASE LAW	In <u>Royal British Bank v. Turquand</u> , the directors of a banking company were authorized by the articles to borrow on bonds such sums of money as should from time to time, by resolution of the company in general meeting, be authorized to borrow. The directors gave a bond to Turquand without the authority of any such resolution. The shareholders claimed that there had been no such resolution authorizing the loan and therefore it was taken without their authority. Once it was found that the directors could borrow subject to a resolution, Turquand had the right to conclude that the necessary resolution must have been passed. It was held that Turquand could sue the company on the bond as he was entitled to assume that the necessary resolution has been passed.
EXCEPTIONS	The doctrine of indoor management is subject to the following exceptions or limitations :- 1. <u>Knowledge of Irregularity</u>: The rule does not protect any person who has actual or constructive notice of the want of authority of the person acting on behalf of the company. 2. <u>No Knowledge of Articles</u>: The rule cannot be invoked in favor of a person who did not in fact consult the company’s memorandum and articles and consequently did not act in reliance of those documents. 3. <u>Negligence or Unusual Transaction</u>: If an officer of the company acts in a manner, which could not ordinarily be within his powers, the person dealing with him must make proper enquiries and satisfy himself as to the officer’s authority. If he fails to make enquiry, he cannot rely on the rule. <u>[Anand Biharilal v. Dinshaw& Co.]</u> 4. <u>Forgery</u>: The rule does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. <u>[Ruben v. Great Fingall Consolidated Ltd.]</u> 5. <u>Illegal Transactions</u>: The rule does not apply to transactions which are illegal or void-ab-initio.

UNIT 5: CONTRACTS & CONVERSIONS

CONVERSION OF A PRIVATE COMPANY INTO A PUBLIC COMPANY	A private company can be converted into a public company by complying with following requirements : ➤ Alteration of its articles thereby deleting the three restrictions of a private company, by passing a Special Resolution as per Section 14; and ➤ Changing its name thereby deleting the word 'private' from its name, by passing a Special Resolution as per Section 13. Further, if the number of members is below 7, steps should be taken to increase the number of members to at least 7 and that the number of directors should be increased to at least 3, if they are only 2 directors. The company becomes public from the date the special resolution is passed u/s 14. But the change in its name, by deleting the word 'private' becomes effective only on the issue of fresh certificate of incorporation by the Registrar of Companies.
CONVERSION OF A PUBLIC COMPANY INTO A PRIVATE COMPANY (Rule 41 of Companies Incorporation Rules 2014) w.e.f. 18th December 2018	[1] An application under the second proviso to sub-section (1) of section 14 for the conversion of a public company into a private company, shall, within sixty days from the date of passing of special resolution, be filed with Regional Director in e-Form No. RD-1 along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 and shall be accompanied by the following documents, namely:- (a) a draft copy of Memorandum of Association and Articles of Association, with proposed alterations including the alterations pursuant to sub-section (68) of section 2; (b) a copy of the minutes of the general meeting at which the special resolution authorising such alteration was passed together with details of votes cast in favour and or against with names of dissenters; (c) a copy of Board resolution or Power of Attorney dated not earlier than thirty days, as the case may be, authorising to file application for such conversion; (d) declaration by a key managerial personnel that pursuant to the provisions of sub-section (68) of section 2, the company limits the number of its members to two hundred and also stating that no deposit has been accepted by the company in violation of the Act and rules made thereunder; (e) declaration by a key managerial personnel that there has been no non-compliance of sections 73 to 76A, 777, 178, 185, 186 and 188 of the Act and rules made thereunder; (f) declaration by a key managerial personnel that no resolution is pending to be filed in terms of sub-section (3) of section 779 and also stating that the company was never listed in any of the Regional Stock Exchanges and if was so listed, all necessary procedures were complied with in full for complete delisting of the shares in accordance with the applicable rules and regulations laid down by Securities Exchange Board of India: Provided that in case of such companies where no key managerial personnel is required to be appointed, the aforesaid declarations shall be filed any of the director. (2) Every application filed under sub-rule (1) shall set out the following particulars, namely:- (a) the date of the Board meeting at which the proposal for alteration of Memorandum and Articles was approved; (b) the date of the general meeting at which the proposed alteration was approved; (c) reason for conversion into a private company, effect of such conversion on shareholders, creditors, debenture holders, deposit holders and other related parties;

- (d) details of any conversion made within last five years and outcome thereof along with copy of order;
- (e) details as to whether the company is registered under section 8.
- (3) There shall be attached to the application, a list of creditors, debenture holders, drawn up to the latest practicable date preceding the date of filing of application by not more than thirty days, setting forth the following details, namely:-
- (a) the names and address of every creditor and debenture holder of the company;
- (b) the nature and respective amounts due to them in respect of debts, claims or liabilities;
- (c) in respect of any contingent or unascertained debt, the value, so far as can be justly estimated of such debt: Provided that the company shall file an affidavit, signed by the Company Secretary of the company, if any, and not less than two directors of the company, one of whom shall be managing director, where there is one, to the effect that they have made a full enquiry into affairs of the company and, having done so, have formed an opinion that the list of creditors and debenture holders is correct, and that the estimated value as given in the list of the debts or claims payable on contingency or not ascertained are proper estimates of the values of such debts and claims that there are no other debts, or claims against, the company to their knowledge.
- (4) A duly authenticated copy of the list of creditors and debenture holders shall be kept at the registered office of the company and any person desirous of inspecting the same may, at any time during the ordinary hours of business, inspect, and take extracts from the same on payment of ten rupees per page to the company.
- (5) The company shall, at least twenty-one days before the date of filing of the application
- (a) advertise in the Form No.INC.25A, in a vernacular newspaper in the principal vernacular language in the district and in English language in an English newspaper, widely circulated in the State in which the registered office of the company is situated;
- (b) serve, by registered post with acknowledgement due, individual notice on each debenture holder and creditor of the company; and
- (c) serve, by registered post with acknowledgement due, a notice to the Regional Director and Registrar and to the regulatory body, if the company is regulated under any law for the time being in force
- (6) (a) Where no objection has been received from any person in response to the advertisement or notice referred to in sub-rule (5) and the application is complete in all respects, the same may be put up for orders without hearing and the concerned Regional Director shall pass an order approving the application within thirty days from the date of receipt of the application.
- (b) Where the Regional Director on examining the application finds it necessary to call for further information or finds such application to be defective or incomplete in any respect, he shall within thirty days from the date of receipt of the application, give intimation of such information called for or defects or incompleteness, on the last intimated e-mail address of the person or the company, which has filed such application, directing the person or the company to furnish such information, to rectify defects or incompleteness and to re-submit such application within a period of fifteen days in e-Form No. RD-GNL-5: Provided that maximum of two re-submissions shall be allowed.
- (c) In cases where such further information called for has not been provided or the defects or incompleteness has not been rectified to the satisfaction of the Regional Director within the period allowed under sub- rule (6), the Regional Director shall reject the application with reasons within thirty days from the date of filing application or within thirty days from the date of last re-submission made. as the case may be.

	(d) Where no order for approval or re-submission or rejection has been explicitly made by the Regional Director within the stipulated period of thirty days, it shall be deemed that the application stands approved and an approval order shall be automatically issued to the applicant. (9) (i) Where an objection has been received or Regional Director on examining the application has specific objection under the provisions of Act, the same shall be recorded in writing and the Regional Director shall hold a hearing or hearings within a period thirty days as required and direct the company to file an affidavit to record the consensus reached at the hearing, upon executing which, the Regional Director shall pass an order either approving or rejecting the application along with reasons within thirty days from the date of hearing, failing which it shall be deemed that application has been approved and approval order shall be automatically issued to the applicant. (ii) In case where no consensus is received for conversion within sixty days of filing the application while hearing or otherwise, the Regional Director shall reject the application within stipulated period of sixty days: Provided that the conversion shall not be allowed if any inquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act (10) On completion of such inquiry inspection or investigation as a consequence of which no prosecution is envisaged or no prosecution is pending, conversion shall be allowed. (11) The order conveyed by the Regional Director shall be filed by the company with the Registrar in Form No. INC-28 within fifteen days from the date of receipt of approval along with fee as provided in the Companies (Registration Offices and Fees) Rules, 2014.
COMPULSORY CONVERSION OF OPC INTO A PUBLIC COMPANY OR A PRIVATE COMPANY	Where the paid up share capital of an One Person Company exceeds fifty lakh rupees or its average annual turnover during the relevant period exceeds two Crore rupees, it shall cease to be entitled to continue as a One Person Company. Here, 'relevant period' means the period of immediately preceding three consecutive financial years. Such One Person Company shall be required to convert itself, within six months of the date on which its paid up share capital is increased beyond fifty lakh rupees of the last day of the relevant period during which its average annual turnover exceeds two Crore rupees as the case may be, into either a private company with minimum of two members and two directors or a public company with at least of seven members and three directors in accordance with the provisions of section 18 of the Act. The One Person Company shall alter its memorandum and articles by passing a resolution in accordance with sub-section (3) of section 122 of the Act to give effect to the conversion and to make necessary changes incidental thereto. The One Person Company shall within period of sixty days from the date of ceasing to be an OPC, give a notice to the Registrar in Form No. INC.5 informing that it has ceased to be a One Person Company and that it is now required to convert itself into a private company or a public company by virtue of its paid up share capital or average annual turnover, having exceeded the threshold limit laid down above. If One Person Company or any officer of the One Person Company contravenes the provisions of these rules, One Person Company or any officer of the One Person Company shall be punishable with fine which may extend to ten thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.
VOLUNTARY	A One Person Company can get itself converted into a Private or Public company

CONVERSION OF OPC INTO A PUBLIC COMPANY OR A PRIVATE COMPANY	after increasing the minimum number of members and directors to two or minimum of seven members and two or three directors as the case may be. It may be noted that an OPC can voluntarily convert itself into a Private or Public company only after the expiry of two years from the date of incorporation of OPC.
CONVERSION OF PRIVATE COMPANY INTO ONE PERSON COMPANY (OPC) (June 2016)	A private company other than a company registered under section 8 (non-profit company) of the Act having paid up share capital of fifty lakhs rupees or less and average annual turnover during the relevant period is two crore rupees or less may convert itself into one person company by passing a special resolution in the general meeting. Before passing such resolution, the company shall obtain No objection in writing from members and creditors. The one person company shall file copy of the special resolution with the Registrar of Companies within thirty days from the date of passing such resolution in Form No. MGT.14. The company shall file an application in Form No. INC.6 for its conversion into One Person Company along with fees as provided in the Companies (Registration offices and fees) Rules, 2014, by attaching the following documents, namely :- - The directors of the company shall give a declaration by way of affidavit duly sworn in confirming that all members and creditors of the company have given their consent for conversion, the paid up share capital company is fifty Lakhs rupees or less or average annual turnover is two Crores rupees or less, as the case may be; - The list of members and list of creditors; - The latest Audited Balance Sheet and the Profit and Loss Account; and - The copy of No Objection letter of secured creditors. On being satisfied and complied with requirements stated herein the Registrar shall issue the Revised Certificate of Incorporation, mentioning that now it has become a One Person Company.
CONVERSION OF SECTION 8 COMPANY INTO ANY OTHER TYPE OF COMPANY	Rule 21 and 22 of Companies (Incorporation) Rules 2014: • Special Resolution: A company registered under section 8 which intends to convert itself into a company of any other kind shall pass a special resolution at a general meeting for approving such conversion. A certified true copy of the special resolution along with a copy of the Notice convening the meeting including the explanatory statement shall be filed with the Registrar in Form No.MGT.14 along with the fee. • Application to Regional Director The company shall file an application in Form No.INC-8 with the Regional Director with the fee along with a certified true copy of the special resolution and a copy of the Notice convening the meeting including the explanatory statement for approval for converting itself into a company of any other kind and the company shall also attach the proof of serving of the notice served to all the authorities prescribed. In this regard Rule 22(b) states that the company shall send a copy of the notice, simultaneously with its publication, together with a copy of the application and all attachments by registered post or hand delivery, to the Chief Commissioner of Income Tax having jurisdiction over the company, Income Tax Officer who has jurisdiction over the company, the Charity Commissioner, the Chief Secretary of the State in which the registered office of the company is situated, any organisation or Department of the Central Government or State Government or other authority under whose jurisdiction the company has been operating and if any of these authorities wish to make any representation to Regional Director, it

shall do so within sixty days of the receipt of the notice, after giving an opportunity to the Company.

- **A copy to be filed with the Registrar**

A copy of the application with annexures as filed with the Regional Director shall also be filed with the Registrar.

- **Publication of notice**

The company shall, within a week from the date of submitting the application to the Regional Director, publish a notice at its own expense, and a copy of the notice, as published, shall be sent forthwith to the Regional Director and the said notice shall be in Form No. INC-9 and shall be published-

(a) at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district; and

(b) on the website of the company, if any, and as may be notified or directed by the Central Government.

The copy of proof of serving such notice shall be attached to the application.

- **No objection certificate from relevant authorities, in case of special status**

Where the company has obtained any special status, privilege, exemption, benefit or grant(s) from any authority such as Income Tax Department, Charity Commissioner or any organisation or Department of Central Government, State Government, Municipal Body or any recognized authority, a "No Objection Certificate" must be obtained, if required under the terms of the said special status, privilege, exemption, benefit or grant(s) from the concerned authority and filed with the Regional Director, along with the application.

- **No failure in filing financial statements/Annual Return**

The company should have filed all its financial statements and Annual Returns upto the financial year preceding the submission of the application to the Regional Director and all other returns required to be filed under the Act up to the date of submitting the application to the Regional Director and in the event the application is made after the expiry of three months from the date of preceding financial year to which the financial statement has been filed, a statement of the financial position duly certified by chartered accountant made up to a date not preceding thirty days of filing the application shall be attached.

- **On receipt of Approval of Regional Director**

(i) the company shall convene a general meeting of its members to pass a special resolution for amending its memorandum of association and articles of association as required under the Act consequent to the conversion of the section 8 company into a company of any other kind;

(ii) the Company shall thereafter file with the Registrar.-

(a) a certified copy of the approval of the Regional Director within thirty days from the date of receipt of the order in Form No.INC-20 along with the fee;

(b) Amended memorandum of association and articles of association of the company.

(c) a declaration by the directors that the conditions, if any imposed by the Regional Director have been fully complied with.

On receipt of the documents referred above, the Registrar shall register the documents and issue the fresh Certificate of Incorporation.

UNIT 6: MEMBERSHIP

DEFINITION OF MEMBER	According to Section 2(55) of the Companies Act, 2013 : “(1.) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on registration, shall be entered as members in its register of members. (2.) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members shall, be a member of the company. (3.) Every person holding shares of a company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be member of the concerned company.” Accordingly in Case (2), there are two important elements, which must be present before a person can acquire membership of a company, viz., (i) Written agreement to become a member; and (ii) Entry of the name of the person agreeing, in the register of members.
MODES ACQUIRING MEMBERSHIP	As per Sec. 2 (55) of the Companies Act, a person may acquire the membership of a company :- (a) By subscribing to the memorandum of association (deemed agreement); (b) By agreeing to become a member :- (i) By making an application to the company for allotment of shares; or (ii) By executing an instrument of transfer of shares as transferee; or (iii) By consenting to transfer of shares of a deceased member in his name; or (iv) By acquiescence or estoppel, And on his name being entered in the register of members of the company. (c) By holding shares in the electronic mode and on his name being entered as beneficial owner in the records of the depository. (1) BY SUBSCRIBING TO THE MEMORANDUM: In the case of a subscriber, no application or allotment is necessary to become a member. By virtue of his subscribing to the memorandum, he is deemed to have agreed to become a member, and he became ipso facto member on the incorporation of the company and is liable for the shares he has subscribed. A subscriber to the memorandum cannot rescind the contract for the purchase of shares; even on the ground of fraud by the promoters [Metal Constituents Company Case]. (2) BY AN APPLICATION AND ALLOTMENT: A person who applies for shares becomes a member when shares are allotted to him, a notice of allotment is issued to him and his name is entered in the register of members. (3) BY TRANSFER OF SHARES: A person can become a member by acquiring shares from an existing member and by having the transfer of shares registered in the books of the company, i.e. by getting his name entered in the register of members of the company. (4) BY TRANSMISSION OF SHARES: A person may become a member of a company by operation of law, i.e. if he succeeds to the estate of a deceased member. On the death of a member, his executor or the person who is entitled under the law to succeed to his estate, gets the rights to have the shares transmitted and registered in his name in the company's register of members. (5) BY ACQUIESCENCE (ACCEPT WITHOUT PROTEST) OR ESTOPPEL: A person is deemed to be a member of a company if he allows his name, without sufficient cause, to be on the register of members of the company or otherwise holds himself out or allows himself to be held out as a member. In such a case, he is estopped from denying his membership. (6) BY HOLDING SHARE AS BENEFICIAL OWNER IN THE RECORDS OF A DEPOSITORY: A person holding share capital of a company whose name is entered in the records of the depository shall be deemed to a member of the concerned

	company.
WHO CAN BECOME A MEMBER	Subject to the memorandum and articles of a company, any sui juris (a person who is competent to contract) can become a member of a company. However, it is important to note the following points in relation to certain organizations and persons :- 1. COMPANY AS A MEMBER OF ANOTHER COMPANY: A company is a legal persona and so is competent to contract. Therefore, it can become a member of any other company. However, it must be authorized by its memorandum of association to invest in the shares of that company or any other company. It may be noted that Section 19 provides that a subsidiary company cannot become a member of its holding company. However, there are certain exceptions to this rule enumerated below :- (i) Where a subsidiary company acts as the legal representative of a deceased member of the holding company; (ii) Where the subsidiary company acts as a trustee for some shareholder of the holding company; and (iii) A subsidiary company can continue to be a member of its holding co., if it was its member before becoming subsidiary. But in this case, the subsidiary co. cannot exercise any right of vote at any meeting of the holding company. Further this section also prohibits holding company to allot or transfer its shares to any of its subsidiary companies. Any such allotment or transfer of shares of a company shall be void. 2. PARTNERSHIP FIRM AS A MEMBER: A partnership firm is not a legal person and so much it cannot, in its own name, become member of a company. However, it can become a member of Section 8 company. 3. FOREIGNERS AS MEMBERS: A foreigner may take shares in an Indian company and become a member with the general or special permission of the RBI under the FEMA, 1999, but in the event of war with his country, he becomes an alien enemy and his power of voting and his right to receive notices are suspended. 4. MINOR AS MEMBER: A minor cannot become a member of a company since he is not competent to enter into a contract. Consequently, an agreement by a minor to take shares is <u>void ab – initio</u>. But the Company Law Board in <u>Miss Nandita Jain v. Bennett Coleman & Co. Ltd.</u> has held that a minor applying through his natural guardian for being registered as a member was entitled to be so registered, if the shares are fully paid – up. 5. PAWNEE: A Pawnee has no right to foreclosure since he never had the absolute ownership at law and his equitable title cannot exceed what is specifically granted by law. In this sense, a pledge differs from a mortgage. In view of the foregoing, a Pawnee cannot be treated as the holder of the shares pledged in his favor, and the pawner continues to be a member and can exercise the rights of a member. 6. RECEIVER: A receiver whose name is not entered in the register of members cannot exercise any of the membership rights attached to a share unless in a proceeding to which company is a party, an order is made therein. 7. BANKRUPT: A bankrupt may be a member of a company, as long as he is on the register of members. He is entitled to vote. 8. TRADE UNION: A trade union, registered under the Trade Union Act, can be registered as a member and can hold shares in the company in its own corporate name.
JOINT MEMBERS	If more than one person apply for shares in a company and shares are allotted to them, each one of such applicants becomes a member. Each of the joint holders of shares is a member of the company. However in the case of a private company,

	joint members are counted as one member for the purpose of Sec. 2(68)(ii) proviso. In the case of joint shareholders, usually rights are exercised by the first named joint holder but duties are cast on all the joint holders. For instance, dividend and notices of general meetings are sent to first named joint holder. All the joint holders have, however, right to attend and participate at the annual and other general meeting but only one of them can vote. In the case of joint holders, the vote of the senior who tenders a vote, shall be accepted to the exclusion of the votes of the other joint holders. For this purpose, seniority shall be determined by the order in which the names stand in the Register of Members. No transfer of shares shall be registered by the company unless the instrument of transfer is executed by all the joint shareholders as transferors of the shares. Joint members are liable jointly and severally to pay calls on the shares held by them. Proxy form to be valid must be signed by all the joint shareholders.
CESSATION OF MEMBERSHIP	A person ceases to be a member of a company when his name is removed from its register of members, which may occur in any of the following situations :- - He transfers his shares to another person; - His shares are forfeited; - He makes a valid surrender of his shares; - His shares are sold by the company to enforce a lien; - He dies or is adjudged insolvent; - His redeemable preference shares are redeemed; - His shares are bought-back; - His shares are attached by the Court in satisfaction of a decree.
EXPULSION OF A MEMBER	The articles of association of a company cannot provide for expulsion of a member, as such a power is opposed to the fundamental principle of the Company Jurisprudence and, therefore, ultra vires the company. Such a provision is repugnant to the various provisions of the Companies Act pertaining to the rights of members. The articles of association are a contract between the company and its members setting out the rights of members inter-se under the contract and expulsion of a member is not only the violation of this contract but it also opposed to the principle of natural justice. The Department of Company Affairs has, therefore, clarified that any assumption of the powers by the Board of Directors to expel a member by alteration of articles of association shall be illegal and void.
RIGHTS OF MEMBER	When once a person becomes a members, he is entitled to exercise all the rights of a member until he ceases to be a member in accordance of the provisions of the Act. The rights of members are :- - Not to have his financial obligation increased by the company without his consent. - To transfer his shares. - To have a share certificate issued to him in respect of his shares. - To vote on resolutions at meetings of the company. - To inspect various registers of the company. - To requisition an extraordinary general meeting of the company. - To receive notice of general meetings and to attend and speak at general meetings. - To appoint proxy and inspect proxy registers. - To demand for poll. - To appoint the representative to attend and vote at general meetings of the company on its behalf, if the member is a body corporate. - To require the company to circulate his resolution. - To enjoy the profits of the company in the shape of dividend. - To elect directors and thus to participate in the management through them. - To apply to the NCLT for relief in case of oppression of the minority shareholders.

		(15.) To apply to the NCLT for winding up of the company. (16.) To share in the surplus on winding up. So long as a persons' name is standing registered in the books as member, even if he has sold the shares and has given the share certificates and the blank transfer deed duly signed, he alone is entitled to exercise the rights of membership. [LIC v. Escorts Ltd. & Others]
LIABILITY MEMBERS	OF	In the case of a company limited by shares, the liability of its members limited to the amount, if any, unpaid on the shares respectively held by them. If his shares are fully paid – up, he has nothing more to pay. In the case of a company limited by guarantee, the liability of its members limited to such an amount as the members may respectively thereby undertake, by the memorandum of association of the company, to contribute to the assets of the company. A special feature of this type of company is that the liability of members to pay their guaranteed amounts arises only when the company has gone into liquidation and not when it is a going concern. If a guarantee company has share capital, the shareholders have two-fold liability; to pay the amount which remains unpaid on their share whenever called upon to pay, and secondly, to pay the amount payable under the guarantee when the company goes into liquidation. In the case of an unlimited company, there is no limit on the liability of its members. Thus, the maximum liability of the members of such a company could extend to their entire personal property to meet the debts and obligations of the company.
'MEMBER' 'SHAREHOLDER'	AND	A member is a person whose name appears on the Register of Members of the company. Whereas the shareholder is a person who holds the shares of the Company. Ordinarily, these terms are used inter – changeably but in certain circumstances, a shareholder need not necessarily be a member and a member need not necessarily be a shareholder of the company. For instance, in the case of transfer of shares, the transferee even though holding shares of the company does not become a member until the transfer is registered by the Company. Similarly, in the case of companies limited by guarantee or unlimited companies, a member need not be a shareholder because such companies may not have a share capital.

UNIT 7: CONCEPT OF CAPITAL & FINANCING OF COMPANIES

KINDS OF SHARES	(a) Equity Share Capital: A company can issue two kinds of Equity Share Capital: - Equity Share Capital with Voting Rights; - Equity Share Capital with differential rights as to Dividend, Voting or otherwise; (b) Preference Share Capital;
EQUITY SHARE CAPITAL	Equity Share Capital with reference to any company limited by shares, means all Share Capital which is not preference share capital. The difference in the Voting Rights can be achieved by reducing the degree of Voting Power. it is ideal for long term investors, typically small investors who seek higher dividend and are not necessarily interested in taking a voting position. <u>CHARACTERISTICS:</u> - Equity Shares carry Voting Rights at the general meetings of the company and have the right to control the management of the company; - Equity Shares carry right to share in the profits of the company in the form of distribution of dividend and bonus shares; - In the event of winding up of the company, Equity share capital is repayable only after repayment of the claims of the creditors and preference share capital. - Equity Shareholders enjoy various rights as member, which includes, inter alia, the following rights: - Right of pre-emption in the matter of fresh issue of Capital; (Right Shares) - Right to apply to the Tribunal to have variation of their rights set aside; - Right to receive a copy of statutory report; - Right to apply to Central Government to call an AGM when the company fails to call such a meeting; - Right to apply to NCLT for calling a EGM of the company; - Right to receive copies of Annual Accounts along with Auditor's Report;
EQUITY SHARES WITH DIFFERENTIAL VOTING RIGHTS (Section 43)	Section 43 of the Companies Act 2013 & Rule 4 of Companies (Share capital and Debentures) Rules, 2014 No Company Whether Unlisted or Listed public company shall issue equity shares with differential rights as to Dividend, Voting or Otherwise, unless it complies with the following conditions: <u>Authorization in the Articles of Association (AOA):</u> the AOA of the company authorizes the issue of shares with differential rights. <u>Shareholder's Approval:</u> the issue of shares is authorized by an ordinary resolution passed at a general meeting of the shareholders. <u>Maximum Limit:</u> The shares with differential rights shall not exceed 26% of the total post issued paid up share capital including the equity shares with differential rights issued at any point of time. <u>Distributable Profits:</u> The company having consistent track record of distributable profits for the last 3 years. <u>No Default in Statutory Filing:</u> The company has not defaulted in filing financial statements and annual returns for 3 financial years immediately preceding the financial year in which it is decided to issue such shares. <u>No Default in the payment of dividend, F or Debentures:</u> The company has no subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend.

	(g) No Penalty: The company has not been penalized by Court or NCLT during the last 3 years of any offence under the RBI Act, SEBI Act, SCRA, FEMA, or any other Special Act.
PREFERENCE SHARE CAPITAL	Preference Share Capital means a Share Capital which has preferences over equity shares in respect of Dividend and Repayment of Capital at the time of Liquidation.
ISSUE & REDEMPTION OF PREFERENCE SHARES (Section 55)	A company limited by shares may issue redeemable preference shares subject to the provisions in the AOA, for a period not exceeding 20 years from the date of its issue. (Section 55) Conditions for the Issue of Preference Shares: A company may issue preference shares subject to the fulfillment of the following conditions: (a) The preference shares may be issued only after passing a Special Resolution; (b) No default made in respect of redemption of preference shares or payment of dividend; Special note: In case a company engaged in the setting up and dealing with infrastructural projects may issue preference shares for a period exceeding 20 years but not exceeding 30 years, subject to the redemption of a minimum 10% of such preference shares per year from the 21st Year onwards or earlier; on proportionate basis, at the option of the preference shareholders. Timeline for Redemption of Preference Shares: A company may redeem its preference shares only on the terms on which they were issued and the preference shares may be redeemed: (a) at a fixed time or on the happening of a particular event; (b) any time at the company's option; (c) any time at the shareholder's option; The Explanatory statement to the special resolution must contain the following information: (a) The Size of the issue and number of preference shares to be issued and nominal value of each share; (b) The nature of such shares i.e. Cumulative or Non-Cumulative, Convertible or Non-Convertible, etc. (c) The objectives of the issue, the manner of issue; (d) The price at which such shares are proposed to be issued; (e) The basis on which the price has been arrived at; (f) The terms of issue, including terms and rate of dividend on each share, etc.; (g) The terms of redemption, including the tenure of redemption, redemption of shares at premium and if the preference shares are convertible, terms of conversion; (h) The manner and modes of redemption; (i) The current shareholding pattern of the company; (j) The expected dilution in equity share capital upon conversion of preference shares; CONDITIONS FOR REDEMPTION: (i) Redemption out of profits or issue proceeds: A company can redeem preference shares in the following two ways: (a) redemption of preference shares out of profits which is available for dividend; (b) Redemption of preference shares out of the proceeds of a fresh issue of shares made for the purpose of such redemption; It is to be noted that A company can only redeem those preference shares which are fully paid up. (ii) Creation of Capital Redemption Reserve: A company which has issued redeemable preference shares, shall transfer a sum equal to nominal amount of the shares to be redeemed, to a Capital Redemption Reserve Account. The Capital Redemption Reserve amount may be applied by the company, in paying

	up unissued shares of the company to be issued to members of the company as fully paid bonus shares. <u>INABILITY TO REDEEM:</u> In case, a company is not in a position to redeem any preference shares or to pay dividend on such shares as per the terms of issue. Under such circumstances, a company may with the consent of 3/4th preference shareholders in value subject to the approval of the NCLT, issue further redeemable preference shares equal to the amount due including the dividend thereon, in respect of unredeemed preference shares, and on the issue of such further redeemable preference shares, the unredeemed preference shares shall be deemed to have been redeemed.
ISSUE OF SWEAT EQUITY SHARES (Section 54)	Sweat Equity Shares means such Equity Shares as are issued by a company to its Directors or Employees at a Discount or for consideration, other than cash, for providing their Know How or making available rights in the nature of intellectual property rights or value additions, by whatever name called. [Section 2(88)] Who shall be eligible for Sweat Equity Shares? Employee means: (a) Permanent employees: A permanent employee of the company who has been working in India or outside India, for at least the last 1 year; or (b) Directors: A director of the company whether a Whole time director or not; (c) Employees of Holding or Subsidiary Companies: An employee or a director of a subsidiary or holding company whether in India or outside India; <u>CONDITIONS FOR ISSUING SWEAT EQUITY SHARES: (SECTION 54)</u> (a) The issue of sweat equity shares must be authorized by a Special resolution. (b) The SR carries the details like number of shares, current market price, consideration, and the class of directors or employees to whom sweat equity shares are to be issued; (c) The Sweat Equity Shares must be issued at least 1 year after the date of commencement of the business. (Now, Deleted) (d) In case of listed Company, the Sweat Equity shares are issued in accordance with the regulations made by SEBI and in case of unlisted company, the sweat equity shares are issued in accordance with the companies act and its rules. (e) The holders of such shares shall rank Pari Passu with other equity shareholders. <u>CONDITIONS AS PER RULE 8 OF COMPANIES (SHARE CAPITAL AND DEBENTURE) RULES, 2014:</u> (a) <u>Special Resolution:</u> Issue of Sweat Equity shares to be authorized by Special Resolution at a General meeting. <u>Explanatory Statement to the Special resolution:</u> The Explanatory Statement to be annexed to the Notice of General meeting shall contain the following details: a) Date of Board Meeting wherein Sweat Equity Shares proposal was approved. b) Reasons/ Justification for the issue of Sweat Equity Shares. c) Total numbers of shares to be issued as sweat equity including the class of shares are intended to be issued. d) Class of directors or employees to whom such equity shares are to be issued. e) Principal Terms and Conditions on which sweat equity shares are to be issued. f) Time period of association of Directors or employees with the company; g) The price at which Sweat equity shares are proposed to be issued; h) The consideration including consideration other than cash. i) Ceiling on Managerial remuneration, if any. j) A statement to the effect that the company shall conform to the applicable

	Accounting Standards, and diluted EPS pursuant to the issue of sweat equity shares calculated in accordance with the applicable accounting standards. (b) Validity: The Special Resolution shall be valid only for 12 months for allotment of sweat equity shares. (c) Maximum Limit: A company cannot issue sweat equity shares not more than 15% of the existing paid up equity share capital in a year or shares of the issue value of ₹ 5 Crores, whichever is higher and 25% of paid up share capital of the company at any time. (d) Valuation: The sweat equity shares to be issued shall be valued at a price determined by a registered valuer, if the shares to be issued for intellectual property rights. A copy of the valuation report obtained in both the above cases shall be sent to the shareholders along with the notice of the general meeting. (e) Register of Sweat Equity Shares: The company shall maintain a register of sweat equity shares in form SH 3. (f) Lock in Period: Sweat Equity Shares shall be non-transferable for 3 years from the date of allotment. ADDITIONAL REQUIREMENTS FOR SWEAT EQUITY SHARES: Part of Managerial Remuneration: The amount of Sweat Equity Shares issued shall be treated as part of managerial remuneration subject to the fulfillment of the following conditions: (a) The Sweat Equity Shares are issued to the Director or Manager; and (b) They are issued for consideration other than cash. Disclosure in Director's Report: The Board of Directors shall disclose the following details in Director's Report with regard to sweat equity shares: a) Class of director/ employee to whom Sweat Equity Shares were issued; b) Class of Shares issued as Sweat Equity Shares; c) The number of Sweat Equity Shares issued to directors, KMP or other employees showing separately the number of such shares issued to them, if any, for consideration other than cash and the individual names of allottees holding 1% or more of issued share capital; d) The reasons/Justification for the issue; e) Total number of shares arising as a result of issue of sweat equity shares; f) Percentage of sweat equity shares of total post issued and paid up share capital; g) Consideration including consideration other than cash received; h) Diluted Earnings per share pursuant to issuance of Sweat Equity Shares;
ISSUE OF SHARES AT A PREMIUM (Section 52)	Premium means an amount collected by the company from its shareholders over the face value of securities. Company may issue securities at a premium when it is able to sell them at a price above par or above nominal value. The companies act, 2013 does not impose any conditions regulating the issues of securities by a company at a premium. A company can receive an amount as premium and will be kept in the Securities premium account. The Securities premium account may be applied by the company for the following purposes: a) Towards the issue of fully paid bonus shares; b) in writing off the preliminary expenses of the company; c) in writing off the expenses of, or the commission paid or discount allowed on any issue of shares or debentures of the company; d) in providing for premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or e) for buy back of its own shares or securities;
ISSUE OF	When a company issues its shares at a price less than the face value of shares is

SHARES AT A DISCOUNT (Section 53)	known as “Shares issued at a Discount”. As per the provisions of Section 53, no company can issue shares at a <u>Discount</u> except issue of Sweat Equity Shares. <i>*Notwithstanding anything contained in sub-sections (1) and (2), a company may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949</i> *Inserted by Companies Amendment Act, 2017 Penalties & Punishment: Where any company fails to comply with the provisions of this section, such company and every officer who is in default shall be liable to a penalty which may extend to an amount equal to the amount raised through the issue of shares at a discount or five lakh rupees, whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of twelve per cent. per annum from the date of issue of such shares to the persons to whom such shares have been issued; (Substituted by Companies Amendment Ordinance 2018 w.e.f. 2nd November 2018)
FURTHER ISSUE OF SHARES (Section 62)	A right issue is an offer of a company to its existing shareholders for purchase of additional shares. When the directors feel the requirement of additional funds for expansion or diversification or for any other reason, they may issue further shares. Eligibility for exercising Rights Issue Option: A company having a share capital proposes to increase its subscribed capital by the issue of further shares, shall offer all times to the following persons : (a) Existing Shareholders (with the approval of Board of Directors): The persons who, at the date of the offer, are holders of equity shares of the company in proportion to the paid-up share capital. The offer shall be made by notice specifying the number of shares offered. The offer shall be open not less than 15 days before and not exceeding 30 days from the date of the offer. If the offer is not accepted within the period it shall be deemed to have been declined. After expiry of the offer or on receipt of decline of offer, the Board of Directors may dispose of such offered shares in any manner which is not disadvantageous to the shareholders and the company. The notice of offer shall be sent either by registered post or speed post or by electronic mode to all the existing shareholders at least 3 days before the opening of the issue. (b) Employees covered under ESOP (with the approval of shareholders via Special Resolution): The Company may issue further shares to the Employees of the company covered under a scheme of employee’s stock option. (c) Any other persons: The Company may also issue further shares to any other person other than existing members or Employee covered under ESOP. Shares issued other than Existing Shareholders: A company can issue further shares to persons other than existing shareholders either for cash or for a consideration other than cash provided : (a) The company passes a special resolution in this regard; and (b) The price of such shares is determined by a registered valuer. The provisions regarding issue of further shares do not apply to: (a) Increase of the subscribed capital: Increase of the subscribed capital of a company caused due to conversion of convertible debentures issued or Convertible Preference shares into shares. (b) Conversion of Govt. Loans: Conversion of part or whole of the debentures issued to or loans obtained from any Government in shares of the company in pursuance of a direction issued by that Government in public interest on such terms and conditions as appear to be fair and reasonable to the Government even if the terms of issue of such debentures or loans do not contain a term providing for an option for such

conversion.

Case Law : Nanalal Zaver v. Bombay Life Assurance Co. Ltd. (1950)

Facts: Section 81 (Corresponding to section 62 of the Companies Act, 2013) is intended to cover cases where the directors decide to increase the capital by issuing further shares within the authorized limit, because it is within that limit that the directors can decide to issue further shares, unless, of course, they are precluded from doing that by the Articles of Association of the company.

Judgment: In this case, it was held that this section (62 of the Companies Act, 2013) becomes applicable only when the directors decide to increase the capital within the limit of authorized capital, by issue of further shares.

Case Law : Mathalone (R) v. Bombay Life Assurance Co. Ltd. (1954)

Judgment: In this case, the Court held that the transferor could not be compelled by the transferee to take up on his behalf the rights shares offered to the transferor and all that he could require the transfer to do was to renounce the rights issue in the transferee's favour.

PREFERENTIAL OFFER/ISSUE(Section 62 of the Companies Act, 2013 and Rule 13 of Companies (Share Capital and Debentures) Rules, 2014)

Preferential Offer means an issue of shares or other securities, by a company to any select person or group of persons on a preferential basis and does not include shares or other securities offered through a public issue, rights issue, employee stock option scheme, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities.

Shares or other securities mean equity shares, fully convertible debentures, partly convertible debentures or any other securities, which would be convertible into or exchanged with equity shares at a later date.

Conditions: In case of a **listed** company, the preferential offer of shares or other securities is made by a company in accordance with the provisions of the Companies Act, 2013 and SEBI regulations.

In case of **unlisted** company, the preferential offer shall be made in accordance with the provisions of the Companies Act, 2013 and its rules and subject to fulfillment of the following requirements :

- (a) The issue is authorized by its Articles;
- (b) The issue has been authorized by a special resolution of the members;
- (c) Securities allotted offer shall be made fully paid-up at the time of their allotment.

The following disclosures are required in the Explanatory Statement attached to the notice of the general meeting for preferential Offer :

- (a) The objects of the issue, the total number of shares or other securities to be issued;
- (b) The price or price band at/within which the allotment is proposed;
- (c) Basis on which the price has been arrived at along with report of the registered valuer;
- (d) Relevant date with reference to which the price has been arrived at;
- (e) The class or classes of persons to whom the allotment is proposed to be made;
- (f) Intention of promoters, directors or key managerial personnel to subscribe to the offer;
- (g) The proposed time within which the allotment shall be completed;
- (h) The names of the proposed allottees and the % of post preferential offer capital that may be held by them;
- (i) The change in control in the company that would occur consequent to the preferential offer;
- (j) The number of persons to whom allotment on preferential basis have already been

	made during the year, in terms of number of securities as well as price;’ (k) The justification for the allotment proposed to be made for consideration other than cash together with valuation report of the registered valuer; (l) Pre-issue and post-issue shareholding pattern of the company. <u>Completion Period:</u> The allotment of securities must be completed within 12 months from the date of passing of special resolution. In case a Company fails to allot securities within 12 months from the date of passing of the special resolution, another special resolution shall be passed for the company to complete such allotment thereafter. <u>Rights of Convertible Securities:</u> The applicability of above provisions shall not apply to the increase of the subscribed capital of a company caused by the exercise of an option as a term attached to the debentures issued or loan raised by the company to convert such debentures or loans into shares in the company. Note: The terms of issue of such debentures or loan containing such an option have been approved before the issue of such debentures or the raising of loan by a special resolution passed in general meeting.
BONUS SHARES (Section 63)	Bonus shares means shares issued by the company to its existing shareholders at free of cost. A Company may capitalize its profits by issuing fully-paid bonus shares provided the company has provisions in this regard. When a company is prosperous and accumulates large distributable profits, it converts these accumulated profits into capital and divides the capital among the existing members in proportion to their entitlements. <u>Advantages</u> (a) Fund flow is not affected adversely. (b) Market value of the Company’s shares comes down to their nominal value by issue of bonus shares. (c) Market value of the members’ shareholding increases with the increase in number of shares in the company. (d) Bonus shares are not an income. Hence it is not a taxable income. (e) Paid-up share capital increases with the issue of bonus shares. <u>Sources</u> A company may issue fully paid-up bonus shares to its members by utilizing the following sources : (a) Free reserves; (b) The securities premium account; or (c) The capital redemption reserve account. <u>Conditions:</u> No company shall capitalize its profits or reserves for the purpose of issuing fully paid-up bonus shares, unless – (a) It is authorized by its articles; (b) It has, on the recommendation of the Board, been authorized in the general meeting of the company; (c) It has not defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it; (d) It has not defaulted in respect of the payment of statutory dues of the employees, such as, contribution to provident fund, gratuity and bonus; (e) The partly paid-up shares, if any outstanding on the date of allotment, are made fully paid-up. (f) No bonus shares shall be issued by capitalizing reserves created by the revaluation of fixed assets.
BUY BACK OF SECURITIES (Section 67 & 68)	Buy Back of shares means purchase of its own shares by the company. In short, buy back is a process when a company makes an offer to buy back its own issued shares. Objectives of Buy Back: (a) To return the surplus cash to shareholders.

- (b) To increase the current Market price of the company.
- (c) To discourage unwelcome takeover bids of the company.
- (d) To increase promoter's Shareholding

Sections 67 & 68 of Companies Act & Rule 17 of Companies (Share Capital and Debentures) Rules, 2014:

A company limited by shares or guarantee having a share capital cannot buy its own shares and this restriction is applicable on all types of companies.

However, Section 68 allows a company to purchase its own shares or securities subject to certain conditions:

Methods for Buy Back: the buyback may be:

- (a) From the existing shareholders;

(The offer should be opened for a period not less than 15 days and not more than 30 days from the date of dispatch of letter of offer to the security holders. Where all member of company agree, the offer for buy back may remain open for a period of less than 15 days.)

- (b) From the Open Market;

- (c) by purchasing the securities from employees which have been issued under ESOP or Sweat Equity.

AUTHORISATION & APPROVALS:

(a) **Authorization in AOA:** Buy Back must be authorized by the articles of association of the company. In Case, there is no such provision, the company has to first alter the articles of association to authorize buy back. Buy Back can be made with the approval of Board of Directors or Shareholders by passing SR in GM, depending on the quantum of buy back.

(b) **Approval by Board of Directors:** The Board of Directors can buy back upto 10% of total paid up Equity Share Capital and Free Reserves of the company by passing Board Resolution.

(c) **Approval of Shareholders:** The shareholders can buy back upto 25% of the total paid up Equity Share Capital and Free Reserves of the company by passing SR in GM.

SOURCES OF BUY BACK:

A company may purchase its own shares or other specified securities out of:

- (a) its free reserves; or
- (b) the securities premium account; or
- (c) the proceeds of any shares of other specified securities

CONDITIONS FOR BUY BACK:

(a) **Power in AOA:** The buyback shall be **authorized by AOA**.

(b) **Approved:** The buyback either **approved** by BOD or Shareholders.

(c) **Debt Equity Ratio:** Debt Equity Ratio is **not more than twice** the capital and its free reserves after such buy back.

Debt to Capital and Free reserves Ratio shall be 6:1 for Government Companies which carry on Non-Banking Finance Institutions and Housing Finance Activities.

(d) No Shares or Securities can be bought back unless they are **fully paid up**.

(e) **Explanatory Statement:** The Notice of General Meeting shall be annexed with the Explanatory Statement and shall have the following details:

- (i) A full and complete disclosure of all material facts;
- (ii) The class of security intended to be purchased under the buy back;
- (iii) The necessity of Buy Back
- (iv) The amount to be invested under the buy back;
- (v) The time limit for completion of buy back;

(f) **Completion of Buy Back:** The buyback should be completed within 1 year of the date of passing Board Resolution or Special Resolution as the case may be;

	(g) Declaration of Solvency: When a company proposes to buy back its own securities, shall file with ROC and SEBI (if Listed) a declaration of Solvency signed by at least 2 directors, one of whom shall be MD, if any, in Form SH 9 before making buy back. (h) Extinguishment of Securities: After completion of buy back the securities must be extinguished and physically destroyed within 7 days of the last date of completion of buy back. (i) No further Issue: After the completion of buy back, the company shall not make a further issue of shares or other specified securities for a period of 6 months except by way of bonus shares or in discharge of subsisting obligations such as conversion of options, etc. (j) Buy Back Return: A company shall file a return of buy back in form SH 15 within 30 days from the date of completion of buy back. Such form must be signed by two directors, one of whom shall be MD, if any, certifying that the buyback of securities has been made in compliance with the provisions of companies act, 2013 and its rules. (k) Register of Buy Back: The company has to maintain a register of securities so bought, the consideration paid for the securities bought back, the date of cancellation of securities, the date of extinguishing and physically destroying of securities and such other particulars as may be prescribed. PROHIBITION OF BUY BACK IN CERTAIN CASES: A company cannot buy back shares or other specified securities, directly or indirectly; (a) through any subsidiary company including its own subsidiary; or (b) through investment or group of investment companies; or (c) when the company has defaulted in the repayment of deposit or interest thereon, redemption of debentures or preference shares or payment of dividend or repayment of any term loan or interest thereon to any financial institution or bank; (d) Company has defaulted in: (i) Filing of Annual Return & financial statements; (ii) Payment of dividend after declaration
EMPLOYEE STOCK OPTION (ESOP) (Section 2(37))	ESOPs means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officer or employees, the benefit or right to purchase or to subscribe for, the shares of the company at a future date at a pre-determined rate. Rule 12 of Companies (Share Capital and Debenture) Rules, 2014: Every company other than listed company is required to comply with the following requirements: The issue of ESOPs has been approved by the Shareholders of the company by passing a Special Resolution. Who are eligible for an ESOP Scheme? (a) A permanent employee of the company who has been working in India or Outside India; or (b) A director of the company, whether a whole time director or not but excluding Independent Director; or (c) An Employee of Subsidiary, in India or Outside India, or a Holding Company of the company or of an Associate Company; Who are not eligible for an ESOP Scheme? (a) Promoter Cum Employee: An Employee who is a Promoter or a person belonging to the Promoter Group; (b) Director cum Employee: A director who either himself or through his relatives or through anybody corporate, directly or indirectly, hold more than 10% of the outstanding equity shares of the company; Disclosures in Explanatory Statement of Notice for passing Special Resolution:

- (i) Total number of Stock options to be granted;
- (ii) Identification of classes of employees entitled to participate in ESOP;
- (iii) The Appraisal process for determining the eligibility of employees to ESOP;
- (iv) The requirements of vesting and period of vesting;
- (v) The maximum period within which the options shall be vested;
- (vi) The exercise price or formula used for arriving at the price;
- (vii) The exercise period and process of exercise;
- (viii) The Lock in period, if any;
- (ix) The maximum number of options to be granted per employee or in aggregate;
- (x) The conditions under which option vested in employees may lapse e.g. termination of employment for misconduct;

Varying the Terms of ESOP requires Special Resolution:

The company may by special resolution, vary the terms of ESOP not yet exercised by the employees provided such variation is not prejudicial to the interest of option holders.

The notice of passing special resolution for variation of terms of ESOP shall disclose full of the variation, rationale therefore, and the details of the employees who are beneficiary of such variation;

Minimum One year Vesting Period:

There shall be a minimum period of 1 year gap between the grant of options and vesting of option. In a case where options are granted by a company under its ESOP scheme in lieu of options held by same period under ESOP in another company, which has merged or amalgamated with the first mentioned company, the period during which the options granted by merging or amalgamating company were held by him shall be adjusted against the minimum vesting period required.

Company has freedom to specify the lock in period:

The Company shall have the freedom to specify the lock in period for the shares issued pursuant to exercise of option.

No Right of Dividend or Voting till exercise of option:

The employees shall not have right to receive any dividend or to vote in any manner enjoy the benefits of a shareholder in respect of option granted to them, till shares are issued on exercise of option.

Forfeiture/Refund:

The amount, if any, payable by the employees, at the time of grant of option:

- (a) May be forfeited by the company if the option is not exercised by the employees within the exercise period; or
- (b) the amount may be refunded to the employees if option are not vested due to non-fulfillment of conditions relating to vesting of option as per the ESOP scheme.

Status of ESOP in case of Death/Permanent Disablement/ Resignation of Employees:

(a) in the event of death of employee while in employment, all the option granted to him till such date vest in the legal heirs or nominees of the deceased employee.

(b) In case the employee suffers a permanent incapacity while in employment, all the options granted to him as on the date of permanent incapacitation, shall vest in him on that day.

(c) In the event of resignation or termination of employee, all options not vested in the employee as on that day shall expire.

Disclosure in the Board's Report:

The BOD shall disclose the details in the Director's report in a particular year of ESOP scheme i.e. option granted, options vested, option exercised, the total number of shares arising as a result of exercise of option, options lapsed, exercise price, variation in terms of option, money realised by exercise of options, total number of options in force, employee wise details of options granted.

SHARE CAPITAL (Section 61)	memorandum in its general meeting to: (a) Increase its authorized share capital by such amount as it thinks expedient; (b) Consolidate all or any of its share capital into shares of a larger amount than its existing shares; (c) Convert all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination; (d) Sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived; (e) Cancel Shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled. (2) The cancellation of shares under sub-section (1) shall not be deemed to be a reduction of share capital. No consolidation and division shall take place which changes the voting percentage of shareholders unless it is approved by the NCLT. Notice to Registrar (Section 64 of the Companies Act, 2013): After alteration of share capital, the company shall give a notice to ROC in Form No. SH 7 along with an altered memorandum within 30 days of such alteration. Where any company fails to comply with the provisions of sub-section (1), such company and every officer who is in default shall be liable to a penalty of one thousand rupees for each day during which such default continues, or five lakh rupees whichever is less; (Substituted by Companies Amendment Ordinance 2018) <u>Penalty & Prosecution:</u> Where the company and any officer of the company who is in default contravenes it or he shall be punishable with fine which may extend to ₹ 1,000/- for each day during which such default continues, or ₹ 5 Lacs, whichever is less. <u>When Share Capital Stands Automatically Increased?</u> The share capital of a company stands automatically increased by the order or direction of the Government for conversion of debentures issued or the loans obtained from the Government. Where the terms and conditions of such conversion are not acceptable to the company, it may file an appeal within 60 days from the date of communication, to NCLT.
REDUCTION OF SHARE CAPITAL	Reduction of capital means reduction of issued, subscribed and paid-up capital of the company by way of reduction of the liability of its shares in respect of share capital not paid-up or cancellation of paid-up share capital which is lost, or payment of any paid-up share capital which is in excess of the wants of the Company. A Company may by passing a special resolution subject to the approval of tribunal (NCLT), can reduce the share capital in following ways : (a) Extinguish or reduce the liability with regard to any shares which is not fully paid-up; or (b) Either with or without extinguishing or reducing liability on any of its shares : (i) Cancel any paid-up share capital which is lost or is unrepresented by available assets; or (ii) Pay off any paid-up share capital which is in excess of the wants of the company alter its memorandum by reducing the amount of its share capital and of its shares accordingly : <u>Procedure for Reduction of Share Capital:</u> (a) Pass a special resolution. (b) Apply to the tribunal (NCLT). (c) The tribunal shall give notice to CG, ROC and SEBI in case of listed companies, and the creditors of the company.

- (d) NCLT shall take into consideration the representations, if any, made by the Government, ROC, the SEBI and the creditors within 3 months from the date of receipt of the notice.
- (e) The NCLT may, if it is satisfied that the debt or claim of every creditor of the company has been discharged or determined or has been secured or his consent is obtained, make an order confirming the reduction of share capital on such terms and conditions as it deems fit.
- (f) The order of NCLT regarding the reduction of share capital shall be published by the company.
- (g) The company shall deliver a certified copy of the order of the NCLT and of a minute approved by the NCLT showing :
- The amount of share capital;
 - The number of shares into which it is to be divided;
 - The amount of each share; and Reduction of share capital;
 - The amount, if any, at the date of registration deemed to be paid-up on each share.

A certified true copy of order passed by NCLT shall be filed with ROC within 30 days from date of receipt NCLT order, who shall register the same and issue a certificate to that effect.

Where the name of any creditor entitled to object to the reduction of share capital is, by the reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his debt or claim, not entered on the list of creditors, and after such reduction, the company is unable to pay the amount of his debt or claim;

(a) Every person, who was a member of the company on the date of the registration of the order for reduction by the ROC, shall be liable to contribute to the payment of that debt or claim, an amount not exceeding the amount which he would have been liable to contribute if the company had commenced winding up on the day immediately before the said date; and

(b) If the company is wound up, the Tribunal may, on the application of any such creditor and proof of his ignorance as aforesaid, if it thinks fit, settle a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding up.

Penalty & Prosecution : If any officer of the company –

- Knowingly conceals the name of any creditor entitled to object to the reduction;
 - Knowingly misrepresents the nature or amount of the debt or claim of any creditor;
- or
- Abets or is privy to any such concealment or misrepresentation as aforesaid.

If a company fails to comply the above provisions, shall be punishable with fine not less than ₹ 5 Lakhs but not more than ₹ 25 Lakhs

UNIT 8: PRIVATE PLACEMENT & PROSPECTUS

PUBLIC OFFER (SECTION 23 OF THE COMPANIES ACT, 2013)	A public company may issue securities : (a) To public through prospectus; or (b) Through private placement; or (c) Through a rights issue or a bonus issue as per the provisions of the Companies Act, 2013 and in case of a listed company or a company which proposes for public issue also comply with the provisions of the SEBI Act, 1992 and its rules and regulations. A private company may issue securities : (a) By way of rights issue or bonus issue in accordance with the provisions of the Companies Act; or (b) Through private placement by complying. Note: Public offer includes initial public offer or further public offer of securities to the public by a company, or an offer for sale of securities to the public by an existing shareholder, through issue of a prospectus.
CONTENTS OF A PROSPECTUS	<u>DISCLOSURE TO BE MADE IN PROSPECTUS</u> (1) Every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed and shall state such information and set out such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government: Provided that until the Securities and Exchange Board specifies the information and reports on financial information under this sub-section, the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, in respect of such financial information or reports on financial information shall apply; Make a declaration about the compliance of the provisions of this Act and a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and the Securities and Exchange Board of India Act, 1992 (15 of 1992) and the rules and regulations made thereunder; (2) Nothing in sub-section (1) shall apply— (a) to the issue to existing members or debenture-holders of a company, of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant has a right to renounce the shares or not under sub-clause (ii) of clause (a) of sub-section (1) of section 62 in favour of any other person; or (b) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange. (3) Subject to sub-section (2), the provisions of sub-section (1) shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently. Explanation.—The date indicated in the prospectus shall be deemed to be the date of its publication. (4) No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless on or before the date of its publication, there has been delivered to the Registrar for registration, a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his duly authorised attorney. (5) A prospectus issued under sub-section (1) shall not include a statement

	purporting to be made by an expert unless the expert is a person who is not, and has not been, engaged or interested in the formation or promotion or management, of the company and has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for registration and a statement to that effect shall be included in the prospectus. (6) Every prospectus issued under sub-section (1) shall, on the face of it,— (a) state that a copy has been delivered for registration to the Registrar as required under sub-section (4); and (b) specify any documents required by this section to be attached to the copy so delivered or refer to statements included in the prospectus which specify these documents. (7) The Registrar shall not register a prospectus unless the requirements of this section with respect to its registration are complied with and the prospectus is accompanied by the consent in writing of all the persons named in the prospectus. (8) Filing with ROC: No prospectus shall be valid if it is issued more than ninety days after the date on which a copy thereof is delivered to the Registrar under sub-section (4). (9) Punishment in case of Contravention: If a prospectus is issued in contravention of the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees and every person who is knowingly a party to the issue of such prospectus shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both.
VARIATION IN TERMS OF CONTRACTS AS REFERRED IN THE PROSPECTUS	Section 27 of the Companies Act, 2013: A company shall vary the terms of a contract or objects as referred to in the prospectus for which the prospectus was issued, subject to the approval via Special Resolution passed by the shareholders. In this regard, notice shall be sent to shareholders and shall also be published in English and in vernacular language. Rule 7 of Companies (Prospectus and Allotment of Securities) Rules, 2014: When the company has raised money from public through prospectus and has any unutilized amount out of the money so raised, it shall not vary the terms of contracts referred to in the prospectus or objects for which the prospectus was issued except by passing a special resolution through postal ballot. (a) Notice of the proposed special resolution shall contain the original purpose or object of the Issue, the total money raised, the money utilized for the objects of the company stated in the prospectus, the extent of achievement of proposed objects (i. e. 50%, 70% etc.), the unutilized amount, the particulars of the proposed variation, the reason and justification for seeking variation, the proposed time limit, the risk factors pertaining to the new objects. (b) Publication in the Newspaper: The notice shall be sent to the shareholders and shall also be published in the two newspapers (one in English and one in vernacular language). (c) Publication on the website: The notice shall also be placed on the web-side of the company. EXIT OPTION TO THE DISSENTING SHAREHOLDERS: The dissenting shareholders (who have not agreed to the proposal to vary the terms of contracts), shall be given an exit offer by promoters or controlling shareholders at exit price as may be specified by the SEBI.

**PRIVATE
PLACEMENT**
[Section 42 & Rule
14 of Companies
(Prospectus and
Allotment of
Securities) Rules,
2014]

(Substituted by
Amendment Act,
2017)

1. **Private Placement** means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in section 42.
2. **Maximum number of persons to whom private placement can be offered:** Private Placement offer can be made to such number of persons not exceeding 50 or such higher number as may be prescribed (**Such higher number is 200 as prescribed in Rules**) *excluding* qualified institutional buyers (QIBs) and employees of the company being offered securities under a scheme of employee's stock option, in a financial year.

Private Placement Offer shall be made to not more than 200 persons in the aggregate in a financial year. Any offer or invitation made to qualified institutional buyers or to employees of the company under a scheme of employee's stock option shall not be considered while calculating the limit of 200 persons. (Sub Rule 2)

Explanation.- For the purposes of this sub-rule it is hereby clarified that the restrictions aforesaid would be reckoned individually for each kind of security that is equity share, preference share or debenture.

The provisions of sub-rule (2) shall not be applicable to -

 - (a) non-banking financial companies which are registered with the Reserve Bank of India under the Reserve Bank of India Act, 1934 and
 - (b) housing finance companies which are registered with the National Housing Bank under the National Housing Bank Act, 1987

if they are complying with regulations made by the Reserve Bank of India or the National Housing Bank in respect of offer or invitation to be issued on private placement basis:

Provided that such companies shall comply with sub-rule (2) in case the Reserve Bank of India or the National Housing Bank have not specified similar regulations.
3. **Minimum Investment Size:** The value of such offer or invitation per person shall be with an investment size of not less than ₹ 20,000/- of face value of the securities.
4. **Investment only through Bank Account:** Every identified person willing to subscribe to the private placement issue shall apply in the private placement and application issued to such person alongwith subscription money paid either by cheque or demand draft or other banking channel and not by cash;

Provided that a company shall not utilise monies raised through private placement unless allotment is made and the return of allotment is filed with the Registrar in accordance with sub-section (8)
5. **Joint Holders:** Monies payable on subscription to securities to be held by joint holders shall be paid from the bank account of the person whose name appears first in the application.
6. **Approvals:** The proposed offer of securities must have been previously approved by a special resolution of the shareholders of the company.
 - (a) **Explanatory Statement:** The explanatory statement to the notice in respect of special resolution for General Meeting must contain the following disclosures:
 - (i) particulars of the offer including date of passing of Board resolution;
 - (ii) kinds of securities offered and the price at which security is being offered;
 - (iii) basis or justification for the price (including premium, if any) at which the offer or invitation is being made;

(iv) name and address of valuer who performed valuation;

(v) amount which the company intends to raise by way of such securities;

(vi) material terms of raising such securities, proposed time schedule, purposes or objects of offer, contribution being made by the promoters or directors either as part of the offer or separately in furtherance of objects; principle terms of assets charged as securities:

(b) Validity of Special Resolution for Non-convertible debentures:

Provided further that this sub-rule shall not apply in case of offer or invitation for non-convertible debentures, where the proposed amount to be raised through such offer or invitation does not exceed the limit as specified in clause (c) of sub section (1) of section 180 and in such cases relevant Board resolution under clause (c) of subsection (3) of section 179 would be adequate:

Provided also that in case of offer or invitation for non-convertible debentures, it shall be sufficient if the company passes a previous special resolution only once in a year for all the offers or invitation for such debentures during the year.

7. **No Fresh Offer:** No fresh offer or invitation under this section shall be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company.

Provided that, subject to the maximum number of identified persons under sub-section (2), a company may, at any time, make more than one issue of securities to such class of identified persons as may be prescribed.

8. **Deemed Public Offer:**

If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of this Chapter. (Explanation III to Sub section 3)

Any offer or invitation not in compliance with the provisions of this Section shall be treated as a public offer, and All the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 and the SEBI Act, 1992 shall be required to be complied with. (Sub Section 11)

9. **Mode Of Payment:** All monies payable towards subscription of securities shall be paid through cheque or demand draft or other banking channels but not by cash.
10. **Time Limit For Allotment:** A company making an offer or invitation shall allot its securities within 60 days from the date of receipt of the application money for such securities.
11. **Refund Of Subscription Money:** If the company fails to allot the securities within 60 days, then it shall repay the application money to the subscribers within 15 days from the date of completion of 60 days and if the company would not be able to repay the application money within 15 days, then such company shall be liable to repay the subscription money along with interest @ 12% p.a. after the expiry of 60th day.
12. **Subscription Money To Be Kept In A Separate Bank Account:** The monies received as share application money shall be kept in a separate bank account in a **scheduled bank** and shall not be utilized for any purpose other than :
(a) For adjustment against allotment of securities; or

	(b) For the repayment of monies where the company is unable to allot securities. 13. Issue Of Private Placement Letter: A private placement offer letter shall be accompanied by an application form (PAS 4) serially numbered and addressed specifically to the person to whom the offer is made and shall be sent to him, either in writing or in electronic mode, within 30 days of recording the names of such persons. No person other than the person so addressed in the application form shall be allowed to apply through such application form and any application not conforming to this condition shall be treated as invalid. A company shall issue private placement offer cum application letter only after the relevant special resolution or Board resolution has been filed in the Registry: Provided that private companies shall file with the Registry copy of the Board resolution or special resolution with respect to approval under clause (c) of subsection (3) of section 179. 14. No Advertisement in Media: No company offering securities under this section shall release any public advertisements or utilize any media, marketing or distribution channels or agents to inform the public at large about such an offer. 15. Return Of Allotment: Whenever a company makes any allotment of securities, it shall file with the ROC a return of allotment within 15 days in PAS 3 along with the complete list of all security-holders, with their full names, addresses, number of securities allotted and such other relevant information, Class of Securities held, Date of Allotment, Number of Securities held, etc 16. Penalty for Contravention: If a company makes any default of the provisions of the Companies Act, 2013, the company, its promoters and directors shall be liable for a penalty which may extend to <u>the amount raised through the private placement or two crore rupees, whichever is lower</u>, and the company shall also refund all monies to subscribers within a period of 30 days of the order imposing the penalty.
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CLASSIFICATION OF PROSPECTUS

DEEMED PROSPECTUS (Section 25)	If a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus. In short, any document issued on behalf of the company for the purpose to sale securities to the public shall be treated as deemed prospectus. Such a document shall be treated as a prospectus (unless the contrary is proved) where : 1. An offer of all or any of the securities for sale to the public was made within 6 months after the allotment or agreement to allot; or 2. At the date when the offer for sale to the public was made, the company had not received the whole consideration in respect of the said shares or debentures. The following additional information is required to be given in the deemed prospectus : 1. The net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates; 2. The place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected. It is sufficient if the prospectus is signed on behalf of the company or firm by 2
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	directors of the company or by not less than $\frac{1}{2}$ of the partners in the firm, as the case may be, either themselves or by their agents authorized in writing.
ABRIDGED PROSPECTUS (Section 33)	“Abridged Prospects” means a memorandum containing such salient features of a prospectus as may be specified by the SEBI by making regulations in this behalf. In other words, abridged prospectus means a summarized version of a prospectus and contains all the salient features of a prospectus : Section 33 of the Companies Act, 2013: The form is application for purchase of any of the securities of a company shall be issued along with an abridged prospectus. It means no application form can be issued for shares or debentures unless accompanied by a memorandum containing salient features of the prospectus. In the following cases, abridged prospectus does not apply : (a) <u>Underwriting Agreement</u> : Where the offer is made in connection with the bona fide invitation to a person to enter into an underwriting agreement with respect to such securities; (b) <u>No offered to the Public</u>: Where the securities are not offered to the public; (c) <u>Rights Issue</u>: Where the offer is made only to the existing members or debenture holders of the company with or without a right to renounce; (d) <u>Uniform Shares</u>: Where the shares or debentures offered are in all respects uniform with shares or debentures already issued and quoted on a recognized stock exchange. Penalties: If a company makes any default, it shall be liable to a penalty of ₹ 50,000/- for each default.
SHELF PROSPECTUS (Section 31)	Shelf Prospectus means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus. In other words, shelf prospectus means a prospectus issued by any financial institution or bank for one or more issues of securities specified in the prospectus. The concept of shelf prospectus has been introduced to save expenditure and time of the companies in issuing a new prospectus every time. <u>CONDITIONS FOR SHELF PROSPECTUS</u> (a) <u>Eligibility for issue of Shelf Prospectus</u>: Any class of companies (i. e. Any public financial institution, public sector bank or scheduled bank whose main object is financing), as prescribed by the Securities and Exchange Board may file a shelf prospectus with the ROC at the stage of the first offer of securities. (b) <u>Validity Period</u>: The shelf prospectus shall not be valid for more than 1 year from the date of opening of the first offer of securities under the shelf prospectus. Further, in respect of a second or subsequent offer issued during the period of validity of shelf prospectus, no further prospectus is required. (c) <u>No requirement of filing fresh prospectus within 1 year</u>: A company filing a shelf prospectus with the Registrar shall not be required to file prospectus afresh at every stage of offer of securities by it within the validity period of 1 year from the date of opening of the 1st issue of securities. (d) <u>Changes in the Material Information</u>: A company filing a shelf prospectus shall be required to file an information memorandum in respect of any change in material facts i. e. Creation of new charges, changes in the financial position occurred between the first offer of securities of the previous offer of securities and the succeeding offer, with the ROC prior to second or subsequent issue. (e) <u>Refund of Money without filing Information Memorandum</u>: If a company has

	received application for the allotment of securities along with advance payments before filing the required changes with ROC. If the applicants express a desire to withdraw their application, the company shall refund subscription within 15 days from the date of his withdrawal application. (f) Filing with ROC: Any class or classes of companies as may be prescribed by the SEBI, shall file a shelf prospectus with ROC. Special Note: The information memorandum with ROC along with shelf prospectus shall be deemed to be a prospectus. The information memorandum shall be prepared in Form PAS – 2 and filed with ROC along with the fee within 1 month prior to the second or subsequent issue under the shelf prospectus.
RED – HERRING PROSPECTUS (Section 32)	Red Herring Prospectus (RHP) means a prospectus which does not include complete particulars of the quantum or price of the securities included therein. In other words, Red Herring Prospectus is a prospectus, which does not have details of either price or number of shares being offered, or the amount of issue. RHP is issued when company comes with a public issue under book building process. RHP contains either the floor price of securities offered or a price band along with the range within which the Bids can move. In the case of book-built issue which is also known as price discovery mechanism. In this method, the price cannot be determined until the bidding process is completed. Hence, such details are not to be shown in the Red Herring prospectus filed with ROC as per the Companies Act, 2013. Only on completion of the bidding process, the details of the final price are included in the offer document. The offer document filed thereafter with ROC is called a prospectus. Important Provisions : (a) Issue of RHP prior to Prospectus: A company proposing to issue of securities, issues a RHP prior to the issue of a prospectus. (b) Filing with ROC: A company proposing to issue a RHP shall file it with ROC at least 3 days prior to the opening of the offer. (c) Variation in the RHP: A RHP shall carry the same obligations as applicable to a prospectus. Any variation between the RHP and a prospectus shall be highlighted as variations in the prospectus. (d) Registration of RHP (Prospectus): Upon the closing of the offer of securities, the prospectus must state all the details which have not been covered in the RHP shall file with the ROC and SEBI.
THE GOLDEN RULE OR GOLDEN LEGACY	The Golden Rule or Golden Legacy is in respect of issue the prospectus. This Golden Rule was pronounced by Kindersley, V. C. in New Brunswick, etc., Co. v. Muggeridge, and has come to be known as the “Golden Legacy or Golden Rule”. The Golden Rule in respect of issue of prospectus is no concealment of material facts or no suppression of facts. In other words, the company must disclose all the real and correct details and information in the prospectus for proposed public issue. Case Law: <u>In re. R. V. Kysant (1932) K. B. 442</u> Facts: All statements in the prospectus were literally true but it failed to disclose that the dividends stated in it as paid, were not paid out of trading profits, but out of realized capital profits (secret reserves). The statement that the company had

	paid dividends for a number of years was true. But the company had incurred losses for all those years (1921 – 27) and no disclosure was made of this fact. Judgment: The prospectus was held to be false in material particulars and the managing director and chairman, who knew that it was false, were held guilty of fraud.
LIABILITY FOR UNTRUE STATEMENT (Section 35)	From the above discussion, it is now clear that a prospectus must contain true and complete information and details. In other words, nothing should be omitted and nothing must be untrue in a prospectus. For such untrue statement, every Director at the time of the issue of the prospectus, every promoter and every person, including an expert, who has authorized the issue of a prospectus, shall be liable for civil and criminal liabilities. <u>WHAT IS AN UNTRUE STATEMENT?</u> An untrue statement means a statement included in a prospectus shall be deemed to be untrue, if the statement is misleading in the form and context in which it is included. In other words, an untrue statement or misstatement is one, which is misleading, in the form and context in which it has been included in the prospectus. Further, where any inclusion or omission of any matter in a prospectus is likely to mislead, the prospectus shall be deemed, in respect of such omission, to be a prospectus in which an untrue statement is included. <u>CRIMINAL LIABILITY FOR MIS – STATEMENTS</u> Where any prospectus is issued or circulated or distributed, which includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, then every person who authorizes the issue of such prospectus shall be liable for fraud. Exception : If a person proves that : - Such statement or omission was immaterial, or - He had reasonable grounds to believe, and did up to the time of issue of the prospectus believe that the statement was true or the inclusion or omission was necessary. <u>Penalty & Prosecution (Sec. 447):</u> <i>Any person who is found guilty of fraud involving an amount of at least 10 Lakhs or 1% of turnover of company, whichever is lower, shall be punishable with imprisonment not less than 6 months but not more than 10 years and shall also be liable for fine of not less than the amount involved in the mis-statement, but not more than 3 times the amount involved.</i> <i>If the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years.</i> <i>Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to Fifty lakh rupees or with both.</i> <u>Onus for Proof of Mis-statement</u> The burden of proof in a suit by an allottee that he has been misled by the mis-statement in the prospectus lies on the allottee. He must prove the following: - The misrepresentation was of a fact; - It was in respect of a material fact. What is a material statement of fact will depend upon the circumstances of each case; - He acted on the misrepresentation; and - He suffered damages in consequence. <u>CIVIL LIABILITY FOR MIS-STATEMENTS</u>

	Where any person subscribes for securities on the basis of misleading statements or inclusion or omission of any matter in the prospectus resulting in any loss or damages, then the company and every person who has authorized the issue of such prospectus or a director, promoter and the other, whosoever is liable shall have to compensate every person who has sustained such loss or damage. Note: In case, a prospectus has been issued with intent to defraud the applicants for the securities of a company, every person involved in such issue shall be personally responsible without any limitation of liability for all losses incurred by the subscribers. <u>WHEN CIVIL LIABILITY CAN BE AVOIDED?</u> No person shall be liable for civil action if he proves that : (a) When he withdrew his consent before the issue of the prospectus, and such prospectus was issued without his consent; or (b) When the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave reasonable public notice that it was issued without his knowledge or consent. *(c) that, as regards every misleading statement purported to be made by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the report or valuation; and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe, that the person making the statement was competent to make it and that the said person had given the consent required by sub-section (5) of section 26 to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder. *Inserted by Companies Amendment Act, 2017 <u>WHO IS ENTITLED TO REMEDIES?</u> The right to claim compensation for any loss or damage sustained by reason of any untrue statement in a prospectus is available only to a person who has "subscribed" for securities on the faith of the prospectus containing untrue statement. Note: A subsequent purchaser of shares in the open market has no remedy against the company or the directors or promoters. <u>Case Law : Peek v. Gurney (1873)</u> Facts: A deceitful prospectus was issued by the directors on behalf of the company, P received a copy of it but did not take any shares originally in the company. The allotment of shares to applicants was completed, and several months afterwards he bought 2,000 shares on the stock exchange. His action against the directors for deceit was rejected. Judgment: It was observed by the Court that the offer of a prospectus is to invite persons to become allottees, and, allotment having been completed, such offer is exhausted and liability to allottees does not follow the shares into the hands of subsequent transferees. Section 37 of the Companies Act, 2013: A suit may be filed or any other action may be taken by any person, <u>group of persons or any association of persons</u> who have been affected by any misleading statement in the prospectus.
GLOBAL DEPOSITORY RECEIPTS [SECTION 41 & Companies (Issue	A company may, after passing a special resolution in its general meeting, issue depository receipts in any foreign country in such manner, and subject to such conditions, <u>as may be prescribed.</u> Conditions for Issue of Depository Receipts. (1) The Board of Directors of the company intending to issue depository receipts

of Depository Receipt) 2014] Global Rules,	shall pass a resolution authorizing the company to do so. (2) The company shall take prior approval of its shareholders by a special resolution to be passed at a general meeting: Provided that a special resolution passed under <u>section 62</u> for issue of shares underlying the depository receipts, shall be deemed to be a special resolution for the purpose of <u>section 41</u> as well. (3) The depository receipts shall be issued by an overseas depository bank appointed by the company and the underlying shares shall be kept in the custody of a domestic custodian bank. (4) The company shall ensure that all the applicable provisions of the Scheme and the rules or regulations or guidelines issued by the Reserve Bank of India are complied with before and after the issue of depository receipts. (5) The company shall appoint a merchant banker or a practising chartered accountant or a practising cost accountant or a practising company secretary to oversee all the compliances relating to issue of depository receipts and the compliance report taken from such merchant banker or Practising chartered accountant or Practising cost accountant or Practising company secretary, as the case may be, shall be placed at the meeting of the Board of Directors of the company or of the committee of the Board of directors authorized by the Board in this regard to be held immediately after closure of all formalities of the issue of depository receipts: Provided that the committee of the Board of directors referred to above shall have at least one independent director in case the company is required to have independent directors. Manner and Form of Depository Receipts. (1) The depository receipts can be issued by way of public offering or private placement or in any other manner prevalent abroad and may be listed or traded in an overseas listing or trading platform. (2) The depository receipts may be issued against issue of new shares or may be sponsored against shares held by shareholders of the company in accordance with such conditions as the Central Government or Reserve Bank of India may prescribe or specify from time to time. (3) The underlying shares shall be allotted in the name of the overseas depository bank and against such shares, the depository receipts shall be issued by the overseas depository bank abroad. Voting Rights (1) A holder of depository receipts may become a member of the company and shall be entitled to vote as such only on conversion of the depository receipts into underlying shares after following the procedure provided in the Scheme and the provisions of this Act. (2) Until the conversion of depository receipts, the overseas depository shall be entitled to vote on behalf of the holders of depository receipts in accordance with the provisions of the agreement entered into between the depository, holders of depository receipts and the company in this regard. Proceeds of Issue. The proceeds of issues of depository receipts shall either be remitted to a bank account in India or deposited in an Indian bank operating abroad or any foreign bank (which is a Scheduled Bank under the Reserve Bank of India Act, 1934) having operations in India with an agreement that the foreign bank having operations in India shall take responsibility for furnishing all the information which may be required and in the event of a sponsored issue of Depository Receipts, the proceeds of the sale shall be credited to the respective bank account of the shareholders.
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UNIT 9: DEBT CAPITAL

DEBENTURES	MEANING: “Debenture includes Debentures Stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not. <i>*Provided that—</i> (a) the instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934; and (b) such other instrument, as may be prescribed by the Central Government in consultation with the Reserve Bank of India, issued by a company, shall not be treated as debenture;” * Inserted by Companies Amendment Act, 2017
BROAD REGULATORY FRAMEWORK FOR DEBT SECURITIES	(a) SEBI (ICDR) Regulations, 2009 (b) Listing Agreement for Debentures issued through public issue/Rights issue. (c) Listing agreement for privately placed Debentures (d) SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (e) SEBI (Public Offer and Listing of Securitized Debt Instruments) Regulations, 2008 (f) The Companies Act, 2013 (g) Companies (Share Capital and Debentures) Rules, 2014 (a), (b), (c), (d) & (e) are covered under Securities Law.
PROVISIONS OF COMPANIES ACT, 2013 FOR ISSUE OF DEBENTURES	A company proposes for the Issue of Debentures, should take the approval from the shareholders via special resolution. A company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption. The issue of debentures with an option to convert such debentures into shares, wholly or partly, shall be approved by a special resolution passed at a general meeting. COMPLIANCE FOR ISSUE OF SECURED DEBENTURES (a) Redemption period: Secured debentures can be issued subject to the maximum redemption period i.e. not exceeding 10 years from the date of issue. A company engaged in the setting up of infrastructure projects may issue secured debentures for a period exceeding 10 years but not exceeding 30 years. (b) Creation of Charge: Issue of secured debentures must be secured by the creation of a charge on the assets of a company, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon. (c) Appointment of Debenture Trustee: The Company shall appoint a debenture trustee before the issue of prospectus for subscription of its debentures and not later than 60 days after the allotment of the debentures, execute a debenture trust deed to protect the interest of the debenture holders. (d) Creation of Charge in favor of Debenture Trustee : The security for the debentures by way of a charge or mortgage shall be treated in favour of the debenture trustee on : (a) Any specific movable property of the company (not being in the nature of pledge) ; or (b) Any specific immovable property. CREATION OF DEBENTURE REDEMPTION RESERVE (DRR) When debentures are issued by a company, the company shall create a debenture redemption reserve account out of the profits of the company, shall not be utilized by the company except for the redemption of debentures. Conditions for creation of DRR : The Company shall create a Debenture Redemption Reserve (DRR) for the purpose of redemption of debentures

subject to the following conditions :

(a) DRR shall be created out of the profits which is available for payment of dividend. (from Free Reserves)

(b) The company shall create DRR as follows :

(i) No DRR is required for Financial Institution & Bank.

(ii) The DRR should be maintained at least 25% of the value of debentures issued by the NBFCs registered with RBI.

(iii) For other companies including listed & unlisted, the DRR should be maintained at least 25% of the value of debentures.

(c) Every Company required to create DRR shall on or before the 30th day of April in each year. **Not less than 15%** of the Total amount in the DRR shall deposit or invest the specified fund or bank.

(d) In case of partly convertible debentures, DRR shall be created in respect of **non-convertible portion** of debenture issue.

(e) The amount credited to the DRR shall not be utilized by the company except for the purpose of redemption of debentures.

APPOINTMENT OF DEBENTURES TRUSTEES

No company shall issue a prospectus or make an offer to its members exceeding 500 for the subscription of its debentures, unless the company has appointed debenture trustee.

CONDITIONS FOR APPOINTMENT OF DEBENTURE TRUSTEES

1. The names of the debenture trustees must be stated in letter of offer for debentures.

2. A written consent must be obtained from the debenture trustee before his appointment as debenture trustee.

3. The following person shall not be appointed as a debenture trustee :

(a) He must not be beneficially of shares in the company;

(b) He should not be promoter, director or key managerial personnel or any other officer or an employee of the company or its holding, subsidiary or associate company;

(c) He is beneficially entitled to moneys which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;

(d) He is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;

(e) He is relative of any promoter or any person who is in the employment of the company as a director or key managerial personnel.

"**relative**", with reference to any person, means any one who is related to another, if—

(i) they are members of a Hindu Undivided Family;

(ii) they are husband and wife; or

(iii) one person is related to the other in such manner as may be prescribed;

A person shall be deemed to be the relative of another, if he or she is related to another in the following manner, namely:-

(1) Father: Provided that the term "Father" includes step-father.

(2) Mother: Provided that the term "Mother" includes the step-mother.

(3) Son: Provided that the term "Son" includes the step-son.

(4) Son's wife.

(5) Daughter.

(6) Daughter's husband.

(7) Brother: Provided that the term "Brother" includes the step-brother;

(8) Sister: Provided that the term "Sister" includes the step-sister.

DUTIES OF DEBENTURES TRUSTEES

A debenture trustee shall take steps to protect the interests of the debenture holders and redress their grievances in accordance with such rules as may be prescribed.

It shall be the duty of every debenture trustee to –

- (a) Satisfy himself that the letter of offer does not contain any matter which is inconsistent with the terms of the issue of debentures or with the trust deed;
- (b) Satisfy himself that the covenants in the trust deed are not prejudicial to the interest of the debenture holders;
- (c) Call for periodical status or performance reports from the company;
- (d) Communicate promptly to the debenture holders defaults with regard to payment of interest or redemption of debentures and action taken by the trustee;
- (e) Appoint a nominee director on the Board of the company in the event of –
 - (i) Two consecutive defaults in payment of interest to the debenture holders; or
 - (ii) Default in creation of security for debentures; or
 - (iii) Default in redemption of debentures.

DEBENTURE CERTIFICATE:

Every company shall, within 6 months of allotment of any of its shares, debentures or debenture stock and within 1 month after the application for registration of the transfer of any such debentures or debenture stock, deliver the certificates of all debentures and debenture stock allotted or transferred in accordance with the procedure laid down.

REGISTER OF DEBENTURE HOLDERS:

Every company has to keep an Index and register of debenture holders.

CLOSURE OF REGISTER OF DEBENTURES (Section 91)

Register of debentures can be closed by the company after giving at least 7 days previous notice by advertisement for a period not exceeding 45 days in a year but not exceeding 30 days at a time.

If company closes register exceeding 45 days then company and every officer of company who is in default shall be liable to penalty of ₹ 5,000 for every day subject to a maximum of ₹ 1,00,000 during which the register is kept closed.

UNIT 10: CREATION & REGISTRATION OF CHARGE

CHARGE [Section 2(16)]	A charge is a security given for securing loans or debentures by way of a mortgage on the assets of the company. Generally, the debentures and borrowings of the company are secured by a charge in the assets of the company. Charge means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.
KINDS OF CHARGES	Charge on the property of the company as security for debts may be of the following kinds: (i) Fixed or Specific Charge: A charge is fixed or specific when it covers assets which are ascertained and definite or are capable of being ascertained and defined, at the time of creating charge. Example: Charges created on land, building, or heavy machinery. A fixed charge is a charge created against certain specific property and the company loses its right to dispose off that property. (ii) Floating Charge: A floating charge is a charge created on floating assets or unidentified assets of the Company. In other words, a floating charge is not attached to any definite property but covers property of a fluctuating type like stock-in-trade. A floating charge is a charge on a class of assets present and future which in the ordinary course of business is changing from time to time and leaves the company free to deal with the property as it deems fit until the holders of charge take steps to enforce their security. “The essence of a floating charge is that the security remains dormant until it is fixed or crystallized”. The advantage of a floating charge is that the company may continue to deal in any way with the property which has been charged. The company may sell, mortgage or lease such property in ordinary course of its business if it is authorized by its memorandum of association.
CRYSTALLISATION OF FLOATING CHARGE	A floating charge attached to the company’s property generally remains dormant till it crystallizes or becomes fixed. The company has a right to carry on its business with the help of assets having a floating charge till the happening of some event which determines this right. A floating charge crystallizes and the security becomes fixed in the following cases : (i) When the company goes into liquidation; (ii) When the company ceases to carry on the business; (iii) When the creditors or the debenture holders take steps to enforce their security e. g. by appointing receiver to take possession of the property charged; (iv) On the happening of the event specified in the deed. (normally, Continuous Default in repayment) In the aforesaid circumstances, the floating charge is said to become fixed or to have crystallized. Until the charge crystallizes or attaches or becomes fixed the company can deal with the property so charged in any manner it likes. EFFECT OF CRYSTALLIZATION OF A FLOATING CHARGE On crystallization, the floating charge converts itself into a fixed charge on the property of the company. It has priority over any subsequent equitable charge and other unsecured creditors. But preferential creditors who have priority for payment over secured creditors in the winding – up get priority over the claims of the debenture holders having floating charge. POSTPONEMENT OF A FLOATING CHARGE The creation of a floating charge leaves the company free to create a legal and equitable mortgage on the same property until the floating charge crystallizes. Where such a mortgage is created it has priority over the floating charge which gets

	postponed. The floating charge is postponed in favor of the following persons if they act before the crystallization of the security : (i) A landlord who distains for rent; (ii) A creditor who obtains a garnishee order absolute; (iii) A judgment creditor who attaches goods of the company and gets them sold (But if the goods are not sold and the debenture holders take action in the meantime, the floating charge has priority); (iv) The employees of the company, as well as other preferential creditors in the event of winding-up of the company; <u>RESTRAINT ON THE POWER TO CREATE CHARGES WITH PRIORITY TO A FLOATING CHARGE</u> As the floating charge allows wide powers to the company to deal with its property subject to floating charge, it is common to insert a clause restricting the powers of the company to create charge with priority to or paripassu with it. Thus if the company creates a mortgage in favor of any person who has notice of the floating charge and restriction, such person ranks after the floating charge.
REGISTRATION OF CHARGE [Section 77]	Every company is responsible to create a charge within or outside India on its property or assets by registering the particulars of the charge duly signed by the company and the charge-holder. <i>The company is responsible to register the charge within 30 days from the date of its creation.</i> Form CHG – 1 (For other than the debentures) or Form CHG – 9 (for debentures) shall be filed by the Company with ROC for registration of charge. Provided that the Registrar may, on an application by the company, allow such registration to be made (a) in case of charges created before the commencement of the Companies (Amendment) Ordinance, 2018, within a period of three hundred days of such creation; or (b) in case of charges created on or after the commencement of the Companies (Amendment) Ordinance, 2018, within a period of sixty days of such creation, on payment of such additional fees as may be prescribed: Provided further that if the registration is not made within the period specified: (a) in clause (a) to the first proviso, the registration of the charge shall be made within six months from the date of commencement of the Companies (Amendment) Ordinance, 2018, on payment of such additional fees as may be prescribed and different fees may be prescribed for different classes of companies; (b) in clause (b) to the first proviso, the Registrar may, on an application, allow such registration to be made within a further period of sixty days after payment of such advalorem fees as may be prescribed; Any Subsequent registration of a Charge shall not prejudice any right acquired in respect of any property before the charge is actually registered. No charge created by a company shall be taken into account by the liquidator or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2). <u>Provided also that this section shall not apply to such charges as may be prescribed in consultation with the Reserve Bank of India.</u> <u>FAILURE BY COMPANY TO REGISTER THE CHARGE:</u>(Section 78) Where a company fails to register the charge within the period of 30 days specified in Sub Section (1) of Section 77, without prejudice to its liability in respect of any offence under this Chapter, the person in whose favor the charge is created may apply to the Registrar for registration of the charge along with the instrument

	created for the charge, within such time and in such form and manner as may be prescribed and the Registrar may, on such application, within a period of fourteen days after giving notice to the company, unless the company itself registers the charge or shows sufficient cause why such charge should not be registered, allow such registration on payment of such fees, as may be prescribed: Provided that where registration is effected on application of the person in whose favor the charge is created, that person shall be entitled to recover from the company the amount of any fees or additional fees paid by him to the Registrar for the purpose of registration of charge. Modification of Charge: It shall be the duty of the Company to register the modification of charge in Form CHG – 3 in the same way as above for 1st creation of charge even in change of Interest rate.
CERTIFICATE OF REGISTRATION OF CHARGE	When a charge is registered with the ROC, ROC shall issue a certificate of registration of charge in Form No. CHG – 2 and for registration of modification of charge in Form No. CHG – 3 to the company and to the person in whose favor the charge is created. The certificate issued by the ROC whether in case of registration of charge or registration of modification shall be treated as conclusive evidence of the Compliances of the requirements of the Companies Act, 2013 (Registration of Charges) and its rules. EFFECT OF NON-REGISTRATION: If a charge is not registered with the prescribed period with the ROC, then such charge shall become void against the liquidator and the creditors of the company. An unregistered charge shall remain valid and be treated as unsecured charge. PUNISHMENT FOR CONTRAVENTION (SECTION 86): If a company makes any default with respect to the registration of charges, penalty shall be levied from ₹ 1 lakh to ₹ 10 Lakhs. Every defaulting officer is punishable with imprisonment for a term not exceeding 6 months or fine which shall not be less than ₹25,000/-, but not exceeding ₹ 1 lakh or both. If any person wilfully furnishes any false or incorrect information or knowingly suppresses any material information, required to be registered in accordance with the provisions of section 77, he shall be liable for action under section 447. (Inserted by Companies Amendment Ordinance 2018 w.e.f. 2nd November 2018)
RECTIFICATION BY CENTRAL GOVERNMENT REGISTER CHARGES [Section 87]	The Central Government on being satisfied that — (a) the omission to give intimation to the Registrar of the payment or satisfaction of a charge, within the time required under this Chapter; or (b) the omission or misstatement of any particulars with respect to any such charge or modification or with respect to any memorandum of satisfaction or other entry made in pursuance of section 82 or section 83, was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors or shareholders of the company, it may, on the application of the company or any person interested and on such terms and conditions as the Central Government deems just and expedient, direct that the time for the giving of intimation of payment or satisfaction shall be extended or, as the case may require, that the omission or misstatement shall be rectified. Rule 12: (1) Where the instrument creating or modifying a charge is not filed within a period of three hundred days from the date of its creation (including acquisition of a property subject to a charge) or modification and where the satisfaction of the charge is not filed within a period of three hundred days from the date on which such payment of satisfaction, the Registrar shall not register the same unless the delay is condoned by the Central Government. (2) The application for condonation of delay and for such other matters covered in sub-clause

	(a),(b) and (c) of clause (i) of sub-section (1) of section 87 of the Act shall be filed with the Central Government in Form No.CHG-8 along with the fee. (3) The order passed by the Central Government under sub-section (1) of section 87 of the Act shall be required to be filed with the Registrar in Form No.INC.28 along with the fee as per the conditions stipulated in the said order.
SATISFACTION OF CHARGES [Section 82]	Satisfaction of charge means full payment of the outstanding loan amount. After making full payment to the Bank or Charge holder, the company has to inform to the ROC for registration of the satisfaction of charge. <u>SATISFACTION PROCESS</u> 1. Notice to ROC: The Company or Charge holder shall give intimation to the ROC in respect of the full payment or satisfaction in full of any charge within 300 days from the date of such payment or satisfaction in Form No. CHG – 4 along with the fee and the provisions of sub-section (1) of section 77 shall, as far as may be, apply to an intimation given under this section; 2. Notice to Charge Holder by ROC: On receipt of such intimation, the ROC shall issue a notice to the charge-holder calling a show cause within such time not exceeding 14 days regarding the full payment or satisfaction of the charge. 3. Opposition of Charge: If no cause is shown, by such holder of the charge, the ROC shall order that a memorandum of satisfaction shall be entered in the register of charges maintained by the ROC and shall inform the company. If the cause is shown to the ROC shall record a note to that effect in the register of charges and shall inform the company accordingly. 4. Certificate of Registration for Satisfaction: After completion of above formalities, the ROC will issue a certificate of registration for satisfaction in Form CHG – 4.
REGISTERS AND RECORDING OF CHARGES	<u>COMPANY'S REGISTER OF CHARGES</u> Every company is required to keep a register in Form No. CHG – 7 of all floating and fixed charge containing a short description of the property charged, the amount of the charge, and the names of the persons entitled to it. Further every company must keep at its registered office, a copy of every instrument creating any charge. The register of charges shall be preserved permanently and the instrument creating a charge or modification thereon shall be preserved for a period of eight years from the date of satisfaction of charge by the company. <u>INSPECTION OF REGISTRATION OF CHARGES</u> The register of charges and instrument of charges shall be kept open for inspection during business hours by members, creditors or any other person subject to reasonable restriction as the company by its article imposes. The register of charges and the instrument of charges kept by the company shall be open for inspection – (a) by an member or creditor of the company without fees; (b) by any other person on payment of fee <u>REGISTRAR'S REGISTER OF CHARGES</u> In accordance with section 81 and the rules, the Registrar of Companies shall maintain a register containing particulars of the charges registered in respect of every company. The particulars of charges maintained on the Ministry of Corporate Affairs portal (www.mca.gov.in/MCA21) shall be deemed to be the register of charges for the purposes of section 81 of the Act. This charge register shall be open to inspection by any person on payment of fee for each inspection.

UNIT 11: ALLOTMENT AND ISSUE OF CERTIFICATES

INTRODUCTION	In the present era of compulsory Dematerialization mode, physical certificates is a rare phenomenon especially for listed companies which are also governed by Depositories Act and relevant regulations, SEBI Regulations, listing agreement etc. as regards allotment of shares and issue of share certificates.
ALLOTMENT OF SHARES	MEANING: Allotment of shares means the act of appropriation of issue proceeds by the Board of Directors of the company. An allotment is the acceptance of an offer to take shares by an applicant, and such acceptance must be communicated to allottees. GENERAL PRINCIPAL REGARDING ALLOTMENT OF SHARES (i) The allotment should be made by the Board of Directors of the Company. (ii) The allotment of shares must be made within a reasonable time. (iii) The allotment should be absolute and unconditional: Securities must be allotted on same terms on which they were applied for and as they are stated in the application for securities. Allotment of securities subject to certain conditions is also not valid. Similarly, if the number of securities allotted is less than those applied for, it cannot be termed as absolute allotment. (iv) The allotment must be communicated to all the allottees. (v) The allotment shall only be made against application. (vi) Allotment should not be in contravention of any other law. CASE LAW JUDGEMENTS: • Allotment of shares made by an irregularly constituted Board shall be treated as invalid. • It is necessary that the Board should be duly constituted and should pass a valid resolution for allotment of shares at a valid Board meeting. • An allotment by a Board irregularly constituted may be subsequently ratified by a regular Board • The interval of about 6 months between application and allotment was held unreasonable
ALLOTMENT OF SECURITIES (SECTION 39)	❖ ALLOTMENT BY BOARD: The Board of Directors or its committee authorized to allot the securities after receiving the minimum subscription. ❖ MINIMUM APPLICATION MONEY [SECTION 39(2)]: The amount payable on application on every security shall not be less than 5% of the nominal amount of the security or such other percentage or amount, as may be specified by SEBI. If minimum amount has not been subscribed and the sum payable on application is not received within 30 days from the date of issue of the prospectus, the amount so received shall be returned within 15 days from the closure of the issue. If any such money is not so repaid within such period the directors of the company who are officers in default shall jointly and severally be liable to repay that money with interest at 15% p.a. ❖ SEPARATE BANK ACCOUNT: The company shall receive in cash the amount payable on application which shall not be less than 5% of the nominal value of the shares and such amount shall be kept in separate bank account i. e. "ESCROW A/C" till the allotment is made and until the certificate to commerce business has been obtained.

	❖ FILING OF RETURN OF ALLOTMENT: Whenever a company having a share capital makes any allotment of securities, it shall file with the Registrar a return of allotment in Form PAS – 3. <u>Companies (Prospectus and Allotment of Securities) Rules, 2014: Rules for allotment of securities</u> The following documents should be attached with the return of allotment: (a) A list of allottees stating their names, address, occupation and number of securities allotted to each of the allottees. (b) Copy of contract in case securities allotted as fully or partly paid up for consideration other than cash. (c) In the case of issue of bonus shares, a copy of the resolution passed in the general meeting authorizing the issue of such shares shall be attached to the Form PAS – 3. PENALTY FOR DEFAULT: In case of any default, the company and its officer who is in default shall be liable to a penalty, for each default, of ₹ 1000/- for each day during which such default continues or ₹ 1,00,000/-, whichever is less.
ISSUE OF SECURITIES IN DEMATERIALIZED FORM BY UNLISTED PUBLIC COMPANIES (Rule 8A) (w.e.f. 10th September 2018)	(1) Every unlisted public company shall - (a) Issue the securities only in dematerialized form; and (b) Facilitate dematerialization of all its existing securities in accordance with provisions of the Depositories Act, 1996 and regulations made there under (2) Every unlisted public company making any offer for issue of any securities or buyback of securities or issue of bonus shares or rights offer shall ensure that before making such offer, entire holding of securities of its promoters, directors, key managerial personnel has been dematerialized in accordance with provisions of the Depositories Act 1996 and regulations made there under. (3) Every holder of securities of an unlisted public company, _ (a) who intends to transfer such securities on or after 2nd October, 2018, shall get such securities dematerialised before the transfer; or (b) who subscribes to any securities of an unlisted public company (whether by way of private placement or bonus shares or rights offer) on or after 2nd October, 2018 shall ensure that all his existing securities are held in dematerialized form before such subscription. (4) Every unlisted public company shall facilitate dematerialisation of all its existing securities by making necessary application to a depository as defined in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996 and shall secure International security Identification Number (ISIN) for each type of security and shall in-form all its existing security holders about such facility. (5) Every unlisted public company shall ensure that _ (a) it makes timely payment of fees (admission as well as annual) to the depository and registrar to an issue and share transfer agent in accordance with the agreement executed between the parties; (b) it maintains security deposit at all times, of not less than two years, fees with the depository and registrar to an issue and share transfer agent in such form as may be agreed between the parties; and (c) it complies with the regulations or directions or guidelines or circulars, if any,

	issued by the securities and Exchange Board or Depository from time to time with respect to dematerialisation of shares of unlisted public companies and matters incidental or related thereto. (6) No unlisted public company which has defaulted in sub-rule (5) shall make offer of any securities or buyback its securities or issue any bonus or right shares till the payments to depositories or registrar to an issue and share transfer agent are made. (7) Except as provided in sub-rule (s), the provisions of the Depositories Act 1996 the securities and Exchange Board of India (Depositories and participants) Regulations, 1996 and the securities and Exchange Board of India (Registrars to an Issue and share Transfer Agents) Regulations, 1993 shall apply mutatis mutandis to dematerialisation of securities of unlisted public companies. (8) The audit report provided under regulation 55A of the securities and Exchange Board of India (Depositories and participants) Regulations, 1996 shall be submitted by the unlisted public company on a half-yearly basis to the Registrar under whose jurisdiction the registered office of the company is situated. (9) The grievances, if any, of security holders of unlisted public companies under this rule shall be filed before the Investor Education and protection Fund Authority. (10) The Investor Education and protection Fund Authority shall initiate any action against a depository or participant or registrar to an issue and share transfer agent after prior consultation with the securities and Exchange Board of India.
LISTING OF SHARES [Section 40]	Every company making public offer, before making such offer, shall, make an application to one or more recognized stock exchange or exchanges to obtain permission for the securities to be dealt with, there such prospectus has to mention the name of the stock exchange. Any allotment made without permission shall be void. All the moneys received on application from public for subscription to the securities shall be kept in a separate bank account. In case of default, the company may pay commission to any person in connection with the subscription to its Securities. Moneys received on application shall be utilized for : (a) Adjustment against allotment of securities where the securities have been permitted to be dealt with in the stock exchanges specified in the prospectus; or (b) The repayment of monies within the time specified by the Securities and Exchange Board, received from applicants in pursuance of the prospectus, where the company is for any other reason unable to allot securities.
PROVISIONS RELATING TO SHARE CERTIFICATE	MEANING: A share certificate is a certificate issued to the members by the company under its common seal specifying the number of shares held by him and the amount paid on each share. The certificate is the only documentary evidence of title in the possession of the shareholder. SIGNIFICANCE OF SHARE CERTIFICATE: A certificate of shares is evidence to the effect that the allottee is holding a certain number of shares of the company showing their nominal and paid-up value and distinctive numbers. DISTINCTIVE NUMBERS: Every share in a company having a share capital shall be distinguished by its distinctive number: Provided that nothing in this section shall apply to a share held by a person whose name is entered as holder of beneficial interest in such share in the records of a depository. (Section 45) TIME OF ISSUE OF SHARE CERTIFICATE: A Company must deliver share certificate to the shareholders : ➤ Within 2 months from the date of Incorporation; in case of Subscribers to

Memorandum or

- Within 2 months from the date of allotment; or
- Within 1 month from the date of receipt of Instrument of Transfer by the company or as the case may be, of intimation of transmission;
- Within a period of six months from the date of allotment in the case of any allotment of debenture.

ISSUE OF SHARE CERTIFICATES

When a company issues any capital, no share certificate shall be issued, except :

- (i) In pursuance of a Board resolution; and
- (ii) On surrender to the company of its letter of allotment or its fractional coupons of requisite value, save in cases of issues against letters of acceptance or of renunciation, or in cases of issue of bonus shares:

PROVIDED that if the letter of allotment is lost or destroyed the Board may impose such reasonable conditions as to evidence and indemnity and the payment of out-of-pocket expenses incurred by the company in investigating evidence as the Board thinks fit. Every certificate of share or shares shall be in Form No. SH – 1.

WHEN CAN A COMPANY ISSUE DUPLICATE SHARE CERTIFICATE?

A duplicate certificate of shares may be issued, if such certificate :

- (a) Is provided to have been lost or destroyed; or
- (b) Has been defaced, mutilated or torn and is surrendered to the company.

RECORDS OF CERTIFICATES

(i) Particulars of every share certificate issued shall be entered in the Register of Members as circumstances admit against name of person to whom it has been issued.

(ii) Particulars of every share certificate issued shall be entered in a Register of Renewed and Duplicate Certificates indicating against the name of the person to whom the certificate is issued the number and the date of issue of the share certificate in lieu of which the new certificate is issued, and the necessary changes indicated in the Register of Members.

(iii) All entries made in the Register of Members or the Register of Renewed and Duplicate Certificates shall be authenticated by the secretary or such other person as appointed by the Board for the purpose of sealing and signing the share certificate.

SEALING AND SIGNING OF CERTIFICATE

Every certificate shall specify the shares to which it relates and the amount paid-up thereon and shall be signed by two directors or by a director and the company secretary, wherever the company has appointed company secretary:

Provided that in case the company has a common seal it shall be affixed in the presence of persons required to sign the certificate.

Explanation. - For the purposes of this sub-rule, it is hereby clarified that,-

(a) in case of an One Person Company, it shall be sufficient if the certificate is signed by a director and the company secretary or any other person authorised by the Board for the purpose.

(b) a director shall be deemed to have signed the share certificate if his signature is printed thereon as facsimile signature by means of any machine, equipment or other mechanical means such as engraving in metal or lithography or digitally signed, but not by means of rubber stamp, provided that the director shall be personally responsible for permitting the affixation of his signature thus and the safe custody of any machine, equipment or other material used for the purpose.

(Amended w.e.f 10.04.2018)

LEGAL EFFECT OF SHARE CERTIFICATE

	A share certificate once issued by the company binds it in two ways, namely : ➤ <u>Estoppel as to Title:</u> A share certificate once issued binds the company in two ways. In the first place, it is a declaration by the company to the entire world that the person in whose name the certificate is made out and to whom it is given is a shareholder in the company. In other words the company is stopped from denying his title to the shares. ➤ <u>Estoppel as to Payment:</u> If the certificate states that on each of the shares full amount has been paid, the company is stopped as against a bona fide purchaser of the shares, from alleging that they are not fully paid. Further a certificate is not evidence as to the equitable interest in shares. Also, where an individual is aware of the false statements in a certificate, he will not be entitled to claim estoppels.
CALLS AND FORFEITURE	<u>CALLS:</u> A call may be defined as a demand made by a company on its shareholders to pay the whole or a part of the balance, remaining unpaid on each share at any time during the continuance of a company. In other words, Call is a demand, by the company in pursuance of a Board resolution and in accordance with the articles of the company, upon its shareholders to pay the whole or part of the balance still due on each class of shares allotted or held by them made at any time during the life of the company. A company issuing shares to its members may call the money due on shares at intervals depending upon the requirements for funds for implementing the project and the shareholders also prefer to pay the Issue price on their shares in installments and when demanded by the company. <u>PROVISIONS RELATING TO CALLS:</u> 1. <u>Minimum Call Money:</u> The amount payable in application on each share shall not be less than 5% of the nominal amount of the share. 2. <u>Balance Amount:</u> The balance may be payable as and when called for in one or more calls. The prospectus and the articles of a company generally specify the amount payable at different times, as call(s). 3. <u>Call in case of Winding-up:</u> A call may also be made by the liquidator in the course of winding up of the company. <u>REQUISITES OF A VALID CALL:</u> (i) Board of Directors to make call(s) on shares: The power to make calls is exercised by the Board in its meeting by means of a resolution. The Board, in making a call, must observe the provisions of the articles, otherwise the call will be invalid, and the shareholder is not bound to pay. A proper notice must be given, and the notice must specify the amount called up and manner i. e. the date for payment and place and to whom it is to be paid. (ii) Call(s) to be made bonafide in the Interest of the Company: The power to make call is in the nature of trust and must be exercised only for the benefit of the company, and not for the private ends of the directors. If the call is made for the personal benefit of directors, the call will be invalid. (iii) Call(s) must be made on Uniform Basis: Calls on same class of shares must be made on a uniform basis. Hence a call cannot be made only on some of the members unless they constitute a separate

class. In other words, there cannot be any discrimination between shareholders of the same class as regards amount and time of payment of call.

(iv) Notice of Call(s):

The notice of call must specify the exact amount and time of payment. A call must be made by serving upon member formal notice.

QUANTUM AND INTERVAL BETWEEN TWO CALLS :

The companies Act provides that no call shall exceed 25% of the nominal value of the share or be payable at less than 1 month from the date fixed for the payment of the last proceeding call.

If the issuer proposes to receive subscription monies in calls, it shall ensure that the outstanding subscription money is called within twelve months from the date of allotment of the issue and if any applicant fails to pay the call money within the said twelve months, the equity shares on which there are calls in arrear along with the subscription money already paid on such shares shall be forfeited.

FORFEITED OF SHARES:

Forfeiture may be termed as penalty for violation of terms of contract. Forfeiture of shares means taking back of shares by the company from the shareholders.

If the shareholder makes default in payment of calls on shares, then the company can use the option of forfeiting the shares.

For a valid forfeiture, satisfaction of following conditions is necessary :

(i) Articles of Association must authorize the forfeiture of shares:

Where power is given in the articles, it must be exercised in accordance with the regulation regarding notice, procedure and manner stated therein; otherwise the forfeiture will be void.

If Articles authorize, the forfeiture shall include forfeiture of all dividends declared in respect of the forfeited shares and such dividend is not actually paid before the forfeiture of the shares.

(ii) Resolution for Forfeiture:

If the defaulting shareholder does not pay the amount within the specified time as required by the notice, the directors may pass a resolution forfeiting the shares.

(iii) Proper Notice:

Before the shares of a member are forfeited, a proper notice to that effect must have been served. A notice shall name a further day (not less than 14 days from the date of service of the notice) on or before which the payment is to be made.

The notice must also mention that in the event of non-payment, the shares will be liable to be forfeited.

(iv) Power of forfeiture must be exercised bona fide and for the benefit of the company:

The power to forfeiture must be exercised bona fide and for the benefit of the company. The power must be used in order to coerce reluctant shareholders into paying their calls. The power of forfeiture cannot be exercised to relieve unwilling shareholders from the liability of making the payment. Such a shareholder continues to be responsible for the unpaid part of the shares.

RE-ISSUE OF FORFEITED SHARES:

Shares forfeited by a company may either be cancelled or re-issued to another person at the discretion of the Board. Generally, such shares are re-issued at a discount which cannot exceed the amount already paid on such shares.

This is done by a Board resolution.

After the money due is received from the new member(s), the company executes a

transfer deed and issues a share certificate, and if the original holder has already surrendered the share certificate, it is duly transferred, otherwise after a public notice in a newspaper, a new share certificate is issued.

If the shares are re-issued at a price more than the face value, the excess of the proceeds of sale is not payable to the former owner, if the articles provide otherwise. The excess of the proceeds to retained shall constitute a premium and must therefore be transferred to the securities premium account.

Case Law : Sri Gopal Jalan & Co. v. Calcutta Stock Exchange Association Ltd. (1963)

Facts: In this case, Calcutta Stock Exh. (Company) was not file return of allotment after re-issue of forfeited shares with the Registrar of Companies.

Judgment: In this case, the Supreme Court held that the Calcutta Stock Exchange was not liable to file any return of the forfeited shares under Section 75(1) of the Companies Act, 1956 [Corresponds to section 39 of the Companies Act, 2013] when the same were re-issued. The Court observed that when a share is forfeited and re-issued, there is no allotment, in the sense of appropriation of shares out of the authorized and unappropriated capital.

SURRENDER OF SHARES:

A company cannot accept a surrender of its shares “**as every surrender of shares, whether fully paid-up or not involves a reduction of capital which is unlawful. Forfeiture is a statutory exception and is the only exception**”.
(Bellerby v. Rowland and Marwood's S.S. Co. Ltd)

Surrender can be accepted in circumstances absolutely parallel to the requirements of forfeiture, the only difference being that instead of going to the length of the formalities of forfeiture, the company accepts in good faith in its own interest the shares which the shareholder is voluntarily surrendering. (Collector of Moradabad vs. Equity Insurance Co. Ltd)

UNIT 12: TRANSFER & TRANSMISSION OF SHARES

INTRODUCTION	The investor in securities of an incorporated enterprise cannot withdraw his investment from the company. He can only convert his investment into cash outside the company in the share market or by private sale. Transferability feature of securities enables the company, to get permanent capital, the shareholder, liquid investments. Transfer of Shares serves as an Exit Option to the investor.
TRANSFER OF SECURITIES	The shares or debentures or other interest of any member in a company shall be movable property, transferable in any manner as given by the articles of the company. (a) The securities or other interest of any member in a public company shall be freely transferable. (b) Any contract or arrangement between 2 or more persons in respect of transfer of securities shall be enforceable as a contract. (c) A private company is required to restrict the right to transfer its shares by its articles. As per Section 58(2), The Board of directors of a Company or the depository has no discretion to refuse or withhold transfer of any security. TRANSFER RULES: Section 56 & Rule 11 of Companies (Shares Capital and Debentures) Rules, 2014 (a) Execution of Transfer Instrument: An instrument of transfer of securities held in physical form shall be in Form No. SH.4 and every instrument of transfer shall be delivered to the company within 60 days from the date of such execution. (b) Registration of Partly paid-up shares: A company shall not register a transfer of partly paid shares, unless the company has given a notice in Form No. SH. 5 to the transferee and the transferee has given no objection to such transfer within 2 weeks from the date of receipt of notice. (c) Delivery of shares certificate: Every Company has to deliver the share certificate in respect of allotment, transfer & transmission of securities within 1 month from the date of receipt by the Company. TRANSFER OF SHARES BY LEGAL REPRESENTATIVE: A transfer of the shares in a company of a deceased member shall be completed by his legal representative although the legal representative is not himself a member of the Company. TRANSFER INSTRUMENT LOST/NOT DELIVERED: Where the transfer instrument has been lost or has not been reached to the Company for transfer then the Company may register the transfer on the basis of submission of Indemnity Bond by the transferee. The company may also ask for submission of affidavits (as proof for loss of share certificate) from the transferor or transferee before registering the transfer. INTIMATION TO DEPOSITORY: Where the securities are dealt with in a depository, the company shall intimate the details of allotment of securities to depository immediately on allotment of such securities. No transfer deed is required for the transfer of shares, when the shares are held in dematerialized form. PAYMENT OF STAMP DUTY ON TRANSFER OF SHARES: Before the transfer is lodged with the company, the transfer instrument should be duly stamped. Transfer of securities attracts Stamp Duty under Indian Stamp Act, 1899. Stamps at the rate of 25 Paise for consideration of ₹ 100 or part thereof is payable. Only the Central Government can levy stamp duty on share transfers.

		The stamp duty payable on transfer of debentures is state matter and may vary from State to State. The amount of consideration is required to be mentioned in the share transfer deed as otherwise the companies cannot verify whether share transfer stamp duty has been correctly charged thereby attracting the penal provisions of the Stamp Act in case of a default. Thus, in case where question of consideration does not arise like in the case of a gift of shares, stamp duty will be paid on the basis of the market value of shares and in case of unquoted shares or where quotations are not available at the face value of the shares. A company cannot register the transfer of securities unless a proper instrument of transfer duly stamped, dated and executed by or on behalf of the transferor and the transferee has been delivered to the company along with the certificate relating to the securities in question. The expression “duly stamped” has not been defined in the Companies Act. Under Section 2(11) of Indian Stamp Act, 1899 “Duly Stamped” as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being force in India. The “value of the shares” means the price which the shares would fetch at the time of the transfer and not the face value of the shares. The consideration actually paid or agreed to be paid is the value of the shares. So long as there is nothing to indicate that the consideration was not truly stated in the transfer, the one mentioned therein should be accepted as the consideration that was paid. (Union of India v. Kulu Valley Transport Ltd) EFFECT OF TRANSFER: A transfer is not complete until registered. The transferee does not acquire a legal title to the shares until his name has been entered in the Register of Members. Position during the period, between the date when a contract to transfer shares is made and the placing of the transferee’s name on the Register of Members may be summed up as : - Transferor must pay the calls. He may recover the amount from the transferee. - If dividends are declared and paid before transfer is registered, the company must pay it to the transferor. - The voting power rests with the transferor but he must vote as the transferee directs. If the transferee has not paid the price, the transferor may vote as he pleases.
DEATH OF TRANSFEROR OR TRANSFEREE BEFORE REGISTRATION OF TRANSFER	OF OR OF	<u>Transferor death notice:</u> Where the transferor dies and the company has no notice of his death the company would obviously register the transfer. If the company has notice of his death, the proper course is not to register until the legal representative of the transferor has been referred to. <u>Transferee death notice:</u> Where the transferee dies and company has notice of his death, a transfer of shares cannot be registered in the name of the deceased. With the consent of the transferor and the legal representatives of the transferee, the transfer may be registered in the names of the later.
APPEAL AGAINST THE REFUSAL OF TRANSFER (Section 58 of the Companies Act, 2013)		The holder of securities has the right to transfer his securities and such right is absolute in nature. Private Company: ❖ If a private company limited by shares refuses (whether in pursuance of any power of the company under its articles or otherwise), to register the transfer of, or the transmission of the right to any securities or interest of a member in the company, then the company shall send notice of the refusal to the transferor and the transferee or to the person giving intimation of such

	transmission, within a period of thirty days from the date on which the instrument of transfer, or the intimation of such transmission, was delivered to the company. Notice shall contain the reasons for refusal to register the transfer or transmission. ❖ The transferee may appeal to the Tribunal (NCLT) against the refusal within 30 days from the date of receipt of the notice or in case no notice has been sent by the company, within 60 days from the date on which the instrument of transfer or the intimation of transmission was delivered to the company. Public Company: If a public company without sufficient cause refuses to register the transfer of securities within 30 days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, is delivered to the company, the transferee may, within 60 days of such refusal or where no intimation has been received from the company, within 90 days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal. ❖ The Tribunal, while dealing with an appeal may, after hearing the parties, either dismiss the appeal, or by order— (a) direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within a period of ten days of the receipt of the order; or (b) direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved. ❖ If a person contravenes the order of the Tribunal he shall be punishable with imprisonment for a term not less than one year but may extend to three years and with fine not less than one lakh rupees which may extend to five lakh rupees. The power to refuse registration of shares which is conferred on the directors by the articles, is a discretionary power and must be exercised reasonably, and in good faith for the benefit of the company. Unless the contrary is proved, the power is deemed to have been exercised properly (<i>Berry & Stewart v. Tottenham Hotspur Football and Athletic Co. Ltd.</i>). The Supreme Court, in <i>Bajaj Auto Limited v. N.K. Firodia</i>, observed, “discretion implies just and proper consideration of the proposal under the facts and circumstances of the case. In the exercise of that discretion, the directors will act in the paramount interest of the company and in the general interest of the shareholders because the directors are in a fiduciary position both towards the company and towards every shareholder. The directors are, therefore, required to act <i>bona fide</i> and not arbitrarily and not for any collateral motive” <u>Can a company refuse to register the transfer in the name of an employee?</u> Case Law: <u>Shri Nirmal Kumar v. Jaipur Metal and Electrical Limited (1976)</u> Facts: A company had refused to register the transfer of shares in favour of its employee on the following grounds : (a) The employee would create nuisance in general meetings, and (b) Would seek access to the records of the company. Judgment: In this case, the court held that refusal to register share transfer on suspicion that the employee if admitted as a member will attend general meetings of the company and may create nuisance by raising irrelevant issues and also obtain access to the records to the company as a shareholder is not a valid reason.
TRANSMISSION OF SECURITIES [Section 56(2)]	The transmission of shares takes place because of death or lunacy of the registered shareholders or on his being adjudged as insolvent. If the holder of securities is a company, when it goes into liquidation because of merger or amalgamation. A company shall have power to register on receipt of an intimation

	of transmission of any right to securities by operation of law from any person to whom such right has been transmitted. By virtue of this section, the legal representative or nominee of the deceased shareholder shall be entitled to transfer the shares. <table border="1" data-bbox="421 255 1497 434"> <thead> <tr> <th>Operation of Law</th><th>Who is entitled to the shares?</th></tr> </thead> <tbody> <tr> <td>Due to death/Lunacy</td><td>Legal representative or nominee</td></tr> <tr> <td>Due to insolvency</td><td>Official Assignee or Receiver</td></tr> <tr> <td>Due to merger or amalgamation (Companies)</td><td>The resultant company</td></tr> </tbody> </table>	Operation of Law	Who is entitled to the shares?	Due to death/Lunacy	Legal representative or nominee	Due to insolvency	Official Assignee or Receiver	Due to merger or amalgamation (Companies)	The resultant company
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PLEDGING OF SHARES	• Shares of a company can be a subject matter of a valid pledge. • Section 2(7) of the Sale of Goods Act, 1930, defines the term 'goods' as meaning every kind of moveable property other than actionable claim and money and includes stocks and shares. Shares are goods under the Sale of Goods Act, 1930 and therefore can be pledged under the Indian Contract Act, 1872. • In <i>Kanhaiyalal Jhanwar vs. Pandit Shirali & others</i>, the Calcutta High Court held that the deposit of share certificates themselves is sufficient to create a pledge thereon. Transmission of shares to widow: If a widow applies for transmission of the shares standing in the name of her deceased husband without producing a succession certificate and if the articles of association of the company so authorizes, the directors may dispense with the production of succession certificate, probate or letter of administration upon such terms as to indemnity as the directors may consider necessary, and transit the shares to the widow of the deceased by obtaining an indemnity bond. Transmission of joint holdings: In case some shares are registered in joint names and the articles of the company provide that the survivor shall be the only person to be recognized by the company as having any title to the shares, the company is justified in refusing to register the transmission of title by operation of law in favour of the son of the deceased holder even though he may obtain succession certificate from the Court.								
BLANK TRANSFER	❖ MEANING: When a shareholder signs transfer form without filling in the name of the transferee and the date of execution and hands it over with the share certificate to the transferee thereby enabling the transferee to deal with the shares, he is said to have made a transfer "in Blank" or "Blank Transfer". ❖ In other words, Blank transfer means purchase and sale of shares by mere delivery of share certificate along with transfer deed without mentioning the name of transferee in the transfer deed. ❖ Generally, the practice of blank transfer is prevalent for the following purposes : (a) Avoidance of transfer stamps (b) Concealment of the identity of the real beneficial owners (c) Evasion of taxes by suppression of profits ❖ A blank transfer accompanied by the delivery of the share certificates vests in the transferee both equitable as well as legal rights in the shares. But until the registration of his name in the register of members, the transferee does not acquire a title and thus he cannot exercise any right as shareholder in respect of those shares. Shares are usually transferred in blank when a shareholder borrows money on its security, e.g., by pledging the shares; the pledger make default in payment of the amount due at the time appointed for repayment, the pledgee or the holder of the share certificate and the blank transfer instrument has implied power to fill up the blanks in the instrument by inserting the date and his own name as								

	transferee and to get himself registered as a member of the company. The pledger is under an implied obligation not to prevent or delay such registration. This right to get himself registered as a member is available to the transferee even after the death of the transferor [In <i>Re. Bengal Silk Mills Co. Ltd.</i>]
FORGED TRANSFER	An instrument on which the signature of the transferor is forged is called a forged transfer which is null and void. A forged instrument of transfer is presented to the company for registration. In order to avoid the consequences because of a forged transfer, companies normally write to the transferor about the lodgment of the transfer instrument so that he can object if he wishes. The company informs him that if no objection is made by him before a day specified in the notice, it would register the transfer. <u>CONSEQUENCES OF A FORGED TRANSFER:</u> (i) <u>Transfer null and void:</u> A forged transfer is a nullity and, therefore, the original owner of the shares continues to be the shareholder and the company is bound to restore his name on the register of members. (ii) <u>No denial of transfer of shares sold to innocent purchaser:</u> If company issues a share certificate to transferee and he sells the shares to an innocent purchaser, the company is liable to compensate such a purchaser, if it refuses to register him as a member, or if his name has to be removed on the application of the true owner. (iii) <u>Indemnify the losses:</u> If the company is put to loss by reason of the forged transfer, as it may have paid damages to an innocent purchaser, it may recover the same independently from the person who lodged the forged transfer.
TRANSPPOSITION OF NAME	• In the case of joint-shareholders, one or more of them may require the company to alter or rearrange the serial order of their names in the register of members of the company. • In this process, there will be need for effecting consequential changes in the share certificates issued to them. • If the company provides in its articles that the senior-most among the joint-holders will be recognized for all purposes like service of notice, a copy of balance sheet, profit and loss account, voting at a meeting etc., the request of transposition may be duly considered and approved by the Board or other authorized officer of the company. Since no transfer of any interest in the shares take place on such transposition, the question of insisting on filling transfer deed with the company, may not arise. • Transposition does not also require stamp duty. • The Stock Exchange Division of the Department of Economic Affairs has clarified that there is no need of execution of transfer deed for transposition of names if the request for change in the order of names was made in writing, by all the joint-holders. If transposition is required in respect of a part of the holding, execution of transfer deed will be required.
DEPOSITORY SYSTEM – AN OVERVIEW	<u>BENEFITS OF DEPOSITORY SYSTEM</u> (i) Elimination of bad deliveries. (ii) Elimination of all risks association with the physical certificates. (iii) It facilitates the immediate transfer and registration of the securities. (iv) It facilitates faster disbursement of non-cash corporate benefits like rights, bonus, etc. (v) It reduces the brokerage for trading in dematerialized securities. (vi) Elimination of paper work and recording of transactions like transfer of shares. (vii) Elimination of problems related to change of the address of investor, transmission, etc.

(viii) Elimination of problems related to selling securities on behalf of minor.

LEGAL FRAMEWORK FOR DEPOSITORY SYSTEM

- (i) The Depositories Act, 1996
- (ii) The SEBI (Depositories and Participants) Regulations, 1996
- (iii) Bye-Laws of Depository
- (iv) Business Rules of Depository

DEPOSITORY PARTICIPANT:

A Depository Participant (DP) is the representative of the investor in the depository system providing link between the Company and investors through depositories. An investor opens its De-mat Account with a Depository Participants for keeping its securities in electronic form.

Safeguards to address the concerns of the Investors on Transfer of Securities in Dematerialized Mode

The concerns arising out of transfer of securities from the Beneficial Owner (BO) Accounts without proper authorization by the concerned investor have been brought to the notice of SEBI by some Investors' Associations. Accordingly SEBI has decided to put in place the following safeguards to address the concerns of the Investors on electronic transfer.

- (a) The depositories shall give more emphasis on investor education particularly with regard to careful preservation of Delivery Instruction Slip (DIS) by the BOs. The Depositories may advise the BOs not to leave "blank or signed" DIS with the Depository Participants (DPs) or any other person/entity.
- (b) The DPs shall not accept pre-signed DIS with blank columns from the BO(s).
- (c) The DPs shall issue only one DIS booklet containing not more than 20 slips for individual account holders and not more than 100 slips for non-individual account holders, at a time.
- (d) If the DIS booklet is lost/stolen/not traceable by the BO, the same must be intimated to the DP immediately by the BO in writing. On receipt of such intimation, the DP shall cancel the unused DIS of the said booklet.
- (e) The DPs can issue subsequent DIS booklet to BO only after the BO has used not less than 75 per cent of the slips contained in the previous DIS booklet. The DP shall also ensure that a new DIS booklet is issued only on the strength of the DIS instruction request slip (contained in the previous booklet) duly complete in all respects, unless the request for fresh booklet is due to loss, etc., as referred to in clause (d) above.
- (f) The DPs shall put in place appropriate checks and balances with regard to verification of signatures of the BOs while processing the DIS.
- (g) The DPs shall cross check with the BOs under exceptional circumstances before acting upon the DIS.

UNIT 13: GENERAL MEETINGS

(Secretarial Standard 2 “General Meetings” has been incorporated)

ANNUAL GENERAL MEETING (Section 96)	Every company (other than OPC) should hold an Annual General Meeting (AGM) every Calendar year for considering the ordinary business of the Company. • 1st AGM A Company should convene its first AGM <u>within 9 months</u> from the end of its 1st Financial Year. • 2ND & SUBSEQUENT AGM Every company must hold subsequent AGM within <u>6 months from the closing of the financial year</u>; or The gap between two annual general meetings <u>should not exceed 15 months</u> whichever is <u>earlier</u>. <u>EXTENSION OF TIME OF 2ND & SUBSEQUENT AGM</u> In case, it is not possible to hold a 2nd & subsequent AGM within the prescribed time, the Registrar may grant extension of time. Such extension can be for a period <i>not exceeding 3 months</i>. <u>Note:</u> No such extension of time shall be granted by the ROC for the holding of the 1st AGM.
DAY & TIME	DAY : Every AGM should be held on <u>any day except on National Holiday</u> as specified by the GOI. (15th August, 26th Jan., 2nd Oct. or any other day as notified by the Central Govt.). National Holiday means and includes a day declared as National Holiday by the Central Government. TIME : Every AGM should be held during the <u>business hours</u> on any day excluding national holiday. Here, business hour is between <u>9.00 A. M. to 6.00 P. M.</u>
PLACE OF MEETING	An annual general meeting should be held: i) Either at the registered office of the company; or ii) At some other place within the city, town or village in which the registered office of the company is situate. In case of a Government company, the Annual General Meeting shall be held at its registered office or any other place with the approval of the Central Government, as may be required in this behalf. Provided that annual general meeting of an unlisted company may be held at any place in India if consent is given in writing or by electronic mode by all the members in advance. (inserted by Amendment Act, 2017)
BUSINESS TRANSACTED AT AN AGM	An AGM of a company must consider the following <i>Ordinary Businesses</i>: - Annual Accounts; - Declaration of dividend; - Appointment of directors (retire by rotation); and - Appointment and fixing of remuneration of the auditors. The above ordinary businesses can only be passed at the AGM. Other than the above mentioned businesses are treated as special business which can be passed either at AGM or EGM.
DEFAULT IN HOLDING ANNUAL GENERAL MEETING	If any default is made in holding the annual general meeting of a company, any member of the company may make an application to the NCLT to call or direct the calling of, an annual general meeting of the company and give

	such ancillary or consequential directions as the Tribunal thinks expedient. Such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute quorum for the meeting. PENALTY: The Company and every officer of the Company who is in default shall be punishable with fine which may extend to ₹1,00,000/- and in case of continuous default with a further fine which may extend to ₹ 5,000/- for every day during which such default continues. In the case of <u>Smith v. Paranga Mines Ltd.</u>, the Board of Directors gave notice of a general meeting and later desired to adjourn by a subsequent notice. It was held that the Board of Directors does not have this power.
EXTRAORDINARY GENERAL MEETING (SECTION 100)	An extraordinary general meeting (EGM) is any general meeting of a company other than the statutory meeting or the annual general meeting. Generally, a company convenes an EGM to transact all urgent matter for which it cannot wait till next annual general meeting. An EGM may call to transact any business other than the ordinary business for fixed Annual General Meeting. An extraordinary general meeting may be convened : - By the Board of Directors on its own, or - By the Board of Directors on the requisition of members, or - By the requisitionists, or - By the Tribunal (NCLT)
WHO MAY CONVENE AN EGM	✓ BY THE BOARD OF DIRECTORS An extraordinary general meeting may be convened by the directors if some business of special importance requires an approval from the members whenever required. ✓ BY BOARD ON REQUISITION OF MEMBERS: The members of a company may ask for an extraordinary meeting to be held. PERSONS ENTITLED TO REQUISITION: A requisition for convening an EGM may be made by members : - Holding 10% of the paid-up share capital and having a right to vote of the Company, or - Holding 10% voting rights, if the company has no share capital, at the date of the deposit of requisition on the matter to be discussed. COMPLIANCE OF REQUISITION: The Board of Directors are under obligation to proceed within 21 days of the deposit of the requisition to convene an EGM which should be held within 45 days of such deposit of the requisition with the company. Any reasonable expenses incurred by the requisitionists by reason of the failure of the Board to call a meeting duly shall be repaid to the requisitionists by the company. Any sum so repaid shall be recovered by the company from the Directors. NOTICE ISSUED BY THE REQUISITIONISTS: The Board may call an extra-ordinary general meeting (EGM) whenever they deem it fit. They may also call EGM on the requisition of shareholders carrying at least 1/10th of paid-up share capital or 1/10th of voting power. The requisition shall set out matters for which the meeting is called and be sent to the registered office. The Board has to within 21 days of the receipt of the requisition call an EGM not later than 45 days.

	Meeting to be convened by the requisitionists: If the Board fails to call the EGM in the time period provided then the requisitionists may call an EGM themselves within 3 months from the date of requisition.
BUSINESS TO BE TRANSACTED	An EGM shall <i>only transact the special business</i> and an explanatory statement to be attached with the notice of an EGM.
PLACE OF MEETING	An EGM shall be held: i) Either at the registered office of the company; or ii) At some other place within the city, town or village in which the registered office of the company is situate. <i>Provided that an extraordinary general meeting of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India.</i> (Inserted by Amendment Act, 2017)
DAY & TIME	DAY: An EGM can be held on any day including National Holiday as specified by the GOI. (15th August, 26th Jan., 2nd Oct. or any other day as notified by the Central Govt.). TIME: An EGM can be held on any time.
GENERAL MEETING FOR ONE PERSON COMPANY (OPC) (SECTION 122)	There is no need to convene an Annual General Meeting or Extra-Ordinary General Meeting for transacting ordinary or special business. For passing any special or ordinary business, it shall be sufficient if the resolution is communicated by the member to the company and entered in the minutes book required to be maintained and signed and dated by the members.
CLASS MEETINGS	Class meetings are those meetings which are held by holders of a particular class of securities, e.g. preference shares and debentures. Need for such meetings arise when it is proposed to vary the rights of a particular class of shares. MEETINGS OF DEBENTURES HOLDERS: It is a meeting of debenture holders to protect their interest relating to redemption of debentures and interest thereon. As per the SEBI regulation, when a company issues debentures, it provides in the trust deed executed for securing the issue for the holding of meetings of debenture holders and also gives power to them to vary the terms of security or to alter their rights in certain circumstances.
QUORUM (Section 103)	Meaning: Quorum means presence of minimum number of members in a meeting. Quorum is required for transaction of business. Quorum: Unless the Articles provide for a larger number, the Quorum for a General Meeting shall be: (a) in case of a public company, – (i) five Members personally present if the number of Members as on the date of Meeting is not more than one thousand; (ii) fifteen Members personally present if the number of Members as on the date of Meeting is more than one thousand but up to five thousand; (iii) thirty Members personally present if the number of Members as on the date of the Meeting exceeds five thousand; (b) in the case of a private company, two Members personally present. Rules for Computing Quorum: 1. Members need to be personally present at a Meeting to constitute the

	Quorum. - Proxies shall be excluded for determining the Quorum. - Two joint holders shall be counted as two for quorum if both joint holders personally present in the General Meeting. - A duly authorised representative of a body corporate or the representative of the President of India or the Governor of a State is deemed to be a Member personally present and enjoys all the rights of a Member present in person. - The stipulation regarding the presence of a Quorum does not apply with respect to items of business transacted through postal ballot. Consequences of no quorum: Unless otherwise provided in the Articles, if the quorum is not present within half-an-hour from the time appointed for holding a meeting : - The meeting shall stand adjourned to the same day in the next week at the same time and place; or - To such other date and such other time and place as fixed by the Board; or - The meeting, if called by requisitionists shall stand cancelled. Notice of an adjourned meeting: In case of an adjourned meeting or of a change of day, time or place of meeting, the company shall give not less than 3 days' notice to the members either individually or by publishing an advertisement in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated. No quorum in an adjourned meeting: If at the adjourned meeting also, a quorum is not present within $\frac{1}{2}$ an hour from the time appointed for holding meeting, the members present, being not less than two in number, shall form the quorum.
NOTICE [SECTION 101(3)]	Time Limit: A general meeting of a company may be called by giving not less than clear 21 days' notice either in writing or through electronic mode. For the purpose of reckoning twenty-one days clear Notice, the day of sending the Notice and the day of Meeting shall not be counted. Further in case the company sends the Notice by post or courier, an additional two days shall be provided for the service of Notice. Contents of Notice: The notice of a general meeting shall specify the place, date, day and the hour of the meeting and shall contain a statement of the business to be transacted at such meeting. Notice shall clearly specify the nature of the Meeting and the business to be transacted thereat. In respect of items of Special Business, each such item shall be in the form of a Resolution and shall be accompanied by an explanatory statement which shall set out all such facts as would enable a Member to understand the meaning, scope and implications of the item of business and to take a decision thereon. In respect of items of Ordinary Business, Resolutions are not required to be stated in the Notice. Right to receive Notice: The notice of every meeting of the company shall be given to : - Every member of the company, legal representative of any deceased member or the assignee of an insolvent member; - The auditor or auditors of the company; and - Every director of the company. Shorter Notice: Provided that a general meeting may be called after giving shorter notice than that specified in this sub-section if consent, in writing or by electronic mode, is accorded thereto—

	(i) in the case of an annual general meeting, by not less than ninety-five per cent. of the members entitled to vote thereat; and (ii) in the case of any other general meeting, by members of the company— (a) holding, if the company has a share capital, majority in number of members entitled to vote and who represent not less than ninety-five per cent. of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or (b) having, if the company has no share capital, not less than ninety-five per cent. of the total voting power exercisable at that meeting: Provided further that where any member of a company is entitled to vote only on some resolution or resolutions to be moved at a meeting and not on the others, those members shall be taken into account for the purposes of this sub-section in respect of the former resolution or resolutions and not in respect of the latter. (Substituted by Amendment Act, 2017) Validity of Meeting in case of Omission: Any accidental omission to give notice to, or the non-receipt of such notice by, any member or other person who is entitled to such notice for any meeting shall not invalidate the General Meeting.
PROXY (SECTION 105)	❖ A member, who is entitled to <u>attend and to vote</u>, can appoint another person as a proxy to attend and vote at the meeting on his behalf. ❖ Proxy need not be a member of Company. ❖ Normally, such right is not available to members of Company not having Share Capital unless the articles provide for it. ❖ A member of a company registered under section 8 shall not be entitled to appoint any other person as his proxy unless such other person is also a member of such company. ❖ Proxy shall not have the right to speak at such meeting and shall not be entitled to vote <u>except on a poll</u>. ❖ A person can act as proxy on behalf of members not exceeding fifty and holding in the aggregate not more than ten percent of the total share capital of the company carrying voting rights: Provided that a member holding more than ten percent, of the total share capital of the Company carrying voting rights may appoint a single person as proxy and such person shall not act as proxy for any other person or shareholder. ❖ The proxy form (MGT – 11) shall be deposited with the Company 48 hours before the general meeting of a company. Any provision contained in the articles of a company which specifies or requires a longer period than forty-eight hours before a meeting of the company, for depositing with the company or any other person any instrument appointing a proxy or any other document necessary to show the validity or otherwise relating to the appointment of a proxy in order that the appointment may be effective at such meeting, shall have effect as if a period of forty-eight hours had been specified in or required by such provision for such deposit. ❖ The instrument appointing a proxy shall : (a) Be in writing; and (b) Be signed by the appointer or his attorney duly authorized in

	writing or, if the appointer is a body corporate, be under its seal or be signed by an officer or an attorney duly authorized by it. ❖ In every notice calling a meeting of a company which has a share capital, or the articles of which provide for voting by proxy at the meeting, there shall appear with reasonable prominence a statement that a member entitled to attend and vote is entitled to appoint a proxy, or, where that is allowed, one or more proxies, to attend and vote instead of himself, and that a proxy need not be a member. If default is made in complying with sub-section (2), every officer of the company who is in default shall be liable to penalty of five thousand rupees. (Amended by Companies Amendment Ordinance 2018) ❖ If for the purpose of any meeting of a company, invitations to appoint as proxy a person or one of a number of persons specified in the invitations are issued at the company's expense to any member entitled to have a notice of the meeting sent to him and to vote thereat by proxy, every officer of the company who knowingly issues the invitations as aforesaid or wilfully authorises or permits their issue shall be punishable with fine which may extend to one lakh rupees: Provided that an officer shall not be punishable under this sub-section by reason only of the issue to a member at his request in writing of a form of appointment naming the proxy, or of a list of persons willing to act as proxies, if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy. ❖ Every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, shall be entitled during the period beginning twenty-four hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, to inspect the proxies lodged, at any time during the business hours of the company, provided not less than three days' notice in writing of the intention so to inspect is given to the company.
CHAIRMAN	The Chairman plays a crucial role in a company meeting and is usually appointed by the articles. The members present in person at a meeting shall elect on a show of hands one of their members to be the chairman. Unless the articles of the company otherwise provide, the members personally present at the meeting shall elect one of themselves to be the Chairman thereof on a show of hands. If a poll is demanded on the election of the Chairman, it shall be taken forthwith in accordance with the provisions of this Act and the Chairman elected on a show of hands shall continue to be the Chairman of the meeting until some other person is elected as Chairman as a result of the poll, and such other person shall be the Chairman for the rest of the meeting. • <u>ROLE OF CHAIRMAN</u> The Chairman is responsible for the successful conduct of a meeting. The Chairman has a duty to keep order, to see that the business is properly conducted and to ensure that the sense of the meeting is properly ascertained in regard to any question before it. • <u>DUTIES OF CHAIRMAN</u> (i) He must ensure that the meeting is properly convened and constituted (i. e. proper notice has been served and quorum has also been observed). (ii) He must ensure that the provisions of the Act and the articles in

	regard to the meeting and its procedures are observed, and that the business is taken in the order set out in the agenda, and that the business is within the scope of the meeting. (iii) He must act at all times bonafide and in the interest of the company as a whole. He must give a reasonable chance to the members present, to discuss any proposed resolution and ensure that views of all are adequately heard. (iv) He must decide questions arising for decisions during the meeting and must ensure that the majority hears the minority. (v) He must ensure that the sense of the meeting is properly ascertained in regard to any question before it. (vi) He must exercise correctly his powers of adjournment. He has no powers to adjourn the meeting at his own will and pleasure. (vii) It is his duty to preserve order and to see that the business is properly conducted. (viii) He must ensure the preparation of the minutes of meeting.
SPECIAL AND ORDINARY BUSINESS	There are two types of business i. e. special business or ordinary business which are being placed in the General Meeting of the Company for Approval. There are four types of ordinary businesses which can only be approved in AGM : (i) The consideration of the accounts, balance sheet and the reports of the Board of Directors and auditors; (ii) The declaration of a dividend; (iii) The appointment of directors in the place of those retiring; and (iv) Appointment of and fixation of remuneration of auditors. All businesses, other than the above mentioned are treated as special business. It means all general meetings other than Annual General Meeting consider only special businesses whereas an Annual General Meeting may consider both types of businesses. It the notice convening the meeting (where at special business will be transacted) does not state the nature of the special business, the meeting would be deemed to have been convened irregularly. Consequently, that special business cannot be dealt with at the meeting.
RESOLUTIONS	Decisions of a company are made by resolutions passed by the prescribed majority of the members present at the meetings. The purpose of a meeting is to arrive at decisions and the sense of a meeting is ascertained by voting upon proposals put to the meeting. A formal proposal put to the meeting is resolution. A company expresses its will by the means of resolutions. There are three types namely, ordinary, special and resolutions requiring special notice. ORDINARY RESOLUTIONS (SECTION 114) A resolution shall be an ordinary resolution if the notice required under this Act has been duly given and it is required to be passed by the votes cast (whether on a show of hands, or electronically or on a poll) in favour of the resolution, including the casting vote (Chairman) by members who vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes cast against the resolution by members. SPECIAL RESOLUTIONS (SECTION 114) A resolution shall be a special resolution when it is duly specified in the notice calling the general meeting and the votes cast in favour of the resolution (whether on a show of hands, or electronically or on a poll) by members who vote in person or by proxy or by postal ballot are required to be not less than 3 times the number of the votes cast against the resolution by members.

	RESOLUTION REQUIRING SPECIAL NOTICE (SECTION 115) (a) <u>Eligibility for sending Special Notice:</u> A special notice required to be given to the company shall be signed, either individually or collectively by such number of members holding not less than one percent of total voting power or holding shares on which an aggregate sum of not less than ₹ 5,00,000/- has been paid-up on the date of the notice. (b) <u>Notice Period:</u> Such notice shall be sent by members to the company not earlier than three months but at least 14 days before the date of the meeting at which the resolution is to be moved, exclusive of the day on which the notice is given and the day of the meeting. (c) <u>Notice for holding meeting:</u> The company shall immediately after receipt of the notice, give its members notice of the resolution at least seven days before the meeting, exclusive of the day of dispatch of notice and day of the meeting, in the same manner as it gives notice of any general meeting. (d) <u>Publication in the Newspapers:</u> If it is not practicable to give the notice of any general meetings, the notice shall be published in English language in English newspaper and in vernacular language in a vernacular newspaper, both having wide circulation in the State where the registered office of the Company is situated. Such notice shall be published at least 7 days before the meeting, exclusive of the day of publication of the notice and day of the meeting. RESOLUTION PASSED AT ADJOURNED MEETING(SECTION 116) Where a resolution is passed at an adjourned meeting (of a company, or the holders of any class of shares in a company; or the Board of Directors of a company) there the resolution shall be treated as having been passed on the date it was actually passed, and not on any earlier date.
STATEMENT TO BE ANNEXED TO NOTICE (Section 102)	(1) A statement setting out the following material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting, namely:— (a) the nature of concern or interest, financial or otherwise, if any, in respect of each items of— (i) every director and the manager, if any; (ii) every other key managerial personnel; and (iii) relatives of the persons mentioned in sub-clauses (i) and (ii); (b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon. (2) For the purposes of sub-section (1),— (a) in the case of an annual general meeting, all business to be transacted thereat shall be deemed special, other than— (i) the consideration of financial statements and the reports of the Board of Directors and auditors; (ii) the declaration of any dividend; (iii) the appointment of directors in place of those retiring; (iv) the appointment of, and the fixing of the remuneration of, the auditors; and (b) in the case of any other meeting, all business shall be deemed to be special: Provided that where any item of special business to be transacted at a meeting of the company relates to or affects any other company, the extent of shareholding interest in that other company of every promoter, director, manager, if any, and of every other key managerial personnel of the first

	mentioned company shall, if the extent of such shareholding is not less than two per cent of the paid-up share capital of that company, also be set out in the statement. (3) Where any item of business refers to any document, which is to be considered at the meeting, the time and place where such document can be inspected shall be specified in the statement under sub-section (1). (4) Where as a result of the non-disclosure or insufficient disclosure in any statement referred to in sub-section (1), being made by a promoter, director, manager, if any, or other key managerial personnel, any benefit which accrues to such promoter, director, manager or other key managerial personnel or their relatives, either directly or indirectly, the promoter, director, manager or other key managerial personnel, as the case may be, shall hold such benefit in trust for the company, and shall, without prejudice to any other action being taken against him under this Act or under any other law for the time being in force, be liable to compensate the company to the extent of the benefit received by him. (5) Without prejudice to the provisions of sub-section (4), if any default is made in complying with the provisions of this section, every promoter, director, manager or other key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees or five times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is higher; (Substituted by Companies Amendment Ordinance 2018 w.e.f 2nd November 2018)
METHODS OF EXERCISING SHAREHOLDERS RIGHTS WITH REGARD TO VOTING	<u>VOTING BY SHOW OF HANDS :</u> In this method, the Chairman calls upon the persons present who are entitled to vote to raise hands in favour of the motion and on counting them he proceeds to count the hands raised against the motion also. On comparison of the hands shown for and against the motion, the Chairman announces his verdict whether the resolution is carried or lost. Each member, irrespective of his shareholding, or voting right, has one vote. <u>VOTING BY POLL :</u> Poll means counting of heads. In this method, the poll is taken if the Chairman or a prescribed number of members are dissatisfied with the result of voting by show of hands. In a poll, since the votes are counted on the basis of shareholdings of members, the true sense of meeting can be ascertained. Further in a poll proxies can also exercise their vote. In this system, the poll papers are given to persons who are entitled to vote who indicate on them their names and whether they are voting for or against the motion and also indicate therein the number of votes which they are entitled to. The Chairman appoints two scrutinizers to scrutinize these poll papers and submit the report to him, who declares the result of the poll. <u>VOTING BY POSTAL BALLOT</u> Every company, except a company having less than or equal to two hundred Members, shall transact items of business as prescribed, only by means of postal ballot instead of transacting such business at a General Meeting. <u>Definition:</u> Section 2(65) – “Postal Ballot” means voting by post or through any electronic mode. The postal ballot is applicable to all types of companies except One Person Company, Small Company or Private Company or a Company having members upto 200. Provided that any item of business required to be transacted by means of postal ballot under clause (a), may be transacted at a general meeting by a

company which is required to provide the facility to members to vote by electronic means under section 108, in the manner provided in that section.

ITEMS OF BUSINESS WHICH SHALL BE PASSED ONLY BY POSTAL BALLOT

A listed company shall get following resolution passed by postal ballot, instead of transacting the business in general meeting of the company :

1. alteration of the objects clause of the memorandum and in the case of the company in existence immediately before the commencement of the Act, alteration of the main objects of the memorandum.
2. alteration of articles of association in relation to insertion or removal of provisions which are required to be included in the articles of a company in order to constitute it a private company
3. change in place of registered office outside the local limits of any city, town or village
4. change in objects for which a company has raised money from public through prospectus and still has any unutilized amount out of the money so raised
5. issue of shares with differential rights as to voting or dividend or otherwise
6. variation in the rights attached to a class of shares or debentures or other securities
7. buy-back of shares by a company
8. appointment of a Director elected by small shareholders
9. sale of the whole or substantially the whole of an undertaking of a company or where the company owns more than one undertaking, of whole or substantially the whole of any of such undertakings
10. giving loans or extending guarantee or providing security in excess of the limit specified
11. any other Resolution prescribed under any applicable law, rules or regulations

Ordinary Business shall not be transacted by means of a postal ballot.

PROCEDURE FOR CONDUCTING BUSINESS THROUGH POSTAL BALLOT

Notice: Where a company is required or decides to pass any resolution by way of postal ballot, it shall send a notice to all the shareholders in writing on a postal ballot or by electronic means within a period of 30 days from the date of dispatch of the notice.

Notice shall specify the day, date, time and venue where the results of the voting by postal ballot will be announced and the link of the website where such results will be displayed.

The notice shall be sent either

- (a) By Registered Post or speed post, or
- (b) Through electronic means like registered e-mail id, or
- (c) Through courier service for facilitating the communication of the assent or dissent of the shareholder to the resolution within 30 days.

Advertisement: An advertisement shall be published at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide

circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district.

In case of companies having a website, Notice of the postal ballot shall also be placed on the website.

PROCESS FOR POSTAL BALLOT

➤ **Step 1: Send Notice along with Postal Ballot Form:**

Where a listed company decides to pass any resolution by resorting to postal ballot, it shall send a notice to all the shareholders, along with a draft resolution explaining the reasons therefore, and requesting them to send their assent or dissent in writing on a postal ballot form within a period of 30 days from the date of posting of the letter.

The postal ballot form shall be accompanied by a postage prepaid reply envelope addressed to the scrutiniser.

➤ **Step 2: Request Reply from Shareholders:**

The notice shall be sent by registered post acknowledgement due, or by any other method as may be prescribed by the Central Government in this behalf. Also with the notice, there shall be included a postage pre-paid envelope for facilitating the communication of the assent or dissent of the shareholder to the resolution within the said period.

➤ **Step 3: Passing of Resolution:**

If resolution is assented to by a requisite majority of the shareholders by means of postal ballot, it shall be deemed to have duly passed at general meeting convened in that behalf.

➤ **Step 4: Appointment of Scrutiniser:**

- (i) The board of directors shall appoint one scrutinizer, who is not in employment of the company;

The scrutiniser may be a Company Secretary in Practice, a Chartered Accountant in Practice, a Cost Accountant in Practice, an Advocate or any other person of repute who is not in the employment of the company and, who can in the opinion of the Board, scrutinise the postal ballot process in a fair and transparent manner.

The scrutiniser shall however not be an officer or employee of the company.

The scrutiniser so appointed may take assistance of a person who is not in employment of the company and who is well-versed with the e-voting system. Prior Consent to act as a scrutiniser shall be obtained from the scrutiniser and placed before the Board for noting.

- (ii) The scrutinizer shall submit his report as soon as possible after the last date of receipt of Postal Ballots;
- (iii) The scrutinizer will be willing to be appointed and he is available at the Registered Office of the company for the purpose of ascertaining the requisite majority;
- (iv) The scrutinizer shall maintain a register to record the consent or otherwise received, including electronic media, mentioning the particulars of name, address, folio number, number of shares, nominal value of shares, whether the shares have voting, differential voting or non-voting rights and the Scrutinizer shall also maintain record for postal ballot which are received in defaced or mutilated form.

➤ **Step 5: Declaration of Results:**

	Based on the scrutiniser's report, the Chairman or any other Director authorised by him shall declare the result of the postal ballot on the date, time and venue specified in the Notice, with details of the number of votes cast for and against the Resolution, invalid votes and the final result as to whether the Resolution has been carried or not. <u>VOTING BY ELECTRONIC MODE:</u> Every listed company or a company having five hundred or more shareholders may provide to its members facility to exercise their right to vote at general meetings by electronic means. A member may exercise his right to vote at any general meeting by electronic means and company may pass any resolution by electronic voting system. Voting by electronic or Electronic voting system means a 'secure system' based process of display of electronic ballots, recording of votes of the members and the number of votes polled in favour or against, such that the entire voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralized server with adequate 'cyber security'. <u>PROVISIONS RELATING TO E-VOTING:</u> 1. Every company that is required or opts to provide e-voting facility to its Members shall comply with the provisions in this regard. 2. Every company providing e-voting facility shall offer such facility to all Members, irrespective of whether they hold shares in physical form or in dematerialized form. 3. The facility for Remote e-voting shall remain open for not less than three days. 4. The Board shall: (a) appoint one or more scrutinizers for e-voting or the ballot process, (b) appoint an Agency; (c) decide the cut-off date for the purpose of reckoning the names of Members who are entitled to Voting Rights; (d) authorize the Chairman or in his absence, any other Director to receive the scrutinizer's register, report on e-voting and other related papers with requisite details. 5. Notice of the Meeting, wherein the facility of e-voting is provided, shall be sent either by registered post or speed post or by courier or by e-mail or by any other electronic means. 6. Notice shall inform the Members about procedure of Remote e-voting, availability of such facility and provide necessary information thereof to enable them to access such facility. 7. Based on the scrutinizer's report received on Remote e-voting and voting at the Meeting, the Chairman or any other Director so authorised shall counter sign the scrutinizer's report and declare the result of the voting forthwith with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not.
RESOLUTIONS AND AGREEMENTS TO BE FILED (Section 117)	(1) A copy of every resolution or any agreement, in respect of matters specified in sub-section (3) together with the explanatory statement under section 102, if any, annexed to the notice calling the meeting in which the resolution is proposed, shall be filed with the Registrar within thirty days of the passing or making thereof in such manner and with such fees as may be prescribed; Provided that the copy of every resolution which has the effect of altering

	the articles and the copy of every agreement referred to in sub-section (3) shall be embodied in or annexed to every copy of the articles issued after passing of the resolution or making of the agreement. (2) If any company fails to file the resolution or the agreement under sub-section (1) before the expiry of the period specified therein, such company shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of twenty-five lakh rupees and every officer of the company who is in default including liquidator of the company, if any, shall be liable to a penalty of fifty thousand rupees and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees. (Substituted by Companies Amendment Ordinance 2018) (3) The provisions of this section shall apply to— (a) special resolutions; (b) resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions; (c) any resolution of the Board of Directors of a company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director; (d) resolutions or agreements which have been agreed to by any class of members but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by a specified majority or otherwise in some particular manner; and all resolutions or agreements which effectively bind such class of members though not agreed to by all those members; (e) resolutions passed by a company according consent to the exercise by its Board of directors of any of the powers under clause (a) and clause (c) of sub-section (1) of section 180 (f) resolutions requiring a company to be wound up voluntarily passed in pursuance of section 59 of the Insolvency and Bankruptcy Code, 2016; (g) resolutions passed in pursuance of sub-section (3) of section 179; Provided that no person shall be entitled under section 399 to inspect or obtain copies of such resolutions; Provided further that nothing contained in this clause shall apply to a banking company in respect of a resolution passed to grant loans, or give guarantee or provide security in respect of loans under clause (f) of sub-section (3) of section 179 in the ordinary course of its business; and. (h) any other resolution or agreement as may be prescribed and placed in the public domain.
MINUTES OF PROCEEDINGS OF MEETINGS (SECTION 118)	Every company is required to keep minutes of the proceedings of general meetings and of the meetings of Board of directors and its committees. Important provisions relating to the Minutes of the Meeting : Every company shall record minutes of the proceedings of every general meeting of any class of shareholders or creditors, and every resolution passed by postal ballot and every meeting of its Board of Directors or of every committee of the Board. (a) RECORD MINUTES WITHIN 30 DAYS: Every company shall record within 30 days of the conclusion of every such meeting concerned, or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered.

	(b) <u>FAIR AND CORRECT SUMMARY:</u> The minutes of each meeting shall contain a fair and correct summary of the proceedings. (c) <u>APPOINTMENT TO BE INCLUDED:</u> All appointments made at any of the meetings shall be included in the minutes of the meeting. In the case of a meeting of the Board of Directors or of a committee of the Board, the minutes shall also contain – (a) The names of the directors present at the meeting; and (b) In the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring with the resolution. The Chairman of the meeting has the authority to add or delete anything which : (a) Is or could reasonably be regarded as defamatory of any person; or (b) Is irrelevant or immaterial to the proceedings; or (c) Is detrimental to the interests of the company. The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes. (d) <u>THE MINUTES KEPT SHALL BE EVIDENCE</u> of the proceedings recorded therein. No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required by this section to be contained in the minutes of the proceedings of such meeting. (e) <u>COMPLIANCES WITH SECRETARIAL STANDARD:</u> Every company shall observe secretarial standards with respect to general and Board meetings specified by the ICSI. (f) <u>FINE & PUNISHMENTS:</u> If any default is made in complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of ₹ 25,000/- and every officer of the company who is in default shall be liable to a penalty of ₹5,000/-. (g) <u>FINE & PUNISHMENT FOR TEMPERING OF MINUTES:</u> If a person is found guilty of tampering with the minutes of the proceedings of meeting, he shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than ₹ 25,000/- which may extend to ₹ 1,00,000/-.
REPORT ON ANNUAL GENERAL MEETING(SECTION 121)	<u>REPORTING BY EVERY LISTED COMPANY:</u> Every listed public company is required to prepare a report on each annual general meeting including the confirmation to the effect that the meeting was convened, held and conducted as per the provisions of the Act and the rules made thereunder. <u>FILING WITH ROC:</u> A copy of the report is to be filed with the ROC in Form No. MGT – 15 within 30 days of the conclusion of annual general meeting along with the prescribed fee. <u>Rules 31 of the Companies (Management and Administration) Rules, 2014</u> The report shall be prepared in the following manner : 1. A report shall be prepared in addition to the minutes of the general meeting. 2. The report shall be signed and dated by the Chairman of the meeting or in case of his inability to sign, by any two directors of the company, one of whom shall be the Managing director, if there is one. 3. Such report shall contain the details in respect of the following : (a) The day, date, hour and venue of the annual general meeting. (b) Confirmation with respect to appointment of Chairman of the meeting. (c) Number of members attending the meeting. (d) Confirmation of quorum.

- (e) Confirmation with respect to compliance of the Act and the Rules, secretarial standards made thereunder with respect to calling, convening and conducting the meeting.
- (f) Business transacted at the meeting and result thereof.
- (g) Particulars with respect to any adjournment, postponement of meeting, change in venue.
- (h) Any other points relevant for conclusion in the Report.

4. Such Report shall contain fair and correct summary of the proceedings of the meeting.

Default in filing the Report: If the company fails to file the report under sub-section (2) before the expiry of the period specified therein, such company shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees and every officer of the company who is in default shall be liable to a penalty which shall not be less than twenty-five thousand rupees and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of one lakh rupees;
(Substituted by Companies Amendment Ordinance 2018)

UNIT 14: DEPOSITS

INTRODUCTION	Deposits from the public are an important mode of finance in the corporate sector. It is accordingly necessary to control the companies inviting deposits from the public in order to safeguard interest of the public at large. The provisions under Sections 73 to 76 of the Companies Act 2013 and the Companies (Acceptance of Deposits) Rules, 2014 shall apply to all companies except - ❖ a banking company and ❖ a non- banking financial company as defined in the Reserve Bank of India Act, 1934 and ❖ a housing finance company registered with the National Housing Bank established under the National Housing Bank Act, 2013; and
DEPOSITS	<u>WHAT IS DEPOSITS?[SECTION 2(31)]</u> Deposit <u>includes</u> any receipt of money by way of deposit or loan or in any other form by a company, <u>but does not include</u> such categories of amount as may be prescribed in consultation with the Reserve Bank of India. <u>WHAT IS NOT A DEPOSIT?</u> (i) Any amount received from: ○ the Central Government (CG) or ○ a State Government (SG) or ○ any amount received from any other source whose repayment is guaranteed by the Central Government or a State Government, or ○ any amount received from a local authority, or ○ any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature; (ii) Any amount received from: ○ foreign Governments, ○ foreign/international banks, ○ multilateral financial Institutions, ○ foreign government owned development financial institutions, ○ foreign export credit agencies, ○ foreign collaborators, ○ foreign bodies corporate and ○ foreign citizens etc.; (iii) Any amount received as a loan or facility from <u>any banking company</u> or from the <u>State Bank of India</u> or its <u>associates</u> or from <u>any banking institution</u>; (iv) Any amount received as a loan or financial assistance from <u>Public Financial Institutions</u> notified by the Central Government in this behalf in consultation with the Reserve Bank of India; (v) Any amount received against issue of <u>commercial paper</u> or any other instrument issued in accordance with the guidelines or notification issued by the Reserve Bank of India; (vi) Any amount received by a company from <u>any other company</u>; (vii) any amount received and held pursuant to an offer made in accordance with the provisions of the Act towards <u>subscription to any securities</u>, including share application money or advance towards allotment of securities pending allotment, so long as such amount is appropriated only against the amount due on allotment of the securities applied for; (viii) Any amount received from a person who, at the time of receipt of amount, was a <u>director of the company</u> or <u>relative of directors</u> of private company; <i>Provided that the director of the company or relative of the director of the private company, as the case may be, from whom money is received, furnishes</i>

to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the Board's report;

(ix) any amount raised by the issue of bonds or debentures secured by a first charge or a charge ranking pari passu with the first charge on any assets referred to in Schedule III of the Act excluding intangible assets of the company or bonds or debentures compulsorily convertible into shares of the company within ten years:

Provided that if such bonds or debentures are secured by the charge of any assets referred to in Schedule III of the Act, excluding intangible assets, the amount of such bonds or debentures shall not exceed the market value of such assets as assessed by a registered valuer;

(ixa) any amount raised by issue of non-convertible debenture not constituting a charge on the assets of the company and listed on a recognised stock exchange as per applicable regulations made by Securities and Exchange Board of India;

(x) Any amount received from an employee not exceeding his annual salary, under a contract of employment with the company in the nature of non-interest bearing security deposit;

(x) Any amount received as security deposit for the performance of the contract for supply of goods or provision of services;

(xi) any non-interest bearing amount received and held in trust;

(xii) any amount received in the course of, or for the purposes of, the business of the company,-

(a) as an advance for the supply of goods or provision of services accounted for in any manner whatsoever provided that such advance is appropriated against supply of goods or provision of services within a period of three hundred and sixty five days from the date of acceptance of such advance:

Provided that in case of any advance which is subject matter of any legal proceedings before any court of law, the said time limit of three hundred and sixty five days shall not apply;

(b) as advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against such property in accordance with the terms of agreement or arrangement;

(c) as security deposit for the performance of the contract for supply of goods or provision of services;

(d) as advance received under long term projects for supply of capital goods except those covered under item (b) above:

(e) as an advance towards consideration for providing future services in the form of a warranty or maintenance contract as per written agreement or arrangement, if the period for providing such services does not exceed the period prevalent as per common business practice or five years, from the date of acceptance of such service whichever is less;

(f) as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;

(g) as an advance for subscription towards publication, whether in print or in

	electronic to be adjusted against receipt of such publications; Provided that if the amount received under items (a), (b) and (d) above becomes refundable (with or without interest) due to the reasons that the company accepting the money does not have necessary permission or approval, wherever required, to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules: Explanation: For the purposes of this sub-clause the amount shall be deemed to be deposits on the expiry of fifteen days from the date they become due for refund. (xiii) Any amount brought in <u>by the promoters</u> of the company by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank subject to fulfillment of the following conditions, namely:- (a) the loan is brought in pursuance of the stipulation imposed by the lending institutions on the promoters to contribute such finance; (b) the loan is provided by the promoters themselves or by their relatives or by both; and (c) the exemption under this sub-clause shall be available only till the loans of financial institution or bank are repaid and not thereafter; (xiv) Any amount accepted by a <u>Nidhi company</u> in accordance with the rules made under section 406 of the Act. Who is depositor? Depositor [Rules 2(1)(d)] means : (a) Any member of the company who has made a deposit with the company. (b) Any person who has made a deposit with a public company.
ACCEPTANCE OF DEPOSITS	❖ <u>ACCEPTANCE OF DEPOSITS FROM MEMBERS:</u> [Section 73(2)] Conditions for Acceptance of Deposits: 1. Passing of Resolution in General meeting 2. Rules as may be prescribed in consultation with RBI; 3. <u>Conditions Specified in Section 73(2):</u> a) issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in such form and in such manner as prescribed; • Issue Circular to all members by registered post acknowledgment due or Speed Post or by Electronic Mode in DPT 1. • Provided that in addition to issue of such circular to all members in the manner specified above, the circular may be published in English language in an English newspaper and in vernacular language in a vernacular newspaper having wide circulation in the State in which the registered office of the company is situated. • Provided further that a certificate of the statutory auditor of the company shall be attached in Form DPT-1, stating that the company has not committed default in the repayment of deposits or in the payment of interest on such deposits accepted either before or after the commencement of the Act and in case a company had committed a default in the repayment of deposits accepted either before or after the commencement of the Act or in the payment of interest on such deposits, a certificate of the statutory auditor of the company shall be attached in Form DPT-1, stating that the company had made good the default and a period of five years has lapsed since the date of making good the default as the case may be; (w.e.f 15th August 2018) • Every eligible company intending to invite deposits shall issue a circular in the form of an advertisement in <u>Form DPT-1</u> for the

	purpose in English language in an English newspaper having country wide circulation and in vernacular language in a vernacular newspaper having wide circulation in the State in which the registered office of the company is situated, and shall also place such circular on the website of the company, if any b) filing a copy of the circular along with such statement with the Registrar within thirty days before the date of issue of the circular; c) depositing, on or before the 30th day of April each year, such sum which shall not be less than 20% of the amount of its deposits maturing during the following financial year and kept in a schedule bank in a separate bank account to be called deposit repayment reserve account; d) Providing such deposit insurance in such manner and to such extent as prescribed under Rule 5 of Companies (Acceptance of deposits) Rules, 2014. (Omitted by Companies Amendment Act, 2017) e) Certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits and where a default had occurred, the company made good the default and a period of 5 years had lapsed since the date of making good the default; (words Inserted by Companies Amendment Act, 2017) f) Providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company. In case when a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as “unsecured deposits” and shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits. <u>Exemption for Private Companies</u> The MCA vide notification no. G.S.R. 464 dated 5th June 2015 has allowed private companies to accept deposits from its members, monies not exceeding 100% of aggregate of the paid up share capital and free reserves, and such company shall file the details of monies so accepted to the Registrar in such manner as may be specified without complying with Section 73(2) (a) to (e). Thus a private company will have to follow only the condition mentioned in Section 73(2) (f). ❖ <u>ACCEPTANCE OF DEPOSITS FROM PUBLIC:</u> Eligible companies, may accept deposits from persons other than its members • subject to the fulfillment of all requirements provided in Section 73(2) • subject to such rules as may be prescribed in consultation with the Reserve Bank of India and Such a company shall be required to obtain the rating (including its net-worth, liquidity and ability to pay its deposits on due date) from a recognized credit rating agency for informing the public the rating given to the company at the time of invitation of deposits from the public which ensures adequate safety and the rating shall be obtained for every year during the tenure of deposits. [First Proviso to Section 76(1)] Every company accepting secured deposits from the public shall within 30 days of such acceptance, create a charge on its assets of an amount not less than the amount of deposits accepted in favor of the deposit holders in accordance with such rules as may be prescribed. [Second Proviso to Section 76(1)] Section 76(2) states that all the provisions for acceptance of deposits shall, mutatis mutandis, apply to the acceptance of deposits from public under this section.
ELIGIBLE COMPANY	Eligible Company means a public company, having :

FOR ACCEPTANCE OF PUBLIC DEPOSITS	(a) A net worth of not less than ₹ 100 Crores; or (b) A turnover of not less than ₹ 500 Crores. Apart from the above, the issuer company has to obtain the prior consent of the company in general meeting by means of a special resolution.
TERMS & CONDITIONS	
MAXIMUM LIMIT FOR ACCEPTANCE OF DEPOSITS (Section 73)	FOR A COMPANY OTHER THAN AN ELIGIBLE COMPANY: No company (other than private company) shall accept or renew any deposits if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits exceeds 35% of the aggregate of the paid-up share capital, free reserve and Securities Premium of the company . Provided that a specified IFSC Public Company and a Private Company may accept from its members monies not exceeding 100% of aggregate of paid up share capital, free reserves and securities premium and such company shall file details of monies so accepted to ROC in Form DPT 3. Explanation: For the purpose of this rule, a Specified IFSC Public Company means an unlisted public company which is licensed to operate by RBI or SEBI or IRDA from International Financial Services Centre located in an approved multi services SEZ set up under SEZ act, 2005 read with SEZ Rules, 2006: Provided further that the maximum limit in respect of deposits to be accepted from members shall not apply to following classes of private companies namely: (No Limit) (i) A Private company which is a startup, for five years from date of its incorporation; (ii) A Private company which fulfills all of the following conditions namely: (a) Which is not an associate or a subsidiary company of any other company; (b) The borrowings of such a company from banks or Financial Institutions or anybody corporate is less than twice of its paid up share capital or ₹ 50 Crores, whichever is less and (c) Such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under section 73; Provided that all the companies accepting deposits shall file the details of monies so accepted to ROC in form DPT 3. FOR AN ELIGIBLE COMPANY : No eligible company shall accept or renew any deposits : (a) Deposits from any Members: Any deposit from its members, if the amount of such deposit together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits from members exceeds 10% of the aggregate of the paid-up share capital, free reserves and securities premium of the company. (b) Deposits from others: If the amount of such deposit together with the amount of such other deposits, other than the deposit referred to in (a), outstanding on the date of acceptance or renewal exceeds 25% aggregate of the paid-up share capital, free reserve & securities premium of the company. Total Limit = 10%+25% = 35% FOR GOVERNMENT COMPANY: No Government company eligible to accept deposits under section 76 shall accept or renew any deposit, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal exceeds 35% of the aggregate of its paid up share capital, free reserves and securities premium account of the company.

CREATION OF DEPOSIT REPAYMENT RESERVE	❖ Every company referred in section 73(2) (except Private Company) or any Eligible Company inviting accepting deposits from members has to deposit before the 30th day of April of each year, a amount of not less than 15% of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called as deposit repayment reserve account. ❖ This deposit repayment reserve account shall not be used by the company for any purpose other than repayment of deposits. ❖ The amount remaining deposited shall not at any time fall below 15% of the amount of deposits maturing, until the end of the current financial year and the next financial year.
DEPOSIT RECEIPTS	❖ Every company shall, on the acceptance or renewal of a deposit, furnish to the depositor or his agent a deposit receipt for the amount received by the company, within a period of 21 days from the date of receipt of money or realization of cheques. [Rule 12(1)] ❖ Deposit receipt shall be signed by an officer of the company duly authorized by the Board in this behalf and shall state the date of deposit, the name and address of the depositor, the amount received by the company as deposit, the rate and periodicity of interest payable thereon and the date on which the deposit is repayable. [Rule 12(2)]
PENAL RATE OF INTEREST	Every company shall pay a penal rate of interest of 18% per annum for the overdue period in case of deposits, whether secured or unsecured, matured and claimed but remaining unpaid.
CREDIT RATING	❖ Every eligible company shall obtain, at least once in a year, credit rating for deposits accepted by it and a copy of the rating shall be sent to the Registrar of Companies along with the return of deposits in Form DPT-3. ❖ The credit rating shall not be below the minimum investment grade rating or other specified credit rating for fixed deposits, from any one of the approved credit rating agencies as specified for Non-Banking Financial Companies in the Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 1998, issued by the Reserve Bank of India, as amended from time to time. [Rule 3(8)]
TENURE OF DEPOSITS	PERIOD: Minimum period – 6 months from the date of acceptance of deposit Maximum period – 36 Months from the date of acceptance or renewal of such deposit A company may accept or renew deposits for the purpose of meeting any of its short term requirements for a period less than 6 months if such deposits. • Do not exceed 10% of the aggregate of paid-up capital and free reserves • Are repayable not earlier than 3 months
RATE OF INTEREST & BROKERAGE	No company under section 73(2) or any Eligible company shall invite or accept or renew any deposits in any form, carrying a rate of interest or pay brokerage thereon at a rate exceeding the maximum rate of interest or brokerage prescribed by the Reserve Bank of India for acceptance of deposits by non-banking financial companies.
CREATION OF SECURITY	(1) Every company referred to in section 73(2) including Private Company and every eligible company inviting secured deposits shall ❖ provide for security by way of a charge on its assets as referred to in Schedule III of the Act excluding intangible assets of the company ❖ for the due repayment of the amount of deposit and interest thereon for an amount which shall not be less than the amount remaining unsecured by the deposit insurance. [Rule 6(1)]

	(2) The amount of deposits and the interest payable secured by way of a charge on its assets referred in Schedule III of the Act excluding intangible assets shall not exceed the market value of such assets as assessed by a registered valuer. (3) The total value of the security either by way of deposit insurance or by way of charge or by both shall not be less than the amount of deposits accepted and the interest payable thereon. (4) Valuation of stocks, shares, debentures, securities etc. shall be conducted by an independent merchant banker who is registered with the SEBI or an independent chartered accountant in practice having a minimum experience of ten years. (5) The security (not being in the nature of a pledge) for deposits shall be created in favor of a trustee for depositors on: (a) specific movable property of the company, or (b) Specific immovable property of the company wherever situated, or any interest therein. [Rule 6(2)]
REGISTERS OF DEPOSITS	(1) Every company accepting deposits shall, from the date of such acceptance, keep at its registered office one or more separate registers for deposits accepted/renewed, in which there shall be entered separately in the case of each depositor the following particulars, namely : (a) Name, address and PAN of the depositor/s; (b) Particulars of guardian, in case of a minor; (c) Particulars of other security/charge created; (d) Deposit receipt number; (e) Date and amount of each deposit; (f) Duration of the deposit and the date on which each deposit is repayable; (g) Rate of interest; (h) Due date(s) for payment of interest; (i) Mandate and instructions for payment of interest and for non-deduction of tax at source, if any; (j) Date or dates on which payment of interest will be made; (k) Details of deposit insurance including extent of deposit insurance; (l) Any other particulars relating to the deposit. (2) Entries in the register shall be made within 7 days from the date of issuance of the deposit receipt and such entries shall be authenticated by a director or secretary of the company or by any other officer authorized by the Board for this purpose. (3) The register or registers shall be preserved in good order for a period of not less than 8 years from the financial year in which the latest entry is made in the register.
RETURN OF DEPOSITS	Every company to which these rules apply, shall on or before the 30th day of June, of every year, file with the Registrar, a return in Form DPT – 3 along with the prescribed fee as provided in Companies (Registration Offices and Fees) Rules, 2014 and furnish the information contained therein as on the 31st day of March of that year duly audited by the auditor of the company.
REPAYMENT OF DEPOSITS ACCEPTED BEFORE COMMENCEMENT OF COMPANIES ACT 2013 (Section 74)	(1) Where in respect of any deposit accepted by a company before the commencement of this Act, the amount of such deposit or part thereof or any interest due thereon remains unpaid on such commencement or becomes due at any time thereafter, the company shall— (a) file, within a period of three months from such commencement or from the date on which such payments, are due, with the Registrar a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made

	for such repayment, notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and ((b) repay within one year from such commencement or from the date on which such payments are due, whichever is earlier; (2) The Tribunal may on an application made by the company, after considering the financial condition of the company, the amount of deposit or part thereof and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.
DISCLOSURES IN THE FINANCIAL STATEMENT	Every company, other than a Private Company, shall disclose in its Financial Statement, by way of notes, about the money received from the Directors. Every Private company shall disclose in its financial statement, by way of notes, about the money received from the directors, or relatives of directors. Every company other than Government company shall file a onetime return of outstanding receipt of money or loan by a company but not considered as deposits, in terms of clause (c) of sub-rule 1 of rule 2 from the 01st April, 2014 to 31st March 2019, as specified in Form DPT-3 within ninety days from 31st March, 2019 along with fee as provided in the Companies (Registration Offices and Fees) Rules, 2014.
PENAL PROVISIONS (Section 76A)	If company contravenes Section 73 or Section 76 or fails to repay the deposit or part thereof or interest due thereon within the time or time allowed by Tribunal then: 1. The Company shall be liable to pay in addition to the deposits & its interest thereon, also liable to pay ₹ 1 Crore or twice the amount of deposit accepted by the company, whichever is lower but which may extend to ₹ 10 Crores. 2. Every officer of the Company who is in default shall be punishable with imprisonment which may extend to 7 years and with the fine between ₹ 25 Lakhs and ₹ 2 Crores or with both. Provided that if it is proved that the officer of the company who is in default, has contravened such provisions knowingly or willfully with the intention to deceive the company or its shareholders or depositors or creditors or tax authorities, he shall be liable for action under section 447. If any company contravenes any provisions of Companies (Acceptance of Deposit) Rules, 2014 for which no punishment is provided in the Act, then the company and every officer in default shall be punishable with fine which may extend to ₹ 5000/- and in case contravention is continuing one, with a further fine which may extend upto ₹ 500/- per day for every day after the first day during which the default continues. [Rule 21]

UNIT 15: DIVISIBLE PROFITS & DIVIDEND
(Incorporating SS 3 "Dividends")

MEANING OF DIVIDEND	Dividend means a portion of net profit payable to the members of the Company. In other words, dividend is a return on the paid-up share capital and payable to the members of a company. Section 2(35) of the Companies Act, 2013: "Dividend includes any interim dividend". The dividend is the liability to the company after its declaration by the shareholders of the company. On other side, the shareholders have the Right to claim dividend only after a dividend is declared by the company in general meeting.												
TYPE OF DIVIDEND	(a) FINAL DIVIDEND: Dividend is said to be a final dividend if it is declared at the annual general meeting of the company. Final dividend once declared becomes a debt enforceable against the company. Final Dividend can be declared only if it is recommended by the Board of Directors of the Company. (b) INTERIM DIVIDEND: Dividend is said to be an interim dividend if it is declared by the Board of Directors between two annual general meetings of the company. <i>The Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of:</i> (i) the surplus in the profit and loss account or (ii) out of profits of the financial year for which such interim dividend is sought to be declared or (iii) out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend: <i>Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during immediately preceding three financial years.</i> <table border="1" data-bbox="379 1290 1423 1659"> <thead> <tr> <th>INTERIM DIVIDEND</th><th>FINAL DIVIDEND</th></tr> </thead> <tbody> <tr> <td>This dividend is paid before the finalization of accounts of the year</td><td>This dividend is paid after the finalization of account of the year</td></tr> <tr> <td>This dividend is declared by Board of Directors</td><td>This dividend is recommended by BOD but approved by Shareholders in General meeting</td></tr> <tr> <td>Can be revoked with the consent of all the shareholders</td><td>Cannot be revoked in any circumstances</td></tr> <tr> <td>Not defined under companies act</td><td>Defined under companies act</td></tr> <tr> <td>Rate of interim dividend is always less than the rate of final dividend</td><td>Rate of final dividend is always higher than interim dividend</td></tr> </tbody> </table>	INTERIM DIVIDEND	FINAL DIVIDEND	This dividend is paid before the finalization of accounts of the year	This dividend is paid after the finalization of account of the year	This dividend is declared by Board of Directors	This dividend is recommended by BOD but approved by Shareholders in General meeting	Can be revoked with the consent of all the shareholders	Cannot be revoked in any circumstances	Not defined under companies act	Defined under companies act	Rate of interim dividend is always less than the rate of final dividend	Rate of final dividend is always higher than interim dividend
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DECLARATION OF DIVIDEND (SECTION 123)	1. Payment of dividend to be authorized by the articles: As per section 51 of the Companies Act, 2013, a company may, if so authorized by its articles, pay dividend in proportion to the amount payable on each share. If not, the Articles have to be amended accordingly. Where a company has issued equity shares with differential rights as to Dividend, Interim Dividend may, at the option of the Board, be declared on all or any one or more of the classes of such shares in accordance with the terms of issue. (SS 3) In case Interim Dividend is declared on only one class of equity shares, the Directors should ensure that the profit as shown in the interim financial statements is adequate to meet the Dividend that would have to be paid on the other classes of equity shares apart from the depreciation for the full												

year and arrears of depreciation, taxation including deferred tax, transfer to reserves, Dividend on preference shares issued, if any, and other anticipated losses for the year. (SS 3)

Where a company has issued equity shares with differential rights as to voting, no differentiation should be made in the declaration of Interim Dividend on equity shares. (SS 3)

2. Sources for payment of dividend

No dividend shall be declared or paid for any financial year except current and previous year profits or money provided by the Central Govt. or State Govt.

(A) **Current & Previous Year Profits** : The dividend shall be payable

(i) Out of the current year profits of the company as arrived after providing depreciation, or

(ii) Out of the previous year profits of the company arrived at after providing for depreciation and remaining undistributed, or

(iii) Out of both;

Provided that in computing profits any amount representing unrealized gains, notional gains or revaluation of assets and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded.

(B) **Money Provided by CG or SG**: The dividend shall also be payable out of the money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government.

3. Provisions for Depreciation

Dividend should be paid out of the profit of the company for the financial year or out of profit(s) for the previous financial year(s) which have not been transferred to reserves, or out of both, only after providing for depreciation for the year and arrears of depreciation, if any. (SS 3)

4. Transfer of profits to reserves

A company **may** transfer some specified of its profits percentage to the reserves of the company before the declaration of any dividend in any financial year.

5. Dividend to be declared only from free reserves: No dividend shall be declared or paid by a company from its reserves other than free reserves.

Dividend should not be declared out of the Securities Premium Account or the Capital Redemption Reserve Account or Revaluation Reserve or Amalgamation Reserve or out of profit on re-issue of forfeited shares or out of profit earned prior to the incorporation of the company. (SS 3)

6. Set off of Losses: Before declaring Dividend out of profit for the year, any loss for the previous year(s) or the amount of depreciation for the previous year(s), whichever is less, should be set off against such profit.

The Act provides that in case a company has incurred loss in any previous financial year or years, the amount of loss or an amount which is equal to the amount provided for depreciation for that previous financial year or those previous financial years, whichever is less, shall be set off against the profit of the company for the year for which Dividend is proposed to be declared or paid. In either case, such profit is to be arrived at after providing for depreciation in accordance with the provisions contained in the Act. (SS 3)

7. Interim Dividend: Interim Dividend, if declared, is payable out of estimated

	profit for the period for which Interim Dividend is to be declared, after taking into account depreciation for the full year and arrears of depreciation, Dividend at the contracted rate on preference shares, if any, appropriations and transfers to statutory reserves, taxation, and the provisions of the Companies (Transfer of Profits to Reserves) Rules, 1975. (SS 3) 8. Default in Redemption of PS: If redeemable preference shares have not been redeemed on the due date, no Dividend should be declared on equity shares until such preference shares are redeemed. This applies to Interim Dividend as well. (SS 3) 9. Dividend should be declared only on the recommendation of the Board, made at a meeting of the Board. The recommendation for declaration of Dividend should not be made by a Committee of the Board nor by way of a Resolution passed by circulation. Unless the Dividend has been recommended by the Board, Members in General Meeting cannot on their own declare any Dividend. 10. Dividend should be declared only at an Annual General Meeting. Members may declare a lower rate of Dividend than what is recommended by the Board but have no power to increase the amount or rate of Dividend recommended by the Board. 11. No Dividend should be declared on equity shares for previous years in respect of which annual accounts have already been adopted at the respective Annual General Meetings. 12. Dividend, once declared, becomes a debt and should not be revoked. 13. Default relating to Deposits: A company shall not declare Dividend on its equity shares in case of non-compliance of provisions relating to the acceptance of deposits under the Act, till such time the deposits accepted have been repaid with interest in accordance with the terms and conditions of the agreement entered with the depositors. 14. A company shall also not declare any Dividend, if it has defaulted in – (a) Redemption of debentures or payment of interest thereon or creation of debenture redemption reserve, (b) Redemption of preference shares or creation of capital redemption reserve, (c) Payment of Dividend declared in the current or previous financial year(s), or (d) Repayment of any term loan to a bank or financial institution or interest thereon, till such time the default is subsisting. 15. A company is prohibited to issue Bonus shares in lieu of Dividend.
PAYMENT OF DIVIDEND (SS 3)	- Dividend should be paid within thirty days of declaration. - The amount of Dividend after deducting tax at source, if applicable, should be deposited in a separate bank account within five days from the date of declaration of Dividend. - Dividend should be paid out of such bank account within thirty days of declaration. Dividend should be paid in cash, not in kind. - Dividend payable in cash may be paid by cheque or warrant or demand draft or pay order or may be credited to the bank account of the Member in terms of a mandate given by the Member. - Initial validity of the Dividend warrant should be for three months.

	7. A duplicate Dividend warrant should be issued only after the expiry of the validity of the Dividend warrant and the reconciliation of the paid amounts thereof. In case the original instrument is not tendered to the company, a duplicate warrant should be issued only after obtaining requisite indemnity/ declaration from the Shareholder. 8. The Dividend warrant must be accompanied by a statement in writing showing the amount of Dividend paid and the amount of tax deducted at source, if any. 9. Dividend should be paid proportionately on the paid-up value of shares. 10. Calls in arrears and any other sum due from a Member may be adjusted against Dividend payable to the Member. 11. Dividend warrants returned by the Bank, after payment thereof, and the Dividend Registers should be preserved for a period of eight years.
DIVIDEND IN CASE OF ABSENCE OR INADEQUACY OF PROFITS	In case of inadequacy or absence of profits in any financial year, any company may declare the dividend out of the previous year's accumulated profits. <u>Rule 3 of Companies (Declaration and Payment of Dividend) Rules, 2014</u> In the event of inadequacy or absence of profits in any year, a company may declare dividend out of previous year surplus subject to the fulfillment of the following conditions : (a) Rate of dividend: The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the 3 years immediately preceding that year. Note: This rule shall not apply to a company which has not declared any dividend in immediately preceding 3 financial years. (b) Total withdrawal from accumulated profits: The total amount to be drawn from such accumulated profits shall not exceed 1/10 of the sum of its paid – up share capital and free reserves as per the latest audited financial statement. (c) Setting off the losses: The amount so drawn shall first be utilized to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared. (d) To maintain reserve : The balance of reserves after withdrawal shall not fall below 15% of its paid – up share capital as per the latest audited financial statement.
UNPAID DIVIDEND ACCOUNT (SECTION 124)	1. <u>Transfer of dividend to a Special Account:</u> In any reason, the dividend has not been paid to the members, the company has to open a special account “unpaid dividend account of ABC Ltd.”, and transfer the unpaid or unclaimed dividend account to the special account. The unpaid or unclaimed dividend amount shall be kept in this account for 7 years from the date of transfer. Note: In case of any default in transfer of the unpaid or unclaimed dividend within 7 days from the expiry of 30 days of declaration, the company shall be liable to pay interest at the rate of 12% on remaining unpaid amount. 2. <u>Transfer to Investors Education and Protection Fund (IEPF):</u> After 7 years, the company has to transfer the entire unpaid or unclaimed amount to the Investors Education and Protection fund. The company shall send a statement of the details of such transfer to the authority which administers the said Fund and that authority shall issue a receipt to the company as evidence of such transfer.

	Before transferring any amount to the Investor Education and Protection Fund, the company should give individual intimation to the Members in respect of whose unclaimed Dividend the amount is being transferred, at least three months before the due date of such transfer. (SS 3) Any interest earned on the Unpaid Dividend Account should be transferred to the Investor Education and Protection Fund. 3. Offence & Penalty: For Company : Fine – Minimum ₹ 5 lakh & Maximum ₹ 25 lakh, For Officer : Fine – Minimum ₹ 1 lakh & Maximum ₹ 5 lakh.
INVESTOR EDUCATION AND PROTECTION FUND (IEPF) (SECTION 125)	The Central Government has established an Investor Education and Protection Fund for the purpose to educate investors and to protect the interest of investors. The following amount is being credited to this fund : - Amounts in the unpaid dividend accounts of companies; - Unpaid or unclaimed application moneys received by companies for allotment of any securities and due for refund; - Unpaid or unclaimed amount of matured deposits with companies; - Unpaid or unclaimed amount of matured debentures with companies; - The interest accrued on the account referred to in clauses (a) to (d); - Grants and donations given to the Fund by the Central Government, State Governments, companies or any other institutions for the purposes of the Fund; and - The interest or other income received out of the investments made from the Fund. - sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years; - redemption amount of preference shares remaining unpaid or unclaimed for seven or more years; - the amount given by the Central Government by way of grants after due appropriation made by Parliament by law in this behalf for being utilised for the purposes of the Fund; - such other amount as may be prescribed: <u>UTILIZATION OF INVESTOR EDUCATION AND PROTECTION FUND</u> The amount of IEPF shall be utilized for : - The refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon; - Promotion of investors' education, awareness and protection; - Distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture – holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement; - Reimbursement of legal expenses incurred in pursuing class action suits by members, debenture – holders or depositors as sanctioned by the NCLT; and any other purpose. <u>ACCOUNTS & AUDIT OF IEPF:</u> - The Authority shall maintain proper accounts and other relevant records as given in Schedule to these rules and prepare an annual statement of accounts in such form as may be specified by the Central Government in consultation with the Comptroller and Auditor-General of India. - The accounts of the Authority shall be audited annually by the Internal Audit Party of the office of Chief Controller of Accounts and Comptroller and Auditor-General of India at such intervals and any expenditure incurred in connection with such audit shall be payable by the Authority to the Comptroller and Auditor-General of India. - The Comptroller and Auditor-General of India or any other person appointed by him in connection with the audit of the accounts of the

Authority shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Authority.

- The accounts of the Authority as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

MANNER OF TRANSFER OF SHARES UNDER SUB-SECTION (6) OF SECTION 124 TO THE FUND

1. The shares shall be credited to DEMAT Account of the Authority to be opened by the Authority for the said purpose, within a period of thirty days of such shares becoming due to be transferred to the Fund

Provided that, in case the beneficial owner has encashed any dividend warrant during the last seven years, such shares shall not be required to be transferred to the Fund even though some dividend warrants may not have been encashed

Provided further that in cases where the period of seven years provided under sub-section (5) of section 124 has been completed or being completed during the period from 7th September, 2016 to 31st October, 2017, the due date of transfer of such shares shall be deemed to be 31st October, 2017

2. For the purposes of effecting transfer of such shares, the Board shall authorise the Company Secretary or any other person to sign the necessary documents.

3. The company shall follow the following procedure while transferring the shares, namely:-

(a) The company shall inform, at the latest available address, the shareholder concerned regarding transfer of shares three months before the due date of transfer of shares and also simultaneously publish a notice in the leading newspaper in English and regional language having wide circulation informing the concerned that the names of such shareholders and their folio number or DP ID - Client ID are available on their website duly mentioning the website address.

(b) In case, where there is a specific order of Court or Tribunal or statutory Authority restraining any transfer of such shares and payment of dividend or where such shares are pledged or hypothecated under the provisions of the Depositories Act, 1996 or shares already been transferred under sub-rule (1) above, the company shall not transfer such shares to the Fund:

Provided that the company shall furnish details of such shares and unpaid dividend to the Authority in Form No. IEPF 3 within thirty days from the end of financial year.

(c) For the purposes of effecting the transfer, where the shares are dealt with in a depository-

(i) the Company shall inform the depository by way of corporate action, where the shareholders have their accounts for transfer in favour of the Authority.

(ii) on receipt of such intimation, the depository shall effect the transfer of shares in favour of DEMAT account of the Authority.

(d) For the purposes of effecting the transfer shares held in physical form-

(i) the Company Secretary or the person authorised by the Board shall make an application, on behalf of the concerned shareholder, to the company, for issue of a new share certificate;

(ii) on receipt of the application under clause (a), a new share certificate for each such shareholder shall be issued and it shall be stated on the face of the certificate that

“Issued in lieu of share certificate No..... for the purpose of transfer to IEPF” and the same be recorded in the register maintained for the purpose;

(iii) particulars of every share certificate shall be in Form No. SH-1 as specified in the Companies (Share Capital and Debentures) Rules, 2014;

(iv) after issue of a new share certificate, the company shall inform the depository by way of corporate action to convert the share certificates into DEMAT form and transfer in favour of the Authority

4. The company shall make such transfers through corporate action and shall preserve copies for its records.

5. While effecting such transfer, the company shall send a statement to the Authority in Form No. IEPF 4 containing details of such transfer.

6. The voting rights on shares transferred to the Fund shall remain frozen until the rightful owner claims the shares:

Provided that for the purpose of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the shares which have been transferred to the Authority shall not be excluded while calculating the total voting rights.

7. The company shall maintain the details of shareholding of each individual shareholders whose shares have been credited to the DEMAT account of the Authority.

8. All benefits accruing on such shares e.g., bonus shares, split, consolidation, fraction shares etc., except right issue shall also be credited to such DEMAT account.

9. The shares held in such DEMAT account shall not be transferred or dealt with in any manner whatsoever except for the purposes of transferring the shares back to the claimant as and when he approaches the Authority or in accordance with sub-rule (10) and (11).

10. If the company is getting delisted, the Authority shall surrender shares on behalf of the shareholders in accordance with the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 and the proceeds realised shall be credited to the Fund and a separate ledger account shall be maintained for such proceeds.

11. In case the company whose shares or securities are held by the Authority is being wound up, the Authority may surrender the securities to receive the amount entitled on behalf of the security holder and credit the amount to the Fund and a separate ledger account shall be maintained for such proceeds.

12. Any further dividend received on such shares shall be credited to the Fund and a separate ledger account shall be maintained for such proceeds.

13. Any amount required to be credited by the companies to the Fund as provided under sub-rules (10), (11) and sub-rule (12) shall be remitted into the specified account of the IEPF Authority maintained in the Punjab National Bank.

14. Authority shall furnish its report to the Central Government as and when

noncompliance of the rules by companies came to its knowledge.

REFUND TO CLAIMANTS FROM FUND

(1) Any person may claim the shares under proviso to sub-section (6) of section 124 or apply for refund under clause (a) of sub-section (3) of section 125 or under proviso to sub-section (3) of section 125, as the case may be, to the **Authority** by submitting an **online application in Form IEPF-5** available on the website www.iepf.gov.in along with fee specified by the Authority from time to time in consultation with the Central Government.

(2) The claimant shall after making an application in Form IEPF-5 under rule (1), **send** the same duly signed by him along with, requisite documents as enumerated in Form IEPF-5 **to the concerned company** at its registered office for verification of his claim.

(2A) Every company which has deposited the amount to the Fund shall **nominate a Nodal Officer** for the **purpose of coordination** with IEPF Authority and communicate the contact details of the Nodal Officer duly indicating his or her designation, postal address, telephone and mobile number and company authorized e-mail ID to the IEPF Authority, within fifteen days from the date of publication of these rules and the company shall display the name of Nodal Officer and his e-mail ID on its website.

(3) The company shall, within fifteen days from the date of receipt of claim, **send a verification report to the Authority** in the format specified by the Authority along with all the documents submitted by the claimant.

Provided that in case of non receipt of documents by the Authority after the expiry of ninety days from the date of filing of Form IEPF-5, the Authority **may reject** Form IEPF-5, after giving an opportunity to the claimant to furnish response within a period of thirty days.

(4) After verification of the entitlement of the claimant-

(a) to the amount claimed, the Authority and then Drawing and Disbursement Officer of the Authority shall present a bill to the Pay and Accounts Office for e-payment as per the guidelines,

(b) to the shares claimed, the Authority shall issue a refund sanction order with the approval of the Competent Authority and shall credit the shares to the DEMAT account of the claimant to the extent of the claimant's entitlement.

(5) The Authority shall, in its records, **cause a note to be made** of all the payments made under sub-rule (4).

(6) An application received for refund of any claim under this rule duly verified by the concerned company shall be **disposed off** by the Authority within **sixty days** from the date of receipt of the verification report from the company, complete in all respects and any delay beyond sixty days shall be recorded in writing specifying the reasons for the delay and the same shall be communicated to the claimant in writing or by electronic means.

(7) In cases, where the application is **incomplete or not approved**, a communication shall be sent to the claimant and the concerned company by the Authority detailing deficiencies of the application.

Provided that in case of non receipt of rectified documents by the Authority after the expiry of ninety days from the date of such communication, the Authority may reject Form IEPF-5, after giving an opportunity to the claimant to furnish response within a period of thirty days.

(8) In case, claimant is a **legal heir or successor or administrator or nominee** of the registered share holder, he has to ensure that the transmission process is completed by the company before filing any claim with the Authority.

	(9) In case, claimant is a legal heir or successor or administrator or nominee of any other registered security or in cases where request of transfer or transmission of shares is received after the transfer of shares by company to the Authority, the company shall verify all requisite documents required for registering transfer or transmission and shall issue letter to the claimant indicating his entitlement to the said security and furnish a copy of the same to the Authority while verifying the claim of such claimant. (10) The claimant shall file only one consolidated claim in respect of a company in a financial year. (11) The company shall be liable under all circumstances whatsoever to indemnify the Authority in case of any dispute or lawsuit that may be initiated due to any incongruity or inconsistency or disparity in the verification report or otherwise and the Authority shall not be liable to indemnify the security holder or Company for any liability arising out of any discrepancy in verification report submitted etc., leading to any litigation or complaint arising thereof.
DIVIDEND DURING REGISTRATION OF TRANSFER OF SHARES (SECTION 126) (SS 3)	When any instrument of transfer of shares has been delivered to any company for registration and the transfer of such shares has not been registered by the company, it shall, notwithstanding anything contained in any other provision of this Act : (a) Transfer such fund to unpaid dividend account : Transfer the dividend in relation to such shares to the Unpaid Dividend Account unless the company is authorized by the registered holder of such shares in writing to pay such dividend to the transferee specified in such instrument of transfer; and (b) Keep in abeyance: Keep in abeyance in relation to such shares, any offer of rights shares and any issue of fully paid – up bonus shares.
PUNISHMENT FOR FAILURE TO DISTRIBUTE DIVIDENDS (SECTION 127) (June 2016)	When a dividend has been declared by a company but has not been paid within 30 days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to 2 years and with fine which shall not be less than ₹ 1000/- for every day during which such default continues and the company shall be liable to pay simple interest at the rate of 18% per annum during the period for which such default continues. EXCEPTIONS: Proviso to section 127 has provided a list where no offence under this section shall be deemed to have been committed :- (a) Where the dividend could not be paid by reason of the operation of any law; (b) Where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him; (c) Where there is a dispute regarding the right to receive the dividend; (d) Where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder; or (e) Where, for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to any default on the part of the company.
DISCLOSURES (SS 3)	1. The Balance Sheet of the company should disclose under the head 'current liabilities and provisions', the amount lying in the Unpaid Dividend Account together with interest accrued thereon, if any. 2. The Annual Report of the company should disclose the total amount lying in the Unpaid Dividend Account of the company in respect of the last seven years. The amount of Dividend, if any, transferred by the company to the Investor Education and Protection Fund during the year should also be

	disclosed. 3. The amounts lying in the Unpaid Dividend Account and the amounts transferred to the Investor Education and Protection Fund should be disclosed in the Directors' Report. 4. The Annual Return of the company should mention that the amount of Dividend remaining unpaid or unclaimed for a period of seven years from the date such Dividend became payable by the company, together with interest accrued thereon, if any, has been credited to the Investor Education and Protection Fund.
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UNIT 16: ACCOUNTS & AUDIT

INTRODUCTION	As a part of legal compliance, it is obligatory to the companies to maintain their books of accounts and the books of accounts get verified and audited from an auditor. An auditor is responsible for checking and verification of books of accounts of a company. The checking and verification of books of account is known as auditing. The auditing is also known as the post mortem of books of accounts of a Company.
ACCOUNTS	The shareholders give capital to the company for doing the business and they are the owners of the company. On contrary, despite providing capital to the company, shareholders do not participate in managing the affairs of the company. However, they have every right to know as to how their money has been dealt with by the directors in a particular period (i. e. financial year).
REQUIREMENT OF KEEPING BOOKS OF ACCOUNT (SECTION 128)	Every company shall keep proper books of account of the company. The main features of the proper books of account are as under :- - The company must keep the books of account., - The books of account must show all money received and expended, sales and purchases of goods and the assets and liabilities of the company. - The books of account must be kept on accrual basis and according to the double entry system of accounting. - The books of account must give a true and fair view of the state of the affairs of the company or its branches. <u>Books of Account</u> include the records maintained in connection with : - All sums of money received and expended by a company and matters in relation to which the receipts and expenditure take place; - All sales and purchases of goods and services by the company; and - The assets and liabilities of the company.
PLACE OF KEEPING BOOKS OF ACCOUNT (Section 128)	➤ Every company has to prepare and keep the books of account and other relevant books and papers and financial statements <u>at its registered office</u>. ➤ The books of accounts may be kept at <u>other place in India</u> as decided by the Board of Directors. ➤ In case of any change about the place of keeping Books of accounts, the company is required to <u>file a notice to ROC within 7days</u> in writing giving the full address of that other place. ➤ Where a company has a branch office in India or Outside, The book of accounts of the branch office relating to transactions of a branch office may be kept at <u>that branch office</u>. However, the branch office must send summarized books of accounts of branch at intervals of not more than 3 months to the registered office or that other place mentioned above.
MAINTENANCE OF BOOKS OF ACCOUNT	✓ A company may maintain the books of account in electronic mode and/or in physical form. The information contained in the records shall be retained completely in the format in which they were <u>originally generated, sent or received</u>, or in a format which shall present accurately the information generated, sent or received and the information contained in the electronic records shall remain complete and unaltered. ✓ The information received from branch offices <u>shall not be altered</u> and shall be kept as it is originally received. The information in the electronic record of the document shall be <u>capable of being displayed in a legible form</u>. ✓ The back – up of the books of account shall be kept in a server physically located in India and shall be updated time to time. ✓ The company shall <u>intimate to the ROC</u> on an Annual Basis along with financial statement :

	(a) The name of the service provider; (b) The internet protocol (IP) address of service provider; (c) The location of the service provider; (d) Where the books of account are maintained on cloud, such address of the service provider.
PRESERVATION OF BOOKS OF ACCOUNT	❖ Every company shall preserve their books of accounts together with the vouchers for <u>at least 8 years</u> immediately preceding the current year. ❖ If the company has not been in existence for 8 years, then for the whole period of its existence.
INSPECTION OF BOOKS OF ACCOUNT	(a) Director: A director can inspect the books of accounts and relevant papers during business hours of a Company. A director may also appoint his agent or representative to inspect the books of accounts of the company during business. Note: The right of inspection can be refused if it is found that the inspection is being sought to pass on the information to a rival business of the company. (b) Inspection by the ROC/Officers of SEBI: The ROC and any other officer authorized by the Central Government to carry out inspection of books of account. The books of account can also be inspected by officers of the SEBI. (c) Member's right of inspection of accounting records: Members of a company do not have a right of inspection of its accounting records except as authorized by the Board or the company in general meeting. The right of inspection of documents and books of a company is not limited to the Board of Directors. (d) Auditor's right of inspection of accounts: An auditor has the right to access at all time to the company's accounts, whether kept at the head office of the company or elsewhere.
PERSONS RESPONSIBLE FOR KEEPING THE BOOKS OF ACCOUNT (June 2016)	The following persons are responsible to take all reasonable steps to secure compliance by the company with the requirement of maintenance of books of accounts : (a) Managing Director, (b) Whole – Time Director, in charge of finance, (c) Chief Financial Officer, (d) Any other person of a company charged by the Board.
PUNISHMENT FOR CONTRAVENTION	Such managing director, whole-time director in charge of finance, Chief Financial officer or such other person of the company shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both.
FINANCIAL STATEMENT[SECTION 2(40)]	Financial Statement includes : (a) Balance Sheet (b) Profit and Loss account or Income and Expenditure account (c) Cash flow Statement (d) Statement of change in equity, if applicable (e) Any explanatory notes annexed to or forming part of financial statements, giving information required to be given and allowed to be given in the form of notes Note: The financial statement with respect to One Person Company (OPC), Small Company and Dormant Company, may not include the cash flow statement. The financial statement shall be laid in the AGM of that financial year. In case of Holding Companies, the company shall prepare a consolidated financial statement of the Company including its subsidiaries and lay before the AGM.
FINANCIAL STATEMENT, BOARD'S REPORT	❖ The financial statements shall: ○ <u>give a true and fair view</u> of the state of affairs of the company or companies, ○ Comply with the accounting standards notified under section 133 and

(SECTION 129)

- Shall be in the form or forms as may be provided for different class or classes of companies in Schedule III:

Provided that the items contained in such financial statements shall be in accordance with the accounting standards:

Provided further that nothing contained in this sub-section shall apply to any insurance or banking company or any company engaged in the generation or supply of electricity, or to any other class of company for which a form of financial statement has been specified in or under the Act governing such class of company:

- ❖ At every annual general meeting of a company, the Board of Directors of the company shall lay before such meeting financial statements for the financial year.

- ❖ *Where a company has one or more subsidiaries or associate companies, it shall, in addition to financial statements provided under sub-section (2), prepare a consolidated financial statement of the company and of all the subsidiaries and associate companies in the same form and manner as that of its own and in accordance with applicable accounting standards, which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under sub-section (2):*

Provided that the company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries in such form as may be prescribed:

Provided further that the Central Government may provide for the consolidation of accounts of companies in such manner as may be prescribed.

- ❖ **Non Compliance with AS:** Where the financial statements of a company do not comply with the accounting standards referred to in sub-section (1), the company shall disclose in its financial statements, the deviation from the accounting standards, the reasons for such deviation and the financial effects, if any, arising out of such deviation.
- ❖ **Punishment for Contravention:** If a company contravenes the provisions of this section, the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person charged by the Board with the duty of complying with the requirements of this section and in the absence of any of the officers mentioned above, all the directors shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both. (Same as Section 128)

ADDITIONAL REQUIREMENTS AS TO FINANCIAL STATEMENTS

For Private or Public Companies :

Financial statement (including consolidated financial statements) of the private and public companies should be approved by the Board of Directors, before such statements are signed.

Financial statement should be signed on behalf of the Board by atleast

- (a) Chairperson of company, if so authorized by the Board, or 2 directors (one should be the managing director), and
- (b) Chief Executive Officer, if he is director, chief financial officer and company secretary, if any in the company.

Requirement for other Companies :

- (a) One Person Company's financial statements shall be signed by only one director.
- (b) Such sign is required for submission of financial statements to the auditor for his report.
- (c) Auditor's report is required to be attached to every financial statement.
- (d) Board's report shall be attached to the statements laid before the company in

general meeting.

Penal provisions:

For Company: not less than ₹ 50,000/- which may extend upto ₹5,00,000/-,

For every officer in default: Imprisonment upto 3 years, or fine from ₹50,000/- to ₹ 5,00,000/- or Both.

Definition of Financial Year [Section2(41)]

"financial year", in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up:

Provided that where a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Central Government may, on an application made by that company or body corporate in such form and manner as may be prescribed, **allow any period as its financial year, whether or not that period is a year:**

Provided also that any application pending before the Tribunal as on the date of commencement of the Companies (Amendment) Ordinance, 2018, shall be disposed of by the Tribunal in accordance with the provisions applicable to it **before such commencement.**

Application under sub-section (41) of section 2 for change in financial year [Rule 40 of Companies (incorporation) Rules, 2014]

(1) The application for approval of concerned Regional Director under sub-section (41) of section 2, shall be filed in e-Form No.RD-1 along with the fee as provided in the companies (Registration offices and Fees) Rules, 2014 and shall be accompanied by the following documents, namely:-

- (a) grounds and reasons for the application;
- (b) a copy of the minutes of the board meeting at which the resolution authorising such change was passed, giving details of the number of votes cast in favour and or against the resolution;
- (c) Power of Attorney or Memorandum of Appearance, as the case may be;
- (d) details of any previous application made within last five years for change in financial year and outcome thereof along with copy of order

(2) Where the Regional Director on examining the application, referred to in sub-rule (1), finds it necessary to call for further information or finds such application to be defective or incomplete in any respect, he shall give intimation of such information called for or defects or incompleteness, on the last intimated e-mail address of the person or the company, which has filed such application, directing the person or the company to furnish such information, or to rectify defects or incompleteness and to re-submit such application within a period of fifteen days, in e-Form No. RD-GNL-S.

Provided that a maximum of two re-submissions shall be allowed.

(3) (a) In case where such further information called for has not been provided or the defects or incompleteness has not been rectified to the satisfaction of the Regional Director within the period allowed under sub-rule (2), the Regional Director shall reject the application with reasons within thirty days from the date of filing application or within thirty days from the date of last re-submission made as the case may be.

(b) In case where the application is found to be in order, Regional Director shall allow and convey the order within thirty days from the date of application or within thirty days from the date of last re-submission, as the case may be.

	(c) where no order for approval or re-submission or rejection has been explicitly made by the Regional Director within the stipulated time of thirty days, it shall be deemed that the application stands approved and an approval order shall be automatically issued to the applicant. (4) The order conveyed by the Regional Director shall be filed by the company with the Registrar in Form No.INC-28 within thirty days from the date of receipt of the order along with fee as provided in the Companies (Registration Offices and Fees) Rules,2014. Provided further that a company or body corporate, existing on the commencement of this Act, shall, within a period of two years from such commencement, align its financial year as per the provisions of this clause;
RE-OPENING OF ACCOUNTS ON COURT'S OR TRIBUNAL ORDER (SECTION 130)	(1) A company shall not re-open its books of account and not recast its financial statements, unless an application in this regard is made by the Central Government, the Income-tax authorities, the Securities and Exchange Board, any other statutory regulatory body or authority or any person concerned and an order is made by a court of competent jurisdiction or the Tribunal to the effect that— (i) the relevant earlier accounts were prepared in a fraudulent manner; or (ii) the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements: Provided that the court or the Tribunal, as the case may be, shall give notice to the Central Government, the Income-tax authorities, the Securities and Exchange Board or any other statutory regulatory body or authority concerned or any other person concerned and shall take into consideration the representations, if any, made by that Government or the authorities, Securities and Exchange Board or the body or authority concerned or any other person concerned before passing any order under this section. (2) Without prejudice to the provisions contained in this Act the accounts so revised or re-cast under sub-section (1) shall be final. (3) No order shall be made under sub-section (1) in respect of re-opening of books of account relating to a period earlier than eight financial years immediately preceding the current financial year: Provided that where a direction has been issued by the Central Government under the proviso to sub-section (5) of section 128 for keeping of books of account for a period longer than eight years, the books of account may be ordered to be re-opened within such longer period
VOLUNTARY REVISION OF FINANCIAL STATEMENTS OR BOARD'S REPORT (SECTION 131)	(1) If it appears to the directors of a company that— (a) the financial statement of the company; or (b) the report of the Board, do not comply with the provisions of section 129 or section 134 they may prepare revised financial statement or a revised report in respect of any of the three preceding financial years after obtaining approval of the Tribunal on an application made by the company in such form and manner as may be prescribed and a copy of the order passed by the Tribunal shall be filed with the Registrar: Provided that the Tribunal shall give notice to the Central Government and the Income tax authorities and shall take into consideration the representations, if any, made by that Government or the authorities before passing any order under this section: Provided further that such revised financial statement or report shall not be prepared or filed more than once in a financial year: Provided also that the detailed reasons for revision of such financial statement or report shall also be disclosed in the Board's report in the relevant financial year in which such revision is being made (2) Where copies of the previous financial statement or report have been sent out to

	members or delivered to the Registrar or laid before the company in general meeting, the revisions must be confined to— (a) the correction in respect of which the previous financial statement or report do not comply with the provisions of section 129 or section 134; and (b) the making of any necessary consequential alteration. (3) The Central Government may make rules as to the application of the provisions of this Act in relation to revised financial statement or a revised director's report and such rules may, in particular— (a) make different provisions according to which the previous financial statement or report are replaced or are supplemented by a document indicating the corrections to be made; (b) make provisions with respect to the functions of the company's auditor in relation to the revised financial statement or report; (c) require the directors to take such steps as may be prescribed.
NATIONAL FINANCIAL REPORTING AUTHORITY (NFRA) (Section 132)	- Through Section 132 of the Companies Act, 2013, the Central Government has introduced a new regulatory authority named as National Authority for Financial Reporting known as National Financial Reporting Authority (NFRA) with wide powers to recommend, enforce and monitor the compliance of accounting and auditing standards. - The Companies Act, 1956 empowers the Central Government to form a Committee for recommendations on Accounting Standards which is National Advisory Committee on Accounting Standards (NACAS). This is now being renamed with enhanced independent oversight powers and authority as National Financial Reporting Authority (NFRA). - NFRA shall be responsible for monitoring and enforcing compliance of auditing and accounting standards and for that purpose, oversee the quality of professions associated with ensuring such compliances. - The Authority shall investigate professional and other misconducts which may be committed by Chartered Accountancy members and firms. There is also a provision for appellate authority. - The National Financial Reporting Authority shall be a quasi – judicial body to regulate matters related to accounting and auditing. - With increasing demand of non – financial reporting, it may be referred to as a National level business Reporting Authority to regulate standards of all kind of reporting- financial as well as non – financial, by the companies in future. - National Financial Reporting Authority shall give its recommendations on accounting standards and auditing standards. It shall only recommend and it is the Central Government who shall prescribe such standards.
OBJECTIVES OF NFRA (Section 132)	The objectives of National Financial Reporting Authority inter alia shall be as follows: (1) Make recommendations on formulation of accounting and auditing policies and standards for adoption by companies, class of companies or their auditors; (2) Monitor and enforce the compliance with accounting standards, monitor and enforce the compliance with auditing standards; (3) Oversee the quality of service of professionals associated with ensuring compliance with such standards and suggest measures required for improvement in quality of service, and (4) Perform such other functions as may be prescribed in relation to aforementioned objectives.

	Function & Duties of NFRA: (Rule 4) (1) The Authority shall protect the public interest and the interests of investors, creditors and others associated with the companies or bodies corporate governed under rule 3 by establishing high quality standards of accounting and auditing and exercising effective oversight of accounting functions performed by the companies and bodies corporate and auditing functions performed by auditors. (2) In particular, and without prejudice to the generality of the foregoing, the Authority shall:- (a) maintain details of particulars of auditors appointed in the companies and bodies corporate specified in rule 3; (b) recommend accounting standards and auditing standards for approval by the Central Government; (c) monitor and enforce compliance with accounting standards and auditing standards; (d) oversee the quality of service of the professions associated with ensuring compliance with such standards and suggest measures for improvement in the quality of service; (e) promote awareness in relation to the compliance of accounting standards and auditing standards; (f) co-operate with national and international organisations of independent audit regulators in establishing and overseeing adherence to accounting standards and auditing standards; and (g) perform such other functions and duties as may be necessary or incidental to the aforesaid functions and duties. (3) The Central Government may, by notification, and subject to such conditions, limitations and restrictions as may be specified therein delegate any of its powers or functions under the Act, other than the power to make rules, to the Authority. Recommending accounting standards and auditing standards (Rule 6) (1) For the purpose of recommending accounting standards or auditing standards for approval by the Central Government, the Authority- (a) shall receive recommendations from the Institute of Chartered Accountants of India on proposals for new accounting standards or auditing standards or for amendments to existing accounting standards or auditing standards; (b) may seek additional information from the Institute of Chartered Accountants of India on the recommendations received under clause (a), if required. (2) The Authority shall consider the recommendations and additional information in such manner as it deems fit before making recommendations to the Central Government.
POWERS OF NFRA	Notwithstanding anything contained in any other law for the time being in force, the National Financial Reporting Authority shall— (a) have the power to investigate, either suo moto or on a reference made to it by the Central Government, for such class of bodies corporate or persons, in such manner as may be prescribed into the matters of professional or other misconduct committed by any member or firm of chartered accountants, registered under the Chartered Accountants Act, 1949: Provided that no other institute or body shall initiate or continue any proceedings in such matters of misconduct where the National Financial Reporting Authority has initiated an investigation under this section; (b) The Authority shall have powers as are vested in a civil court under Code of Civil Procedure in respect of following matters: 1. Discovery and production of books of accounts and other documents

2. Summoning and enforcing the attendance of persons and examining them on oath
3. Inspection of any books, registers and other documents of any person
4. Issuing commission for examination of witness or documents.

(c) where professional or other misconduct is proved, have the power to make order for—

(A) imposing penalty of—

(I) not less than one lakh rupees, but which may extend to five times of the fees received, in case of individuals; and

(II) not less than five lakh rupees, but which may extend to ten times of the fees received, in case of firms;

(B) debarring the member or the firm from engaging himself or itself from practice as member of the Institute of Chartered Accountant of India referred to in clause (e) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 for a minimum period of six months or for such higher period not exceeding ten years as may be decided by the National Financial Reporting Authority.

Explanation.—For the purposes of this sub-section, the expression "professional or other misconduct" shall have the same meaning assigned to it under section 22 of the Chartered Accountants Act, 1949.

Classes of companies and bodies corporate governed by the Authority

(1) The Authority shall have power to monitor and enforce compliance with accounting standards and auditing standards, oversee the quality of service under sub-section (2) of section 132 or undertake investigation under sub-section (4) of such section of the auditors of the following class of companies and bodies corporate, namely:-

(a) companies whose securities are listed on any stock exchange in India or outside India;

(b) unlisted public companies having paid-up capital of not less than rupees five hundred crores or having annual turnover of not less than rupees one thousand crores or having, in aggregate, outstanding loans, debentures and deposits of not less than rupees five hundred crores as on the 31st March of immediately preceding financial year;

(c) insurance companies, banking companies, companies engaged in the generation or supply of electricity, companies governed by any special Act for the time being in force or bodies corporate incorporated by an Act in accordance with clauses (b), (c), (d), (e) and (f) of sub-section (4) of section 1 of the Act;

(d) any body corporate or company or person, or any class of bodies corporate or companies or persons, on a reference made to the Authority by the Central Government in public interest; and

(e) a body corporate incorporated or registered outside India, which is a subsidiary or associate company of any company or body corporate incorporated or registered in India as referred to in clauses (a) to (d), if the income or net worth of such subsidiary or associate company exceeds twenty per cent. of the consolidated income or consolidated net worth of such company or the body corporate, as the case may be, referred to in clauses (a) to (d).

(2) Every existing body corporate other than a company governed by these rules, shall inform the Authority within thirty days of the commencement of these rules, in *Form NFRA-1, the particulars of the auditor as on the date of commencement of these rules.

(3) Every body corporate, other than a company as defined in clause (20) of section 2, formed in India and governed under this rule shall, within fifteen days of appointment of an auditor under sub-section (1) of section 139, inform the Authority in *Form NFRA-1, the particulars of the auditor appointed by such body corporate:

Provided that a body corporate governed under clause (e) of sub-rule (1) shall

provide details of appointment of its auditor in *Form NFRA-1.

(4) A company or a body corporate other than a company governed under this rule shall continue to be governed by the Authority for a period of three years after it ceases to be listed or its paid-up capital or turnover or aggregate of loans, debentures and deposits falls below the limit stated therein.

Monitoring and enforcing compliance with accounting standards (Rule 7)

(1) For the purpose of monitoring and enforcing compliance with accounting standards under the Act by a company or a body corporate governed under rule 3, the Authority may review the financial statements of such company or body corporate, as the case may be, and if so required, direct such company or body corporate or its auditor by a written notice, to provide further information or explanation or any relevant documents relating to such company or body corporate, within such reasonable time as may be specified in the notice.

(2) The Authority may require the personal presence of the officers of the company or body corporate and its auditor for seeking additional information or explanation in connection with the review of the financial statements of such company or body corporate.

(3) The Authority shall publish its findings relating to non-compliances on its website and in such other manner as it considers fit, unless it has reasons not to do so in the public interest and it records the reasons in writing.

(4) Where the Authority finds or has reason to believe that any accounting standard has or may have been violated, it may decide on the further course of investigation or enforcement action through its concerned Division.

Monitoring and enforcing compliance with auditing standards (Rule 8)

(1) For the purpose of monitoring and enforcing compliance with auditing standards under the Act by a company or a body corporate governed under rule 3, the Authority may: –

- (a) review working papers (including audit plan and other audit documents) and communications related to the audit;
- (b) evaluate the sufficiency of the quality control system of the auditor and the manner of documentation of the system by the auditor; and
- (c) perform such other testing of the audit, supervisory, and quality control procedures of the auditor as may be considered necessary or appropriate.

(2) The Authority may require an auditor to report on its governance practices and internal processes designed to promote audit quality, protect its reputation and reduce risks including risk of failure of the auditor and may take such action on the report as may be necessary.

(3) The Authority may seek additional information or may require the personal presence of the auditor for seeking additional information or explanation in connection with the conduct of an audit.

(4) The Authority shall perform its monitoring and enforcement activities through its officers or experts with sufficient experience in audit of the relevant industry.

(5) The Authority shall publish its findings relating to non-compliances on its website and in such other manner as it considers fit, unless it has reasons not to do so in the public interest and it records the reasons in writing.

(6) The Authority shall not publish proprietary or confidential information, unless it has reasons to do so in the public interest and it records the reasons in writing.

(7) The Authority may send a separate report containing proprietary or confidential information to the Central Government for its information.

(8) Where the Authority finds or has reason to believe that any law or professional or other standard has or may have been violated by an auditor, it may decide on the

	further course of investigation or enforcement action through its concerned Division. <u>Overseeing the quality of service and suggesting measures for improvement. (Rule 9)</u> (1) On the basis of its review, the Authority may direct an auditor to take measures for improvement of audit quality including changes in their audit processes, quality control, and audit reports and specify a detailed plan with time-limits. (2) It shall be the duty of the auditor to make the required improvements and send a report to the Authority explaining how it has complied with the directions made by the Authority. (3) The Authority shall monitor the improvements made by the auditor and take such action as it deems fit depending on the progress made by the auditor. (4) The Authority may refer cases with regard to overseeing the quality of service of auditors of companies or bodies corporate referred to in rule 3 to the Quality Review Board constituted under the Chartered Accountants Act, 1949 (38 of 1949) or call for any report or information in respect of such auditors or companies or bodies corporate from such Board as it may deem appropriate. (5) The Authority may take the assistance of experts for its oversight and monitoring activities.
CONSTITUTION OF NFRA	(i) It shall consist of a chairperson, who shall be a person of eminence & having expertise in accountancy, auditing, finance, business administration, business law, economics or similar disciplines, to be nominated by Central Government, and such other prescribed members not exceeding 15. (ii) The chairperson and all members shall make a declaration in prescribed form about no conflict of interest or lack of independence in respect of their appointment. The chairperson and all full – time members shall not be associated with any audit firm or related consultancy firm during course of their appointment and two years after ceasing to hold such appointment. (iii) The head office of National Financial Reporting Authority shall be at New Delhi and it may, meet at such other places in India, as it deems fit. (iv) Its accounts shall be audited by Comptroller and Auditor General of India (CAG) and such accounts as certified by CAG, together with audit report, shall be forwarded annually to the Central Government.
CG TO PRESCRIBED ACCOUNTING STANDARDS (SECTION 133)	The Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under section 3 of the Chartered Accountants Act, 1949, in consultation with and after examination of the recommendations made by the National Financial Reporting Authority.
FINANCIAL STATEMENTS, BOARD REPORT, ETC (SECTION 134)	(1) <u>SIGNING OF FINANCIAL STATEMENTS:</u> The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by : (i) the chairperson of the company where he is authorized by the Board or (ii) by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or (iii) in the case of One Person Company, only by one director, for submission to the auditor for his report thereon. (2) The auditors' report shall be attached to every financial statement. (3) There shall be attached to statements laid before a company in general meeting,

a **REPORT BY ITS BOARD OF DIRECTORS**, which shall include—

(a) the web address, if any, where annual return referred to in sub-section (3) of section 92 has been placed;

(b) number of meetings of the Board;

(c) Directors' Responsibility Statement;

(ca) details in respect of frauds reported by auditors under sub-section (12) of section 143 other than those which are reportable to the Central Government. (i.e. Amount involved in less than ₹ 1 Crore)

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

(e) in case of a company covered under sub-section (1) of section 178, company's policy on directors' appointment and remuneration including criteria for determining qualifications, positive attributes, independence of a director and other matters provided under sub-section (3) of section 178;

(f) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made— (i) by the auditor in his report; and (ii) by the company secretary in practice in his secretarial audit report;

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

(h) particulars of contracts or arrangements with related parties referred to in sub-section (1) of section 188 in the prescribed form;

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

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

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

(l) material changes and commitments, if any, affecting the financial position of the company which have occurred between the end of the financial year of the company to which the financial statements relate and the date of the report;

(m) the conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as may be prescribed;

(n) a statement indicating development and implementation of a risk management policy for the company including identification therein of elements of risk, if any, which in the opinion of the Board may threaten the existence of the company;

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

(p) in case of a listed company and every other public company having such paid-up share capital as may be prescribed, a statement indicating the manner in which formal annual evaluation of the performance of the Board, its Committees and of individual directors has been made;

(q) such other matters as may be prescribed

Provided that where disclosures referred to in this sub-section have been included in the financial statements, such disclosures shall be referred to instead of being repeated in the Board's report.

Provided further that where the policy referred to in clause (e) or clause (o) is made available on company's website, if any, it shall be sufficient compliance of the requirements under such clauses if the salient features of the policy and any

change therein are specified in brief in the Board's report and the web-address is indicated therein at which the complete policy is available.

(3A) The Central Government may prescribe an abridged Board's report, for the purpose of compliance with this section by One Person Company or small company.

Matters to be included in Board's Report for One Person Company and Small Company (Rule 8A)

(1) The Board's Report of One Person Company and Small Company shall be prepared based on the stand alone financial statement of the company, which shall be in abridged form and contain the following:-

(a) the web address, if any, where annual return referred to in sub-section (3) of section 92 has been placed;

(b) number of meetings of the Board;

(c) Directors' Responsibility Statement as referred to in sub-section (5) of section 134;

(d) details in respect of frauds reported by auditors under sub-section (12) of section 143 other than those which are reportable to the Central Government;

(e) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report;

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

(g) the financial summary or highlights;

(h) material changes from the date of closure of the financial year in the nature of business and their effect on the financial position of the company;

(i) the details of directors who were appointed or have resigned during the year;

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

(2) The Report of the Board shall contain the particulars of contracts or arrangements with related parties referred to in sub-section (1) of section 188 in the Form AOC-2. (w.e.f 31.07.2018)

(4) The report of the Board of Directors to be attached to the financial statement under this section shall, in case of a One Person Company, mean a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.

(5) The **DIRECTORS' RESPONSIBILITY STATEMENT** referred to in clause (c) of sub-section (3) shall state that—

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

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

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

	(d) the directors had prepared the annual accounts on a going concern basis; and (e) the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively. Explanation.—For the purposes of this clause, the term “internal financial controls” means the policies and procedures adopted by the company for ensuring the orderly and efficient conduct of its business, including adherence to company’s policies, the safeguarding of its assets, the prevention and detection of frauds and errors, the accuracy and completeness of the accounting records, and the timely preparation of reliable financial information; (f) the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively. (6) SIGNING ON BOARD’S REORT: The Board’s report and any annexure thereto under sub-section (3) shall be signed by: (i) its chairperson of the company if he is authorized by the Board and (ii) where he is not so authorized, shall be signed by at least two directors, one of whom shall be a managing director, or by the director where there is one director. (7) CIRCULATION OF FINANCIAL STATEMENTS:A signed copy of every financial statement, including consolidated financial statement, if any, shall be issued, circulated or published along with a copy each of— (a) any notes annexed to or forming part of such financial statement; (b) the auditor’s report; and (c) the Board’s report referred to in sub-section (3). (8) CONTRAVENTION WITH THIS SECTION: If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.
ANNUAL COMPLIANCES OF FINANCIAL STATEMENT (SECTION 137)	For Private or Public Company : (a) Adoption of Financial Statement in AGM: Every company is required to file the financial statements (including consolidated financial statement) in Form AOC – 4 with the ROC within 30 days from the day on which the AGM held and adopted the financial statements. (b) Non – adoption of Financial Statement in AGM: If the financial statements are not adopted at the AGM or adjourned AGM, such unadopted financial statements along with the required documents to be filed with the ROC within 30 days of the date of AGM. If AGM has not been held, the financial statement duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with ROC within 30 days of the last day before which the AGM should have been held. For One Person Company: An OPC shall file the copy of financial statements duly adopted by its members within 180 days from the closure of financial year. Note: The Company shall also attach the financial statements of its subsidiaries incorporated outside India not having place of business in India. Special Note: The Certain class of companies as notified by the Central Government, shall mandatorily file their financial statement in XBRL format.

	4th Proviso: Provided also that in the case of a subsidiary which has been incorporated outside India (herein referred to as "foreign subsidiary"), which is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the requirements of the fourth proviso shall be met if the holding Indian company files such unaudited financial statement along with a declaration to this effect and where such financial statement is in a language other than English, along with a translated copy of the financial statement in English; Penal Provisions: If company fails to comply with the requirement of submission of financial statement before ROC, the company shall be punishable with Penalty of ₹ 1000/- per day till the continuance of default subject to maximum of ₹ 10 Lakhs. The managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of the company, shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees; (Amended by Companies Amendment Ordinance 2018)
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QUALIFICATION & DISQUALIFICATION OF AUDITOR (SECTION 141)

(1)	A person shall be eligible for appointment as an auditor of a company only if he is a chartered accountant: Provided that a firm whereof <i>majority of partners</i> practicing in India are qualified for appointment as aforesaid may be appointed by its firm name to be auditor of a company.								
(2)	Where a firm including a limited liability partnership is appointed as an auditor of a company, only the partners who are chartered accountants shall be authorized to act and <u>sign</u> on behalf of the firm.								
(3)	Under sub-section (3) of section 141 along with Rule 10 of the Companies (Audit and Auditors) Rule, 2014 (hereinafter referred as CAAR), the following persons shall not be eligible for appointment as an auditor of a company, namely:- (Disqualifications) <table border="1"> <tr> <td>BODY CORPORATE</td><td>(a) A Body Corporate other than a limited liability partnership registered under the Limited Liability Partnership Act, 2008;</td></tr> <tr> <td>OFFICER OR EMPLOYEE</td><td>(b) An Officer Or Employee of the company;</td></tr> <tr> <td>PARTNER/EMPLOYEE</td><td>(c) a person who is a partner, or who is in the employment, of an officer or employee of the company;</td></tr> <tr> <td>HOLDING ANY SECURITY OF OR INTEREST</td><td> (d) <u>A person who, or his relative or partner -</u> (i) Is HOLDING ANY SECURITY OF OR INTEREST in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company: Provided that the relative may hold security or interest in the company of face value not exceeding rupees one lakh; Provided that the condition of rupees one lakh shall, wherever relevant, be also applicable in the case of a company not having share capital or other securities: Provided further that in the event of acquiring any security or interest by a relative, above the threshold prescribed, the corrective action to </td></tr> </table>	BODY CORPORATE	(a) A Body Corporate other than a limited liability partnership registered under the Limited Liability Partnership Act, 2008;	OFFICER OR EMPLOYEE	(b) An Officer Or Employee of the company;	PARTNER/EMPLOYEE	(c) a person who is a partner, or who is in the employment, of an officer or employee of the company;	HOLDING ANY SECURITY OF OR INTEREST	(d) <u>A person who, or his relative or partner -</u> (i) Is HOLDING ANY SECURITY OF OR INTEREST in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company: Provided that the relative may hold security or interest in the company of face value not exceeding rupees one lakh; Provided that the condition of rupees one lakh shall, wherever relevant, be also applicable in the case of a company not having share capital or other securities: Provided further that in the event of acquiring any security or interest by a relative, above the threshold prescribed, the corrective action to
BODY CORPORATE	(a) A Body Corporate other than a limited liability partnership registered under the Limited Liability Partnership Act, 2008;								
OFFICER OR EMPLOYEE	(b) An Officer Or Employee of the company;								
PARTNER/EMPLOYEE	(c) a person who is a partner, or who is in the employment, of an officer or employee of the company;								
HOLDING ANY SECURITY OF OR INTEREST	(d) <u>A person who, or his relative or partner -</u> (i) Is HOLDING ANY SECURITY OF OR INTEREST in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company: Provided that the relative may hold security or interest in the company of face value not exceeding rupees one lakh; Provided that the condition of rupees one lakh shall, wherever relevant, be also applicable in the case of a company not having share capital or other securities: Provided further that in the event of acquiring any security or interest by a relative, above the threshold prescribed, the corrective action to								

	maintain the limits as specified above shall be taken by the auditor within sixty days of such acquisition or interest. (ii) is INDEBTED TO THE COMPANY, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of rupees five lakh; or (iii) has given a GUARANTEE or provided any SECURITY in connection with the indebtedness of any third person to the Company or its Subsidiary, or its Holding or Associate Company or a Subsidiary of such Holding Company, in excess of one lakh rupees; <i>Explanation.—For the purposes of this clause, the term "relative" means the spouse of a person; and includes a parent, sibling or child of such person or of the spouse, financially dependent on such person, or who consults such person in taking decisions in relation to his investments.</i>
BUSINESS RELATIONSHIP	(e) a person or a firm who, whether directly or indirectly has business relationship with the Company, or its Subsidiary, or its Holding or Associate Company or Subsidiary of such holding company or associate company, of such nature as may be prescribed; Student may note that for the purpose of clause (e) above, the term "business relationship" shall be construed as any transaction entered into for a commercial purpose, except – (i) commercial transactions which are in the nature of professional services permitted to be rendered by an auditor or audit firm under the Act and the Chartered Accountants Act, 1949 and the rules or the regulations made under those Acts; (ii) commercial transactions which are in the ordinary course of business of the company at arm's length price - like sale of products or services to the auditor, as customer, in the ordinary course of business, by companies engaged in the business of telecommunications, airlines, hospitals, hotels and such other similar businesses.
RELATIVE IS A DIRECTOR OR IS IN THE EMPLOYMENT	(f) a person whose relative is a director or is in the employment of the company as a director or key managerial personnel; Meaning of Relative: i) Members of HUF; ii) They are husband & Wife; iii) They are related to another in the following manner: a. Father b. Mother c. Son d. Daughter e. Brother f. Sister
FULL TIME EMPLOYMENT ELSEWHERE OR BREACH OF CEILING	(g) a person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such person or partner is at the date of such appointment or reappointment holding appointment as auditor of MORE THAN TWENTY COMPANIES;
OFFENCE	(h) a person who has been convicted by a court of an offence involving fraud and a period of ten years has not elapsed from the date of such conviction.
PROVIDING & CONULSTING SPECIALISED SERVICES	(i) a person who, directly or indirectly, renders any service referred to in section 144 to the company or its holding company or its subsidiary company.

	(June 2016)	Section 144 of the Companies Act, 2013 is a new provision which prescribes certain services not to be rendered by the auditor. An auditor appointed under this Act shall provide to the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be, but which shall not include any of the following services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company), namely: (i) accounting and book keeping services; (ii) internal audit; (iii) design and implementation of any financial information system; (iv) actuarial services; (v) investment advisory services; (vi) investment banking services; (vii) rendering of outsourced financial services; (viii) management services; and (ix) any other kind of services as may be prescribed. Provided that an auditor or audit firm who or which has been performing any non-audit services on or before the commencement of this Act shall comply with the provisions of this section before the closure of the first financial year after the date of such commencement.
(4)	Where a person appointed as an auditor of a company incurs any of the disqualifications mentioned in sub-section (3) AFTER HIS APPOINTMENT , he shall VACATE his office as such auditor and such vacation shall be deemed to be a casual vacancy in the office of the auditor.	

APPOINTMENT OF AUDITOR (SECTION 139)

Section 139 of the Companies Act, 2013 contains provisions regarding Appointment of Auditors. Discussion on appointment of auditors may be grouped under two broad headings-

I Appointment of First Auditors.

II Appointment of Subsequent Auditors

APPOINTMENT OF FIRST AUDITORS IN THE CASE OF A COMPANY, OTHER THAN A GOVERNMENT COMPANY	As per Section 139(6), the first auditor of a company, other than a Government company, shall be appointed by the Board of Directors within 30 days from the date of registration of the company. In the case of failure of the Board to appoint the auditor, it shall inform the members of the company. The members of the company shall within 90 days at an extraordinary general meeting appoint the auditor. Appointed auditor shall hold office till the conclusion of the first annual general meeting.
APPOINTMENT OF FIRST AUDITORS IN THE CASE OF GOVERNMENT COMPANY:	Section 139(7) provides that in the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government, or Governments, or partly by the Central Government and partly by one or more State Governments, the first auditor shall be appointed by the Comptroller and Auditor-General of India within 60 days from the date of registration of the company. In case the Comptroller and Auditor-General of India does not appoint such auditor within the above said period, the Board of Directors of the company shall appoint such auditor within the next 30 days. Further, in the case of failure of the Board to appoint such auditor within next 30 days, it shall inform the members of the company who shall appoint such auditor within 60 days at an extraordinary general meeting. Auditors shall hold office till the conclusion of the first annual general meeting.
APPOINTMENT OF SUBSEQUENT AUDITOR/REAPPOINTMENT OF AUDITOR IN CASE OF COMPANIES	Section 139(1) of the Companies Act, 2013 provides that every company shall, at the first annual general meeting appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its sixth annual general meeting and thereafter till the conclusion of every sixth meeting.

OTHER THAN GOVERNMENT COMPANY	The following points need to be noted in this regard- (i) The company shall place the matter relating to such appointment of ratification by member at every Annual General Meeting. (ii) Before such appointment is made, the written consent of the auditor to such appointment, and a certificate from him or it that the appointment, if made, shall be in accordance with the conditions as may be prescribed, shall be obtained from the auditor. (iii) The certificate shall also indicate whether the auditor satisfies the criteria provided in section 141. (iv) The company shall inform the auditor concerned of his or its appointment, and also file a notice of such appointment with the Registrar within 15 days of the meeting in which the auditor is appointed.
APPOINTMENT OF SUBSEQUENT AUDITORS IN CASE OF GOVERNMENT COMPANIES:	As per Section 139(5), in the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, the Comptroller and Auditor-General of India shall, in respect of a financial year, appoint an auditor duly qualified to be appointed as an auditor of companies under this Act, within a period of 180 days from the commencement of the financial year, who shall hold office till the conclusion of the annual general meeting.
FILLING OF A CASUAL VACANCY	As per Section 139(8), any casual vacancy in the office of an auditor shall- <u>COMPANIES OTHER THAN GOVERNMENT COMPANY:</u> (i) In the case of a company other than a company whose accounts are subject to audit by an auditor appointed by the Comptroller and Auditor-General of India, be filled by the Board of Directors within thirty days. If such casual vacancy is as a result of the <u>RESIGNATION OF AN AUDITOR</u>, such appointment shall also be approved by the company at a general meeting convened within three months of the recommendation of the Board and he shall hold the office till the conclusion of the next annual general meeting; <u>GOVERNMENT COMPANY:</u> (ii) In the case of a company whose accounts are subject to audit by an auditor appointed by the Comptroller and Auditor-General of India, be filled by the Comptroller and Auditor-General of India within thirty days: It may be noted that in case the Comptroller and Auditor-General of India does not fill the vacancy within the said period the Board of Directors shall fill the vacancy within next thirty day.
CASUAL VACANCY BY RESIGNATION:	As per section 140 (2) the auditor who has resigned from the company shall file within a period of thirty days from the date of resignation, a statement in the prescribed form ADT-3 (as per Rule 8 of CAAR) with the company and the Registrar, and in case of the companies referred to in section 139(5) i.e. subsequent auditor of Government company, the auditor shall also file such statement with the Comptroller and Auditor General of India, indicating the reasons and other facts as may be relevant with regard to his resignation. If the auditor does not comply with the provisions of sub-section (2), he or it shall be liable to a penalty of fifty thousand rupees or an amount equal to the remuneration of the auditor, whichever is less, and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees. (Substituted by Companies Amendment Ordinance 2018)

OTHER IMPORTANT PROVISIONS REGARDING APPOINTMENT OF AUDITORS

1. A retiring auditor may be re-appointed at an annual general meeting, if-
 - (a) he is not disqualified for re-appointment;
 - (b) he has not given the company a notice in writing of his unwillingness to be re-appointed; and
 - (c) a special resolution has not been passed at that meeting appointing some other auditor or providing expressly that he shall not be re-appointed.
2. Where at any annual general meeting, no auditor is appointed or re-appointed, the existing auditor shall continue to be the auditor of the company

ROTATION OF AUDITOR

Applicability of section 139(2) Rotation of Auditor: As per rules prescribed in Companies (Audit and Auditors) Rules, 2014, for applicability of section 139(2) the class of companies shall mean the following classes of companies excluding one person companies and small companies:-

- (I) all unlisted public companies having paid up share capital of rupees ten Crore or more;
- (II) all private limited companies having paid up share capital of rupees Fifty Crore or more;
- (III) all companies having paid up share capital of below threshold limit mentioned in (a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of rupees fifty Crores or more.

As per Section 139(2), No listed company or a company belonging to such class or classes of companies as mentioned above, shall appoint or re-appoint-

- (a) an individual as auditor for more than one term of five consecutive years; and
- (b) an audit firm as auditor for more than two terms of five consecutive years: Provided that -
 - (i) an individual auditor who has completed his term under clause (a) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term;
 - (ii) an audit firm which has completed its term under clause (b), shall not be eligible for re-appointment as auditor in the same company for five years from the completion of such term.

The following points merit consideration in this regard-

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

2. Provided also that every company, existing on or before the commencement of this Act which is required to comply with the provisions of this sub-section, shall comply with requirements of this sub-section within a period which shall not be later than the date of the first annual general meeting of the company held, within the period specified under sub-section (1) of section 96, after three years from the date of commencement of this Act.

3. It has also been provided that right of the company to remove an auditor or the right of the auditor to resign from such office of the company shall not be prejudiced.

4 Subject to the provisions of this Act, members of a company may resolve to provide that-

- (a) In the audit firm appointed by it, the auditing partner and his team shall be rotated at such intervals as may be resolved by members; or
- (b) The audit shall be conducted by more than one auditor.

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

Manner of Rotation of Auditors by the Companies on Expiry of their Term:

Rule 6 of the Companies (Audit and Auditors) Rules, 2014 prescribes the manner of rotation of auditors on expiry of their term which is given below:

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

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

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

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

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

Explanation I - For the purposes of these rules the term "same network" includes the firms operating or functioning, hitherto or in future, under the same brand name, trade name or common control.

Explanation II - For the purpose of rotation of auditors,-

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

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

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

PROVISIONS RELATING TO AUDIT COMMITTEE

MANNER AND PROCEDURE OF SELECTION AND APPOINTMENT OF AUDITORS	Rule 3 of CAAR 2014 (Companies Accounts and Audit Rules) prescribes the following manner and procedure of selection and appointment of auditors. (1) In case of a company that is required to constitute an Audit Committee under section 177, the committee, and, in cases where such a committee is not required to be constituted, the Board, shall take into consideration the qualifications and experience of the individual or the firm proposed to be considered for appointment as auditor and whether such qualifications and experience are commensurate with the size and requirements of the company: Provided that while considering the appointment, the Audit Committee or the Board, as the case may be, shall have regard to any order or pending proceeding relating to professional matters of conduct against the proposed auditor before the Institute of Chartered Accountants of India or any competent authority or any Court. (2) The Audit Committee or the Board, as the case may be, may call for such other information from the proposed auditor as it may deem fit. (3) Subject to the provisions of sub-rule (1), where a company is required to constitute the Audit Committee, the committee shall recommend the name of an individual or a firm as auditor to the Board for consideration and in other cases, the Board shall consider and recommend an individual or a firm as auditor to the members in the annual general meeting for appointment. (4) If the Board agrees with the recommendation of the Audit Committee, it shall further recommend the appointment of an individual or a firm as auditor to the members in the annual general meeting. (5) If the Board disagrees with the recommendation of the Audit Committee, it shall refer back the recommendation to the committee for reconsideration citing reasons for such disagreement. (6) If the Audit Committee, after considering the reasons given by the Board, decides not to reconsider its original recommendation, the Board shall record reasons for its disagreement with the committee and send its own recommendation for consideration of the members in the annual general meeting; and if the Board agrees with the recommendations of the Audit Committee, it shall place the matter for consideration by members in the annual general meeting.
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	(7) The auditor appointed in the annual general meeting shall hold office from the conclusion of that meeting till the conclusion of the sixth annual general meeting, with the meeting wherein such appointment has been made being counted as the first meeting: Provided that such appointment shall be subject to ratification in every annual general meeting till the sixth such meeting by way of passing of an ordinary resolution. Explanation.- For the purposes of this rule, it is hereby clarified that, if the appointment is not ratified by the members of the company, the Board of Directors shall appoint another individual or firm as its auditor or auditors after following the procedure laid down in this behalf under the Act.
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AUDITOR'S REMUNERATION

As per section 142 of the act the remuneration of the auditor of a company shall be fixed in its **general meeting (Members)** or in such manner as may be determined therein.

However, **board** may fix remuneration of the **first auditor** appointed by it.

Further, the remuneration, in addition to the fee payable to an auditor, include the expenses, if any, incurred by the auditor in connection with the audit of the company and any facility extended to him but does not include any remuneration paid to him for any other service rendered by him at the request of the company. Therefore, it has been clarified that the remuneration to Auditor shall also include any facility provided to him.

REMOVAL OF AUDITORS

REMOVAL OF AUDITOR BEFORE EXPIRY OF TERM:	According to Section 140 (1) the auditor appointed under section 139 may be removed from his office before the expiry of his term only by a special resolution of the company, after obtaining the previous approval of the Central Government in that behalf as per Rule 7 of CAAR, 2014: (1) The application to the Central Government for removal of auditor shall be made in Form ADT-2 and shall be accompanied with fees as provided for this purpose under the Companies (Registration Offices and Fees) Rules, 2014. (2) The application shall be made to the Central Government within thirty days of the resolution passed by the Board. (3) The company shall hold the general meeting within sixty days of receipt of approval of the Central Government for passing the special resolution. It is important to note that before taking any action for removal before expiry of terms, the auditor concerned shall be given a reasonable opportunity of being heard.
APPOINTMENT OF AUDITOR OTHER THAN RETIRING AUDITOR:	Section 140 lays down procedure to appoint an auditor other than retiring auditor who was removed: 1. Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed, except where the retiring auditor has completed a consecutive tenure of five years or as the case may be, ten years, as provided under sub-section (2) of section 139. 2. On receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor. 3. Where notice is given of such a resolution and the retiring auditor makes with respect thereto representation in writing to the company (not exceeding a reasonable length) and requests its notification to members of the company, the company shall, unless the representation is received by it too late for it to do so,- (a) in any notice of the resolution given to members of the company, state the fact of the representation having been made; and

	(b) Send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company. and if a copy of the representation is not sent as aforesaid because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting: Provided that if a copy of representation is not sent as aforesaid, a copy thereof shall be filed with the Registrar.
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POWERS AND RIGHTS OF AUDITORS

RIGHT OF ACCESS TO BOOKS, ETC	The auditor of a company, at all times, shall have a right of access to the books of account and vouchers of the company, whether kept at the registered office of the company or at any other place and he is entitled to require from the officers of the company such information and explanation as he may consider necessary for the performance of his duties as auditor. [Section 143(1)]. Further, the auditor of a company which is a holding company shall also have the right of access to the records of all its subsidiaries and Associates in so far as it relates to the consolidation of its financial statements with that of its subsidiaries and Associates.[Section143(1)]
RIGHT TO OBTAIN INFORMATION AND EXPLANATION FROM OFFICERS	This right of the auditor to obtain from the officers of the company such information and explanations as he may think necessary for the performance of his duties as auditor is a wide and important power.
RIGHT TO RECEIVE NOTICES AND TO ATTEND GENERAL MEETING	The auditors of a company are entitled to attend any general meeting of the company (the right is not restricted to those at which the accounts audited by them are to be discussed); also to receive all the notices and other communications relating to the general meetings, which members are entitled to receive and to be heard at any general meeting in any part of the business of the meeting which concerns them as auditors (Section 146).
RIGHT TO REPORT TO THE MEMBERS OF THE COMPANY ON THE ACCOUNTS EXAMINED BY HIM	The auditor shall make a report to the members of the company on the accounts examined by him and on every financial statements which are required by or under this Act to be laid before the company in general meeting and the report shall after taking into account the provisions of this Act, the accounting and auditing standards and matters which are required to be included in the audit report under the provisions of this Act or any rules made there under or under any order made under this section and to the best of his information and knowledge, the said accounts, financial statements give a true and fair view of the state of the company's affairs as at the end of its financial year and profit or loss and cash flow for the year and such other matters as may be prescribed.
RIGHT TO LIEN	In terms of the general principles of law, any person having the lawful possession of somebody else's property, on which he has worked, may retain the property for non-payment of his dues on account of the work done on the property. On this premise, auditor can exercise lien on books and documents placed at his possession by the client for non-payment of fees, for work done on the books and documents. The Institute of Chartered Accountants in England and Wales has expressed a similar view on the following conditions: (i) Documents retained must belong to the client who owes the money. (ii) Documents must have come into possession of the auditor on the authority of the client. They must not have been received through irregular or illegal means. In case of a company client, they must be received on the authority of the Board of Directors. (iii) The auditor can retain the documents only if he has done work on the documents assigned to him.

	(iv) Such of the documents can be retained which are connected with the work on which fees have not been paid.
POWERS / RIGHTS OF COMPTROLLER AND AUDITOR-GENERAL OF INDIA	In the case of a Government company, the comptroller and Auditor-General of India shall appoint the auditor under sub-section (5) or sub-section (7) of section 139 i.e. appointment of First Auditor or Subsequent Auditor (discuss in the beginning of the chapter) and direct such auditor the manner in which the accounts of the Government company are required to be audited and hereupon the auditor so appointed shall submit a copy of the audit report to the Comptroller and Auditor-General of India which, among other things, include the directions, if any, issued by the Comptroller and Auditor-General of India, the action taken thereon and its impact on the accounts and financial statement of the company. The Comptroller and Auditor-General of India shall within sixty days from the date of receipt of the audit report have a right to, (a) conduct a supplementary audit of the financial statement of the company by such person or persons as he may authorize in this behalf; and for the purposes of such audit, require information or additional information to be furnished to any person or persons, so authorized, on such matters, by such person or persons, and in such form, as the Comptroller and Auditor-General of India may direct; and (b) comment upon or supplement such audit report: Provided that any comments given by the Comptroller and Auditor-General of India upon, or supplement to, the audit report shall be sent by the company to every person entitled to copies of audited financial statements under sub-section (1) of section 136 i.e. every member of the company, to every trustee for the debenture-holder of any debentures issued by the company, and to all persons other than such member or trustee, being the person so entitled and also be placed before the annual general meeting of the company at the same time and in the same manner as the audit report. Test Audit : Further, without prejudice to the provisions relating to audit and auditor, the Comptroller and Auditor-General of India may, in case of any company covered under sub-section (5) or sub-section (7) of section 139, if he considers necessary, by an order, cause test audit to be conducted of the accounts of such company and the provisions of section 19A of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971, shall apply to the report of such test audit. '

DUTIES OF AUDITORS (Section 143)

DUTY OF AUDITOR TO INQUIRE ON CERTAIN MATTERS	It is the duty of auditor to inquire into the following matters: (a) Whether loans and advances made by the company on the basis of security have been properly secured and whether the terms on which they have been made are prejudicial to the interests of the company or its members; (b) Whether transactions of the company which are represented merely by book entries are prejudicial to the interests of the company; (c) Where the company not being an investment company or a banking company, whether so much of the assets of the company as consist of shares, debentures and other securities have been sold at a price less than that at which they were purchased by the company; (d) Whether loans and advances made by the company have been shown as deposits; (e) Whether personal expenses have been charged to revenue account; (f) Where it is stated in the books and documents of the company that any shares have been allotted for cash, whether cash has actually been received in respect of
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	such allotment, and if no cash has actually been so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading. The opinion of the Research Committee of the Institute of Chartered Accountants of India on section 143(1) is reproduced below : “The auditor is not required to report on the matters specified in sub-section (1) unless he has any special comments to make on any of the items referred to therein. If he is satisfied as a result of the inquiries, he has no further duty to report that he is so satisfied. In such a case, the content of the Auditor's Report will remain exactly the same as the auditor has to inquire and apply his mind to the information elicited by the enquiry, in deciding whether or not any reference needs to be made in his report. In our opinion, it is in this light that the auditor has to consider his duties under section 143(1).” Therefore, it could be said that the auditor should make a report to the members in case he finds answer to any of these matters in adverse.
DUTY TO SIGN THE AUDIT REPORT	The person appointed as an auditor of the company shall sign the auditor's report or sign or certify any other document of the company, in accordance with the provisions of sub-section (2) of section 141 and the qualifications, observations or comments on financial transactions or matters, which have any adverse effect on the functioning of the company mentioned in the auditor's report shall be read before the company in general meeting and shall be open to inspection by any member of the company.
DUTY TO COMPLY WITH AUDITING STANDARDS	As per sub section 9 of section 143 of the Companies Act, 2013, every auditor shall comply with the auditing standards. Further as per sub section 10 of section 143 of the Act, the Central Government may prescribe the standards of auditing or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under section 3 of the Chartered Accountants Act, 1949, in consultation with and after examination of the recommendations made by the National Financial Reporting Authority: Provided that until any auditing standards are notified, any standard, or standards of auditing specified by the Institute of Chartered Accountants of India shall be deemed to be the auditing standards.
DUTY TO AUDIT REPORT (CARO 2003)	As per sub section 3 of section 143, the auditor's report shall also state: (a) Whether he has sought and obtained all the information and explanations which to the best of his knowledge and belief were necessary for the purpose of his audit and if not, the details thereof and the effect of such information on the financial statements; (b) Whether, in his opinion, proper books of account as required by law have been kept by the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him; (c) Whether the report on the accounts of any branch office of the company audited under sub-section (8) by a person other than the company's auditors has been sent to him under the proviso to that sub-section and the manner in which he has dealt with it in preparing his report; (d) Whether the company's balance sheet and profit and loss account dealt with in the report are in agreement with the books of account and returns; (e) Whether, in his opinion, the financial statements comply with the accounting standards; (f) The observations or comments of the auditors on financial transactions or matters which have any adverse effect on the functioning of the company; (g) Whether any director is disqualified from being appointed as a director under sub-

	section (2) of the section 164; (h) Any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith; (i) Whether the company has adequate internal financial controls system in place and the operating effectiveness of such controls; (j) Such other matters as may be prescribed. Rule 11 of the Companies (Audit and Auditors) Rules, 2014 prescribes the other matters to be included in auditors report. The auditor's report shall also include their views and comments on the following matters, namely:- (i) Whether the company has disclosed the impact, if any, of pending litigations on its financial position in its financial statement; (ii) Whether the company has made provision, as required under any law or accounting standards, for material foreseeable losses, if any, on long term contracts including derivative contracts; (iii) Whether there has been any delay in transferring amounts, required to be transferred, to the Investor Education and Protection Fund by the company.
DUTY TO REPORT ON FRAUDS[Section 143(12)] (Amendment)	❖ If an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, which involves or is expected to involve individually an amount of ₹ 1 Crore or above, he shall immediately report the matter to the Central Government within such time and in such manner prescribed in Rule 13. ❖ Auditor shall forward his report to the Board or the Audit Committee, as the case may be, immediately after he comes to knowledge of the fraud but not later than 2 days, seeking their reply or observations within forty-five days; ❖ On receipt of such reply or observations the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within 15 days of receipt of such reply or observations; ❖ In case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of forty-five days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he failed to receive any reply or observations within the stipulated time. ❖ Further, the report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed post followed by an e-mail in confirmation of the same. This report shall be on the letter-head of the auditor containing postal address, e-mail address and contact number and be signed by the auditor with his seal and shall indicate his Membership Number. The report shall be in the form of a statement as specified in Form ADT-4. ❖ No duty to which an auditor of a company may be subject to shall be regarded as having been contravened by reason of his reporting the matter above if it is done in good faith. It is very important to note that the provision of this rule shall also apply, mutatis mutandis, to a cost auditor and a secretarial auditor during the performance of his duties under section 148 and section 204 respectively. If any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12) of section 143, he shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees)

	❖ In case of a fraud involving lesser than the amount of ₹ 1 Crore, the auditor shall report the matter to Audit Committee constituted under Section 177 or to the Board immediately but not later than 2 days of his knowledge of the fraud and he shall report the matter specifying the following: ○ Nature of Fraud with description] ○ Approximate Amount involved ○ Parties involved ❖ The following details of each of the fraud reporting to the Audit Committee or the Board shall be disclosed in the Board's Report: ○ Nature of Fraud with description ○ Approximate Amount involved ○ Parties involved, remedial action not taken ○ Remedial actions taken ❖ The provision of this Rule shall also apply mutatis mutandis to a Cost auditor and a Secretarial Auditor during the performance of his duties under section 148 & 204 respectively.
DUTY TO REPORT ON ANY OTHER MATTER SPECIFIED BY CENTRAL GOVERNMENT	The Central Government may, in consultation with the National Financial Reporting Authority, by general or special order, direct, in respect of such class or description of companies, as may be specified in the order, that the auditor's report shall also include a statement on such matters as may be specified therein.
DUTY RELATED TO BRANCH AUDITORS	Duties and powers of the company's auditor with reference to the audit of the branch and the branch auditor are discussed separately in the chapter under heading branch audits.
DUTY TO GIVE REASONS FOR QUALIFICATIONS IN AUDIT REPORT	Duty to state the reason for qualification or negative report: As per sub section 4 of section 143, where any of the matters required to be included in the audit report is answered in the negative or with a qualification, the report shall state the reasons there for.
CONTRAVENTION WITH SECTION 139 TO 146 (Section 147)	(1) If any of the provisions of sections 139 to 146 (both inclusive) is contravened, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees, or with both. (2) If an auditor of a company contravenes any of the provisions of section 139, section 143, section 144 or section 145, the auditor shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees or four times the remuneration of the auditor, whichever is less; Provided that if an auditor has contravened such provisions knowingly or wilfully with the intention to deceive the company or its shareholders or creditors or tax authorities, he shall be punishable with imprisonment for a term which may extend to one year and with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees or eight times the remuneration of the auditor, whichever is less; (3) Where an auditor has been convicted under sub-section (2), he shall be liable to— (i) refund the remuneration received by him to the company; and (ii) pay for damages to the company, statutory bodies or authorities or to the members or Creditors of company for loss arising out of incorrect or misleading statements of particulars made in his audit report. (4) The Central Government shall, by notification, specify any statutory body or authority or an officer for ensuring prompt payment of damages to the company or the persons under clause (ii) of sub-section (3) and such body, authority or officer

	shall after payment of damages to such company or persons file a report with the Central Government in respect of making such damages in such manner as may be specified in the said notification. (5) Where, in case of audit of a company being conducted by an audit firm, it is proved that the partner or partners of the audit firm has or have acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to or by, the company or its directors or officers, the liability, whether civil or criminal as provided in this Act or in any other law for the time being in force, for such act shall be of the partner or partners concerned of the audit firm and of the firm jointly and severally <i>"Provided that in case of criminal liability of an audit firm, in respect of liability other than fine, the concerned partner or partners, who acted in a fraudulent manner or abetted or, as the case may be, colluded in any fraud shall only be liable."</i>
INTERNAL AUDIT (Section 138)	<u>Applicability of Internal Audit</u> Internal Audit applies to all companies as under : 1. Every listed company; 2. Every unlisted public company having : (a) Paid – up share capital of ₹ 50 Crore or more during the preceding financial year; or (b) Turnover of ₹ 200 Crore rupees or more during the preceding financial year; or (c) Outstanding loans from banks or public financial institutions exceeding ₹ 100 Crore or more at any point of time during the preceding financial year; or (d) Outstanding deposits of ₹ 25 Crore or more at any point of time during the preceding financial year; and 3. Every private company having : (a) Turnover of ₹ 200 Crore or more during the preceding financial year; or (b) Outstanding loans from banks or public financial institutions ₹ 100 Crore or more at any point of time during the preceding financial year. Provided that an existing company covered under the above parameter shall comply within 6 months with the provisions Internal Audit. <u>Who can be appointed as Internal Auditor?</u> The following professional may conduct the Internal Audit of the above mentioned Companies : (a) A Chartered Accountant; (Whether engaged in Practice or not) or (b) A Cost Accountant; (Whether engaged in Practice or not) or (c) Other professional as may be decided by the Board of Directors to conduct internal audit of the functions and activities of the Company. It may be noted that Internal Auditor may be an Individual, Partnership Firm or Body Corporate. For conducting the internal audit by the above mentioned professional, the Internal Auditor should have knowledge about : (a) Legal and regulatory framework within which the auditee entity operates. (b) Accounting, internal control systems and procedure along with accounting policies. (c) Determine the effectiveness of internal control and check procedures adopted by the entity. (d) Understand the business and other technical details of the auditee entity. (e) Determine nature, timing and extent of procedures to be carried out or performed.
SECRETARIAL AUDIT (Section 204) (December 2015)	• Secretarial Audit means correction and verification of secretarial records and compliances to be maintained by the Company. In other words, secretarial audit is a compliance audit and it is a part of total compliance management in an organization. • It is an effective tool for corporate compliance management.

Every: L U: S: 50 T: 250	• It helps to detect non – compliance and to take corrective measures. • Secretarial Audit is a process to check compliance with the provisions of various laws and rules/regulations/procedures, maintenance of books, records etc., by an independent professional to ensure that the company has complied with the legal and procedural requirements and also followed the due process. It is essentially a mechanism to monitor compliance with the requirements of stated laws. • 1st Time, the Companies Act, 2013 gives statutory recognitions to the Secretarial Audit. As per section 204 of the Companies Act, 2013, every listed company and other class of companies as notified have to annex a Secretarial Audit Report. • Secretarial Audit should be an independent, objective assurance intended to add value and improve an organization's operations. • It helps to accomplish the organization's objectives by bringing a systematic, disciplined approach to evaluate and improve effectiveness of risk management, control, and governance processes. • The Board of Directors shall explain, in their report, in full any qualification made in the Secretarial Audit Report. <u>Applicability of Secretarial Audit:</u> The following companies are required to do the secretarial audit : (a) Every listed companies; or (b) Every Unlisted public company having a paid – up share capital of ₹ 50 Crores or more; or (c) Every Unlisted public company having a turnover of ₹ 250 Crores or more. <u>Who will conduct the Secretarial Audit of the Companies?</u> Only a practicing company secretary can conduct the secretarial audit of the Companies. It shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records.
COST RECORDS & AUDIT (Section 148)	The Central Government may direct for conducting cost audit of certain class of companies which are engaged in the production of such goods or providing such services relating to the utilization of material or labor or to other items of cost. If the Central Government is of the opinion, that it is necessary to do so, it may, by order, direct that the audit of cost records of class of companies. <u>Who will conduct the Cost Audit of the Companies?</u> The cost audit shall be conducted by a Cost Accountant who shall be appointed by the Board of Directors. The qualifications, disqualifications, rights, duties and obligations applicable to auditors shall also apply to a cost auditor and it shall be the duty of the company to give all assistance and facilities to the cost auditor for auditing the cost records of the company. The report on the audit of cost records shall be submitted by the cost accountant in practice to the Board of Directors of the company. A company shall within 30 days from the date of receipt of the cost audit report, furnish with the Central Government with such report along with full information and explanation on every reservation or qualification. <u>The Companies (Cost Records and Cost Audit) Rules, 2014</u> (a) <u>Applicability for cost audit:</u> The Central Government may direct for the audit of cost records of certain class of companies. (b) <u>Maintenance of records:</u> Every company covered under these rules including all units and branches thereof, shall, in respect of each financial year commencing on or after the 1st day of April, 2014, maintain cost records in Form CRA – 1. (c) <u>Cost audit:</u> Every company covered under these rules shall appoint a cost auditor within 180 days from the commencement of every financial year. (d) <u>Qualification of Cost audit Report:</u> Every cost auditor, who conducts an audit of

- (c) Whether the title deeds of immovable properties are held in the name of the company. If not, provide the details thereof;
- (ii) whether physical verification of inventory has been conducted at reasonable intervals by the management and whether any material discrepancies were noticed and if so, whether they have been properly dealt with in the books of account;
- (iii) Whether the company has granted any loans, secured or unsecured to companies, firms, Limited Liability Partnerships or other parties covered in the register maintained under section 189 of the Companies Act, 2013. If so,
 (a) whether the terms and conditions of the grant of such loans are not prejudicial to the company's interest;
 (b) whether the schedule of repayment of principal and payment of interest has been stipulated and whether the repayments or receipts are regular;
 (c) if the amount is overdue, state the total amount overdue for more than ninety days, and whether reasonable steps have been taken by the company for recovery of the principal and interest;
- (iv) in respect of loans, investments, guarantees, and security whether provisions of section 185 and 186 of the Companies Act, 2013 have been complied with. If not, provide the details thereof.
- (v) in case, the company has accepted deposits, whether the directives issued by the Reserve Bank of India and the provisions of sections 73 to 76 or any other relevant provisions of the Companies Act, 2013 and the rules framed thereunder, where applicable, have been complied with? If not, the nature of such contraventions be stated; If an order has been passed by Company Law Board or National Company Law Tribunal or Reserve Bank of India or any court or any other tribunal, whether the same has been complied with or not?
- (vi) Whether maintenance of cost records has been specified by the Central Government under sub-section (1) of section 148 of the Companies Act, 2013 and whether such accounts and records have been so made and maintained.
- (vii) (a) whether the company is regular in depositing undisputed statutory dues including provident fund, employees' state insurance, income-tax, sales-tax, service tax, duty of customs, duty of excise, value added tax, cess and any other statutory dues to the appropriate authorities and if not, the extent of the arrears of outstanding statutory dues as on the last day of the financial year concerned for a period of more than six months from the date they became payable, shall be indicated;
 (b) where dues of income tax or sales tax or service tax or duty of customs or duty of excise or value added tax have not been deposited on account of any dispute, then the amounts involved and the forum where dispute is pending shall be mentioned. (A mere representation to the concerned Department shall not be treated as a dispute).
- (viii) Whether the company has defaulted in repayment of loans or borrowing to a financial institution, bank, Government or dues to debenture holders? If yes, the period and the amount of default to be reported (in case of defaults to banks, financial institutions, and Government, lender wise details to be provided).
- (ix) Whether moneys raised by way of initial public offer or further public offer (including debt instruments) and term loans were applied for the purposes for which those are raised. If not, the details together with delays or default and subsequent rectification, if any, as may be applicable, be reported;
- (x) whether any fraud by the company or any fraud on the Company by its officers or employees has been noticed or reported during the year; If yes, the nature and the amount involved is to be indicated;
- (xi) Whether managerial remuneration has been paid or provided in accordance with the requisite approvals mandated by the provisions of section 197 read with Schedule V to the Companies Act? If not, state the amount involved and steps

	taken by the company for securing refund of the same; (xii) whether the <u>Nidhi Company</u> has complied with the Net Owned Funds to Deposits in the ratio of 1: 20 to meet out the liability and whether the Nidhi Company is maintaining ten per cent unencumbered term deposits as specified in the <u>Nidhi Rules, 2014</u> to meet out the liability; (xiii) whether all transactions with the related parties are in compliance with sections 177 and 188 where applicable and the details have been disclosed in the Financial Statements etc., as required by the applicable accounting standards; (xiv) whether the company has made any preferential allotment or private placement of shares or fully or partly convertible debentures during the year under review and if so, as to whether the requirement of section 42 of the Companies Act, 2013 have been complied with and the amount raised have been used for the purposes for which the funds were raised. If not, provide the details in respect of the amount involved and nature of non-compliance; (xv) whether the company has entered into any non-cash transactions with directors or persons connected with him and if so, whether the provisions of section 192 have been complied with; (xvi) Whether the company is required to be registered under section 45-IA of the Reserve Bank of India Act, 1934 and if so, whether the registration has been obtained.
Reasons to be stated for unfavorable or qualified answers	(1) Where, in the auditor's report, the answer to any of the questions referred to in paragraph 3 is unfavorable or qualified, the auditor's report shall also state the basis for such unfavorable or qualified answer, as the case may be. (2) Where the auditor is unable to express any opinion on any specified matter, his report shall indicate such fact together with the reasons as to why it is not possible for him to give his opinion on the same.

UNIT 17: INSTITUTION OF DIRECTORS

INTRODUCTION	The company is a creation of law and treated as artificial person which is managed by the humans. The humans who run the Company are known Directors of the Company. When the Directors act collectively, they are known as Board and Individually treated as Directors. The directors play a very important role to manage the day to day affairs of the company. In short, the Directors are responsible to attain the objectives as prescribed in Memorandum of Association of the company.,
DIRECTOR [SECTION 2(34) & SECTION 2(10)]	Section 2(34) of the Companies Act, 2013: "Director means a director appointed to the Board of a company". Section 2(10) of the Companies Act, 2013: "Board of Directors or Board, in relation to a company, means the collective body of the directors of the company". As per Section 149 of the Companies Act, 2013, the Board of Directors of every company shall consist of individual only. Thus, no body corporate, association or firm shall be appointed as director. Again Section 166 of Companies Act, 2013, prohibits assignment of office of director to any other person. Any assignment of office made by a director shall be void.
MINIMUM/ MAXIMUM NUMBER OF DIRECTORS [SECTION 149(1)]	Minimum Directors: Every public company must have a minimum number of 3 directors. In case of private company, there must be 2 directors and whereas 1 director is required in One Person Company. Maximum Directors: Any company can appoint maximum 15 directors. Any company can appoint more than 15 directors subject to the approval of shareholders via a special resolution in general meeting. CG approval is not required. <u>The restriction of maximum number of directors shall not apply to Section 8 Companies.</u>
NUMBER OF DIRECTORSHIP (SECTION 165)	✓ An individual cannot hold more than 20 directorships in companies including alternate directorship. Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten. Explanation 1: For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included (Can be called as <u>Deemed Public Companies</u>) Explanation 2: For reckoning the limit of directorships of twenty companies, the Directorship in a Dormant Company & Section 8 Companies shall not be included. ✓ This limit is maximum, however, company may, by its AOA, provide for lesser number of companies in which a director of company may act as director. ✓ No such person shall act as director in more than the specified number of companies,— (a) after dispatching the resignation of his office as director or non-executive director thereof, in pursuance of clause (b) of sub-section (3); or (b) after the expiry of one year from the commencement of this Act, whichever is earlier.

	✓ FINE FOR DEFAULT: Not less than ₹ 5,000/- but not more than ₹25,000/- for every day after the first day during which the contravention continues.
RESIDENTIAL STATUS OF DIRECTOR [SECTION 149 (3)]	Every company shall have at least 1 director who has stayed in India for a total period of not less than 182 days during the Financial year. <i>Provided that in case of a newly incorporated company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated.</i>
WOMEN DIRECTOR (Second Proviso to SECTION 149) EVERY L U S: 100 T: 300	The following class of companies must appoint at least 1 woman director on its Board : (i) Every listed company; (ii) Every other public company having :- (a) Paid-up share capital of ₹ 100 Crores or more; or (b) Turnover of ₹ 300 Crores rupees or more. <u>The paid up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.</u> Any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or 3 months from the date of such vacancy, whichever is later. Special Note: The paid-up share capital or turnover as on the last date of latest audited financial statements shall be taken into account.
SMALL SHAREHOLDERS DIRECTORS (SECTION 151) (LISTED COMPANY ONLY)	Every listed company may have one director elected by such small shareholders. Here, "Small shareholder" means a shareholder holding shares of nominal value of not more than ₹ 20,000/- or such other sum as may be prescribed. <u>RULE 7 OF COMPANIES (APPOINTMENT AND QUALIFICATION OF DIRECTORS) RULES, 2014</u> <u>Terms and Conditions for appointment of small shareholder's director:</u> (i) <u>ELECTION OF SMALL SHAREHOLDER DIRECTOR:</u> A listed company, may upon notice of not less than (a) One thousand small shareholders; or (b) one-tenth of the total number of such shareholders, Whichever is lower; have a small shareholder's director elected by the small shareholder. A 'Small Shareholders' Director' may be elected voluntarily by any listed company. Thus, a listed company, may, on its own, act to appoint a Small Shareholders' Director. In such a case, no notice from small shareholder(s) is required. (ii) <u>NOTICE TO THE COMPANY BY SMALL SHAREHOLDERS:</u> The small shareholders intending to propose a person as a candidate for the post of small shareholders' director shall give a signed notice to the company at least 14 days before the meeting. (iii) <u>ATTACHMENT OF THE NOTICE:</u> The notice shall be accompanied by a statement signed by the proposed director for the post of small shareholders' director stating (a) His Director Identification Number; (b) That he is not disqualified to become a director under the Act; and (c) His consent to act as a director of the company. (iv) <u>ELIGIBLE TO ACT AS INDEPENDENT DIRECTOR:</u> If proposed director is qualified for appointment as an independent director and has given declaration for his independence then such director shall be considered as an independent

	director. (v) TENURE OF OFFICE: The director's tenure as small shareholders' director shall not exceed a period of 3 consecutive years and he shall not be liable to retire by rotation. Further, he shall not be eligible for reappointment after the expiry of his tenure. (vi) APPOINTMENT ONLY IN TWO COMPANIES: A small director shall not hold the office of small shareholders' director in more than two companies. If second company is in competitive business or is in conflict with business of the 1st company then he shall not be appointed in second company. (vii) NO ASSOCIATION FOR 3 YEARS AFTER EXPIRY OF TENURE: A small director shall directly or indirectly not be appointed or associated in any other capacity with the company for a period of 3 years from the date of cessation as a small shareholder's director.
APPOINTMENT OF DIRECTORS (SECTION 152)	FIRST DIRECTOR Generally, the first director of the companies are named in AOA of the Company. If the names of the First Directors are not given in the AOA of a company, then subscribers to the MOA who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed. In case of OPC, an individual being a member shall be deemed to be its first director until the director(s) are duly appointed by the member. PROVISIONS RELATING TO APPOINTMENT OF DIRECTORS: 1. APPOINTMENT OF DIRECTORS IN THE GENERAL MEETING: Every director shall be appointed by the company in general meeting except otherwise provided. 2. DIN: Director Identification Number is compulsory for appointment of director of a company. Every person proposed to be appointed as a director shall furnish his DIN and a declaration that he is not disqualified to be appointed as director. 3. FILLING OF CONSENT: A person appointed as a director shall on or before the appointment give his consent to hold the office of director in physical Form DIR – 2 i. e. Consent to act as a director of a company. The Company has to file Form DIR – 12 (particulars of appointment of directors and KMP along with the Form DIR – 2) within 30 days of the appointment of a director. The consent to act as director and intimation to Registrar is not required in case of section 8 company and where appointment of such director is done by the Central or State Government, as the case may be. 4. APPOINTMENT OF DIRECTORS TO BE VOTED INDIVIDUALLY (Section 162): A single resolution shall not be moved for the appointment of 2 or more persons as directors unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it. A resolution moved in contravention of aforesaid provision shall be void, whether or not any objection was taken when it was moved. A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment. The Ministry of Corporate Affairs has clarified via Notifications No. 464(E) dated 5th June, 2015, that section 162 of the Companies Act, 2013, shall not apply to (A) Government company in which the entire paid up share capital is held by

- CG, or by any SG or Governments or by CG and one or more SG;
 (B) A Subsidiary of Government Company referred to in (a) above, in which the entire paid up share capital is held by Government Company;
 (C) a private company.

5. RETIRE BY ROTATION:

Applicability : The provisions relating to retire by rotation only applies to the Public Companies provided:

(a) Articles of a public company may have the provisions relating to retirement of the all directors by rotation.

(b) If there is no provision in the AOA, then not less than 2/3 of the total number of directors of a public company shall be persons whose period of office is liable to retire by rotation and eligible to be reappointed at AGM.

At every Annual General Meeting of a public company, 1/3 of total number of the directors for the time being as are liable to retire by rotation or if their number is neither 3 nor a multiple of 3, then the number nearest to 1/3, shall retire from office.

Note: The independent directors shall not be included for the computation of total number of directors retires by rotation.

6. WHO SHALL RETIRE FIRST?

Longest in the office:

The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

7. FILLING OF VACANCY: If the vacancy of the retiring director is not so filled-up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.

If at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless :

- (a) A resolution for the re-appointment of such director has been put to the meeting and lost;
- (b) The retiring director has expressed his unwillingness to be so re-appointed;
- (c) He is not qualified or is disqualified for appointment;
- (d) A resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act; or
- (e) Appointment of directors to be voted individually.

8. PUNISHMENT: If any individual or director of a company, contravenes any of the provisions of section 152, such individual or director of the company shall be punishable with imprisonment for a term which may extend to 6 months or with fine which may extend to fifty thousand rupees and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first day during which the contravention continues.

OPTION TO ADOPT PRINCIPLE OF PROPORTIONAL REPRESENTATION FOR APPOINTMENT OF DIRECTORS (SECTION 163)

Notwithstanding anything contained in this Act, the articles of a company may provide for the appointment of not less than two-thirds of the total number of the directors of a company in accordance with the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise and such appointments may be made once in every three years and casual vacancies of such directors shall be filled as provided in sub-section (4) of section 161.]

	Exceptions: 1. In case of Government Company- Section 163 shall not apply to :- (a) a Government Company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments; (b) a subsidiary of a Government company, referred to in (a) above, in which the entire paid up share capital is held by that Government company.
ADDITIONAL DIRECTOR [SECTION 161 (1)]	The Board can appoint additional directors provided they are authorized by the Articles of Association of the Company. The additional director shall hold office only upto the date of next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier. In case, the AGM gets postponed due to any reason, the additional director has to vacate his office on the date of AGM. A person who fails to get appointed as a director in a general meeting cannot be appointed as Additional Director.
ALTERNATE DIRECTOR [SECTION 161 (2)]	1. APPLICABILITY: this section applies to all companies, whether public or private 2. POWER & MODE OF APPOINTMENT: The Board of Directors of a company may, (i) if so authorized by its articles or (ii) by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company <u>or holding directorship in the same company</u>, to act as an alternate director for a director during his absence for a period of not less than three months from India: Provided that no person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act: Provided further that an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India (Tenure) Provided also that if the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.
NOMINEE DIRECTORS [SECTION 161 (3)]	The Board of directors may appoint any person as a director nominated by any financial institution/Bank or also by private equity partners. The appointment of Nominee Director is based on the agreement between the financial institution/Bank for providing loan to the Company. The Company and the Board of directors have no option except to appoint such nominated person as nominated by the Bank/Financial Institution. Nominee director are appointed only for the purpose to take care interest of the Bank/Financial Institution.
CAUSAL VACANCY [SECTION 161 (4)]	if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which <u>shall be subsequently approved by members in the immediate next general meeting</u>. Provided that any person so appointed shall hold office only up to the date up to

	which the director in whose place he is appointed would have held office if it had not been vacated.
APPOINTMENT OF A PERSON AS DIRECTOR OTHER THAN RETIRING DIRECTORS (SECTION 160)	Notice: A person who is not a retiring director shall be eligible for appointment as director shall give notice not less than 14 days before the general meeting at the registered office of the company. Deposits: The notice must be in writing under his hand signifying his candidature along with a deposit of ₹ 1,00,000/- which shall be refunded to such person if the person proposed gets elected as a director or gets more than 25% of the valid votes casted. Provided that requirements of deposit of amount shall not apply in case of appointment of: (1) An independent director or (2) a director recommended by the Nomination and Remuneration Committee, if any, constituted under sub-section (1) of section 178 or (3) a director recommended by the Board of Directors of the Company, in the case of a company not required to constitute Nomination and Remuneration Committee. 7 days' advance Notice: The Company shall inform its members of the candidature of a person for the office of a director or the intention of a member to propose such person as a candidate for that office, at least 7 days before the general meeting by serving individual notices to members through e-mail and by post. Advertisement: If a company advertises such candidature in a vernacular newspaper in the principal vernacular language of the registered office's district and also in English language not less than 7 days before the General Meeting then there is no requirement for serving individual notices to the members. NON APPLICABILITY: Section 160 is not applicable to Government Company where the entire paid up share capital is held by Central Government jointly or severally or in case of subsidiary of Government Company in which the entire paid up capital is held by that Government Company. Further, Section 160 is not applicable to Private Companies, Section 8 Companies whose article provide for election of directors by Ballot.
DIRECTOR IDENTIFICATION NUMBER [DIN] (SECTION 153 TO SECTION 159)	PROCEDURE FOR ALLOTMENT OF DIN APPLICATION FOR DIN: Every individual, who is to be appointed as director shall make an application electronically in Form DIR – 3 to the Central Government for the allotment of a DIN. The Central Government shall provide an electronic system to facilitate submission of application for the allotment of DIN through the portal on the website of the Ministry of Corporate Affairs. (Section 153) Provided that the Central Government may prescribe any identification number which shall be treated as Director Identification Number for the purposes of this Act and in case any individual holds or acquires such identification number, the requirement of this section shall not apply or apply in such manner as may be prescribed. SUBMISSION OF DOCUMENTS: The applicant shall download the DIR – 3 from the MCA Portal, fill in the required particulars and attach the following documents: (a) Photograph; (b) Proof of identity; (c) Proof of residence; (d) Board resolution proposing his appointment as director in an existing company

(e) Specimen signature duly verified and sign the form digitally.

Form DIR – 3 shall be signed and submitted electronically by the applicant using his or her own DSC and shall also be verified digitally by a company secretary in full time employment of the company or by the managing director or director or CEO or CFO of the company in which the applicant is to be appointed a director in an Existing Company;

TIME LIMIT FOR ALLOTMENT: (Section 154)

(1) On the submission of the Form DIR-3 on the portal and payment of the requisite amount of fees through online mode an application number shall be generated by the system automatically.

(2) After generation of the application number, the Central Government shall process the application received for allotment of DIN under Sub-rule (2) of Rule 9 decide on the approval or rejection thereof and communicate the same to the applicant along with DIN allotted. In case of approval by way of a letter by post or electronically or in any other mode within a period of one month from the receipt of such application.

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

Provided that Central Government shall-

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

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

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

(4) In case of rejection or invalidation of application, the fee so paid with the application shall neither be refunded nor adjusted with any other application.

VALIDITY OF DIN:

The DIN so allotted under these rules is valid for the life-time of the applicant and shall not be allotted to any other person.

CANCELLATION OF DIN

The Regional Director (North) may cancel or deactivate the DIN in the following cases :

(a) The DIN is found to be duplicated in respect of the same person;

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

(c) In case of the death of the concerned individual;

(d) The concerned individual has been declared as a lunatic or unsound mind;

(e) If the concerned individual has been adjudicated an insolvent.

(f) on an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN but after verification of e-records.

DIR 3 KYC Form [Rule 12A of Companies (Appointment & Qualifications of Directors) Rules, 2014]

For Financial year 2018-19 - Any person who has been allotted "Director Identification Number (DIN/DPIN)" on or before 31st March 2018 and the status of such DIN is 'Approved', needs to file form DIR-3 KYC to update KYC details in

the system on or before 5th October.

Provided that every individual who has already been allotted a Director Identification Number (DIN) as at 31st March, 2018, shall submit e-form DIR-3 KYC on or before **5th October, 2018**.

FOR FINANCIAL YEAR 2019-20 ONWARDS - Every Director who has been allotted DIN on or before the end of the financial year, and whose DIN status is 'Approved', would be mandatorily required to file form DIR-3 KYC before **30th June** of the immediately next financial year.

After expiry of the respective due dates, system will mark all non-compliant DINs against which DIR-3 KYC form has not been filed as 'Deactivated due to non-filing of DIR-3 KYC'.

The Central Government or Regional Director (Northern Region), or any officer authorized by the Central Government or Regional Director (Northern Region) shall, deactivate the Director Identification Number (DIN), of an individual **who does not intimate his particulars in e-form DIR-3-KYC** within stipulated time in accordance with rule 12A:

The de-activated DIN shall be re-activated only after e-form DIR-3-KYC is filed along with fee as prescribed under Companies (Registration Offices and Fees) Rules, 2014

DIRECTORS OF COMPANY REQUIRED TO FILE E-FORM ACTIVE

Rule 12B w.e.f 16.05.2019

(1) Where a company governed by Rule 25A of the Companies (Incorporation) Rules, 2014, fails to file the e-form ACTIVE within the period specified therein, the Director Identification Number (DIN) allotted to its existing directors, shall be marked as "Director of ACTIVE non-compliant company".

(2) Where the DIN of a director has been marked as "Director of ACTIVE non-compliant company", such director shall take all necessary steps to ensure that all companies governed by rule 25A of the Companies (Incorporation) Rules, 2014, where such director has been so appointed, file e-form ACTIVE.

(3) After all the companies referred to in sub-rule (2) file the e-form ACTIVE, the DIN of such director shall be marked as "Director of ACTIVE compliant company".

PROHIBITION TO OBTAIN MORE THAN ONE DIN:

According to Section 155, No individual shall apply for/obtain/ possess another Director Identification Number who has already been allotted a Director Identification Number under section 154.

DIRECTOR TO INTIMATE DIN:

Section 156 stipulated that Every existing director shall intimate his DIN to the company or all companies wherein he is a director within one month of the receipt of DIN from the Central Government.

COMPANY TO INFORM DIN TO REGISTRAR:

Every company shall, within fifteen days of the receipt of intimation of DIN from director, furnish the DIN to the Registrar/authorised office by the Central Government in e-form DIR-3C. The e-form is to be digitally signed by Company Secretary of the company or Company Secretary in Practice.

If any company fails to furnish the Director Identification Number under sub-section (1), such company shall be liable to a penalty of twenty-five thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of one lakh rupees, and every officer of the company who is in default shall be liable to a penalty of not less than twenty-five thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for

	each day after the first during which such failure continues, subject to a maximum of one lakh rupees. (Substituted by Companies Amendment Ordinance 2018) OBLIGATION TO OBTAIN DIN: Section 158 specified that every person or company shall mention the DIN in return, information or particulars as required to be furnished under this Act, in case such return etc. relate to the director or contain any reference of any director. PUNISHMENT FOR CONTRAVENTION Section 155 of the Act provides that no individual who has already been allotted a Director Identification Number under section 154, shall apply for, obtain or possess another Director Identification Number. If any individual or director of a company makes any default in complying with any of the provisions of section 152, section 155 and section 156, such individual or director of the company shall be liable to a penalty which may extend to fifty thousand rupees and where the default is a continuing one, with a further penalty which may extend to five hundred rupees for each day after the first during which such default continues. (Section 159) (Substituted by Companies Amendment Ordinance 2018)
QUALIFICATIONS OF A DIRECTOR	The Companies Act, 2013 does not prescribe any qualification for holding the position of directorship by any individual. It means any individual can be appointed as director in any company subject to fulfillment of the following conditions : 1. He must have obtained Director Identification Number (DIN) before his appointment from MCA. 2. He has not been disqualified under section 164.
DISQUALIFICATIONS OF A DIRECTOR (SECTION 164)	Basic disqualifications (Section 164(1): A person shall not be eligible for appointment as a director of a company, if : (a) He is of unsound mind and stands so declared by a competent court; (b) He is an undischarged insolvent. (c) He has applied to be adjudicated as an insolvent and his application is pending; (d) He has been convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months and a period of 5 years has not elapsed from the date of expiry of the sentence. Note: If a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of 7 years or more, he shall never be eligible to be appointed as a director in any company. (e) An order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force; (f) He has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and 6 months have elapsed from the last day fixed for the payment of the call; (g) He has been convicted of the offence dealing with related party transactions at any time during the last preceding 5 years; or (h) He has not got the DIN. (i) he has not complied with the provisions of sub-section (1) of section 165; (Maximum Number of Directors) (Inserted by Companies Amendment Ordinance, 2018) ADDITIONAL DISQUALIFICATION based on Non-Compliances (Section 164(2)) : A Director shall also be treated as disqualified in case of non-filing of financial statements or annual returns.

	What are the Non-Compliances? (a) Non-filing of financial statement and annual return for continuous 3 financial year; or (b) Defaulted in payment of debentures/deposit/dividend in any year. Note: Default in Interest payable to Banks & Financial Institutions in not covered above. Impact of the above Disqualifications: Such director shall not be eligible for appointment as director in any company and also for re-appointment in the same company for 5 years from the date of default. <i>"Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.";</i> <i>"Provided that the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification."</i> Rule 14 of the Companies (Appointment and Qualification of Directors) Rules, 2014 Every director who is disqualified as above, shall inform to the company before he appointment or re-appointment (in Form DIR – 8). The company shall immediately file Form DIR – 9 to the ROC relating to such directors of the company within 30 days from the date of failure. Upon receipt of the Form DIR – 9, the Registrar shall immediately register the document and place it in the document file for public inspection. A private company may by its articles provide for any disqualifications for appointment as a director in addition to aforesaid mentioned. The above disqualification mentioned in clauses (d), (e) and (g) shall not take effect : (a) For 30 days from the date of conviction or order of disqualification; (b) Where an appeal or petition is preferred within 30 days as aforesaid against the conviction resulting in sentence or order, until expiry of 7 days from the date on which such appeal or petition is disposed off; or (c) Where any further appeal or petition is preferred against order or sentence within 7 days, until such further appeal or petition is disposed off.
DUTIES OF DIRECTORS (SECTION 166)	1. Duty to act as per the articles of the company The director of a company shall act in accordance with the articles of the company. 2. Duty to act in good faith A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment. 3. Duty to exercise due care A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment. 4. Duty to avoid conflict of interest A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company. 5. Duty not to make any undue gain A director of a company shall not achieve or attempt to achieve any undue gain

	or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company. 6. Duty not to assign his office A director of a company shall not assign his office and any assignment so made shall be void. <u>PUNISHMENT FOR CONTRAVENTION:</u> If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.
VACATION OF OFFICE OF DIRECTOR [SECTION 167]	The office of a director shall become vacant in case : (a) He disqualifies as per section 164; <i>Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.</i> (b) He absents himself from all the Board meetings during a period of 12 months with or without leave of absence from the Board; (c) He acts in contravention of the provisions of section 184 relating to entering into contracts or arrangement in which he is directly or indirectly interested; (d) He fails to disclose his interest (direct or indirect) in any contract or arrangement; (e) He becomes disqualified by an order of a court or the Tribunal; (f) He is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months: <i>Provided that the office shall not be vacated by the director in case of orders referred to in clauses (e) and (f)—</i> <i>(i) for thirty days from the date of conviction or order of disqualification;</i> <i>(ii) where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or</i> <i>(iii) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of</i> (g) He is removed in pursuance of the provisions of this Act; (h) He, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company. <u>Imprisonment & Fine:</u> In case of failure to vacate the position of directorship, the person shall be liable for punishment for a term which may extend to 1 year or with fine not less than ₹ 1,00,000/- but not more than ₹ 5,00,000/- or with both.
RESIGNATION OF DIRECTOR (SECTION 168)	The provisions relating to resignation of directors, as contained in section 168 of the Companies Act, 2013 and Rule 15 and 16 of the Companies (Appointment and Qualification of Directors) Rules, 2014 are described below. <u>1. Intimation of resignation to Registrar by director as well as by the company</u> A director may resign from his office by giving notice in writing. The Board shall, on receipt of such notice within 30 days intimate the Registrar in Form DIR-12 and also place the fact of such resignation in the Directors' Report of subsequent general meeting of the company and post the information on its website. The director shall also forward a copy of resignation alongwith detailed reasons

	for the resignation to the Registrar in Form DIR-11 within 30 days from the date of resignation. <u>2. Effect of resignation made under section 168 (1) [Section 168(2)]</u> The notice shall become effective from (i) the date on which the notice is received by the company; or (ii) the date, if any, specified by the director in the notice, whichever is later. <u>3. No extinguishment of liability even after resignation</u> The director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure. <u>4. Consequences of resignation of all the directors [Section 168(3)]</u> If all the directors of a company resign from their office or vacate their office under section 167, the promoter or in his absence the Central Government shall appoint the required number of directors to hold office till the directors are appointed by the company in General Meeting. Where all the directors of a company resign and as a consequences the digital signature certificates (DSC) of all the directors are deactivated, DIR-12 cannot be filed by the company due to lack of an authorized signatory director. In order to enable the filing of DIR-12 in such a case, the Registrar are authorized, on request from the stakeholder, and after due examination, to allow any one of the resigned director who was an authorized signatory director for the purpose of filing DIR-12 only. (General circular No. 03/2015 dated 03.03.2015).
REMOVAL OF DIRECTORS (SECTION 169)	❖ A Company may remove a director except the director appointed by NCLT, before the expiry of the period of his office after giving him a reasonable opportunity of being heard and passing the ordinary resolution. ❖ A special notice of the meeting shall be required of such resolution, to remove a director or to appoint somebody in place of a director so removed. The intention to move the resolution for removal of a director must be— (a) Given to the company not earlier than 3 months before the date of general meeting but at least 14 days before the general meeting (excluding the day on which such notice is given and the day of the general meeting) (b) Signed by member(s) holding not less than 1% of total voting power or member(s) holding paid up share capital of rupees five lakhs. ❖ On receipt of notice of a resolution regarding removal of a director, the company shall forthwith send a copy thereof to the director concerned. ❖ Where notice has been given of a resolution to remove a director under this section and the director concerned makes with respect thereto representation in writing to the company and requests its notification to members of the company, the company shall, if the time permits it to do so,— (a) in any notice of the resolution given to members of the company, state the fact of the representation having been made; and (b) send a copy of the representation to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company), and if a copy of the representation is not sent as aforesaid due to insufficient time or for the company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting. Provided that copy of the representation need not be sent out and the representation need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Tribunal is satisfied that the rights conferred by this sub-section are being

	abused to secure needless publicity for defamatory matter; and the Tribunal may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it. ❖ A vacancy created by the removal of a director may, if he had been appointed by the company in general meeting or by the Board, be filled by the appointment of another director in his place at the meeting at which he is removed, provided special notice of the intended appointment has been given. ❖ Tenure for Appointment: A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed. ❖ If the vacancy is not filled, it may be filled as a casual vacancy by the Board of Directors.
DIRECTORS CAN NOT BE REMOVED UNDER SECTION 169 (SITUATION)	(a) Directors appointed by the Central Government under section 161(3) of the Act. (b) Directors appointed by the Tribunal under section 242 of the Act. (c) Directors appointed by way of proportional representation under section 163 of the Act. Example: Where a company has appointed 4 directors out of total 6 directors, by way of proportional representation, only these 4 directors cannot be removed; the remaining 2 directors may be removed under section 169 of the Act. (d) Nominee directors appointed by any financial institution constituted under a special Act of Parliament, if the provisions contained in the special Act restrain removal of such nominee directors by the members.

UNIT 18: INDEPENDENT DIRECTORS

INTRODUCTION	A Cadbury Committee was formed in 1992 on the backdrop of corporate scandals involving BCCI, Poly Peck and Maxwell. This committee evolved the concept of independent director for better governance. Independent directors function as an oversight body in monitoring the performance and should raise and flags whenever suspicion occurs.
WHICH COMPANIES ARE REQUIRED TO HAVE INDEPENDENT DIRECTORS? Every L U: S: 10 L:50 T: 100	The Companies Act, 2013 provides that every listed company to have at least 1/3 of the total number of directors as independent directors and further states that the Central Government may prescribe the minimum number of independent directors for a class of companies. The Rule & prescribes at least two directors as independent directors for the following classes of public limited companies having: (a) Paid up share capital of ₹ 10 crore or more; or (b) Turnover of ₹ 100 crore or more; or (c) In aggregate, outstanding loans, debentures and deposits, exceeding ₹ 50 crore. An unlisted public company which is Joint Venture, a Wholly owned Subsidiary or a Dormant Company will not be required to appoint Independent Directors. Joint Venture would mean a Joint arrangement, entered into in writing, whereby the parties that have Joint control on the arrangement, have rights to the net assets of the arrangement.
INDEPENDENT DIRECTOR [Section 149(6)] (December 2015)	Independent Director, in relation to a company, means a director other than a managing director or a whole time director or a nominee director: (a) Who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience; (b) (i) Who is or was not a promoter of the company or its holding, subsidiary or associate company; (ii) Who is not related to promoters or directors in the company, its holding, subsidiary or associate company. (c) Who has or had no pecuniary (Money) relationship <u>other than remuneration as such director or having transaction not exceeding ten per cent. of his total income or such amount as may be prescribed</u> with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year. (d) none of whose relatives— (i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year: Provided that the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or two per cent. of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed; (ii) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; (iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; or

	(iv) has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to two per cent. or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii) (e) who, neither himself nor any of his relatives— (i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed; (ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of— (A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or (B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm; (iii) Holds together with his relatives two per cent. or more of the total voting power of the company; or (iv) is a Chief Executive or director, by whatever name called, of any non-profit organisation that receives twenty-five per cent or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or Provided that in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding three financial years. (f) who possesses such other qualifications as may be prescribed.
QUALIFICATION OF INDEPENDENT DIRECTORS	<u>Rule 5 of Companies (Appointment and Qualification of Directors) Rules, 2014</u> An independent director shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business.
MANNER OF SELECTION OF AN INDEPENDENT DIRECTOR	(a) <u>Selection from Data Bank</u>: Independent directors may be selected from a data bank of eligible and willing persons maintained by the agency (Anybody), institute or association as may be authorized by Central Government <i>like ICSJ</i>). (b) <u>Approval from Shareholders</u>: The appointment of independent directors has to be approved by members in a General meeting and the explanatory statement annexed to the notice must indicate justification for such appointment. (c) <u>Application for adding the name in the databank</u>: Any person who desires to get his name included in the data bank of independent directors shall make an application to the agency in Form DIR – 1 Application for inclusion of name in the databank of Independent Directors which includes the personal, educational, professional, work experience, other Board details of the applicant. The agency may charge a reasonable fee from the applicant for inclusion of his name in the data bank of independent directors. An existing or applicant of such data bank of independent directors shall intimate any changes in his Particulars within 15 days of such change to the agency.
DECLARATION BY	Every independent director shall at the first meeting of the Board in which he

INDEPENDENT DIRECTOR	participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an independent director, give a declaration that he meets the criteria of independence.										
CODE FOR INDEPENDENT DIRECTORS	The company and independent directors shall follow code of conduct for independent directors. It is a guide to professional conduct for independent directors. Adherence to these standards by independent directors and fulfillment of their responsibilities in a professional and faithful manner will promote confidence of the investment community, particularly minority shareholders, regulators and companies in the institution of independent directors. <u>GUIDELINES OF PROFESSIONAL CONDUCT</u> An independent director shall: - Uphold ethical standards of integrity and probity; - Act objectively and constructively while exercising his duties; - Exercise his responsibilities in a bona fide manner in the interest of the company; - Devote sufficient time and attention to his professional obligations for informed and balanced decision making; - Not allow any extraneous (unrelated) considerations that will vitiate his exercise of objective independent judgment in the paramount interest of the company as a whole, while concurring in or dissenting from the collective judgment of the Board in its decision making; - Not abuse his position to the detriment of the company or its shareholders or for the purpose of gaining direct or indirect personal advantage or advantage for any associated person; - Refrain from any action that would lead to loss of his independence; - Where circumstances arise which make an independent director lose his independence, the independent director must immediately inform the Board accordingly; - Assist the company in implementing the best corporate governance practices. <u>ROLE AND FUNCTIONS OF AN INDEPENDENT DIRECTOR</u> <table border="1"> <tr> <td>To help in taking independent decisions</td><td>The independent director helps the Board of Director to take independent decisions relating to the strategy, performance, risk management, resources, key appointments and standards of conduct of the Company.</td></tr> <tr> <td>Evaluation of the performance</td><td>The independent director evaluates the performance of board and management.</td></tr> <tr> <td>To Scrutinize the performance</td><td>The independent director scrutinizes the performance of management in the Board meeting agreed goals and objectives and monitor the reporting of performance.</td></tr> <tr> <td>To safeguard the interests of all stakeholders</td><td>The independent director has to take all measure to safeguard the interests of all stakeholders, particularly the minority shareholders of the Company.</td></tr> <tr> <td>To determine remuneration of KMP</td><td>The independent directors are to determine the remuneration of executive directors, key managerial personnel and senior management according to their role.</td></tr> </table> <u>MANNER OF APPOINTMENT</u> <u>Selection of Independent Director:</u> The Board shall select a person for the position of Independent director who has appropriate skills, experience and knowledge to discharge its functions and duties effectively. <u>Approval from shareholders:</u> The appointment of independent director(s) of the company shall be approved at the meeting of the shareholders. Note: The explanatory statement attached to the notice of the meeting shall include the opinion of the Board for the proposed appointment of the independent director. The opinion of the Board shall explain fulfillment of the conditions as	To help in taking independent decisions	The independent director helps the Board of Director to take independent decisions relating to the strategy, performance, risk management, resources, key appointments and standards of conduct of the Company.	Evaluation of the performance	The independent director evaluates the performance of board and management.	To Scrutinize the performance	The independent director scrutinizes the performance of management in the Board meeting agreed goals and objectives and monitor the reporting of performance.	To safeguard the interests of all stakeholders	The independent director has to take all measure to safeguard the interests of all stakeholders, particularly the minority shareholders of the Company.	To determine remuneration of KMP	The independent directors are to determine the remuneration of executive directors, key managerial personnel and senior management according to their role.
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specified in Companies Act, 2013 and its rules.

Finalization of the terms of appointment: The appointment of independent directors shall be finalized through a letter of appointment, which shall cover:

- (a) The term (period) of appointment;
- (b) The expectation of the Board from the Independent director;
- (c) The fiduciary duties that come with such an appointment along with accompanying liabilities;
- (d) Provision for providing insurance to the Independent Directors;
- (e) The Code of Business Ethics of the company;
- (f) List of actions that a director should not do while functioning as such in the company; and
- (g) Other details like remuneration, sitting fees, reimbursement of expenses for Board Meeting and other meetings etc.

Open to the General Public for Inspection: The terms and conditions of appointment of independent directors shall be open for inspection at the registered office by any member during normal business hours.

Terms & Conditions of Appointment on the Company's website: The terms and conditions of appointment of independent directors shall also be posted on the company's website.

RESIGNATION OR REMOVAL OF INDEPENDENT DIRECTOR

An independent director shall be resigned or removed subject to the fulfillment of the following conditions:

Notice in writing: An Independent director may resign from his office by giving a notice in writing to the company and the Board. The receipt of such notice shall be taken into account and shall also be informed to ROC by the company.

Note: The resignation of a director shall take effect from the date on which the notice is received by the company or the date as specified by the director, whichever is later.

Replacement of Independent Director: An independent director who resigns or is removed shall be replaced by a new independent director within 180 days from the date of such resignation or removal.

No Replacement till resignation or removal: Where the company fulfills the requirement of independent directors even without filing the vacancy created by resignation or removal, the requirement of Replacement by a new independent director shall not apply.

SEPARATE MEETINGS OF INDEPENDENT DIRECTORS

The independent directors shall hold **at least 1 meeting** in a year without the presence of non-independent directors (i.e. MD/WTM) and members of management (i.e. Employee). All independent directors of the Company shall make every effort to be present at the meeting of Independent Director.

The meeting of Independent Director shall:

- (a) Review the performance of non – independent directors and the Board as a whole;
- (b) Review the performance of the Chairperson of the company, taking into account the views of executive directors and non – executive directors;
- (c) Assess the quality, quantity and timeliness of flow of information between the company management.

EVALUATION MECHANISM:

(1) The performance evaluation of independent directors shall be done by the entire Board of Directors, excluding the director being evaluated.

(2) On the basis of the report of performance evaluation, it shall be determined whether to extend or continue the term of appointment of the independent

	director.
TENURE OF INDEPENDENT DIRECTOR [Section 149(10)]	❖ An independent director shall hold office for 5 years in a row, but shall be eligible for reappointment on passing of a special resolution and other conditions. ❖ No independent director shall hold office for more than 2 consecutive terms. It means no independent director shall hold office for more than 10 years in a row. ❖ An independent director shall be eligible for appointment after the expiration of three years of ceasing to become an independent director. The above appointment is only possible when an independent director has not been associated with the company in any other capacity either directly or indirectly.
MCA CLARIFICATION REGARDING THE TERMS OF AN INDEPENDENT DIRECTOR	Appointment of 'IDs' for less than 5 years: Clarification has been sought as to whether it would be possible to appoint an individual as an ID for a period less than five years. It is clarified that section 149(10) of the Act provides a term of "upto five consecutive years" for an 'ID'. As such while appointment of an 'ID' for a term of less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as a one term. No person can hold office of 'ID' for more than '2 consecutive terms'. Such a person shall have to vacate the office after completion of 2 consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years.
LIABILITY OF INDEPENDENT DIRECTOR	An independent director or a non – executive director not being promoter or key managerial personnel shall be held liable only to those acts of omission which had occurred with their knowledge and with his consent or connivance or where they had not acted diligently.
RETIREMENT BY ROTATION	The provisions in respect of retirement of directors by rotation shall not apply to the independent directors.
REMUNERATION OF INDEPENDENT DIRECTOR	An independent director shall not be entitled to any stock option scheme (i. e. ESOP & Sweat equity) but shall receive remuneration by way of sitting fee, reimbursement of expenses for participation in the Board Meetings and other meetings and profit related commission as approved by the members.

UNIT 19: BOARD MEETINGS & ITS POWER
(Secretarial Standard 1 “Board Meetings” has been incorporated)

Secretarial Standard 1 is not applicable to:

- One person company has only 1 Director &
- Company licensed under Section 8

BOARD MEETING (Section 173)	<u>For Private or Public Company</u> 1st Board Meeting: The 1st Board meeting should be held within 30 days from the date of incorporation. It will be sufficient if subsequent meeting are held with a maximum interval of 120 days between two consecutive meetings. 2nd & Subsequent Board Meeting: The company shall hold at least 4 meetings of its Board in each Calendar year with a maximum interval of 120 days between any two Consecutive Meetings. <u>For OPC, Dormant Company & Small Company</u> There must be at least one board meeting in each half of the calendar year and the gap between two meetings should not be less than 90 days. An adjourned Meeting being a continuation of the original Meeting, the interval period in such a case, shall be counted from the date of the original Meeting. Where a company is required to appoint Independent Directors under the Act, such Independent Directors shall meet at least once in a Calendar Year. A Director shall not be reckoned for Quorum in respect of an item in which he is interested and he shall not be present, whether physically or through Electronic Mode, during discussions and voting on such item. For this purpose, a Director shall be treated as interested in a contract or arrangement entered into or proposed to be entered into by the company: (a) with the Director himself or his relative; or (b) with any body corporate, if such Director, along with other Directors holds more than two percent of the paid-up share capital of that body corporate, or he is a promoter, or manager or chief executive officer of that body corporate; or (c) with a firm or other entity, if such Director or his relative is a partner, owner or Member, as the case may be, of that firm or other entity. However, in case of a Private Company, a Director shall be entitled to participate in respect of such item after disclosure of his interest.
NOTICE FOR BOARD MEETINGS	<u>Issued by:</u> Notice shall be issued by the Company Secretary or where there is no Company Secretary, any Director or any other person authorized by the Board for the purpose. <u>Time Limit:</u> Notice should be given to every directors of the Company not less than 7 days before the date of Board Meeting. The notice should be sent to the registered address of every director as available with the company or in case of absence of details of address, any of such addresses appearing in the Director Identification Number (DIN) registration of the Director. In case the Company sends the Notice by Speed Post or by Registered Post, and Additional two days shall be added for the Service of Notice. (SS 1) <u>Mode of Sending Notice:</u> Notice in writing of every Meeting shall be given to every Director by hand or by speed post or by registered post or by facsimile or by e-mail or by any other electronic means. (Courier Not allowed) Where a Director specifies a particular means of delivery of Notice, the Notice shall be given to him by such means. However, in case of a Meeting conducted at a Shorter notice, the company may choose an Expedient mode of sending notice. (SS 1)

	Proof of Sending Notice and its delivery shall be maintained by the company for such period as decided by the Board, which shall not be less than 3 years from the date of Meeting. (SS 1) Proof of Agenda & Notes on Agenda & their delivery shall be maintained by the company for such period as decided by the Board, which shall not be less than 3 years from the date of Meeting. (SS 1) Shorter Notice: A Board Meeting can be called at a shorter notice provided at least one independent director shall be present at the meeting in which it was decided for shorter notice. If the Independent Director is not present, then decision of the meeting shall be circulated to all directors and it shall be final only after ratification of decision by at least one Independent Director. Video Conferencing Option: The Notice shall inform the Directors about the option available to them to participate through Electronic Mode and provide them all the necessary information. Any Director may participate through Electronic Mode in a Meeting unless the Act or any other law specifically prohibits such participation through Electronic Mode in respect of any item of business. If a Director intends to participate through Electronic Mode, he shall give sufficient prior intimation to the Chairman or the CS to enable them to make suitable arrangement in this behalf. The Director may intimate his intention of participation through electronic mode at the beginning of the Calendar year also, which shall be valid for such Calendar year. Agenda: The Agenda, setting out the business to be transacted at the Meeting, and Notes on Agenda shall be given to the Directors at least seven days before the date of the Meeting, unless the Articles prescribe a longer period. In case the company sends the Agenda and Notes on Agenda by Speed Post or by Registered Post, an Additional two days shall be added for the service of Agenda and Notes on Agenda. However, in case of a Meeting conducted at a Shorter notice, the company may choose an Expedient mode of sending Agenda & Notes on Agenda. Any item not included in the Agenda may be taken up for consideration with the permission of the Chairman and with the consent of a majority of the Directors present in the Meeting. Board Note: Each item of business requiring approval at the Meeting shall be supported by a note setting out the details of the proposal, relevant material facts that enable the Directors to understand the meaning, scope and implications of the proposal and the nature of concern or interest, if any, of any Director in the proposal, which the Director had earlier disclosed.
QUORUM FOR BOARD MEETINGS (Section 174)	Quorum means the minimum number of directors which is required to validate meeting of the Board. Quorum should be present throughout the meeting of Board, it means at beginning of the meeting and also at conclusion of the Meeting. If any decision (resolution) is taken without the presence of quorum, then such decision (resolution) shall be treated as null and void. (a) General Quorum: <u>1/3rd of total strength of Board or 2 directors, whichever is higher</u>, shall be treated the quorum for a Board Meeting of a Company.

	If due to resignations or removal of director(s), the number of directors of the company is reduced below the quorum as fixed by the Articles of Association of the company, then, the continuing Directors may act for the purpose of increasing the number of Directors to that required for the quorum or for summoning a general meeting of the Company. It shall not act for any other purpose. (b) Quorum in case of Interested Director: If at any time the number of interested directors exceeds or is equal to 2/3 of the total strength of Board, the remaining directors shall be counted for quorum provided the number should not be less than 2. If a Board meeting has been adjourned due to want of quorum, unless the articles provide otherwise, the Board Meeting shall be held on the same day at the same time and same place in the next week. Board Meeting can be held even on a National Holiday. (SS 1) If there is no Quorum at the adjourned Meeting also, the Meeting shall stand cancelled.
PLACE OF BOARD MEETING	Board meeting can be held anywhere in the world as there is no such provision regarding the place of holding board meeting. Board meeting can be done by the way of video conferencing provided that the Notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode and director intending to participate through video conferencing shall give prior intimation to that effect in advance so that company is able to make suitable arrangements in this behalf. Any director who intends to participate in the meeting through electronic mode may intimate about such participation at the beginning of the calendar year and such declaration shall be valid for one year; <i>Provided that such declaration shall not debar him from participation in the meeting in person in which case he shall intimate the company sufficiently in advance of his intention to participate in person.</i>
CHAIRMAN OF BOARD MEETINGS	The Chairman of the company shall be the Chairman of the Board. If the company does not have a Chairman, the Directors may elect one of themselves to be the Chairman of the Board. The Chairman of the Board shall conduct the Meetings of the Board. If no Chairman is elected or if the Chairman is unable to attend the Meeting, the Directors present at the Meeting shall elect one of themselves to chair and conduct the Meeting, unless otherwise provided in the Articles. If the Chairman is interested in any item of business, he shall, with the consent of the members present, entrust the conduct of the proceedings in respect of such item to any Dis-interested Director and resume the Chair after that item of business has been transacted. The Chairman shall also not be present at the Meeting during discussions on such items. Unless otherwise provided in the Articles, in case of an equality of votes, the Chairman shall have a second or casting vote.
PROCEDURES & REQUIREMENT OF A BOARD MEETING	<u>RULE 3 OF THE COMPANIES (MEETINGS OF BOARD AND ITS POWERS) RULES, 2014</u> 1. Convening of Board Meetings: A Board Meeting may be conducted physically or also through video conferencing or other audio visual mode. Note: Every Company shall make necessary arrangements to avoid failure of video or audio visual connection during the Board Meeting.

Provided that the Central Government may, by notification, specify such matters which shall not be dealt with in a meeting through video conferencing or other audio visual means.

Provided further that where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means in such meeting on any matter specified under the first proviso.

Safeguards during Board Meetings: The Chairperson and the company secretary shall take due and reasonable care:

- (a) To safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;
- (b) To ensure the availability of proper video conferencing or other audio visual equipment or facilities for transmission of the communications for effective participation in the Board Meeting;
- (c) To record the proceedings of the Board Meeting and prepare the minutes of the meeting;
- (d) To store for safekeeping and marking the tape recordings(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year;
- (e) To ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means.

2. **Notice to the Directors:** The notices of the meeting shall be sent to all the directors.

(a) The notice of the meeting shall inform about the other option available to participate in the Meeting through video conferencing mode or other electronic mode.

(b) A director intending to participate through video conferencing mode or audio visual means shall communicate his intention to the Chairman or the company secretary.

(c) The director, who desires, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for 1 calendar year.

Provided that such declaration shall not debar him from participation in the meeting in person in which case he shall intimate the company sufficiently in advance of his intention to participate in person.

(d) In the absence of any such intimation from the director, it shall be assumed that the director will attend the meeting in person.

3. **Roll call by Chairperson:** At the commencement of the meeting, the Chairperson shall check and ensure the participation of every director through video conferencing or other audio visual for the record and verify the following details:

- (a) The name of the directors;
- (b) The location from where a director is participating;
- (c) Ensure that the directors can completely and clearly see, hear and communicate with the other participants;
- (d) Ensure that the directors have received the agenda and all the relevant material for the meeting; and
- (e) Ensure that no one other than the concerned director is attending.

However, the roll call shall also be made at the conclusion of the board meeting and at the re-commencement of the board meeting after every break to confirm the presence of a quorum throughout the meeting.

Note: After the roll call, the Chairperson or the Secretary shall inform the Board about the names of persons other than the directors who are present for the said

	meeting at the request or with the permission of the Chairman. Special Note: A director participating in a meeting through video conferencing or other audio visual mode shall be counted for the purpose of quorum. 4. Place of Board Meetings: In case of Board Meeting convened by video conferencing or other electronic mode, the place of recording of proceedings of the board meetings shall be deemed as place of Board Meeting. 5. No accessibility of the place of Board Meeting: No person other than the Chairperson, directors, Secretary and any authorized person shall be allowed access to the place where the Board Meeting is going on without the permission of the Board. 6. The following matters shall not be dealt with in any meeting held through video conferencing or other audio visual mode: (a) The approval of the annual financial statements; (b) The approval of the Board's report, (c) The approval of the prospectus; (d) The Audit Committee Meetings for consideration of accounts; and (e) The approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover. Chairman has no power to permit any above mention business to carry out in Video Conferencing mode. These businesses can be decided only in a Physical Meeting.
PREPARATION OF MINUTES	(a) Circulation of draft minutes: Within fifteen days from the date of the conclusion of the Meeting of the Board or the Committee, the draft Minutes thereof shall be circulated by hand or by speed post or by registered post or by courier or by e-mail or by any other recognised electronic means to all the members of the Board or the Committee, as on the date of the Meeting, for their comments. (b) Confirmation from Directors: The Directors, whether present at the Meeting or not, shall communicate their comments, if any, in writing on the draft Minutes within seven days from the date of circulation thereof, so that the Minutes are finalised and entered in the Minutes Book within the specified time limit of thirty days. If any Director communicates his comments after the expiry of the said period of seven days, the Chairman, if so authorised by the Board, shall have the discretion to consider such comments. In the event a Director does not comment on the draft Minutes, the draft Minutes shall be deemed to have been approved by such Director. A Director, who ceases to be a Director after a Meeting of the Board is entitled to receive the draft Minutes of that particular Meeting and to offer comments thereon, irrespective of whether he attended such Meeting or not. (c) Recording in the Minute Books: After completion of above confirmation procedure of the meeting, the minutes shall be entered in the minute book and signed by the Chairperson within 30 days from the date of conclusion of meeting. (d) No Alteration: Minutes, once entered in the Minutes Book, shall not be altered. Any alteration in the Minutes as entered shall be made only by way of express approval of the Board at its subsequent Meeting at which the Minutes are noted by the Board and the fact of such alteration shall be recorded in the Minutes of such subsequent Meeting. (e) Signing & Dating: Minutes of the Meeting of the Board shall be signed and dated by the Chairman of the Meeting or by the Chairman of the next Meeting. Minutes of

	the previous Meeting may be signed either by the Chairman of such Meeting at any time before the next Meeting is held or by the Chairman of the next Meeting at the next Meeting. (f) Preservation: Minutes of all Meetings shall be preserved permanently in physical or in electronic form with Timestamp. Office copies of Notices, Agenda, Notes on Agenda and other related papers shall be preserved in good order in physical or in electronic form for as long as they remain current or for eight financial years, whichever is later and may be destroyed thereafter with the approval of the Board. (g) Custody: Minutes Books shall be in the custody of the Company Secretary. Where there is no Company Secretary, Minutes Books shall be in the custody of any Director duly authorised for the purpose by the Board.
COMPLIANCE WITH SECRETARIAL STANDARDS	Section 118(10): "Every company shall observe secretarial standards with respect to general and Board meetings specified by the Institute of Company Secretaries of India (ICSI) constituted under section 3 of the Company Secretaries Act, 1980, and approved as such by the Central Government". Revised SS 1 deals with "Meetings of Board of Directors" which has become effective from 1st October 2017.
RESOLUTION PASSED BY CIRCULATION (Section 175 Of The Companies Act, 2013)	- The Act requires certain business to be approved only at Meetings of the Board. However, other business that requires urgent decisions can be approved by means of Resolutions passed by circulation. Resolutions passed by circulation are deemed to be passed at a duly convened Meeting of the Board and have equal authority. - Where not less than one-third of the total number of Directors for the time being require the Resolution under circulation to be decided at a Meeting, the Chairman shall put the Resolution for consideration at a Meeting of the Board. Interested Directors shall not be excluded for the purpose of determining the above one-third of the total number of Directors. PROCEDURE: (SS 1) - A Resolution proposed to be passed by circulation shall be sent in draft, together with the necessary papers, individually to all the Directors including Interested Directors on the same day. - The draft of the Resolution to be passed and the necessary papers shall be circulated amongst the Directors by hand, or by speed post or by registered post or by courier, or by e-mail or by any other recognised electronic means. - Each business proposed to be passed by way of Resolution by circulation shall be explained by a note setting out the details of the proposal, relevant material facts that enable the Directors to understand the meaning, scope and implications of the proposal, the nature of concern or interest, if any, of any Director in the proposal, which the Director had earlier disclosed and the draft of the Resolution proposed. The note shall also indicate how a Director shall signify assent or dissent to the Resolution proposed and the date by which the Director shall respond. - The Resolution is passed when it is approved by a majority of the Directors entitled to vote on the Resolution, unless not less than one-third of the total number of Directors for the time being require the Resolution under circulation to be decided at a Meeting. - The Resolution, if passed, shall be deemed to have been passed on the last date specified for signifying assent or dissent by the Directors or the date on which assent from more than two-third of the Directors has been received, whichever is earlier, and shall be effective from that date, if no other effective date is

	specified in such Resolution. 6. Resolutions passed by circulation shall be noted at the next Meeting of the Board and the text thereof with dissent or abstention, if any, shall be recorded in the Minutes of such Meeting. 7. Passing of Resolution by circulation shall be considered valid as if it had been passed at a duly convened Meeting of the Board. Illustrative list of items of business which shall not be passed by circulation and shall be placed before the Board at its Meeting <u>General Business Items</u> • Noting Minutes of Meetings of Audit Committee and other Committees. • Approving financial statements and the Board's Report. • Considering the Compliance Certificate to ensure compliance with the provisions of all the laws applicable to the company. • Specifying list of laws applicable specifically to the company. • Appointment of Secretarial Auditors and Internal Auditors. <u>Specific Items</u> • Borrowing money otherwise than by issue of debentures. • Investing the funds of the company. • Granting loans or giving guarantee or providing security in respect of loans. • Making political contributions. • Making calls on shareholders in respect of money unpaid on their shares. • Approving Remuneration of Managing Director, Whole-time Director and Manager. • Appointment or Removal of Key Managerial Personnel. • Appointment of a person as a Managing Director / Manager in more than one company. • According sanction for related party transactions which are not in the ordinary course of business or which are not on arm's length basis. <u>Corporate Actions</u> • Authorize Buy Back of securities • Issue of securities, including debentures, whether in or outside India. • Approving amalgamation, merger or reconstruction. • Diversify the business. • Takeover another company or acquiring controlling or substantial stake in another company.
BOARD COMMITTEES	• The Companies Act, 2013 also recognizes the formation of Board Committees Including Audit Committees. The Committees may be formed by the Board of Directors for following reasons: (a) Audit (b) Compensation (c) Executive

	(d) Governance and nomination (e) Other types of committees - Committees are usually formed as a means of improving board effectiveness and efficiency in areas where more focused, specialized and technical discussions are required. - These committees prepare the groundwork for decision – making and report at the subsequent board meeting. - Any board should regularly review its own structure and performance and whether it has the right committee structure and an appropriate scheme of delegation from the board.
CLASSIFICATION OF BOARD COMMITTEES	
AUDIT COMMITTEE (Section 177)	Earlier the provisions relating to the Audit Committee was captured under section 292A of the Companies Act, 1956. This Act further extends the role & responsibilities of Audit Committee in certain class of Companies. In fact, Clause 49 of the listing agreement also talks about the constitution of the Audit Committee for all listed public companies irrespective of their paid – up share capital. This Act makes responsible to an Audit Committee relating to monitor & evaluate of auditor's performance, approval or modification of related – party transactions, scrutiny of loans and investments etc. it has to establish a vigil mechanism and protection for any whistle – blower. Constitution of Audit Committee: As per the provisions of the Companies Act, 2013, the following companies are required to constitute an Audit Committee: - Every Listed Public Companies; or - Unlisted public companies having: - Paid up share capital of ₹ 10 Crores or more; - Turnover of ₹ 100 Crores or more; - Aggregate, outstanding loans or borrowings or debentures or deposits exceeding ₹ 50 Crores or more. Note: The calculation of above paid – up share capital or turnover or outstanding loans etc. shall be based on the last audited Financial Statements. The Companies Act, 2013 provides 1 year from the date of its enforcement for reconstitution of the Audit Committee. Members: The Audit Committee shall comprise of minimum 3 directors with majority of the directors being Independent Directors. The majority of members of audit committee should be financial literate. Role of Audit Committee: - The recommendation for appointment, remuneration and terms of appointment of auditors; - Review and monitor the auditors' independence and performance, and effectiveness of audit process; - Examination of the financial statement and the auditors' report thereon; - Approval or any subsequent modification of transactions of the company with related parties; <i>Provided that the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such conditions <u>as may be prescribed</u></i> - Scrutiny of inter – corporate loans and investments;

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	(f) Valuation of undertakings or assets of the company, wherever it is necessary; (g) Evaluation of internal financial controls and risk management systems; (h) Monitoring the end use of funds raised through public offers and related matters. Establishment of Internal Control Systems: The Audit Committee recommends the establishments of Internal Control Systems (relating to financial) and may also call the auditors for comments relating to internal control systems, the scope of audit etc. Investigation: The audit committee can start investigation in the matter or referred by the Board and also have the authority to obtain advice from external sources and have full access to records of the company. Establishments of vigil Mechanism: Every listed company and the companies belonging to the following class or classes shall establish a vigil mechanism for their directors and employees to report genuine concerns or grievances: (1) The companies which accept deposits from the public; (2) The companies which have borrowed money from banks and public financial institutions in excess of ₹ 50 crore. Note: In case of repeated frivolous complaints being filed by a director or an employee, the audit committee or the director nominated to play the role of audit committee may take suitable action against the concerned director or employee including reprimand.
NOMINATION AND REMUNERATION COMMITTEE (Section 178)	The nomination and Remuneration Committee helps the Board relating to the appointment of the members of the Board. This Committee finalizes the conditions of employment and remuneration of senior management, and to management's and personnel's remuneration and incentive schemes. Constitution of nomination Committee: The following companies are required to constitute a nomination Committee: 1. Every listed Public Companies, or 2. Unlisted public companies having; (a) Paid up capital of ₹ 10 Crores or more; (b) Turnover of ₹ 100 Crores or more; (c) Aggregate, outstanding loans or borrowings or debentures or deposits exceeding ₹ 50 Crores or more. Note: The calculation of above paid – up share capital or turnover or outstanding loans etc. shall be based on the last audited Financial Statements. Members: This committee shall consist of 3 or more non – executive directors out of which not less than ½ shall be independent directors. Formulation of Policy: The Nomination and Remuneration Committee shall consider the following while formulating the policy: (a) The level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully. (b) Relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and (c) Remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long – term performance objectives appropriate to the working of the company and its goals. <i>Provided that such policy shall be placed on the website of the company, if any, and the salient features of the policy and changes therein, if any, along with the web</i>

	<i>address of the policy, if any, shall be disclosed in the Board's report.</i> ROLE & RESPONSIBILITIES OF NOMINATION AND REMUNERATION COMMITTEE (June 2016) (a) Identifying the persons who are qualified to become Directors and who may be appointed in senior management; (b) Recommend to the Board the appointment and removal of any director and shall specify the manner for effective evaluation of performance of Board, its committees and individual directors to be carried out either by the Board, by the Nomination and Remuneration Committee or by an independent external agency and review its implementation and compliance; (c) Formulation of the parameters for determining qualifications, positive attributes and independence of a Director; and (d) Recommend a policy relating to the remuneration for the Directors, KMP and other employees.
STAKEHOLDERS' RELATIONSHIP COMMITTEE [Section 178(5)]	❖ A company has to constitute a "Stakeholders Relationship Committee" where such company has more than 1000 shareholders, debenture – holders, deposit – holders and any other security holders at any time during a financial year. ❖ The Chairperson of a Stakeholders Relationship Committee shall be a non – executive director or other member of the Board. This Committee considers and resolves the grievances of security holders of the company. ❖ The chairperson of each of the committees or in his absence, any other member of the committee duly authorized by him, shall attend the general meetings of the company. Penalty for Contravention: For Company: Minimum Fine – ₹ 1,00,000/- Maximum Fine – ₹5,00,000/-. For Every officer who is in default: Imprisonment – upto one year or Minimum Fine – ₹ 25,000/-, Maximum Fine – ₹ 1,00,000/- or both. Provided that inability to resolve or consider any grievance by the Stakeholders Relationship Committee in good faith shall not constitute a contravention of this section.
CORPORATE SOCIAL RESPONSIBILITY COMMITTEE [Section 135 & The Companies (CSR Policy) Rules, 2014] P: 5 W: 500 T: 1000	As per section 135 of the Companies Act, 2013, certain class of companies must constitute a CSR Committee for formulation and implementation of CSR policy. Constitution of CSR Committee: Every company has to constitute a CSR Committee which is having: (a) Net worth of ₹ 500 Crores or more or (b) Turnover of ₹ 1000/- Crores or more or (c) Net profit of ₹ 5 Crores or more Note: If a company crosses the above limits in respect of net worth or turnover or net profit during the immediately preceding financial year, such company has to constitute a CSR committee. Members: The CSR Committee shall consist of 3 or more Directors, out of which at least one Director shall be an Independent Director. Provided that where a company is not required to appoint an independent director under Sub Section 4 of Section 149, it shall have in its CSR Committee; two or more directors; (Inserted by Companies Amendment Act, 2017 w.e.f. 19th September 2018) COMPOSITION OF CSR COMMITTEE (a) For Listed Company : The CSR committee shall consist of 3 or more directors, out of which one director shall be an independent director.

(b) **For Unlisted Public or Private Company** : In case of an unlisted public company or a private company which is not required to appoint an independent director shall have its CSR Committee without the independent director.

Example: A private company having only two directors on its Board shall constitute its CSR Committee with two such directors.

(c) For Foreign Company: With respect of foreign company, the CSR Committee shall comprise of at least two persons out of which one person resident in India and another person may be from foreign country duly nominated by the foreign company.

FUNCTIONS OF THE CSR COMMITTEE

The Committee formulate a CSR Policy and recommend to the Board which shall indicate the activities to be undertaken by company in areas or subject specified in Schedule VII. The Committee shall recommend the amount of expenditure to be incurred on the activities. Further, the CSR Committee is under an obligation to monitor the implementation of the CSR policy from time to time.

The CSR activities shall be completed by way of the following methods:

(a) **By Charity** : A company can donate money to various charitable trusts, societies, NGOs etc. who work for social economic welfare of society.

(b) **By Contract** : A company can make a contract with an NGO or any other agency for carrying out the CSR Activities for and on behalf of the company.

(c) **By itself**: A company can take up any CSR activities on its own or create its own trust for CSR Activities.

SCHEDULE VII:

Activities which may be included by companies in their Corporate Social Responsibility Policies Activities relating to:—

(a) **Social Welfare Work** : Eradicating poverty and malnutrition, providing preventive health care and sanitation *including Contribution to Swatch Bharat Kosh set up by CG for promotion of Sanitation* and making available safe drinking water;

(b) **Promotion of Education**: Promoting education including special education and employment enhancing vocation skills especially among children, women and others;

(c) **Promotion of Gender Equality**: Promoting gender equality, empowering women, setting up homes and hostels for women and orphans etc.;

(d) **Environment Protection**: Ensuring environment sustainability, ecological balance, animal welfare, conservation of natural resources and maintaining quality of soil, air and water *including Contribution to Clean Ganga Fund set up by CG for rejuvenation of River Ganga*;

(e) **Protection of national heritage**: Protection of national heritage, art and culture including restoration of building and sites of historical important and works of art;

(f) **Contribution to the Prime Minister's National Relief Fund**: Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio – economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women.

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

(h) training to promote rural sports, nationally recognised sports, paralympic sports and olympic sports;

	(i) slum area development; (j) contributions or funds provided to technology incubators located within academic institutions which are approved by the central govt; ROLE OF THE BOARD OF DIRECTORS: The Board of every company shall – (a) Ensure that the activities which formulate by CSR Committee are duly undertaken by the company. (b) Ensure that the company spends in every financial year, at least 2% of the average net profits of the company made during the 3 immediately preceding financial years, in pursuance of its CSR Policy. (c) Ensure that the company shall give preference to the local area and areas around it where it operates. Note: If the company fails to spend CSR amount (2%), the Board shall give reasons for not spending the amount in the Director's report. Explanation: For the purposes of this section "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of section 198. (Words inserted by Companies Amendment Act, 2017) Penalty <u>For Company</u> : If a Company fails to comply with the above provisions, it shall be punishable with fine which shall not be less than ₹50,000/- which may extend up to ₹ 25 lakh. <u>For every officer</u> : Every officer who is in default shall be punishable with imprisonment upto 3 years or with fine which shall not be less than ₹ 50 thousand which may extend up to ₹ 5 lakh or with both.
WHICH ACTIVITIES DO NOT QUALIFY FOR CSR	• The CSR projects or programs or activities that benefit only the employees of the company and their families. • One-off events such as marathons/awards/charitable contribution/advertisement/sponsorships of TV programmes etc. • Expenses incurred by companies for the fulfillment of any other Act/Statute of regulations (such as Labor Laws, Land Acquisition Act, 2013, Apprentice Act, 1961 etc.) • Contribution of any amount directly or indirectly to any political party. • Activities undertaken by the company in pursuance of its normal course of business. • The project or programmes or activities undertaken outside India.
CSR FAQs 1. Whether the 'average net profit' criteria for section 135(5) is Net profit before tax or Net profit after tax? Computation of net profit for section 135 is as per section 198 of the Companies Act, 2013 which is primarily PROFIT BEFORE TAX (BT). 2. Can contribution of money to a trust/Society/Section 8 Companies by a company be treated as CSR expenditure of the company? <i>General Circular No. 21/2014 Of MCA Dated June 18, 2014 Clarifies That Contribution To Corpus Of A Trust/Society/Section 8 Companies Etc. Will Qualify As CSR Expenditure As Long As:</i>	

- (a) The Trust/Society/Section 8 company etc. is created exclusively for undertaking CSR activities or
- (b) where the corpus is created exclusively for a purpose directly relatable to a subject covered in Schedule VII of the Act.

3. Whether CSR expenditure of a company can be claimed as a business expenditure?

The amount spent by a company towards CSR cannot be claimed as a business expenditure. The Finance Act, 2014 provides that any expenditure incurred by an assessee on the activities relating to Corporate Social Responsibility referred to in section 135 of the Companies Act, 2013 shall not be deemed to be an expenditure incurred by the Assessee for the purposes of the business or profession.

4. Can the CSR expenditure be spent on the activities beyond Schedule VII?

General Circular No. 21/2014 dated June 18, 2014 of MCA has clarified that the statutory provision and provisions of CSR Rules, 2014, is to ensure that activities undertaken in pursuance of the CSR policy must be relatable to Schedule VII of the Companies Act, 2013. The entries in the said Schedule VII must be interpreted liberally so as to capture the essence of the subjects enumerated in the said Schedule. The items enlisted in the Schedule VII of the Act, are broad-based and are intended to cover a wide range of activities. The General Circular also provides an illustrative list of activities that can be covered under CSR. In a similar way many more can be covered. It is for the Board of the company to take a call on this.

5. What tax benefit can be availed under CSR?

No Specific Tax Exemptions Have Been Extended To CSR Expenditure Per Se. The Finance Act, 2014 Also Clarifies That Expenditure On CSR does not form part of business expenditure. While no specific tax exemption has been extended to expenditure incurred on CSR, spending on several activities like contributions to Prime Minister's Relief Fund, scientific research, rural development projects, skill development projects, agricultural extension projects, etc., which find place in Schedule VII, already enjoy exemptions under different sections of the Income Tax Act, 1961.

6. Whether it is mandatory for Foreign Company to give report on CSR activity?

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

7. If a company spends in excess of 2% of its average net profit of three preceding years on CSR in a particular year, can the excess amount spent be carried forward to the next year and be offset against the required 2% CSR expenditure of the next year?

Any excess amount spent (i.e., more than 2% as specified in Section 135) cannot be carried forward to the subsequent years and adjusted against that year's CSR expenditure.

8. Can the unspent amount from out of the minimum required CSR expenditure be carried forward to the next year?

The Board is free to decide whether any unspent amount from out of the minimum required CSR expenditure is to be carried forward to the next year. However, the carried forward amount should be over and above the next year's CSR allocation equivalent to at least 2% of the average net profit of the company of the immediately preceding three years.

9. Can CSR funds be utilized to fund Government Scheme?

The objective of this provision is indeed to involve the corporate in discharging their social responsibility with their innovative ideas and management skills and with greater efficiency and better outcomes. Therefore, CSR should not be interpreted as a source of financing the resource gaps in Government Scheme. Use of corporate innovations and management skills in the delivery of 'public goods' is at the core of CSR implementation by the companies. In principle, CSR fund of companies should not be used as a source of funding Government Schemes. CSR projects should have a larger multiplier effect than that under the Government schemes.

However, under CSR provision of the Act and rules made thereunder, the Board of the eligible company is competent to take decision on supplementing any Government Scheme provided the scheme permits corporate participation and all provisions of Section 135 of the Act and rules thereunder are complied by the company.

10. Who is the appropriate authority for approving and implementation of the CSR programmes/projects of a Company? What is Government's role in this regard?

Government has no role to play in this regard. Section 135 of the Act, Schedule VII and Companies CSR Policy Rules, 2014 read with General Circular dated 18.06.2014 issued by the Ministry of Corporate Affairs, provide the broad contour with which eligible companies are required to formulate their CSR policies including activities to be undertaken and implement the same in the right earnest. Therefore, all CSR programmes/projects should be approved by the Boards on the recommendations of their CSR Committees.

**POWER OF BOARD
(Section 179)**

The Board may take the decisions including on the following matters:

- (a) To make calls on shareholders in respect of money unpaid on their shares;
- (b) To authorize buy – back of securities under section 68;
- (c) To issue securities, including debentures, whether in or outside India;
- (d) To borrow monies;
- (e) To invest the funds of the company;
- (f) To grant loans or give guarantee or provide security in respect of loans;
- (g) To approve financial statement and the Board's report.

The Board may delegate its power to any committee of directors, the managing director, the manager or any other principal officer of the company, by a resolution passed at a meeting.

**RESTRICTION ON
POWERS OF BOARD
(SECTION 180)**

The Board can exercise the following powers only with the approval via special resolution passed by the shareholders:

(a) To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings;

(b) To Invest Otherwise In Trust Securities The Amount Of Compensation Received By It As A Result Of any merger or amalgamation;

(c) **To borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid – up share capital, free reserves and Securities Premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business.**

Provided that the acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company within the meaning of this clause.

Explanation.—For the purposes of this clause, the expression “temporary loans” means loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature;

(d) To remit, or give time for the repayment of, any debt due from a director.

The special resolution relating to borrowing money exceeding paid – up capital and free reserves specify the total amount up to which the money may be borrowed by Board.

**CONTRIBUTIONS TO
CHARITABLE FUNDS
AND POLITICAL
PARTIES (Section
181 of Companies
Act)**

Section 181: The contribution must be authorized by board in its meeting by resolution. The permission of company in general meeting is required if such contribution **exceeds 5%** of its average net profits for the 3 immediately preceding previous years.

**PROHIBITIONS AND RESTRICTIONS REGARDING POLITICAL CONTRIBUTIONS:
SECTION 182:**

Who Cannot Give Political Contributions: Government Company and Company who has a Existence of Less than 3 years.

Quantum of Contribution:

	The non – government company or the company which has been in existence less than 3 financial years may contribute any amount directly or indirectly to any political party. Further, the limit of contribution to political parties is 7.5% of the average net profits during the 3 immediately preceding financial years. (Deleted by Annual Finance Act 2017) (now, no limit on contributions) <u>Mode of Payment:</u> Notwithstanding anything contained in sub-section (1), the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account: Provided that a company may make contribution through any instrument, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties. <u>Disclosure:</u> The company is required to disclose in its profit and loss account any amount or amounts contributed by it to any political party during the financial year and the particular of total amount contributed and the name of the political party to whom the contribution so made. <u>Penalty for Contravention:</u> The company shall be punishable for an amount of which may extend to 5 times of the amount so contributed and every officer who is in default shall be punishable with imprisonment for a term which may extend to 6 months and with fine which may extend to 5 times of the amount so contributed.
RELATED PARTY TRANSACTIONS	The concept of related party transactions is captured under the Companies Act, 2013 or previous company law for the purpose to protect the interest of the General Public (other than promoter's Investors). Related party transaction means any transaction with a company where a director or his relative is directly or indirectly interested in such transactions. The legal provisions in connection with related party transactions have been covered under three places i. e. The Companies Act, 2013 (Applicable to Companies), Clause – 49 of the listing agreement (Applicable to listed Companies) & Accounting Standard (AS – 18). <u>RELATED PARTY TRANSACTIONS UNDER THE COMPANIES ACT, 2013</u> A transaction shall be treated as the related party transaction if it is made between a Company and its directors or their relative, KMP or their relative, with a firm or company in which directors are interested. For understanding the entire concept of Related Party Transactions, we have to know the meaning of the following terms: (a) Related Parties (b) Related Party Transactions (c) Office or Place of profit (d) Arm's Length transactions <u>RELATED PARTIES (Section 188)</u> A related party means and includes: (a) A director or his relative, (b) Key Managerial Personnel or their relative, (c) A firm in which a director, manager or his relative is a partner, (d) A private company in which a director or manager is a director or members, (e) A public company in which a director or Manager is a director or holds along with his relatives more than 2% of its paid – up share capital, (f) A person on whose advice, directions or instruction (except given in professional capacity) a director or manager is accustomed to act, (g) A holding/subsidiary or associate company, subsidiary's subsidiary, and such person as would be prescribed.

- (h) *any body corporate which is—*
 (A) *a holding, subsidiary or an associate company of such company;*
 (B) *a subsidiary of a holding company to which it is also a subsidiary; or*
 (C) *an investing company or the venturer of the company;"*;

Explanation.—For the purpose of this clause, “the investing company or the venturer of a company” means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.

RELATED PARTIES TRANSACTIONS

The following contracts or arrangements come under the category related party transactions:

- (a) Sale, purchase or supply of any goods or materials;
- (b) Selling or otherwise disposing of, or buying, property of any kind;
- (c) Leasing of property of any kind;
- (d) Availing or rendering of any services;
- (e) Appointment of any agent for purchase or sale of goods, materials, services or property;
- (f) Such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and
- (g) Underwriting the subscription of any securities or derivatives thereof, of the company.

Provided that no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by a resolution

Provided further that no member of the company shall vote on such ⁴[resolution], to approve any contract or arrangement which may be entered into by the company, if such member is a related party

Provided also that nothing contained in the second proviso shall apply to a company in which ninety per cent or more members, in number, are relatives of promoters or are related parties.

Provided also that nothing in this sub-section shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis.

Provided also that the requirement of passing the resolution under first proviso shall not be applicable for transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

*Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting under sub-section (1) and if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within three months from the date on which such contract or arrangement was entered into, such contract or arrangement **shall be voidable at the option of the Board or, as the case may be, of the shareholders** and if the contract or arrangement is with a related party to any director, or is authorized by any other director, the directors concerned shall indemnify the company against any loss incurred by it.*

OFFICE OR PLACE OF PROFIT means any office or place:

- (i) For Director: Where such office or place is held by a director, if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent – free accommodation, or otherwise;

(ii) For Individual: Where such office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent – free accommodation, or otherwise.

ARM'S LENGTH TRANSACTION:

Arm's length transaction means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

In simple words, it means a transaction which is made at the market price (without giving any special discount or concession) that is Arm's length transaction between a company or related parties.

In other words, Arm's length transaction would mean transaction between two related or affiliated parties that is conducted as if they were unrelated. The concept of an arm's length transaction is to ensure that both parties in the deal are acting in their own self – interest and are not subject to any pressure from either party.

How to enter into Related Party Transactions or Contracts: Rule 15 of the Companies (Meeting of Board and its Powers) Rules, 2014: A company shall enter into any related party transaction subject to the following conditions:

Agenda for Board meeting: Where a related party transaction is to be approved by the Board of Directors in their meeting, the Agenda of Board should disclose:

- (a) The name of the related party and nature of relationship;
- (b) The nature, duration of the contract and particulars of the contract or arrangement;
- (c) The important terms of the contract or arrangement including the value;
- (d) Any advance paid or received;
- (e) The method of determining the pricing and other commercial terms;
- (f) Any other information relevant or important for the Board on the proposed transaction.

Non – presence of Interested Director: An interested director shall not be present at the meeting during discussions on the subject matter of the resolution relating to such contract or arrangement in which he is interested.

2nd Proviso: Provided further that no member of the company shall vote on such resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party:

3rd Proviso: Provided also that nothing contained in the second proviso shall apply to a company in which ninety per cent. or more members, in number, are relatives of promoters or are related parties:

Approval from shareholders: The prior approval from shareholders via **Resolution** (as per the **Companies (Amendment) Act, 2015**) is required in the following circumstances:

(a) as contracts or arrangements with respect to clauses (a) to (e) of sub-section (1) of section 188, with criteria as mention below-

- (i) sale, purchase or supply of any goods or material, directly or through appointment of agent, amounting to 10% or more of the turnover of the company or rupees 100 crore, whichever is lower, as mentioned in clause (a) and clause (e) respectively of sub-section (1) of section 188;

(ii) selling or otherwise disposing of or buying property of any kind, directly or through appointment of agent, amounting to 10% or more of net worth of the company or Rs. 100 crore, whichever is lower, as mentioned in clause (b) and clause (e) respectively of sub-section (1) of section 188;

(iii) leasing of property any kind amounting to 10% or more of the net worth of company or 10% or more of turnover of the company or Rs. 100 crore, whichever is lower, as mentioned in clause (c) of sub-section (1) of section 188;

(iv) availing or rendering of any services, directly or through appointment of agent, amounting to 10% or more of the turnover of the company or Rs. 50 crore, whichever is lower as mentioned in clause (d) and clause (e) respectively of sub-section (1) of section 188:

Explanation.- It is hereby clarified that the limits specified in sub-clause (i) to (iv) shall apply for transaction or transactions to be entered into either individually or taken together with the previous transactions during a financial year.

(b) is for appointment to any office or place of profit in the company, its subsidiary company or associate company at a monthly remuneration exceeding two and a half lakh rupees as mentioned in clause (f) of sub-section (1) of section 188.

(c) is for remuneration for underwriting the subscription of any securities or derivatives thereof, of the company exceeding one percent of the net worth as as mentioned in clause (g) of sub-section (1) of section 188.

Explanation.- (1) The turnover or net worth referred in the above sub-rules shall be computed on the basis of the audited financial statement of the preceding financial year.

Companies (Amendment) Act, 2015

1. The Audit Committee may make **omnibus (all power) approval** for related party transaction proposed to be entered into by the company.

2. There is no requirement of Special Resolution whereas the **ordinary resolution** is sufficient.

3. Related Party Transactions (RPT) between holding company and its wholly owned subsidiary does not require any approval from the members, even of the holding company. It means RPT transactions are exempted from the purview of Related Party Transactions.

Special Note: In case of any ordinary course of business and on the arm's length transaction basis, then there is no requirement of obtaining approval from the audit committee.

Disclosure of Interest by Director (Section 184) (June 2016)

Every director shall disclose his interest or concern in any company or firms or other association of individuals in writing in **Form MBP – 1** at the 1st Board Meeting after his appointment as director and also at 1st Board Meeting of every financial year.

In addition to the above disclosure, the director shall also disclose any change after previous disclosure in next board meeting.

(a) **No participation:** Every director is required to disclose his interest at the Board Meeting in which such contract or arrangement is discussed. The participation of

	the interest of director is not allowed in such meeting. (b) Time of disclosure: Every interested director shall disclose his interest at the meeting held immediately after the date of the board notice. (c) Preservation of record: All notices shall be kept at the registered office and preserved for a period of 8 years from the end of the financial year. Note: If a contract entered into by the company without disclosure of interest by director or with participation by a director who is interested whether directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company. Exemption from this Section: Nothing in this section— (a) shall be taken to prejudice the operation of any rule of law restricting a director of a company from having any concern or interest in any contract or arrangement with the company; <i>(b) shall apply to any contract or arrangement entered into or to be entered into between two companies or between one or more companies and one or more bodies corporate where any of the directors of the one company or body corporate or two or more of them together holds or hold not more than two per cent. of the paid-up share capital in the other company or the body corporate.</i> Penalty for Non – Disclosure: Punishment – upto 1 year or with fine which may extend to ₹ 1,00,000/- or both.
LOANS TO DIRECTORS (Section 185)	(1) No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,— (a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or (b) any firm in which any such director or relative is a partner. (2) A company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in whom any of the director of the company is interested, subject to the condition that— (a) a special resolution is passed by the company in general meeting: Provided that the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilized by the recipient of the loan or guarantee or security and any other relevant fact; and (b) the loans are utilized by the borrowing company for its principal business activities. Explanation.—For the purposes of this sub-section, the expression "any person in whom any of the director of the company is interested" means— (a) any private company of which any such director is a director or member; <i>(b) anybody corporate at a general meeting of which not less than twenty-five per cent. of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or</i> <i>(c) anybody corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.</i> (3) Exemptions from this Section: Nothing contained in sub-sections (1) and (2) shall apply to—

	(a) the giving of any loan to a managing or whole-time director— (i) as a part of the conditions of service extended by the company to all its employees; or (ii) pursuant to any scheme approved by the members by a special resolution; or (b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three year, five year or ten year Government security closest to the tenor of the loan; or (c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or (d) any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company: Provided that the loans made under clauses (c) and (d) are utilised by the subsidiary company for its principal business activities. (4) Punishment for Contravention: If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section, the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, and the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both. Case Law: <u>Dr. Freddie Ardesir Mehta v. Union of India</u> In this case, the Bombay High Court held that where company sells flat to one of its directors on receipt of 50% cash and 50% agrees to receive by installments does not amount to loan. It is like a sale credit and shall not be treated loan to directors, therefore section 185 does not attract. Note: A company may give loan to managing or whole – time director as part of the conditions of service extended by the company to all its employees or pursuant to any scheme approved by the members by a special resolution. Penalty: Punishment – upto 6 months or Fine – Minimum ₹ 5 Lakhs to Maximum ₹ 25 Lakhs or with both.
REGISTER OF RELATED PARTY TRANSACTIONS (SECTION 189)	Every company is required to keep one or more registers in Form MBP – 4 and enter all particulars of all related party transactions (Contract or arrangement) particulars of Companies, firms or other association of individuals, in which any director has any concern or interest. <u>Important provisions</u> (a) The entries in the register shall be made at once, whenever there is a cause to make entry, in chronological order and shall be authenticated by the company secretary or by any authorized person. (b) The register shall be kept at the registered office of the company and the register shall be preserved permanently and shall be kept in the custody of the company secretary or any authorized person. (c) Such register or registers are required to be placed before the next meeting of the Board and signed by all the directors present at the meeting. (d) Every director within 30 days of his appointment or reappointment is required

	to disclose his concern or interest in other association, which are required to be included in the register. (e) The register is to be kept at the registered office of the company and also open for inspection during business hours. <u>Penalty</u>: Every director who fails to comply is liable to a penalty of ₹25,000/-. <u>RESTRICTION ON NON – CASH TRANSACTIONS INVOLVING DIRECTORS</u>(Section 192) A company can't enter into an agreement by which: (a) A director of the company or its holding, subsidiary or associate company or a person connected with him acquires or is to acquire assets for consideration other than cash, from the company; or (b) The company acquires or is to acquire assets for consideration other than cash, from such director or person so connected. <u>Prior Approval from Shareholders</u>: A company can enter into any contract or arrangement with the prior approval by shareholders in general meeting either for the director of the same company or its holding company. <u>Voidable Contract</u>: Any arrangement entered into by a company or its holding company in contravention of the provision shall be voidable at the option of the company.
CONTRACT BY ONE PERSON COMPANY (Section 193)	<u>Contract must be in writing</u>: Where One Person Company limited by shares or by guarantee enters into a contract except in its ordinary course of business with the sole member of the OPC who is also the director of the OPC, the OPC shall ensure that the contract is in writing. <u>Provisions in MOA</u>: If the contract is not in writing, it ensures that the terms of the contract or offer are contained in a memorandum or are recorded in the minutes of the 1st Board Meeting of OPC held next after entering into contract. The OPC is required to inform the ROC about every contract entered into by the OPC and recorded in the minutes of the Board Meeting within 15 days from the date of its approval.

Illustrative list of items of business for the Agenda for the First Meeting of the Board of the company

1. To appoint the Chairman of the Meeting.
2. To note the Certificate of Incorporation of the company, issued by the Registrar of Companies.
3. To take note of the Memorandum and Articles of Association of the company, as registered.
4. To note the situation of the Registered Office of the company and ratify the registered document of the title of the premises of the registered office in the name of the company or a Notarized copy of lease / rent agreement in the name of the company.
5. To note the first Directors of the company.
6. To read and record the Notices of disclosure of interest given by the Directors.
7. To consider appointment of Additional Directors.
8. To consider appointment of the Chairman of the Board.
9. To consider appointment of the first Auditors.
10. To adopt the Common Seal of the company, if any.
11. To appoint Bankers and to open bank accounts of the company.
12. To authorize printing of share certificates and correspondence with the depositories, if any.
13. To authorize the issue of share certificates to the subscribers to the Memorandum and Articles of Association of the company.
14. To approve and ratify preliminary expenses and preliminary agreements.
15. To approve the appointment of the Key Managerial Personnel, if applicable and other senior officers.

UNIT 20: KEY MANAGERIAL PERSONNEL

INTRODUCTION	The Companies Act, 2013 recognizes the appointment of the Key Managerial Personnel (KMP) on top level of the organizational structure for managing entire business of a Company. KMP is also responsible for all regulatory compliances not only as per the Companies Act, 2013 but also for other laws applicable on Companies. It means KMP is the executive management of a company and responsible for the day to day management of a company.
MEANING OF KEY MANAGERIAL PERSONNEL	<u>Key Managerial Personnel: Section 2(51)</u> Key Managerial Personnel, in relation to a company, means: - The Chief Executive Officer or the managing director or the manager; - The Company Secretary; - The Whole – Time Director; - The Chief Financial Officer; and <i>Such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board;</i> and - such other officer as may be prescribed <u>Functions of Company Secretary</u> (Section 205 of the Companies Act, 2013) The functions of the company secretary shall include: - To report to the Board about compliance of this Act and its rules and other laws applicable to the company; - To ensure the compliance of the applicable secretarial standards as issued by ICSI; - To discharge such other duties as may be prescribed by the Act. <u>Additional Functions</u> - To provide guidance to the directors of the company either collectively and individually as they may require, with regard to discharge their duties, responsibilities and powers; - To convene the meetings and attend Board, committee and general meetings, and maintain the minutes of these meetings; - To obtain approvals from the Board, general meetings, the Government and such other authorities as required under this Act; - To represent before various regulators, Tribunal and other authorities under this Act; - To assist the Board in the conduct of the affairs of the company; - To assist and advise the Board in ensuring good corporate governance; and - To discharge such other duties as may be assigned by the Board from time to time or as prescribed in this Act.
PROVISIONS RELATING TO KMP (December 2015)	<u>Appointment of Key Managerial Personnel</u> Section 203 of the Companies Act, 2013 & Rule 8 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, w. e. f. 1st April, 2014. Every listed company and every unlisted public company having a paid – up share capital of ₹ 10 crores or more shall appoint following whole – time key managerial personnel: - Managing Director, or Chief Executive Office or Manager and in their absence, a whole – time director; - Company Secretary; and - Chief Financial Officer. Insertion of New Rule 8A of Companies (Appointment and Remuneration of

	Managerial Personnel) Rules, 2014, w. e. f. 9th June, 2014. A company other than a company covered under rule 8 which has a paid up share capital of five Crore rupees or more shall have a whole – time company secretary other than the KMP as given in Rule 8. <u>Appointment of KMP by the Board</u> Every whole – time key managerial personnel of a company shall be appointed by passing a Board Resolution containing the terms and conditions of the appointment including the remuneration. Note: No KMP shall become the Chairperson unless the articles of such a company provide otherwise. Whole – time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time. However, he can hold directorship in other companies with the permission of the Board. <u>Re – appointment of KMP by the Board</u> If the office of any whole – time key managerial personnel is vacated, the resulting vacancy shall be filled – up by the Board within 6 months from the date of such vacancy. <u>Default with Section 203:</u> If any company makes any default in complying with the provisions of this section, such company shall be liable to a penalty of five lakh rupees and every director and key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees and where the default is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such default continues but not exceeding five lakh rupees. (Substituted by Companies Amendment Ordinance, 2018)
APPOINTMENT OF MANAGING DIRECTOR, WHOLE – TIME DIRECTOR OR MANAGER	<u>Tenure for MD/WTD/Manager: (Section 196)</u> A company shall not appoint or re – appoint any person as its MD, WTD or Manager for a term exceeding 5 years at a time and no reappointment shall be made earlier than one year before the expiry of his term. Note: No company shall appoint or employ at the same time a Managing Director or a Manager. <u>Appointment by Board Resolution:</u> A MD, WTD or manager shall be appointed and the terms and conditions of such appointment and remuneration payable should also be approved by the Board Meeting. <u>Approval by Shareholders & CG:</u> The approval from shareholders is required in next general meeting and by CG in case any variances in the terms & conditions as specified in Part 1 of Schedule V. <u>Filing of return for the appointment of KMP</u> Rule 3 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 A company shall file a return of appointment of a MD, WTD or Manager, CEO, CS and CFO within 60 days of their appointment, with the ROC in Form No. MR – 1. Note: Where an appointment of a MD, WTD or manager is not approved by the company at a general meeting, any act done by him before such approval shall be treated as valid. No company shall appoint at the same time a Managing Director or a Manager. <u>Procedure for Approval of Central Government</u> An application seeking approval to the appointment of a MD, WTD or Manager

shall be made to the Central Government in **e – Form No. MR – 2.**

The Central Government shall consider the following with regard to the appointment of a MD, WTD or Manager:

- (a) The financial position of the company;
- (b) The remuneration or commission drawn by the individual concerned in any other capacity;
- (c) The remuneration or commission drawn by him from any other company;
- (d) Professional qualifications and experience of the individual concerned;
- (e) Such other matters as may be prescribed.

Disqualifications of KMPs

No company shall appoint or continue the employment of any person as its MD, WTD or Manager who:

- (a) Is less than 21 years or has attained the age of 70 years;

A person, who has attained 70 years, may be appointed by passing a special resolution.

Provided further that where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made; (Inserted by Companies Amendment Act, 2017 w.e.f. 12th September 2018)

- (b) Is an undischarged insolvent or has at any time been adjudged as an insolvent; or
- (c) Has suspended the payments to his creditors;
- (d) Has convicted by a court of an offence and sentenced for a period of more than 6 months.

Apart from the above conditions, a person to be eligible for appointment as MD, WTD, or manager without the approval of the Central Government. These conditions are as below:

Part – I of Schedule – V

(a) He had not been sentenced to imprisonment for any period, or to a fine exceeding ₹ 1000/-, for the conviction of an offence under any of the following Acts, namely:-

1. The Indian Stamp Act, 1899,
2. The Central Excise Act, 1944,
3. The Industries (Development and Regulation) Act, 1951,
4. The Prevention of Food Adulteration Act, 1954,
5. The Essential Commodities Act, 1955.
6. The Companies Act, 2013
7. The Securities Contracts (Regulation) Act, 1956,
8. The Wealth – tax Act, 1957,
9. The Income – tax Act, 1961,
10. The Customs Act, 1962,
11. The Competition Act, 2002,
12. The Foreign Exchange Management Act, 1999,
13. The Sick Industrial Companies (Special Provisions) Act, 1985,
14. The Securities and Exchange Board of India Act, 1992,
15. The Foreign Trade (Development and Regulation) Act, 1992,
16. The Prevention of Money Laundering Act, 2002;
17. The Insolvency & Bankruptcy Code 2016
18. The Goods & Services Tax Act, 2017
19. The Fugitive Economic Offenders Act, 2018

(b) He had not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974;

~~(c) Where he is a managerial person in more than one company, he draws remuneration from one or more companies;~~

	(Omitted w.e.f. 12th September 2018) (d) He is resident in India. Note: Resident in India includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India: (i) For taking up employment in India, or (ii) For carrying on a business or vocation in India. Special Note: The person must have obtained the proper Employment Visa from the concerned Indian Mission abroad.
MANAGERIAL REMUNERATION OF KMP (December 2015)	The provisions relating of the Managerial Personnel in the Companies Act, 2013 are as under: (a) Section 197: Overall ceiling for Managerial Remuneration i. e. 11% of the Net Profit or Individual limit. (b) Section 198: Calculation of Net Profit as required under section 197. (c) Schedule V: Conditions for Appointments of KMPs and their remunerations in case of a Company having no profit or inadequate profits.
OVERALL LIMIT OF MANAGERIAL REMUNERATION(SECTION 197 OF THE COMPANIES ACT, 2013) (December 2015)	The maximum ceiling for payment of managerial remuneration by a public company to its MD, WTD and which shall not exceed 11% of the net profit of the company in a particular financial year. This section only applies to public company or a private company which is a subsidiary of a public company. Note: The calculation of net profit for the purpose of Managerial Remuneration shall be made in accordance with section 198. A company may pay more than 11% of the Net Profit with authority of shareholders & Central Government. (No CG Approval required now. Only Shareholders Approval is sufficient. Amendment is brought by Companies Amendment Act, 2017 w.e.f. 12th September 2018) Individual limit of Managerial Remuneration to MD, WTD or Manager The remuneration payable to any one MD or WTD or Manager shall not exceed 5% of the net profits and if there are more than one such directors and manager, remuneration shall not exceed 10% of the net profits. Individual Limit to directors other than MD, WTD or Manager The remuneration payable to Directors other than MD or WTD shall not exceed: (a) 1% of the net profits, if there is a MD, WTD or Manager; (b) 3% of the net profits in any other case. Note: The Company may increase the above limit of Managerial Remuneration subject to the approval of shareholders in general meeting by Special Resolution. (Words “Special Resolution” inserted by Companies Amendment Act, 2017 w.e.f 12th September 2018. Earlier it was not clear which resolution was required. Now it is clear that Special Resolution is required) Provided also that, where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting. (Proviso inserted by Companies Amendment Act, 2017 w.e.f 12th September 2018) Notwithstanding anything contained in sub-sections (1) and (2), but subject to the provisions of Schedule V, if, in any financial year, a company has no profits or its

profits are inadequate, the company shall not pay to its directors, including any managing or whole time director or manager, by way of remuneration any sum exclusive of any fees payable to directors under sub-section (5) hereunder except in accordance with the provisions of Schedule V; **(No Central Government Required)**

In cases where Schedule V is applicable on grounds of no profits or inadequate profits, any provision relating to the remuneration of any director which purports to increase or has the effect of increasing the amount thereof, whether the provision be contained in the company's memorandum or articles, or in an agreement entered into by it, or in any resolution passed by the company in general meeting or its Board, shall not have any effect unless such increase is in accordance with the conditions specified in that Schedule;

Transitional Provision Added: (Sub Section 17)

On and from the commencement of the Companies (Amendment) Act, 2017, any application made to the Central Government under the provisions of this section [as it stood before such commencement], which is pending with that Government shall abate, and the company shall, within one year of such commencement, obtain the approval in accordance with the provisions of this section, as so amended;

Provisions relating to sitting fees

The above mentioned limit of managerial remuneration shall be exclusive of sitting fees payable to directors for attending the board meetings/committees meetings.

The maximum sitting fees payable to the each director for attending the Board Meeting or any committee meeting shall not exceed ₹ 1 lakh per meeting.

Note: The Board may decide different sitting fee payable to independent and non – independent directors other than whole – time directors. Any director can take sitting fees including MD or WTD.

Remuneration to Directors in other Capacity: The remuneration payable to the directors including MD, WTD or Manager shall be inclusive of the remuneration payable for the services rendered by him in any other capacity except the services of a professional nature and in the opinion of the Nomination and Remuneration Committee or the Board, the director possesses the requisite qualification for the services of the professional nature.

Other provisions relating to Monthly Remuneration to Director or Manager

(a) Permissible forms of Remuneration: A director or manager may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other.

(b) Commission or remuneration from holding or subsidiary company: Any director who is in receipt of any commission from the company and who is a MD, WTD or Manager of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board's report.

~~(c) Independent directors are not entitled to stock options: An independent director shall not be entitled to any stock option and may receive remuneration by way of fees, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.~~
(Deleted by Companies Amendment Ordinance 2018)

(d) Insurance Premium not part of Remuneration: Where any insurance is taken by a company on behalf of its MD, WTD, Manager, CEO, CFO or CS for indemnifying against any liability in respect of any negligence, default, or breach of trust for which they may be guilty in relating to the company, such insurance premium shall not be treated managerial remuneration.

Note: If such KMP is proved to be guilty, the premium paid on such insurance

shall be treated as part of the remuneration.

S. No.	Persons entitled for remuneration	Maximum remuneration in any financial year	If remuneration exceeds maximum remuneration in any financial year as provided under column (b)
	(a)	(b)	(c)
(i)	Directors including managing director, whole time director and manager of public companies	11% of the net profits of the company for that financial year	Company in general meeting with approval of Central Government subject to provisions of Schedule V may pay remuneration in excess of 11% of the net profits of the company.
(ii)	One Managing director/ Whole time director/ manager	5% of the net profits of the company for that year	With the approval of the company in general meeting this limit may be exceeded.
(iii)	More than one Managing director/ Whole time director/ manager	10% of the net profits	With the approval of the company in general meeting this limit may be exceeded.
(iv)	Directors who are neither Managing director nor whole time directors	1% of the net profits of the company if there is a managing director or a whole time director	Approval of the company in general meeting is required.
(v)	Directors who are neither Managing director nor whole time directors	3% of the net profits of the company if there is no managing director or whole time director	Approval of the company in general meeting is required.

CALCULATION OF PROFIT FOR PURPOSE TO PAY MANAGERIAL REMUNERATION UNDER SECTION 197.

SCHEDULE – V

CONDITIONS FOR APPOINTMENTS OF KMPS AND THEIR REMUNERATIONS

PART – I of the Schedule V

PART – II of the Schedule V

Section I: Remuneration by Companies having Profits

A company having profits in a financial year shall pay remuneration to its KMP in accordance with Section 197.

Section II: Remuneration by Companies having no profits or inadequate profits

Where in any financial year, if a company has no profits or inadequate profits, it may pay the remuneration to the managerial person not exceeding the limits as mentioned in Table A and Table B below:

TABLE – A (LOSS MAKING COMPANY)

Effective Capital	Remuneration (Annually)
Negative or less than ₹ 5 Crores	₹ 60 Lakhs
More than ₹ 5 Crores but less than ₹ 100 Crores	₹ 84 Lakhs
More than ₹ 100 Crores but less than ₹ 250 Crores	₹ 120 Lakhs
₹ 250 Crores and above	₹ 120 Lakhs plus 0.01% of the effective capital in excess of ₹ 250 Crores

Note: Provided that remuneration in excess of above limits may be paid if a special

resolution is passed by the shareholders. It is clarified that for a period less than one year, the limits shall be pro – rated.

TABLE – B (A COMPANY HAVING INADEQUATE PROFIT)

In case of a **managerial person who is functioning in a professional capacity**, remuneration as per item (A) may be paid, if such managerial person is not having any interest in the capital of the company or its holding company or any of its subsidiaries directly or indirectly or through any other statutory structures and not having any, direct or indirect interest or related to the directors or promoters of the company or its holding company or any of its subsidiaries at any time during the last two years before or on or after the date of appointment and possesses graduate level qualification with expertise and specialised knowledge in the field in which the company operates:

Provided that any employee of a company holding shares of the company not exceeding 0.5% of its paid up share capital under any scheme formulated for allotment of shares to such employees including Employees Stock Option Plan or by way of qualification shall be deemed to be a person not having any interest in the capital of the company;

CENTRAL GOVERNMENT OR COMPANY TO FIX LIMIT WITH REGARD TO REMUNERATION (SECTION 200)

Notwithstanding anything contained in this Chapter, ~~The CG~~ or the company may, while according its approval under section 196, to any appointment or to any remuneration under section 197 in respect of cases where the company has inadequate or no profits, fix the remuneration within the limits specified in this Act, at such amount or percentage of profits of the company, as it may deem fit and while fixing the remuneration, ~~CG or~~ the company shall have regard to—

- (a) the financial position of the company;
- (b) the remuneration or commission drawn by the individual concerned in any other capacity;
- (c) the remuneration or commission drawn by him from any other company;
- (d) professional qualifications and experience of the individual concerned;
- (e) such other matters as may be prescribed.

(Words “Central Government” Omitted by Companies Amendment Act, 2017 w.e.f 12th September 2018)

Other Matter Prescribed are:

The Central Government or the company shall have regard to the following matters, namely:-

- (1) The Financial and operating performance of the company during the three preceding financial years.
- (2) The relationship between remuneration and performance.
- (3) The principle of proportionality of remuneration within the company, ideally by a rating methodology which compares the remuneration of directors to that of other directors on the board who receives remuneration and employees or executives of the company.
- (4) Whether remuneration policy for directors differs from remuneration policy for other employees and if so, an explanation for the difference.
- (5) The securities held by the director, including options and details of the shares pledged as at the end of the preceding financial year.

REMUNERATION BY UNLISTED COMPANIES IN CASE OF INADEQUACY OF PROFITS OR NO PROFIT

An unlisted company and subsidiary of a listed company may pay remuneration to its managerial person in the event of no profit or inadequate profit beyond ceiling prescribed in section II, part II of Schedule V subject to complying with the following conditions:

(a) Approval by the Board & Committee: Payment of remuneration is approved by a resolution passed by the Board & also approved by nomination and remuneration committee and while doing so record in writing clear reason and justification for payment of remuneration beyond the said limit;

(b) No default on repayments: The company has not made any default in repayment of any of its debts or debentures or interest payable thereon for a continuous period of 30 days in the preceding financial year before the date of appointment of such managerial person;

(c) Approval from shareholders: Prior approval of shareholders by way of a special resolution at a general meeting of the company for payment of remuneration for a period not exceeding 3 years;

(d) Statement with Notice: Statement along with a notice calling the general meeting as referred above is given to the shareholders containing the following information, namely:-

General Information:

- (a) Nature of industry
- (b) Date or expected date of commencement of commercial production
- (c) In case of new companies, expected date of commencement of activities as per project approved by financial institutions appearing in the prospectus
- (d) Financial performance based on given indicators
- (e) Foreign investments or collaborations, if any.

Information about the appointee:

- (a) Background details
- (b) Past remuneration
- (c) Recognition or awards
- (d) Job profile and his suitability
- (e) Remuneration proposed
- (f) Comparative remuneration profile with respect to industry, size of the company, profile of the position and person (in case of expatriates the relevant details would be with respect to the country of his origin)
- (g) Pecuniary relationship directly or indirectly with the company, or
- (h) Relationship with the managerial personnel, if any.

Other information:

- (a) Reasons of loss or inadequate profits
- (b) Steps taken or proposed to be taken for improvement
- (c) Expected increase in productivity and profits in measurable terms.

Disclosures:

The following disclosures shall be mentioned in the Board of Director's report under the heading "Corporate Governance", if any, attached to the financial statement:-

- (a) All elements or remuneration package such as salary, benefits, bonuses, stock options, pension, etc., of all the directors;
- (b) Details of fixed component and performance linked incentives along with the performance criteria;
- (c) Service contracts, notice period, severance fees;
- (d) Stock option details, if any, and whether the same has been issued at a discount as well as the period over which accrued and over which exercisable.

SECTION III: REMUNERATION IN SPECIAL CIRCUMSTANCES

Where the company is having no profit or inadequate profit can pay remuneration to its managerial personnel in excess of amount as mentioned in Section II above. The following companies are covered in this section:

- (a) Foreign Company
 - (b) New incorporate Company (for a period of 7 years from the date of Incorporation)
 - (c) Sick Company (as order passed by BIFR or NCLT for five years from date of sanction of scheme)
 - (d) ~~An unlisted company in a Special Economic Zone (Max. ₹2,40,00,000 per annum)~~
- (Omitted w.e.f 12th September 2018)

SECTION IV: PERQUISITES NOT INCLUDED IN MANAGERIAL REMUNERATION

The following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II and Section III:

- (a) **Contribution towards Statutory Requirements:** Contribution to provident fund, superannuation fund or annuity fund to the extent these either singly or put together are not taxable under the Income – tax Act, 1961;
- (b) **Gratuity:** Gratuity payable at a rate not exceeding half a month's salary for each completed year of service; and
- (c) **Leave encashment:** Encashment of leave at the end of the tenure.

In addition to the above perquisites, an expatriate managerial person (including a non – resident Indian) shall be eligible to the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II or Section III:

- (i) **Children's education allowance:** In case of children studying in or outside India, an allowance limited to a maximum of ₹ 12,000 per month per child or actual expenses incurred, whichever is less. Such allowance is admissible up to a maximum of two children.
- (ii) **Holiday passage for children studying outside India or family staying abroad:** Return holiday passage once in a year by economy class or once in two years by first class to children and to the members of the family from the place of their study or stay abroad to India if they are not residing in India, with the managerial person.
- (iii) **Leave travel concession:** Return passage for self and family in accordance with the rules specified by the company where it is proposed that the leave to spent in home country instead of anywhere in India.

CALCULATION OF EFFECTIVE CAPITAL:

Paid – up share capital (Excluding Application money or advances against shares)
Add:
(a) Credit of share premium account;
(b) Reserves and surplus (excluding revaluation reserve);
(c) Long – term loans and deposits repayable after one year (Excluding working capital loans, over drafts, interest due on loans unless funded bank guarantee, etc., and other short – term arrangements)
Less:
(a) Aggregate of any investments (except in case of investment by an investor company whose principal business is acquisition of shares, stock, debentures or other securities)
(b) Accumulated Losses
(c) Preliminary Expenses not written off
Effective Capital

Explanation II:

- (a) Where the appointment of the managerial person is made in the year in which company has been incorporated, the effective capital shall be calculated as on the date of such appointment;
- (b) In any other case the effective capital shall be calculated as on the last date of the financial year preceding the financial year in which the appointment of the managerial person is made.

Explanation III: For the purposes of this Schedule, “family” means the spouse, dependent children and dependent parents of the managerial person.

Explanation IV: The Nomination and Remuneration Committee while approving

	the remuneration under Section II or Section III, shall: (a) Take into account, financial position of the company, trend in the industry, appointee's qualification, experience, past performance, past remuneration, etc.; (b) Be in a position to bring about objectivity in determining the remuneration package while striking a balance between the interest of the company and the shareholders. Explanation V: For the purposes of this Schedule, "negative effective capital" means the effective capital which is calculated in accordance with the provisions contained in Explanation I of this Part is less than zero. Explanation VI: For the purposes of this Schedule" (A) "current relevant profit" means the profit as calculated under section 198 but without deducting the excess of expenditure over income referred to in section 4(1) thereof in respect of those years during which the managerial person was not an employee, director or shareholder of the company or its holding or subsidiary companies. (Omitted w.e.f. 12th September 2018) SECTION V: REMUNERATION PAYABLE TO A MANAGERIAL PERSON IN TWO COMPANIES A managerial person shall draw remuneration from one or more companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is a managerial person. PART – III PROVISIONS APPLICABLE TO PARTS I AND II OF THIS SCHEDULE 1. The appointment and remuneration referred to in Part I and Part II of this Schedule shall be subject to approval by a resolution of the shareholders in general meeting. 2. The auditor or the Secretary of the company or where the company is not required to be appointed a Secretary, a Secretary in whole – time practice shall certify that the requirement of this Schedule have been complied with and such certificate shall be incorporated in the return filed with the ROC. PART – IV The Central Government may, by notification, exempt any class or classes of companies from any of the requirements contained in this Schedule.
RECOVERY OF MANAGERIAL REMUNERATION (SECTION 197)	If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without approval required under this section, he shall refund such sums to the company, within two years or such lesser period as may be allowed by the company, and until such sum is refunded, hold it in trust for the company; (Substituted by Companies Amendment Act, 2017 w.e.f 12th September 2018) The company shall not waive the recovery of any sum refundable to it under sub-section (9) unless approved by the company by special resolution within two years from the date the sum becomes refundable; (No Central Government Approval required) Provided also that, where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting. (Proviso inserted by Companies Amendment Act, 2017 w.e.f 12th September 2018) The auditor of the company shall, in his report under section 143, make a statement as to whether the remuneration paid by the company to its directors is in accordance with the provisions of this section, whether remuneration paid to any director is in excess of the limit laid down under this section and give such

	other details as may be prescribed; (Inserted by Companies Amendment act, 2017 w.e.f 12 th September 2018)
CONSEQUENCES OF DEFAULT WITH SECTION 197	If any person makes any default in complying with the provisions of this section, he shall be liable to a penalty of one lakh rupees and where any default has been made by a company, the company shall be liable to a penalty of five lakh rupees. (Substituted by Companies Amendment act, 2017 w.e.f 12 th September 2018)
FORMS OF, AND PROCEDURE IN RELATION TO, CERTAIN APPLICATIONS (Section 201)	(1) Every application made to the Central Government under Section 196 shall be in such form as may be prescribed. (2) (a) Before any application is made by a company to the Central Government under Section 196, there shall be issued by or on behalf of the company a general notice to the members thereof, indicating the nature of the application proposed to be made. (b) Such notice shall be published at least once in a newspaper in the principal language of the district in which the registered office of the company is situate and circulating in that district, and at least once in English in an English newspaper circulating in that district. (c) The copies of the notices, together with a certificate by the company as to the due publication thereof, shall be attached to the application.
COMPENSATION FOR LOSS OF OFFICE (Section 202)	1. A company <u>can pay</u> compensation to its directors for loss of office as provided in sections 202 of the Companies Act, 2013. 2. Under section 202, such compensation can be <u>paid only to managing director, director holding the office of the manager and to a whole time director</u> but not to others. 3. The compensation payable shall be on the basis of average remuneration actually earned by such director for three years, or such shorter period as the case may be, immediately preceding the ceasing of holding of such office and shall be for the unexpired portion of his term or for three years whichever is shorter. 4. No such payment can be made, if winding up of the company is commenced before or commences within 12 months after he ceases to hold office if the assets of the company on the winding up, after deducting expenses thereof, are not sufficient to repay to the shareholders the share capital (including the premium, if any) contributed by them. 5. However, no payment of compensation can be made in the following cases: (a) where a director resigns on the ground of amalgamation or reconstruction and is appointed the office of managing director or manager or other officer of such reconstructed or amalgamated company, (b) where the director resigns his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid, (c) where the director vacates office under section 167 of the Companies Act, 2013, (d) where the winding up of the company is due to the negligence of the director concerned, (e) where the director has been guilty of any fraud or breach of trust, (f) where the director has instigated or has taken part directly or indirectly in bringing about, the termination of his office. 6. Recovery of Compensation paid wrongly: <i>Bell vs. Lever Brothers, (1932)</i>, Lever Brothers removed their managing director of a subsidiary by paying him compensation. It was afterwards discovered that during his tenure of office he had been guilty of so many breaches of duty and corrupt practices that he could have been removed without compensation. An action was then commenced to recover back the compensation money.

	It was held that Bell was not bound to refund the compensation money and to disclose any breach of his fiduciary obligation so as to give the company an opportunity to dismiss him.
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	Thus, the Managing Director is not bound to refund the compensation.
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UNIT 21: LOAN AND INVESTMENTS

INTRODUCTION	The Inter Corporate Loan & Investment is very prevalent in the current Market Scenario. It is the easiest method to take loan by one company from another. As per Section 186 of the Companies Act, 2013, a company can make investment up to 2 layers of investment companies except acquisition of any foreign company. A Company can give loan and make investment upto 60% of paid – up share capital plus free reserves and securities premium account or 100% of free reserves and securities premium account, whichever is more.
RESTRICTION ON NUMBER OF LAYERS OF INVESTMENTS (w.e.f 20.09.2017) [Companies (Restriction on number of layers) rules, 2017]	1. Restriction on number of layers for certain classes of holding companies: (1) on and from the date of commencement of these rules, No Company, other than company belonging to Class specified in Sub Rule 2, shall have more than two layers of subsidiaries: Provided that provisions of this Sub Rule shall not affect a company from acquiring a company incorporated outside India with subsidiaries beyond two layers as per the laws of such country; Provided further that for computing the number of layers under this rule, one layer which consists of one or more wholly owned subsidiary or subsidiaries shall not be taken into account. (2) The provisions of this rule shall not apply to the following classes of companies, namely: (BING) (a) a Banking Company (b) a NBFC (c) an Insurance Company (d) a Government Company (3) The provisions of this rule shall not be in derogation of the proviso to sub section (1) of Section 186 of the Act. (4) Every company, other than company referred to in sub rule 2, existing on or before the commencement of these rules, which has number of layers of subsidiaries in excess of layers specified in sub rule 1: (i) Shall file with Registrar a return in form CRL – 1 disclosing the details specified therein, within a period of 150 days from the date of publication of these rules in official gazette; (ii) Shall not, after the commencement of these rules, have any additional layer of subsidiaries over and above the layers existing on such date; and (iii) Shall not, in case one or more layers are reduced to it subsequent to the commencement of these rules, have the number of layers beyond the number of layers it has after such reduction or maximum layers allowed in sub rule 1, whichever is more. (5) if any company contravenes any provision of these rules the company and every officer of the company who is in default shall be punishable with fine which may extend to 10,000 and where the contravention is a continuing one, with a further fine which may extend to 1000 for every day after the first day during which such contravention continues.
LIMIT ON INTER CORPORATE LOANS & INVESTMENTS [SECTION 186(2)]	No Company shall, directly or indirectly: (a) Give any loan to any person or other body corporate; (b) Give any guarantee or provide security in connection with a loan to any other body corporate or person; and (c) Acquire, by way of subscription, purchase or otherwise, the securities of any other body corporate, ❖ Exceeding 60% of its paid – up share capital, free reserves and securities premium account or

❖ 100% of its free reserves and securities premium account, whichever is more
Unless the same is previously authorized by a special resolution passed in a general meeting.

Explanation.—For the purposes of this sub-section, the word "person" does not include any individual who is in the employment of the company

Meaning of Free reserves & Net Worth:

"free reserves" means such reserves which, as per the latest audited balance sheet of a company, are available for distribution as dividend:

PROVIDED that:

(i) Any amount representing unrealized gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise; or

(ii) Any change in carrying amount of an asset or of a liability recognized in equity, including surplus in profit and loss account on measurement of the asset or the liability at fair value, shall not be treated as free reserves;

"Net worth" means the aggregate value of the paid-up share capital and all reserves created out of the profits *securities premium account and debit or credit balance of profit and loss account*, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation;

PROVISIONS RELATING PRIOR APPROVAL VIA SPECIAL RESOLUTION [Section 186(3)]

Where the aggregate of the loans and investments exceed the limits as specified under section 186, no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorized by a special resolution passed in a General meeting.

A Special resolution passed at a general meeting to give any loan or guarantee or investment or providing any security or the acquisition shall specify the total amount up to which the Board of Directors are authorized to give such loan or guarantee, to provide such security or make such acquisition.

Note: The Company shall disclose to the members in the financial statement the full particulars.

Exception to the above: When a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase, the securities of its wholly owned subsidiary company.

Provided further that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-section (4).

PRACTICAL QUESTION:

1) Board of directors of Joy Ltd., b a resolution passed at its meeting, decide to provide a loan of ₹50 Crore to Happy Ltd.. The paid – up share capital of Joy Ltd. on the date of resolution was ₹100 Crore and the aggregate balance in the free reserves and securities premium account stood at ₹40 Crore. Examining the provisions of the Companies Act, 2013, decide whether the Board's resolution to provide a loan of ₹50 Crore to Happy Ltd. is valid? **(June 2015)**

**CONTRAVENTION
WITH THE
PROVISIONS
[Section 186(3)]**

Company: Fine not less than ₹ 25,000 but which may extend to ₹5,00,000.

Officer: Imprisonment which may extend to 2 Years or Fine not less than ₹ 25,000

	but which may extend to ₹ 1,00,000.
EXEMPTIONS [Section 186(11)]	Nothing contained in this section, except sub-section (1), shall apply— (a) to any loan made, any guarantee given or any security provided or any investment made by a banking company, or an insurance company, or a housing finance company in the ordinary course of its business, or a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities; (b) to any investment— (i) made by an investment company; (ii) made in shares allotted in pursuance of clause (a) of sub-section (1) of section 62 or in shares allotted in pursuance of rights issues made by a body corporate; (iii) made, in respect of investment or lending activities, by a non-banking financial company registered under Chapter III-B of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities.
DISCLOSURE IN FINANCIAL STATEMENTS [Section 186(4)]	The Company shall disclose to the members in the financial statement the full particulars of the loans given, investment made or guarantees given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilized by the recipient of the loan or guarantee or security.
PRIOR APPROVAL OF FINANCIAL INSTITUTION [Section 186(5)]	The company has to obtain prior approval from the public financial institution or Bank if any term loan is subsisting. No investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it, is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained. The prior approval of Public Financial Institution or Bank shall not be required where the aggregate of loans and investments does not exceed the limit as specified above and there is no default in repayment of loan installments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.
APPROVAL OF ALL DIRECTORS [Section 186(5)]	No loan or investment shall be made or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all directors present at the meeting.
DEFAULT SUBSISTS WITH RESPECT TO REPAYMENT OF DEPOSITS [Section 186(6)]	No company, which is in default in repayment of any deposits accepted before or after the commencement of the Companies Act, 2013 or in payment of interest thereon, shall give any loan or give any guarantee, or provide any security or make an acquisition till such default is subsisting. Every company giving loan or giving a guarantee or providing security or making an acquisition shall maintain a register in Form MPB – 2 which shall contain such particulars as may be prescribed.
LOANS & INVESTMENT BY INTERMEDIARIES	No company, which is registered under section 12 of the Securities and Exchange Board of India Act, 1992 and covered under such class or classes of companies as may be prescribed, shall take inter-corporate loan or deposits exceeding the prescribed limit and such company shall furnish in its financial statement the details of the loan or deposits. Pursuant to the above provisions no stock broker, sub-broker, share transfer agent, banker to issue, Registrar to an issue, Merchant Baker, underwriter, portfolio manager, investment advisor or any intermediary associated with capital market and which is registered under section 12 of the SEBI Act, shall make loans or investments or give guarantees or provide security in excess of the limits specified above. [Rule 11(3)]
RATE OF INTEREST	Loan given under this section shall carry the rate of interest not lower than the prevailing yield of one year, three year, five year or ten year Government Security closest to the tenor of the loan.

REGISTER OF LOANS, GUARANTEE & INVESTMENTS MADE [Section 186(9)]	Sub-section (9) of section 186 provides that every company giving loan or giving a guarantee or providing security or making an acquisition under this section shall keep a register which shall contain such particulars and shall be maintained in such manner as may be prescribed. Rule 12 states that (1) Every company giving loan or giving guarantee or providing security or making an acquisition of securities shall, from the date of its incorporation, maintain a register in Form MBP 2 and enter therein separately, the particulars of loans and guarantees given, securities provided and acquisitions made as aforesaid. (2) The entries in the register shall be made chronologically in respect of each such transaction within seven days of making such loan or giving guarantee or providing security or making acquisition. (3) The register shall be kept at the registered office of the company and the register shall be preserved permanently and shall be kept in the custody of the company secretary of the company or any other person authorised by the Board for the purpose. (4) The entries in the register (either manual or electronic) shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose. (5) For the purpose of sub-rule (4), the register can be maintained either manually or in electronic mode. (6) The extracts from the register maintained under sub-section (9) of section 186 may be furnished to any member of the company on payment of such fee as may be prescribed in the Articles of the company which shall not exceed ten rupees for each page.
INSPECTION OF REGISTER [Section 186(10)]	Sub-section (10) of section 186 provides that the register referred to in sub-section (9) shall be kept at the registered office of the company and — (a) shall be open to inspection at such office; and (b) extracts may be taken therefrom by any member, and copies thereof may be furnished to any member of the company on payment of such fees as may be prescribed.
INVESTMENT TO BE HELD BY COMPANY IN ITS OWN NAME [Section 187(1)]	According to Sub-section (1) of Section 187, all investments made or held by a company in any property, security or other asset shall be made and held by it in its own name. The requirement that the investment made by the company must be held in its own name is confined to only those investments which are made by it on its own behalf and not on behalf of someone else. In a case where the company is a trustee, the investment is supposed to be made on behalf of the beneficiaries of the trust and not on its own behalf. Therefore, the investments by the company as a trustee and held in the name of the beneficiaries is allowed. As per proviso to section 187(1), the company may hold any shares in its subsidiary company in the name of any nominee or nominees of the company, if it is necessary to do so, to ensure that the number of member of the subsidiary company is not reduced below the statutory limit.
REGISTER OF INVESTMENTS NOT HELD IN COMPANY'S OWN NAME [Section 187(3)]	Any shares or securities in which investments have been made by a company are not held by it in its own name, the company shall maintain a register which shall contain such particulars as may be prescribed and such register shall be open to inspection by any member or debenture – holder of the company without any charge during business hours subject to such reasonable restrictions as the company may by its articles or in general meeting impose. Therefore, a company is only required to maintain a register for securities not

	held in the name of the company, when the investments are held in the name of a depository.
PUNISHMENT [Section 187(4)]	if a company contravenes the provisions of section 187, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.
MEANING OF INVESTMENT COMPANY	Explanation.—For the purposes of this section,— (a) the expression “investment company” means a company whose principal business is the acquisition of shares, debentures or other securities and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than fifty per cent. of its total assets, or if its income derived from investment business constitutes not less than fifty per cent. as a proportion of its gross income.

UNIT 22: LIMITED LIABILITY PARTNERSHIP

INTRODUCTION	Limited Liability Partnership (LLP) is a form of business organization combining the vital aspects of a partnership firm and the advantages of a limited liability company. LLP is a hybrid of a company and a partnership. The LLP is a separate legal entity which can continue its existence irrespective of changes in its partners. A LLP can be incorporated under the Limited Liability Partnership Act, 2008 with limited liability and perpetual succession. LLP is also a suitable vehicle for small and medium enterprises and also for professionals like CS, CA & CMA.																		
FEATURES OF LLP	(a) <u>Limited Liability & Perpetual Succession</u>: The LLP is a body corporate and a separate legal entity. Any 2 or more persons can form a LLP for carrying a lawful business with a view to make profit. The LLP has a perpetual succession. (b) <u>Mutual Rights & Duties</u>: The mutual rights and duties of partners of an LLP inter se and those of the LLP and its partners shall be governed by an agreement between partners or between the LLP and the partners subject to the provisions of the proposed legislation. (c) <u>Separate Legal Entity</u>: A LLP is a separate legal entity, liable to the full extent of its assets, with the liability of the partners being limited to their agreed contribution in the LLP which may be tangible or intangible in nature or both tangible and intangible in nature. (d) <u>Minimum Partners</u>: Every LLP shall have at least 2 partners and shall also have at least 2 individuals as Designated Partners, of whom at least one shall be resident in India. (e) <u>To maintain Books of Accounts</u>: A LLP shall maintain annual accounts reflecting true and fair view of its state of affairs. A statement of accounts and solvency shall be filed by every LLP with the Registrar every year.																		
DEFINITIONS	Designated Partner [Section 2(j)]: Designated partner means any partner designated as such pursuant to Section 7. Limited Liability Partnership [Section 2(n)]: Limited liability partnership means a partnership formed and registered under the Limited Liability Partnership Act, 2008. LLP Agreement [Section 2(o)]: LLP agreement means any written agreement between the partners of the LLP or between the LLP and its partners which determines the mutual rights and duties of the partners and their rights and duties in relation to that LLP. Partner [Section 2(q)]: Partner, in relation to a LLP, means any person who becomes a partner in the LLP in accordance with the LLP agreement.																		
DISTINCTION BETWEEN LLP AND PARTNERSHIP	<table><tr><th>Basis</th><th>LLP</th><th>Partnership</th></tr><tr><td>Distinctive</td><td>LLP is a separate legal entity and therefore, can be sued or it can sue others</td><td>A partnership firm is not distinct from the several persons who compose it.</td></tr><tr><td>Liability</td><td>Partners have Limited Liability</td><td>Partner of a firm would have unlimited liability.</td></tr><tr><td>Dissolution</td><td>The retirement or death of a partner would not dissolve the LLP</td><td>The death or retirement of a partner would dissolve the partnership firm.</td></tr><tr><td>Firm's Property</td><td>Property belongs to the LLP and not to the individuals comprising it</td><td>The property of the firm is the property of the individuals comprising it.</td></tr><tr><td>Legality</td><td>LLP is formed by an incorporation</td><td>A partnership can be formed</td></tr></table>	Basis	LLP	Partnership	Distinctive	LLP is a separate legal entity and therefore, can be sued or it can sue others	A partnership firm is not distinct from the several persons who compose it.	Liability	Partners have Limited Liability	Partner of a firm would have unlimited liability.	Dissolution	The retirement or death of a partner would not dissolve the LLP	The death or retirement of a partner would dissolve the partnership firm.	Firm's Property	Property belongs to the LLP and not to the individuals comprising it	The property of the firm is the property of the individuals comprising it.	Legality	LLP is formed by an incorporation	A partnership can be formed
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		document and an LLP agreement, thus, giving it a legality	either orally or by a deed of agreement whether registered or not.
	Max No. of Partners	No upper limit has been laid down by the Act	A registered or unregistered partnership cannot have more than 50 partners.
	Perpetual Succession	The death or insolvency of a shareholder or all of them does not effect the life of the LLP	The death or insolvency of a partner dissolves the firm, unless otherwise provided.
	Capacity	A partner of LLP in his separate capacity as a legal person can do business with the LLP since the LLP is a separate legal entity by itself	An individual partner would not be able to conduct business transaction with the partnership firm of which he is a partner.
DISTINCTION BETWEEN LLP AND COMPANY			
	Basis	LLP	Company
	Incorporation Process	Incorporation Process is reduced into a simple procedure of filling of the prescribed information in the Incorporation document and statement in Form No. 2.	As compared to LLP, Incorporation process is complex.
	Agreement	In case of LLP, a limited liability partnership agreement (LLPA) is prepared.	In case of a Company, articles of association of a company are prepared.
	Memorandum	The memorandum of a LLP is not required to name the state in which it is required to be incorporated.	The memorandum of a company is required to name the state in which it is required to be incorporated.
	Change in Registered office	The detail procedure involved in changing the registered office from the state of incorporation to another state is not required to be followed in case of a LLP.	The detail procedure is required to be followed in case of a company.
	Meeting	There is no such stipulation for meeting of partners.	Meeting of partners either periodically or compulsory as stipulated for directors and shareholders' meetings in the Companies Act.
	Management & Ownership	There is no separation between management of the company and the ownership since all the partners, unlike all the directors, can take part in the day to day affairs of the LLP.	There is a separation between management of the company and the ownership.
	Authority	In an LLP, each partner has the authority to do so unless expressly prohibited by the partnership terms.	In case of a company no individual director can conduct the business of the company.
	Remuneration	There are no provisions in the LLP Act for remuneration payable to designated partners.	The Companies Act contemplates regulating the remuneration payable to directors.
	Borrowing Powers	Unlike in the case of companies, there are no restrictions on the borrowing powers.	There are restrictions on borrowing powers in case of a company.
	Maintenance of accounts	The LLP can choose to maintain the accounts on cash basis/accrual basis.	Whereas under the Companies Act, accrual method is compulsory.
NAME OF LLP	Every LLP shall have either the words "limited liability partnership" or "LLP" as the last words of its name.		

	A LLP won't be allowed to use the following name: (a) Name of the proposed company shall not be identical with existing name of a company. (b) Name is prohibited under the Emblems & Names (Prevention of Improper Use) Act, 1950. (c) Name which infringes the trademark which is subject to application for registration. (d) Use of which will constitute an offence under any law for the time being in force. (e) Offensive to any section of society.
LLP AGREEMENT	The LLP agreement determines the mutual rights and duties of the partners and their rights and duties in relation to limited liability partnership. This LLP agreement is required to be filed with the Registrar. The mutual rights and duties of the partners of a LLP, and the mutual rights and duties of a LLP and its partners, shall be governed by the LLPAA between the partners, or between the LLP and its partners.
PARTNERS AND DESIGNATED PARTNERS	Any person can be a partner in the LLP as per the LLP agreement. Every LLP shall have at least 2 designated partners who are individuals and at least one of them shall be a resident in India. No Maximum Limit on Number of Partners just as in case of Public Company. Even a body corporate may also become a partner in limited liability partnership. An HUF cannot be treated as body corporate for the purpose of LLP Act and therefore, HUF or its Karta cannot become partner or designated partner in LLP. In case of a LLP in which all the partners are body corporate, at least two partners shall nominate their respective individuals who are to act as "designated partners" and one of the nominees shall be a resident of India. Every designated partner of a limited liability partnership shall obtain a Designated Partner Identification Number (PIN) from the Central Government. Disqualification of partners in LLP: An individual shall not be capable of becoming a partner of a limited liability partnership, if – (a) He has been found to be of unsound mind by a Court of competent jurisdiction or (b) He is an un – discharged insolvent or (c) He has applied to be adjudicated as an insolvent and his application is pending. Liabilities of designated partners [Section 8]: A designated partner shall be – (a) Responsibility for the doing of all acts, matters and things as are required to be done by the LLP in respect of compliance of the provisions of the Act including filing of any documents, return, statement and the reports and (b) Liable to all penalties imposed on the limited liability partnership for any contravention of those provisions. Changes in designated partners [Section 9]: A LLP may appoint a designated partner within 30 days of a vacancy arising for any reasons. However, if no designated partner is appointed, or if at any time there is only one designated partner, each partner shall be deemed to be a designated partner.
LLP FOR THE PROFESSIONALS	LLPs are eminently suited to the professionals like Company Secretaries and others. They will get the benefit of limited liability and insulate them from third party claims against professional negligence or deficiency. A cross section of the professionals may come together under the banner of LLP to carry on the professional work in their respective field of specialization, with the respective statutes according sanction for such a dispensation. Such an arrangement will bring the professionals closer and this will benefit the corporate and other clients, as they may be able to get solutions to their problems under one roof. This will also create a strong organization of professionals and acts as a bulwark against keen competition expected to happen from the professionals abroad, with the opening of legal field under the WTO dispensation.

FILING OF ANNUAL RETURN	Every LLP shall file an annual return with the Registrar in Form 11 duly authenticated with ROC within 60 days of closure of financial year. The annual return of an LLP having turnover upto ₹ 5 crore during the corresponding financial year or contribution upto ₹ 50 lakh shall be accompanied with a certificate from a designated partner, other than the signatory to the annual return, to the effect that annual return contains true and correct information.
MAINTENANCE OF BOOKS OF ACCOUNT, OTHER RECORDS & AUDIT	1. The LLP shall maintain proper books of account relating to its affairs for each year of its existence on cash or accrual basis and according to double entry system of accounting. Such books of account shall be maintained at the registered office for 8 years from the date on which they are made. 2. Every LLP shall, within a period of 6 months from the end of each financial year, prepare a Statement of Account and Solvency in Form No. 8 and such statement shall be signed by the designated partners of the LLP. 3. Every LLP shall file the Statement of Account and Solvency with the ROC every year in within the prescribed. 4. The accounts of LLPs shall be audited in accordance with prescribed rules. However, the Central Government may exempt any class or classes of LLPs from the requirements of auditing accounts by notification in the Official Gazette. As per Rule 24(10), a LLP shall be exempt from the audit of its accounts if its turnover does not exceed, in any financial year, ₹40,00,000 or its contribution does not exceed ₹ 25,00,000. Appointment of auditor [Rule 24(13) to (17)]: An auditor or auditors of a LLP shall be appointed for each financial year of the LLP, unless the LLP is exempt from the provisions of audit. For each financial year for which an auditor or auditors is or are to be appointed (other than the LLP's first financial year), the appointment must be made within 30 days before the end of the financial year. The designated partners may appoint an auditor or auditors – (a) At any time for the first financial year but before the end of the first financial year, or (b) Within 30 days before the end of the each financial year or (c) To fill a casual vacancy in the office of auditor or (d) To fill up the vacancy caused by removal of an auditor. The partners may appoint an auditor or auditors where the designated partners fail to appoint the auditor as stated above. Only a chartered accountant in practice shall be qualified for appointment as auditor of a LLP.
WHISTLE BLOWING UNDER THE LLP ACT	The Court or Tribunal may reduce or waive any penalty leviable against any partner or employee of a LLP, if it is satisfied that – (a) Such partner or employee of a LLP has provided useful information during investigation of LLP or (b) When any information given by any partner or employee leads to LLP or its partner or employee being convicted under the Act or any other Act. Partner or employee of any LLP cannot be discharged, demoted, suspended, threatened, harassed or discriminated merely because of he provides information pursuant to Section 31(1).
UNLIMITED LIABILITY IN CASE OF FRAUD [SECTION 30]:	If any act is carried out by a LLP or its partners with intent to defraud creditors or any other person or for any fraudulent purpose, the liability of the LLP and its partners shall be unlimited for all or any of the debts or other liabilities of the LLP. In case any fraudulent act is carried out by a partner, the LLP is liable to the same extent as the partner. However, if it is established by the LLP that such act was

	without the knowledge or the authority of the LLP then LLP will not be liable. Punishment: Where any business is carried on with to defraud creditors or any other person or for any fraudulent purpose, every person who was knowingly a party to the carrying on of the business shall be punishable with imprisonment for a term which may extent to 2 years and with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 5,00,000. In addition to penalty as stated above, partner may be liable for criminal proceeding and also liable to pay compensation to any person who has suffered any loss or damage due to such fraudulent acts. However, LLP shall not be liable if any such partner or designated partner or employee has acted fraudulently without knowledge of the LLP.
EXTENT OF LIABILITY OF LLP [SECTION 27]:	(1) A LLP is not bound by anything done by a partner in dealing with a person if - - The partner in fact has no authority to act for the LLP in doing a particular act and - The person knows that he has no authority or does not known or believe him to be a partner of the LLLP. (2) The LLP is liable if a partner commits a wrongful act or omit do on his part in the course of the business of the LLP. (3) An obligation of the LLP shall be solely the obligation of the LLP. Thus, obligation of LLP is not obligation of partners. (4) The liabilities of the LLP shall be met out of the property of the LLP. Extent of liability of partner [Section 28]: A partner is not personally liable, directly or indirectly for an obligation of the LLP. A partner shall not be personally liable for the wrongful act or omission of any other partner of the LLP. LLP done after his death.
PROVISIONS RELATING TO REGISTERED OFFICE OF LLP	Registered office of LLP and change therein [Section 13]: (1) Every LLP shall have a registered office to which all communication and notices may be addressed and where they shall be received. (2) A document may be served on a LLP or a partner or designated partner thereof by sending it by post under a certificate of posting or by registered post or by any other prescribed manner, at the registered office and any other address specifically declared by the LLP. As per Rule 16(3), the intimation of address for service of documents to LLP shall be given to the Registrar in Form No. 12. (3) A LLP may change the place of its registered office and file the notice of change with the ROC in prescribed form. As per Rule 17(2), such notice of change in registered office shall be given to ROC in Form No. 15. Change of registered office form one State to another State [Rule 17(4)]: Where the change in place of registered office is from one state to another state, the LLP shall, not less than 1 month before filing any notice with Registrar, publish a general notice, at least once, in the district in a daily newspaper published in English and in the principal language of the district in which the registered office of the LLP is situated and circulating in that district giving notice of change of registered office. Change of registered office within the state from the jurisdiction of one Registrar to the jurisdiction of another Registrar [Rule 17(5)]: Where the change in place of registered office is from one place to another place within the state from the jurisdiction of one ROC to the jurisdiction of another ROC or from one state to another state, the LLP shall file the notice in form 15 with the ROC from where the LLP proposes to shift its registered office with a copy thereof for the information to the ROC under whose jurisdiction the registered office is proposed to be shifted.
INVESTIGATION OF THE AFFAIRS OF LLP [SECTION 43]	The Central Government shall appoint one or more inspectors to investigate the affairs of a LLP and to report thereon if - (a) The Tribunal, either suomoto, or on an application received from not less than

(June 2016)	20% of the total number of partners, by order, declares that the affairs of the LLP ought to be investigated or (b) Any Court, by order, declares that the affairs of a LLP ought to be investigated. The appointment of inspectors may be made, - (a) If not less than 20% of the total number of partners of the LLP make an application along with supporting evidence and security amount as may be prescribed; or (b) If the LLP makes an application that the affairs of the LLP ought to be investigated or (c) If, in the opinion of the Central Government, there are circumstances suggesting – - That the business of the LLP is being or has been conducted with an intent to defraud its creditors, partners or any other person, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive or unfairly prejudicial to some or any of its partners, or that the LLP was formed for any fraudulent or unlawful purpose; or - That the affairs of the LLP are not being conducted in accordance with the provisions of this Act or - That, on receipt of a report of the ROC or any other investigating or regulatory agency, there are sufficient reasons that the affairs of the LLP ought to be investigated.
FOREIGN LIMITED LIABILITY PARTNERSHIP	Any foreign LLP which is proposing to establish a place of business in India and such LLP has to comply with LLP Rules, 2009. As per rule 34(1) of the said Rules, a foreign limited liability partnership shall, within 30 days of establishing a place of business in India, file with the Registrar in Form 27: (a) Copy of the certificate of incorporation or registration and other instrument(s) constituting or defining the constitution of the limited liability partnership; (b) The full address of the registered or principal office of the limited liability partnership in the country of its incorporation; (c) The full address of the office of the limited liability partnership in India which is to be deemed as its principal place of business in India; and (d) List of partners and designated partners, if any, and the names and addresses of two or more persons resident in India, authorized to accept on behalf of the limited liability partnership, service of process and any notices or other documents required to be served on the limited liability partnership. Note: FDI is allowed in LLPs. The department of Industrial Policy and Promotion vide its press note dated May 20 2011, amending Consolidated FDI Policy allows LLPs to have FDI.
WINDING UP AND DISSOLUTION	The winding up of a LLP may be either voluntary or by the Tribunal and LLP, so wound up may be dissolved.' Circumstances in which LLP may be wound up by Tribunal [Section 64]:A LLP may be wound up by the Tribunal – (a) If the LLP decides that LLP be wound up by the Tribunal; (b) If the number of partners is reduced below 2 for a period of more than 6 months; (c) If the LLP is unable to pay its debts; (d) If the LLP has acted against the interests of the sovereignty and integrity of India, the security of the State or public order; (e) If the LLP has made a default in filing with the ROC the Statement of Account and Solvency or annual return for any 5 consecutive financial years; or (f) If the Tribunal is of the opinion that it is just and equitable that the LLP be wound up.

The Limited Liability Partnership (Winding up and Dissolution) Rules, 2012 prescribes the details provisions relating to winding up. Any LLP may be wound – up voluntarily if the LLP passes a resolution to wind up the LLP with approval of at least 75% of the total number of its partners. However, where the LLP has creditors, whether secured or unsecured, the winding up shall not take place unless approval of such creditors takes place.

A copy of the resolution shall be filed with the ROC within **30 days** of passing of such resolution in **Form No.1**.

UNIT 23: BOARD'S REPORT & DISCLOSURES

INTRODUCTION	The directors are holding the position of trust and they are under obligation to manage the business efficiently and effectively for the purpose to maximize the wealth of shareholders. In view of the above, Board's Report or Director's Report plays an important role for the stakeholders to judge or analyze the performance and corporate governance measures adopted by the company.
OTHER DISCLOSURES UNDER THE COMPANIES ACT, 2013	<u>Independent Director:</u> An independent director shall hold office for a term up to 5 consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment is required in the Board's report. <u>Resignation of Director u/s 168:</u> A director may resign from his office by giving notice in writing to the company and the Board. Section 168(1) requires the Board to place the fact of resignation of a director in report of directors laid in the immediately following general meeting by the Company. <u>Audit Committee:</u> Board's Report shall disclose the composition of audit committee and also discloses the recommendation of the audit committee which is not accepted by the Board along with reason thereof. <u>Vigil Mechanism:</u> It is the whistleblower provisions which is a mandatory requirement. This mechanism would enable a company to evolve a process to encourage ethical corporate behavior. Every listed company shall establish a Vigil mechanism for their Directors and Employees to report their genuine concern or grievances. <u>Related Party Transactions u/s 188(2):</u> Every contract or arrangement entered into under Section 188(1) shall be referred to in the Board's report to the shareholders along with the justification for entering into such contract or arrangement in the prescribed form i.e., Form no. AOC-2. <u>Remuneration received by MD and WTD from holding or subsidiary companies – Section 197(14)</u> Subject to the provisions of Section 197, any director who is in receipt of any commission from the company and who is a managing or whole-time director of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board's report. Thus, a company should disclose in its Board's report remuneration or commission from any holding company or subsidiary company received by MD or WTD. <u>Nomination and Remuneration Committee:</u> Section 178(3) and (4) provides that the Nomination and Remuneration Committee shall formulate and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees. Such policy shall ensure that— (a) the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully; (b) relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and (c) remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals.

	The policy so formulated shall be disclosed in the Board's report. Secretarial Audit: Every listed company and other prescribed companies shall annex the secretarial audit report given by a Company Secretary in practice with Board's Report. The Board in its report shall explain any qualification or other remarks made by the Company Secretary in Practice. Disclosures about CSR Policy: The disclosure of contents of Corporate Social Responsibility Policy in the Board's report and on the company's website. Disclosures relating to Issue of Equity Shares with Differential Rights: - Total number of shares allotted with differential rights; - Details of the differential rights relating to voting rights & dividends; - Price at which such shares have been issued; - Particulars of Promoters, directors or Key Managerial Personnel to whom such shares are issued; - Change in control, if any, in the company consequent to the issue of equity shares with differential voting rights; - Diluted Earnings per share pursuant to the issue of each class of shares, calculated in accordance with applicable AS (i.e AS 20) - Pre & Post issue shareholding pattern - Percentage of shares with differential rights to total post issue equity share capital. Disclosure about issue of Sweat Equity Shares: (Already studies in the chapter of Share Capital) The Board of Directors shall, inter alia, disclose in the Director's Report for the year in which such shares are issued, the following details of issue of sweat equity shares, namely:- - The class of director or employee to whom sweat equity shares were issued. - The class of shares issued as Sweat Equity Shares. - The number of sweat equity shares issued to the directors, KMP or employees showing separately the number of such shares issued to them. - The reasons or justification for the issue. - The principal terms and conditions for issue of sweat equity shares, including pricing formula. Disclosure about issue of shares under ESOP and ESPS: (Already studies in the chapter of Share Capital) The Board of Directors shall disclose the following details about ESOP & ESPS in the Director's Report for each year: - Options granted; - Options vested; - Options exercised; - The total number of shares arising as a result of exercise of option; - Options lapsed; - The exercise price; - Variation of terms of options; - Money realized by exercise of options; - Total number of options in force; - Employee wise details of options granted to – - Key managerial personnel; - Any other employee who receives a grant of options in any 1 year of option amounting to 5% or more of options granted during that year; - Identified employees who were granted option, during any 1 year, equal to or exceeding 1% of the issued capital (excluding outstanding warrants and conversions) of the company at the time of grant.
DISCLOSURES AS PER THE LISTING AGREEMENT OF STOCK EXCHANGES	Management Discussion and Analysis Report: Clause 49 of the listing agreement provides that as a part of the directors' report or as an addition thereto, a Management Discussion and Analysis Report (MDAR) should form part of the Annual Report to the shareholders. The MDAR should include discussion on the following matters within the limits set by the company's competitive position:

	(a) Industry structure and developments. (b) Opportunities and Threats. (c) Segment – wise or product – wise performance. (d) Outlook. (e) Risks and concerns. (f) Internal control systems and their adequacy. (g) Discussion on financial performance with respect to operational performance. (h) Material developments in Human Resources/Industrial Relations front, including number of people employed. PRACTICAL QUESTION: <i>Priya, a nominee director on the Board of Aroma Ltd., a listed company, informed the Board of directors during a Board meeting that the next annual report of the company shall contain a 'Management Discussion and Analysis Report'. You being the Company Secretary have been asked by the Board to prepare the said report. State the matters you would include in the report. (Dec. 2016)</i> Corporate Governance (CG) Report: As per clause 49 of the listing agreement, corporate governance aims to improve the company's image, efficiency, effectiveness and social responsibility. It encompasses in itself a range of corporate controls and accountability mechanisms designed to meet the aims of corporate stockholders. It deals with issues regarding transparency accounting integrity, composition of the board of directors, the role of non – executive directors and their accountability to shareholders, etc. Statement of deviation or variation (Regulation 32 of ICDR) Regulation 32(1) specifies that a listed entity shall submit to the stock exchange the following statement(s) on a quarterly basis for public issue, rights issue, preferential issue, etc. , - (a) indicating deviations, if any, in the use of proceeds from the objects stated in the offer document or explanatory statement to the notice for the general meeting, as applicable; (b) indicating category wise variation (capital expenditure, sales and marketing, working capital, etc.) between projected utilisation of funds made by it in its offer document or explanatory statement to the notice for general meeting, as applicable and the actual utilisation of funds. Further Regulation 32(4) provides that the listed entity shall furnish an explanation for the variation specified in sub-regulation (1), in the Directors' report in the annual report.
DISCLOSURE REQUIREMENTS UNDER THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION & REDRESSAL) ACT, 2013	• The Act mandates that all companies having more than 10 women employees shall disclose in annual report following details as per section 22 and 28 of the Act. • Rule 14 of Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Rules, 2013 provides that the annual report which the Complaints Committee shall prepare shall contain following information- (a) Number of complaints of sexual harassment received in the year; (b) Number of complaints disposed off during the year; (c) Number of cases pending for more than ninety days; (d) Number of workshops or awareness programme against sexual harassment carried out; (e) Nature of action taken by the employer or District Officer.
LIABILITY FOR MIS – STATEMENT (SECTION 448 OF THE COMPANIES ACT, 2013)	If in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of the Companies Act, 2013 or the rules made thereunder, any person makes a statement – (a) Which is false in any material particulars, knowing it to be false; or (b) Which omits any material fact, knowing it to be material. He shall be liable under section 447.

UNIT 24: REGISTER, FORMS & RETURNS

INTRODUCTION	A company has to maintain various registers for meeting the requirement for statutory & management purposes. A company has also to file many returns with the regulatory authorities based on the requirements of the Companies Act, 2013. The objective behind such returns is not only statutory requirement, but these are also helpful for the smooth functioning of the company. These returns have to file on quarterly basis, half yearly basis, annual basis or event basis.
STATUTORY BOOKS/REGISTERS	Every company incorporated must maintain and keep certain records, registers & other documents at its registered office of the Company. The companies have to file certain returns & documents with the Registrar of Companies within certain specified time limits and with the prescribed filing fees. Every company is required to keep the following records & Registers at its registered office: - Register of securities bought back. - Register of deposits. - Register of charges. - Register of members. - Index of members. - Register of debenture holders. - Index of debenture holders. - Register and index of beneficial owners. - Register of sweat equity shares. - Annual Return. - Register of Postal Ballot. - Books containing minutes of general meeting and of Board and of committees of Directors. - Books of accounts. - Register of Directors/Key Managerial Personnel. - Register of contracts with companies/firms in which directors are interested. STATUTORY BOOKS VS. STATISTICAL BOOKS: (June 2012) (Dec 2008) Statutory Books: Every Company incorporated under the Act is required to keep at its registered office, the following statutory books and registers: - Register of Members - Register of Debenture Holders - Register of Deposit Holders - Register of Charges - Books of Accounts etc. Statistical Books: Besides the above Statutory or compulsory books, other books and register are also generally maintained by companies which are called Statistical or optional or non-statutory books. Some examples are: - Share Call book - Share Certificate book - Share Transfer Book - Share Application & Allotment Book - Agenda Book
INSPECTION OF REGISTERS, RETURNS ETC. (SITUATION) (Section 94)	- The registers required to be kept and maintained by a company under section 88 and copies of the annual return filed under section 92 shall be kept at the registered office of the company: - Provided that such registers or copies of return may also be kept at any other place in India in which <i>more than one-tenth of the total number of members entered in the register of members reside</i>, if approved by a special resolution passed at a general

	meeting of the company and the Registrar has been given a copy of the proposed special resolution in advance • Provided further that the period for which the registers, returns and records are required to be kept shall be such as may be prescribed. • The registers and copies of return shall be open for inspection during business hours for a reasonable time (not being less than two hours on any working day) by any member, debenture holder, other security holder or beneficial owner without payment of fee and by any other person on payment of such fee as may be specified in the articles of association of the company but not exceeding fifty rupees for each inspection. • <i>Provided that such particulars of the register or index or return as may be prescribed shall not be available for inspection under sub-section (2) or for taking extracts or copies under this sub-section. (Inserted by Amendment Act 2017)</i> • Any such member, debenture holder, security holder or beneficial owner or any other person may <u>require a copy</u> of any such register or entries therein or return on payment of such fee as may be specified in the articles of association of the company but not exceeding ten rupees for each page and the copy or entries or returns <u>shall be supplied with in seven days</u> from the date of deposit of Such fees and if it is refused the company and every officer of the company shall be punishable with fine. • The Central Government may by order direct inspection of documents and to have an extract or copy of such registers by any person.
REGISTER OF CHARGES	Every company shall keep at its registered office a register of charges in Form No. CHG – 7 which shall include therein all charges and floating charges affecting any property or assets of the company or any of its undertakings, indicating in each case such particulars as may be prescribed. The entries in the register of charges maintained by the company shall be made after the creation, modification or satisfaction of charge. The register of charges shall contain the particulars of all the charges registered with the ROC on any of the property, assets or undertaking of the company and the particulars of any property acquired subject to a charge as well as particulars of any modification of a charge and satisfaction of charge. All the entries in the register shall be authenticated by a director or the secretary of the company or any other person authorized by the Board for the purpose. The register of charges shall be preserved permanently and the instrument creating a charge or modification thereon shall be preserved for a period of eight years from the date of satisfaction of charge by the company. A copy of the instrument creating the charge shall also be kept at the registered office of the company along with the register of charges.
REGISTER OF MEMBERS	Every company to keep and maintain the following registers along with the Index thereof; (a) Register of members for each class of equity and preference shares (separately); (b) Register of debenture holders; (c) Register of any other security holders; and (d) Foreign register of members and debenture holders etc. Every company shall, from the date of its registration, keep and maintain a register of its members in one or more books in Form No. MGT – 1. In case of existing companies, registered under the Companies Act, 1956, particulars shall be complied within six months from the date of commencement of rules of the Companies Act, 2013. The register of members shall contain the following particulars in respect of each member: (a) Name of the member;

	(b) Address; (c) e – mail address; (d) Permanent Account Number or CIN; (e) Father's/Mother's/Spouse's name; (f) Occupation; (g) Status; (h) Nationality; (i) In case member is a minor, name of the guardian and the date of birth of the member; name and address of nominee; (j) Date of becoming member; (k) Date of cessation; (l) Amount of guarantee and instructions etc.
FOREIGN REGISTER	In terms of sub-section (4) of Section 88, a company, if authorized by its Articles of Association, can also keep any part of the Register in any other country. Hence, in all such countries, where the Company has large number of shareholders, a Register of Members containing information about the members from that particular country may be kept. To be called "foreign register", this Register should contain the names and particulars of the members, debenture holders, other security holders or beneficial owners residing in that country. The Rules provides as under with regard to the foreign register, the company shall, within thirty days from the date of the opening of any foreign register, file with the Registrar notice of the situation of the office in Form No.MGT-3 along with the fee where such register is kept; and in the event of any change in the situation of such office or of its discontinuance, shall, within thirty days from the date of such change or discontinuance, as the case may be, file notice in Form No.MGT-3 with the Registrar of such change or discontinuance. A foreign register shall be open to inspection and may be closed, and extracts may be taken there from and copies thereof may be required, in the same manner, mutatis mutandis, as is applicable to the principal register, except that the advertisement before closing the register shall be inserted in at least two newspapers circulating in the place wherein the foreign register is kept. The company shall— (a) transmit to its registered office in India a copy of every entry in any foreign register within fifteen days after the entry is made; and (b) keep at such office a duplicate register of every foreign register duly entered up from time to time. The company may discontinue the keeping of any foreign register; and thereupon all entries in that register shall be transferred to some other foreign register kept by the company in the same part of the world or to the principal register. The register should be kept in the custody of the person in charge of the office in the foreign country. The foreign register of members should be preserved until discontinued. On discontinuance, all entries should be incorporated in another foreign register or in the principal register. The foreign register of debenture holders should be preserved for a period of 15 years from the date of redemption of debentures. On discontinuance, all entries should be incorporated in another foreign register or in the principal register.
REGISTER OF DIRECTORS AND KEY MANAGERIAL PERSONNEL	Every company shall keep at its registered office a register of its directors & KMP containing the following particulars: (i) Present Name & Surname in full; (ii) DIN (if KMP not has DIN, then PAN) (iii) Any former name or surname in full; (iv) Date of birth; (v) Fathers name, mothers name and spouse name (if married); (vi) Residential Address (vii) Nationality

	(viii) Occupation (ix) Date of Board Resolution in which appointment was made; (x) Membership Number of ICSI in case of CS; (xi) Date of appointment and reappointment in the company; Entries in the register should be authenticated by the secretary of the company or by any other person authorized by the Board for the purpose, by appending his signature to each entry. The register should be preserved permanently and should be kept in the custody of the secretary of the company or any other person authorized by the Board for the purpose.
REGISTER OF SIGNIFICANT BENEFICIAL OWNERS IN A COMPANY (SECTION 90) (Substituted by Companies Amendment Act, 2017)	(1) Every individual, who acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holds beneficial interests, of not less than twenty-five per cent. or such other percentage as may be prescribed, in shares of a company or the right to exercise, or the actual exercising of significant influence or control as defined in clause (27) of section 2, over the company (herein referred to as "significant beneficial owner"), shall make a declaration to the company, specifying the nature of his interest and other particulars, in such manner and within such period of acquisition of the beneficial interest or rights and any change thereof, as may be prescribed: Provided that the Central Government may prescribe a class or classes of persons who shall not be required to make declaration under this sub-section. <i>Rule 2A. Duty of the reporting company.</i> <i>(1) Every reporting company shall take necessary steps to find out if there is any individual who is a significant beneficial owner, as defined in clause (h) of rule 2, in relation to that reporting company, and if so, identify him and cause such individual to make a declaration in Form No. BEN-1.</i> <i>(2) Without prejudice to the generality of the steps stated in sub-rule (1), every reporting company shall in all cases where its member (other than an individual), holds not less than ten per cent of its:-</i> <i>(a) shares, or</i> <i>(b) voting rights, or</i> <i>(c) right to receive or participate in the dividend or any other distribution payable in a financial year, give notice to such member, seeking information in accordance with subsection (5) of section 90, in Form No. BEN-4.</i> <i>Rule 3: Declaration of significant beneficial ownership under section 90</i> <i>(1) On the date of commencement of the Companies (Significant Beneficial Owners) Amendment Rules, 2019, every individual who is a significant beneficial owner in a reporting company, shall file a declaration in Form No. BEN-1 to the reporting company within ninety days from such commencement.</i> <i>(2) Every individual, who subsequently becomes a significant beneficial owner, or where his significant beneficial ownership undergoes any change shall file a declaration in Form No. BEN-1 to the reporting company, within thirty days of acquiring such significant beneficial ownership or any change therein.</i> <i>Explanation.- Where an individual becomes a significant beneficial owner, or where his significant beneficial ownership undergoes any change, within ninety days of the commencement of the Companies (Significant Beneficial Owners) Amendment Rules, 2019, it shall be deemed that such individual became the significant beneficial owner or any change therein happened on the date of expiry of ninety days from the date of commencement of said rules, and the period of thirty days for filing will be reckoned accordingly</i>

Rule 4. Return of significant beneficial owners in shares

Upon receipt of declaration under rule 3, the reporting company shall file a return in Form No. BEN-2 with the Registrar in respect of such declaration, within a period of thirty days from the date of receipt of such declaration by it, along with the fees as prescribed in Companies (Registration offices and fees) Rules, 2014

- (2) Every company shall maintain a register (Form BEN 3) of the interest declared by individuals under sub-section (1) and changes therein which shall include the name of individual, his date of birth, address, details of ownership in the company and such other details as may be prescribed.
- (3) The register maintained under sub-section (2) shall be open to inspection by any member of the company on payment of such fees as may be prescribed.
- (4) Every company shall file a return of significant beneficial owners of the company and changes therein with the Registrar containing names, addresses and other details as may be prescribed within 30 days from date of receipt of declaration in BEN 2.
- (5) A company shall give notice, in BEN 4, to any person (whether or not a member of the company) whom the company knows or has reasonable cause to believe—
- (a) to be a significant beneficial owner of the company;
 - (b) to be having knowledge of the identity of a significant beneficial owner or another person likely to have such knowledge; or
 - (c) to have been a significant beneficial owner of the company at any time during the three years immediately preceding the date on which the notice is issued, and who is not registered as a significant beneficial owner with the company as required under this section.
- (6) The information required by the notice under sub-section (5) shall be given by the concerned person within a period not exceeding thirty days of the date of the notice.
- (7) The company shall,— (a) where that person fails to give the company the information required by the notice within the time specified therein; or (b) where the information given is not satisfactory, apply to the Tribunal within a period of fifteen days of the expiry of the period specified in the notice, for an order directing that the shares in question be subject to restrictions with regard to transfer of interest, suspension of all rights attached to the shares and such other matters as may be prescribed.
- (8) On any application made under sub-section (7), the Tribunal may, after giving an opportunity of being heard to the parties concerned, make such order restricting the rights attached with the shares within a period of sixty days of receipt of application or such other period as may be prescribed.

7. Application to the Tribunal

The reporting company shall apply to the Tribunal,

- (i) where any person fails to give the information required by the notice in Form No. BEN-4, within the time specified therein; or*
- (ii) where the information given is not satisfactory,*
in accordance with sub-section (7) of section 90, for order directing that the shares in question be subject to restrictions, including

- (a) restrictions on the transfer of interest attached to the shares in question;*
- (b) suspension of the right to receive dividend or any other distribution in relation to the shares in question;*
- (c) suspension of voting rights in relation to the shares in question;*
- (d) any other restriction on all or any of the rights attached with the shares in question*

8. Non-Applicability

These rules shall not be made applicable to the extent the share of the reporting company is held by,

- (a) the authority constituted under sub-section (5) of section 125 of the Act;*

(b) its holding reporting company:
Provided that the details of such holding reporting company shall be reported in Form No. BEN-2.

(c) the Central Government, State Government or any local Authority;

(d) (i) a reporting company, or

(ii) a body corporate, or

(iii) an entity,

controlled by the Central Government or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments;

(e) Securities and Exchange Board of India registered Investment Vehicles such as mutual funds, alternative investment funds (AIF), Real Estate Investment Trusts (REITs), Infrastructure Investment Trust (InvITs) regulated by the Securities and Exchange Board of India,

(f) Investment Vehicles regulated by Reserve Bank of India, or Insurance Regulatory and Development Authority of India, or Pension Fund Regulatory and Development Authority.

(9) The company or the person aggrieved by the order of the Tribunal may make an application to the Tribunal for relaxation or lifting of the restrictions placed under sub-section (8), within a period of one year from the date of such order:

Provided that if no such application has been filed within a period of one year from the date of the order under sub-section (8), such shares shall be transferred to the authority constituted under sub-section (5) of section 125, in such manner as may be prescribed;

(Substituted by Companies Amendment Ordinance 2018 w.e.f. 2nd November 2018)

(10) If any person fails to make a declaration as required under sub-section (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to ten lakh rupees or with both and where the failure is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the failure continues.

(11) If a company, required to maintain register under sub-section (2) and file the information under sub-section (4), fails to do so or denies inspection as provided therein, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than ten lakh rupees but which may extend to fifty lakh rupees and where the failure is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the failure continues.

(12) If any person willfully furnishes any false or incorrect information or suppresses any material information of which he is aware in the declaration made under this section, he shall be liable to action under section 447.'.

"SIGNIFICANT BENEFICIAL OWNER" in relation to a reporting company means an individual referred to in sub-section (1) of section 90, who acting alone or together, or through one or more persons or trust, possesses one or more of the following rights or entitlements in such reporting company, namely:-

(i) holds indirectly, or together with any direct holdings, not less than ten per cent. of the shares;

(ii) holds indirectly, or together with any direct holdings, not less than ten per cent. of the voting rights in the shares;

(iii) has right to receive or participate in not less than ten per cent. of the total distributable dividend, or any other distribution, in a financial year through indirect

holdings alone, or together with any direct holdings;

(iv) has right to exercise, or actually exercises, significant influence or control, in any manner other than through direct-holdings alone:

Explanation I - For the purpose of this clause, if an individual does not hold any right or entitlement indirectly under sub-clauses (i), (ii) or (iii), he shall not be considered to be a significant beneficial owner.

Explanation II - For the purpose of this clause, an individual shall be considered to hold a right or entitlement directly in the reporting company, if he satisfies any of the following criteria, namely.'

(i) the shares in the reporting company representing such right or entitlement are held in the name of the individual;

(ii) the individual holds or acquires a beneficial interest in the share of the reporting company under sub-section (2) of section 89, and has made a declaration in this regard to the reporting company.

Explanation III - For the purpose of this clause, an individual shall be considered to hold a right or entitlement indirectly in the reporting company, if he satisfies any of the following criteria, in respect of a member of the reporting company, namely: -

(i) where the member of the reporting company is a body corporate (whether incorporated or registered in India or abroad), other than a limited liability partnership, and the individual,-

(a) holds majority stake in that member; or

(b) holds majority stake in the ultimate holding company (whether incorporated or registered in India or abroad) of that member;

(ii) where the member of the reporting company is a Hindu Undivided Family (HUF) (through karta), and the individual is the karta of the HUF;

(iii) where the member of the reporting company is a partnership entity (through itself or a partner), and the individual,-

(a) is a partner; or

(b) holds majority stake in the body corporate which is a partner of the partnership entity; or

(c) holds majority stake in the ultimate holding company of the body corporate which is a partner of the partnership entity.

(iv) where the member of the reporting company is a trust (through trustee), and the individual,-

(a) is a trustee in case of a discretionary trust or a charitable trust;

(b) is a beneficiary in case of a specific trust;

(c) is the author or settlor in case of a revocable trust.

(v) where the member of the reporting company is,-

(a) a pooled investment vehicle; or

(b) an entity controlled by the pooled investment vehicle,

based in member State of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member State is a member of the

	International Organization of Securities Commissions, and the individual in relation to the pooled investment vehicle,- (A) is a general partner; or (B) is an investment manager; or (C) is a Chief Executive Officer where the investment manager of such pooled vehicle is a body corporate or a partnership entity. Explanation IV-Where the member of a reporting company is, (i) a pooled investment vehicle; or (ii) an entity controlled by the pooled investment vehicle, based in a jurisdiction which does not fulfil the requirements referred to in clause (v) of Explanation III, the provisions of clause (i) or clause (ii) or clause (iii) or clause (iv) of Explanation III, as the case may be, shall apply. Explanation V - For the purpose of this clause, if any individual, or individuals acting through any person or trust, act with a common intent or purpose of exercising any rights or entitlements, or exercising control or significant influence, over a reporting company, pursuant to an agreement or understanding, formal or informal, such individual, or individuals, acting through any person or trust, as the case may be, shall be deemed to be 'acting together'. Explanation VI - For the purposes of this clause, the instruments in the form of global depository receipts, compulsorily convertible preference shares or compulsorily convertible debentures shall be treated as 'shares'.
REGISTER OF POSTAL BALLOT	Every company which is required to or which proposes to get any resolution passed through postal ballot should maintain a separate register for each postal ballot to record the assent or dissent received through postal ballot. Entries in the register should be made immediately after the opening of postal ballots. The register, postal ballot forms and all other related records are not available for inspection. All postal ballot forms should be authenticated by the Scrutinizer. Entries in the register should be authenticated by the Scrutinizer. The secretary of the company, managing director or whole-time director or the director so authorised and the Scrutinizer should make adequate arrangements for safe custody of the register and proof of dispatch of Notices and all envelopes received by post or by hand, until the Scrutinizer submits his report to the Chairman. The register should be kept at the registered office of the company after the Scrutinizer has submitted his report.
REGISTER OF INVESTMENTS IN SECURITIES NOT HELD IN COMPANY'S NAME	(1) Every company shall, from the date of its registration, maintain a register in Form MBP 3 and enter therein, chronologically, the particulars of investments in shares or other securities beneficially held by the company but which are not held in its own name and the company shall also record the reasons for not holding the investments in its own name and the relationship or contract under which the investment is held in the name of any other person. (2) Further, the company shall also record whether such investments are held in a third party's name for the time being or otherwise. (3) The register shall be maintained at the registered office of the company. The register shall be preserved permanently and shall be kept in the custody of the company secretary of the company or if there is no company secretary, any director or any other officer authorized by the Board for the purpose. (4) Entries in the register shall be authenticated by the company secretary of the company or by any other person authorized by the Board for the purpose.

	The said register shall be open to inspection by any member or debenture-holder of the company without any charge during business hours subject to such reasonable restrictions as the company may by its articles or in general meetings impose.
COPIES OF THE REGISTERS AND ANNUAL RETURN	Copies of the registers or entries therein and annual return may be given to any member, debenture –holder, other security holder or beneficial owner of the company on payment of such fee as may be given in the AOA of the company but not exceeding rupees ten for each page.
PRESERVATION OF REGISTER OF MEMBERS ETC. AND ANNUAL RETURN	The register of members (Foreign Members) along with the index shall be preserved permanently and shall be kept in the custody of the company secretary or any other person authorized by the Board; and The register of debenture holders (Foreign debenture holders) or any other security holders along with the index shall be preserved for 15 years from the date of redemption of debentures or securities. Copies of all annual returns and copies of all certificates and documents required to be attached with it shall be preserved for 8 years from the date of filing with the ROC.
ANNUAL RETURN (Section 92)	(1) Every company shall prepare a return (hereinafter referred to as the annual return) in the prescribed form containing the particulars as they stood on the close of the financial year regarding— (a) its registered office, principal business activities, particulars of its holding, subsidiary and associate companies; (b) its shares, debentures and other securities and shareholding pattern; (c) its indebtedness; (Omitted) (d) its members and debenture-holders along with changes therein since the close of the previous financial year; (e) its promoters, directors, key managerial personnel along with changes there in since the close of the previous financial year; (f) meetings of members or a class thereof, Board and its various committees along with attendance details; (g) remuneration of directors and key managerial personnel; (h) penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment; (i) matters relating to certification of compliances, disclosures as may be prescribed; (j) details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors indicating their names, addresses, countries of incorporation, registration and percentage of shareholding held by them; and (k) such other matters as may be prescribed, and signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice: Provided that in relation to One Person Company and small company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company. (June 2016) Provided further that CG may prescribe Abridged form of Annual Return for OPC, Small Company and such other class or classes of companies as may be prescribed; (Inserted by Amendment Act, 2017) (2) The annual return, filed by a listed company or, by a company having such paid-up capital and turnover as may be prescribed, shall be certified by a company secretary in practice in the prescribed form, stating that the annual return discloses the facts correctly and adequately and that the company has complied with all the provisions of this Act. (3) An extract of the annual return in such form as may be prescribed shall form part of the Board's report.

Every company shall place a copy of annual return on the website of company, if any, and the web link of such annual return shall be disclosed in board report. (Inserted by Amendment Act, 2017)

(4) Every company shall file with the Registrar a copy of the annual return, **within sixty days** from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty days from the date on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting, ~~with such fees or additional fees as may be prescribed.~~

(5) If any company fails to file its annual return under sub-section (4), before the expiry of the period specified therein, such company and its every officer who is in default shall be liable to a penalty of fifty thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of five lakh rupees;

(Substituted by companies Amendment Ordinance 2018 w.e.f 2nd November 2018)

(6) If a **company secretary in practice** certifies the annual return otherwise than in conformity with the requirements of this section or the rules made thereunder, he shall be punishable with fine which shall **not be less than fifty thousand rupees but which may extend to five lakh rupees.**

UNIT 25: INSPECTION, INQUIRY & INVESTIGATION
(Section 206 to 229)

INTRODUCTION	A check on performance of a company is scrutinized by the ROC who is empowered to call for information and explanation with respect to any matter to which such documents or any information received by him. The object of inspection is not only to keep a watch on the performance of companies but also to evaluate the level of efficiency in the conduct of the companies and the compliance of law particularly the Companies Act, 2013.
INSPECTION	The ROC or Inspectors appointed by Central Government to conduct inspection in order to ascertain that all the transactions have been validly entered into and recorded in appropriate books and those applicable laws, rules and procedures have been complied with by the company. PURPOSE OF INSPECTION (a) To detect concealment of income by falsification of accounts. (b) To secure knowledge about the mismanagement of the business of a company and transactions entered into with an intent to defraud creditors, shareholders or otherwise for fraudulent or unlawful purposes. (c) To ascertain whether the statutory auditors have discharged their functions and duties in Certifying the true and fair view of a company's accounts and their proper maintenance. (d) To enable the Government to ascertain the quantum of profits accrued but not adequately accounted for. (e) To detect misapplication of funds leading a company to a state of perpetual financial crisis. (f) To keep a watch on performance of a company. (g) To detect misuse of fiduciary responsibilities by the company's management for personal aggrandizement.
POWERS OF ROC TO CALL FOR INFORMATION, INSPECT BOOKS & CONDUCT ENQUIRIES (Section 206)	• If on a scrutiny of any <i>document filed</i> or <i>any information received by ROC</i>, the ROC may ask for additional information or explanation or any further document relating to the company. The ROC may call such other information by a written notice and require the company – (a) To furnish the information or explanation in writing; or (b) To produce such document, <i>within the reasonable time</i> specified in notice. • On the receipt of a notice under sub-section (1), it shall be the duty of the company and of its officers concerned to furnish such information or explanation to the best of their knowledge and power and to produce the documents to the Registrar within the time specified or extended by the Registrar. • If ○ no information or explanation is furnished to the Registrar within the time specified under subsection (1) or ○ if the Registrar on an examination of the documents furnished is of the opinion that the information or explanation furnished is <i>inadequate</i> or ○ if the Registrar is satisfied on a scrutiny of the documents furnished that an <i>unsatisfactory state of affairs exists</i> in the company and does not disclose a full and fair statement of the information required, ○ he may, by another written notice, call on the company to produce for his inspection such further books of account, books, papers and explanations as he may require at such place and at such time as he may specify in the notice. • If the Registrar is satisfied on the basis of information available with or

	furnished to him or on a representation made to him by any person that the business of a company is being carried on for a fraudulent or unlawful purpose or not in compliance with the provisions of this Act or if the grievances of investors are not being addressed, the Registrar may, after informing the company of the allegations made against it by a written order, call on the company to furnish in writing any information or explanation on matters specified in the order within such time as he may specify therein and carry out such inquiry as he deems fit after providing the company a reasonable opportunity of being heard: Provided that the Central Government may, if it is satisfied that the circumstances so warrant, direct the Registrar or an inspector appointed by it for the purpose to carry out the inquiry under this subsection: Provided further that where business of a company has been or is being carried on for a fraudulent or unlawful purpose, every officer of the company who is in default shall be punishable for fraud in the manner as provided in section 447. • Without prejudice to the foregoing provisions of this section, the Central Government may, if it is satisfied that the circumstances so warrant, direct inspection of books and papers of a company by an inspector appointed by it for the purpose. • The Central Government may, having regard to the circumstances by general or special order, authorise any statutory authority to carry out the inspection of books of account of a company or class of companies. • If a company fails to furnish any information or explanation or produce any document required under this section, the company and every officer of the company, who is in default shall be punishable with a fine which may extend to one lakh rupees and in the case of a continuing failure, with an additional fine which may extend to five hundred rupees for every day after the first during which the failure continues.
CONDUCT OF INSPECTION & INQUIRY (SECTION 207)	• Where a Registrar or inspector calls for the books of account and other books and papers under section 206, it shall be the duty of every director, officer or other employee of the company to produce all such documents to the Registrar or inspector and furnish him with such statements, information or explanations in such form as the Registrar or inspector may require and shall render all assistance to the Registrar or inspector in connection with such inspection. • The Registrar or inspector, making an inspection or inquiry under section 206 may, during the course of such inspection or inquiry, as the case may be,— (a) make or cause to be made copies of books of account and other books and papers; or (b) place or cause to be placed any marks of identification in such books in token of the inspection having been made. • Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the Registrar or inspector making an inspection or inquiry <u>shall have all the powers as are vested in a civil court</u> under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:— (a) the discovery and production of books of account and other documents, at such place and time as may be specified by such Registrar or inspector making the inspection or inquiry; (b) summoning and enforcing the attendance of persons and examining them on oath; and

	(c) inspection of any books, registers and other documents of the company at any place. (i) If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to one year and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees. (ii) If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.
SUBMISSION OF INSPECTION REPORT TO CG (Section 208)	❖ The ROC or inspector shall, after the inspection of the books of account or an inquiry of other books and papers of the company, submit a report in writing to the Central Government along with concerned documents. ❖ A copy of report may be obtained by making an application to CG by Members, Creditors or any other person whose interest is likely to be affected. ❖ The report of Inspector shall be authenticated either; a. By the Seal, if any of the company whose affairs have been investigated; b. By certificate of a public officer having the custody of the report and such report shall be admissible in any legal proceeding as evidence in relation to any matter contained in the report.
SEARCH AND SEIZURE BY THE REGISTRAR OR INSPECTOR (Section 209)	Section 209(1) provides for search and seizure of documents by the Registrar with the permission of special court. If the ROC or inspector has reasonable ground to believe that the books and papers of a company, or relating to the key managerial personnel or any director or auditor or company secretary in practice if the company has not appointed a company secretary, are likely to be destroyed, mutilated, altered, falsified or secreted, he may, after obtaining an order from the Special Court for the seizure of such books and papers. The ROC or inspector shall return the books and papers seized, as soon as may be, and in any case not later than 180th day after such seizure, to the company from whose custody or power such books or papers were seized. Before returning such books and papers as aforesaid, the ROC may take copies of, or extracts from them or place identification marks on them.
INVESTIGATIONS (Section 210 To 229)	Investigation within the meaning of the relevant provisions of the Act is a form of probe; a deeper probe; into the affairs of a company. It is a fact finding exercise. The main object of investigation is to collect evidence and to see if any illegal acts or offences are disclosed and then decide the action to be taken. The said expression also includes investigation of all its business affairs profit and losses, assets including goodwill, contracts and transactions, investments and other property interests and control of subsidiary companies too. KINDS OF INVESTIGATION (a) Investigation of the affairs of the company if it is necessary to investigate into the affairs of the company in public interest; (b) Investigation of the affairs of related companies; (c) Investigation about the ownership of a Company; (d) Investigation of foreign companies; (e) Investigation by Serious Fraud Investigation Office directed by Central Government. (f) Investigation on the order of Tribunal.
INVESTIGATION INTO THE AFFAIRS	1. When the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company:

OF COMPANY (SECTION 210)	(a) On the receipt of a report of the Registrar or inspector under section 208; (b) On intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or (c) In public interest, it may order an investigation into the affairs of the company. 2. When an order is passed by a court or the Tribunal in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation into the affairs of a company.
ESTABLISHMENT OF SERIOUS FRAUD INVESTIGATION OFFICE (SFIO) BY CG (SECTION 211, 212)	The CG shall also appoint a Director in the SFIO not below the rank of Joint Secretary to Government of India having knowledge and experience in dealing with matters relating to Company Law and may also appoint such experts (<u>persons of ability, integrity & experience in Banking, Corporate Affairs, Taxation, Forensic Audit, Capital Market, Information Technology, Law or such other fields</u>) and other officers and Employees in SFIO as it considers necessary for the efficient discharge of functions. <u>BASIS OF ORDERING INVESTIGATION BY THE CENTRAL GOVERNMENT</u> When the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office: (a) On receipt of a report of the Registrar or inspector; (b) On intimation of a special resolution passed by a company that its affairs are required to be investigated; (c) In the public interest; or (d) On request from any Department of the Central Government or a State Government, The Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and the Director of SFIO may designate such number of inspectors, as he may consider necessary for the purpose of such investigation. <u>RESTRICTIONS ON OTHER INVESTIGATING AGENCIES</u> Where any case has been assigned by the Central Government to the Serious Fraud Investigation Office for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to Serious Fraud Investigation Office. <u>MANNER OF INVESTIGATION AND SUBMISSION OF REPORT</u> Where the investigation into the affairs of a company has been assigned by the Central Government to Serious Fraud Investigation Office, it shall – (a) Conduct the investigation in the manner and follow the procedure provided in this Chapter; and (b) Submit its report to the Central Government within such period as may be specified in the order. <u>INVESTIGATING OFFICER TO EXERCISE POWERS OF INSPECTOR</u> The Director, Serious Fraud Investigation Office shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector. <u>RESPONSIBILITY OF COMPANY AND ITS OFFICERS TO PROVIDE INFORMATION TO THE INVESTIGATING OFFICER</u> The company and its officers and employees, who are or have been in employment of the company, shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation. (6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, offence covered under section 447 of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his

own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years or is a woman or is sick, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence referred to this sub-section except upon a complaint in writing made by—

(i) the Director, Serious Fraud Investigation Office; or

(ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

(7) The limitation on granting of bail specified in sub-section (6) is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.

*(8) If the Director, Additional Director or Assistant Director of Serious Fraud Investigation Office authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (6), **he may arrest such person** and shall, as soon as may be, inform him of the grounds for such arrest.

*(9) The Director, Additional Director or Assistant Director of Serious Fraud Investigation Office shall, immediately after arrest of such person under sub-section (8), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Serious Fraud Investigation Office in a sealed envelope, in such manner as may be prescribed and the Serious Fraud Investigation Office shall keep such order and material for such period as may be prescribed.

*(10) Every person arrested under sub-section (8) shall within twenty-four hours, be taken to a **Judicial Magistrate or a Metropolitan Magistrate**, as the case may be, having jurisdiction:

Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's court.

(11) The Central Government if so directs, the Serious Fraud Investigation Office shall submit an **interim report** to the Central Government.

(12) On completion of the investigation, the Serious Fraud Investigation Office shall **submit the investigation report** to the Central Government.

(13) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report **may be obtained by any person** concerned by making an application in this regard to the court.

(14) On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud Investigation Office **to initiate prosecution against the company and its officers or employees**, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company.

(15) Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be **deemed to be a report filed by a police officer** under section 173 of the Code of Criminal Procedure, 1973.

(16) Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by Serious Fraud Investigation Office under the provisions of the Companies Act, 1956 **shall continue** to be proceeded with under that Act as if this Act had not been passed.

(17) (a) In case Serious Fraud Investigation Office has been investigating any offence under this Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to the Serious Fraud Investigation Office;

(b) The Serious Fraud Investigation Office shall share any information or

	documents available with it, with any investigating agency, State Government, police authority or income tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law.
SECURITY DEPOSIT (SECTION 214)	Where an investigation is ordered by the Central Government in pursuance of clause (b) of sub-section (1) of section 210 , or in pursuance of an order made by the Tribunal under section 213 , the Central Government may before appointing an inspector under subsection (3) of section 210 or clause (b) of section 213 , require the applicant to give such security not exceeding twenty-five thousand rupees as may be prescribed , as it may think fit, for payment of the costs and expenses of the investigation and such security shall be refunded to the applicant if the investigation results in prosecution.
APPOINTMENT OF INSPECTOR (SECTION 215)	No firm, body corporate or other association shall be appointed as an inspector
INVESTIGATION IN COMPANY AFFAIRS IN OTHER CASES (SECTION 213)	The Tribunal may,— (a) on an application made by— (i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or (ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital, and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or (b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that— (i) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose; (ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or (iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company, order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct: Provided that if after investigation it is proved that— (i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or (ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.
INVESTIGATION OF	(1) The CG may if it has reason to believe that the affairs of the company ought to

OWNERSHIP OF COMPANY [SECTION 216]	be investigated as regards membership of company, appoint one or more inspectors to investigate and report on matters relating to the company and its membership for determining the true persons: (a) Who are or have been financially interested in the success or failure, whether real or apparent, of the company; or (b) Who are or have been able to control or materially able to influence the policy of the company; or (2) Without prejudice to its powers under sub-section (1), the Central Government shall appoint one or more inspectors under that sub-section, if the Tribunal, in the course of any proceeding before it, directs by an order that the affairs of the company ought to be investigated as regards the membership of the company and other matters relating to the company, for the purposes specified in sub-section (1). (3) While appointing an inspector under sub-section (1), the Central Government may define the scope of the investigation, whether as respects the matters or the period to which it is to extend or otherwise, and in particular, may limit the investigation to matters connected with particular shares or debentures.
POWERS OF INSPECTOR (SECTION 217)	(1) DUTY OF OFFICERS: It shall be the duty of all officers and other employees and agents including the former officers, employees and agents of a company which is under investigation in accordance with the provisions contained in this Chapter, and where the affairs of any other body corporate or a person are investigated under <u>section 219</u>, of all officers and other employees and agents including former officers, employees and agents of such body corporate or a person— (a) to preserve and to produce to an inspector or any person authorised by him in this behalf all books and papers of, or relating to, the company or, as the case may be, relating to the other body corporate or the person, which are in their custody or power; and (b) otherwise to give to the inspector all assistance in connection with the investigation which they are reasonably able to give. (2) POWER OF INSPECTOR: The inspector may require any body corporate, other than a body corporate referred to in sub-section (1), to furnish such information to, or produce such books and papers before him or any person authorised by him in this behalf as he may consider necessary, if the furnishing of such information or the production of such books and papers is relevant or necessary for the purposes of his investigation. (3) SEIZURE OF BOOKS AND PAPERS: The inspector shall not keep in his custody any books and papers produced under sub-section (1) or sub-section (2) for more than one hundred and eighty days and return the same to the company, body corporate, firm or individual by whom or on whose behalf the books and papers were produced: Provided that the books and papers may be called for by the inspector if they are needed again for a further period of one hundred and eighty days by an order in writing. (4) EXAMINE ON OATH: An inspector may examine on oath— (a) any of the persons referred to in sub-section (1); and (b) with the prior approval of the Central Government, any other person, in relation to the affairs of the company, or other body corporate or person, as the case may be, and for that purpose may require any of those persons to appear before him personally: Provided that in case of an investigation under <u>section 212</u>, the prior approval of Director, Serious Fraud Investigation Office shall be sufficient under clause (b). (5) POWERS AS VESTED IN CIVIL COURT: Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the

inspector, being an officer of the Central Government, making an investigation under this Chapter shall **have all the powers as are vested in a civil court under the Code of Civil Procedure, 1908**, while trying a suit in respect of the following matters, namely:—

- (a) the discovery and production of books of account and other documents, at such place and time as may be specified by such person;
- (b) summoning and enforcing the attendance of persons and examining them on oath; and
- (c) inspection of any books, registers and other documents of the company at any place.

(6) NON COMPLIANCE WITH ORDERS:

(i) If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with **imprisonment** which may extend to one year and with **fine** which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

(ii) If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.

(7) The notes of any examination under sub-section (4) shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him.

(8) CONSEQUENCE OF NON CO-OPERATION: If any person fails without reasonable cause or refuses—

(a) to produce to an inspector or any person authorised by him in this behalf any book or paper which is his duty under sub-section (1) or sub-section (2) to produce;

(b) to furnish any information which is his duty under sub-section (2) to furnish;

(c) to appear before the inspector personally when required to do so under subsection (4) or to answer any question which is put to him by the inspector in pursuance of that sub-section; or

(d) to sign the notes of any examination referred to in sub-section (7),

he shall be punishable with imprisonment for a term which may extend to six months and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, and also with a further fine which may extend to two thousand rupees for every day after the first during which the failure or refusal continues.

(9) ASSISTANCE TO INSPECTOR: The officers of the Central Government, State Government, police or statutory authority shall provide assistance to the inspector for the purpose of inspection, inquiry or investigation, which the inspector may, with the prior approval of the Central Government, require.

(10) AGREEMENT WITH FOREIGN COUNTRIES: The Central Government may enter into an agreement with the Government of a foreign State for reciprocal arrangements to assist in any inspection, inquiry or investigation under this Act or under the corresponding law in force in that State and may, by notification, render the application of this Chapter in relation to a foreign State with which reciprocal arrangements have been made subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the agreement with that State.

(11) LETTER OF REQUEST TO FOREIGN COUNTRY'S COURT: Notwithstanding anything contained in this Act or in the Code of Criminal Procedure, 1973 if, in the course of an investigation into the affairs of the company, **an application is**

	made to the competent court in India by the inspector stating that evidence is, or may be, available in a country or place outside India, such court may issue a letter of request to a court or an authority in such country or place, competent to deal with such request, to examine orally, or otherwise, any person, supposed to be acquainted with the facts and circumstances of the case, to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing, which may be in his possession pertaining to the case, and to forward all the evidence so taken or collected or the authenticated copies thereof or the things so collected to the court in India which had issued such letter of request: (12) LETTER OF REQUEST BY FOREIGN COUNTRY'S COURT: Upon receipt of a letter of request from a court or an authority in a country or place outside India, competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to affairs of a company under investigation in that country or place, the Central Government may, if it thinks fit, forward such letter of request to the court concerned, which shall thereupon summon the person before it and record his statement or cause any document or thing to be produced, or send the letter to any inspector for investigation, who shall thereupon investigate into the affairs of company in the same manner as the affairs of a company are investigated under this Act and the inspector shall submit the report to such court within thirty days or such extended time as the court may allow for further action: Provided that the evidence taken or collected under this sub-section or authenticated copies thereof or the things so collected shall be forwarded by the court, to the Central Government for transmission, in such manner as the Central Government may deem fit, to the court or the authority in country or place outside India which had issued the letter of request.
PROTECTION OF EMPLOYEES DURING INVESTIGATION Notified w.e.f. 01.06.2016 (SECTION 218)	Notwithstanding anything contained in any other law for the time being in force, if: (a) During the course of any investigation of the affairs and other matters of or relating to a company, other body corporate or person or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person; or (b) During the pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company, such company, other body corporate or person proposes: (a) To discharge or suspend any employee; or (b) To punish him, whether by dismissal, removal, reduction in rank or otherwise; or (c) To change the terms of employment to his disadvantages, The company, other body corporate or person, as the case may be, shall obtain approval of the Tribunal of the action proposed against the employee and if the Tribunal has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned.
POWER OF INSPECTOR TO CONDUCT INVESTIGATION IN AFFAIRS OF RELATED COMPANIES (SECTION 219)	If an inspector appointed under <u>section 210</u> or <u>section 212</u> or <u>section 213</u> to investigate into the affairs of a company considers it necessary for the purposes of the investigation, to investigate also the affairs of— (a) any other body corporate which is, or has at any relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding company; (b) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant

	time, the managing director or the manager of the company; (c) any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or (d) any person who is or has at any relevant time been the company's managing director or manager or employee, he shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the managing director or manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the company for which he is appointed.
SEIZURE OF DOCUMENTS BY INSPECTOR (SECTION 220)	(1) Where in the course of an investigation under this Chapter, the inspector has reasonable grounds to believe that the books and papers of, or relating to, any company or other body corporate or managing director or manager of such company are likely to be destroyed, mutilated, altered, falsified or secreted, the inspector may— (a) enter, with such assistance as may be required, the place or places where such books and papers are kept in such manner as may be required; and (b) seize books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books and papers at its cost for the purposes of his investigation. (2) The inspector shall keep in his custody the books and papers seized under this section for such a period not later than the conclusion of the investigation as he considers necessary and thereafter shall return the same to the company or the other body corporate, or, as the case may be, to the managing director or the manager or any other person from whose custody or power they were seized: Provided that the inspector may, before returning such books and papers as aforesaid, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such manner as he considers necessary. (3) The provisions of the Code of Criminal Procedure, 1973, relating to searches or seizures shall apply mutatis mutandis to every search or seizure made under this section.
FREEZING OF ASSETS OF COMPANY (SECTION 221)	(1) Where it appears to the Tribunal, • on a reference made to it by the Central Government or • in connection with any inquiry or investigation into the affairs of a company under this Chapter or • on any complaint made by such number of members as specified under sub-section (1) of section 244 or a creditor having one lakh amount outstanding against the company or any other person having a reasonable ground to believe that the removal, transfer or disposal of funds, assets, properties of the company is likely to take place in a manner that is prejudicial to the interests of the company or its shareholders or creditors or in public interest, it may by order direct that such transfer, removal or disposal shall not take place during such period not exceeding three years as may be specified in the order or may take place subject to such conditions and restrictions as the Tribunal may deem fit. (2) In case of any removal, transfer or disposal of funds, assets, or properties of the company in contravention of the order of the Tribunal under sub-section (1), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

IMPOSITION OF RESTRICTION ON SECURITIES (SECTION 222)	(1) Where it appears to the Tribunal, in connection with any investigation under <u>section 216</u> or on a complaint made by any person in this behalf, that there is good reason to find out the relevant facts about any securities issued or to be issued by a company and the Tribunal is of the opinion that such facts cannot be found out unless certain restrictions, as it may deem fit, are imposed, the Tribunal may, by order, direct that the securities shall be subject to such restrictions as it may deem fit for such period not exceeding three years as may be specified in the order. (2) Where securities in any company are issued or transferred or acted upon in contravention of an order of the Tribunal under sub-section (1), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.
INSPECTOR REPORT (SECTION 223)	(1) An inspector appointed under this Chapter may, and if so directed by the Central Government shall, submit interim reports to that Government, and on the conclusion of the investigation, shall submit a final report to the Central Government. (2) Every report made under sub-section (1) shall be in writing or printed as the Central Government may direct. (3) A copy of the report made under sub-section (1) may be obtained by making an application in this regard to the Central Government. (4) The report of any inspector appointed under this Chapter shall be authenticated either— (a) by the seal, if any, of the company whose affairs have been investigated; or (b) by a certificate of a public officer having the custody of the report, as provided under section 76 of the Indian Evidence Act, 1872, and such report shall be admissible in any legal proceeding as evidence in relation to any matter contained in the report. (5) Nothing in this section shall apply to the report referred to in <u>section 212</u>.
ACTION TO BE TAKEN IN PERUSANCE OF INSPECTOR'S REPORT (SECTION 224)	(1) If, from an inspector's report, made under <u>section 223</u>, it appears to the Central Government that any person has, in relation to the company or in relation to any other body corporate or other person whose affairs have been investigated under this Chapter been guilty of any offence for which he is criminally liable, the Central Government may prosecute such person for the offence and it shall be the duty of all officers and other employees of the company or body corporate to give the Central Government the necessary assistance in connection with the prosecution. (2) If any company or other body corporate is liable to be wound up under this Act or under the Insolvency and Bankruptcy Code, 2016 and it appears to the Central Government from any such report made under <u>section 223</u> that it is expedient so to do by reason of any such circumstances as are referred to in <u>section 213</u>, the Central Government may, unless the company or body corporate is already being wound up by the Tribunal, cause to be presented to the Tribunal by any person authorised by the Central Government in this behalf— (a) a petition for the winding up of the company or body corporate on the ground that it is just and equitable that it should be wound up; (b) an application under <u>section 241</u>; or (c) both. (3) If from any such report as aforesaid, it appears to the Central Government that proceedings ought, in the public interest, to be brought by the company or any body corporate whose affairs have been investigated under this Chapter— (a) for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation, or the management of the affairs, of such company or body corporate; or (b) for the recovery of any property of such company or body corporate which has

	been misapplied or wrongfully retained, the Central Government may itself bring proceedings for winding up in the name of such company or body corporate. (4)The Central Government, shall be indemnified by such company or body corporate against any costs or expenses incurred by it in, or in connection with, any proceedings brought by virtue of sub-section (3). (5)Where the report made by an inspector states that fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement of such asset, property, or cash, as the case may be, and also for holding such director, key managerial personnel, officer or other person liable personally without any limitation of liability.
EXPENSES OF INVESTIGATION (SECTION 225)	(1)The expenses of, and incidental to, an investigation by an inspector appointed by the Central Government under this Chapter other than expenses of inspection under <u>section 214</u> shall be defrayed in the first instance by the Central Government, but shall be reimbursed by the following persons to the extent mentioned below, namely:— (a) any person who is convicted on a prosecution instituted, or who is ordered to pay damages or restore any property in proceedings brought, under <u>section 224</u>, to the extent that he may in the same proceedings be ordered to pay the said expenses as may be specified by the court convicting such person, or ordering him to pay such damages or restore such property, as the case may be; (b) any company or body corporate in whose name proceedings are brought as aforesaid, to the extent of the amount or value of any sums or property recovered by it as a result of such proceedings; (c) unless, as a result of the investigation, a prosecution is instituted under <u>section 224</u>,— (i) any company, body corporate, managing director or manager dealt with by the report of the inspector; and (ii) the applicants for the investigation, where the inspector was appointed under <u>section 213</u>, to such extent as the Central Government may direct. (2) Any amount for which a company or body corporate is liable under clause (b) of sub-section (1) shall be a first charge on the sums or property mentioned in that clause.
VOLUNTARY WINDING UP NOT TO STOP INVESTIGATION (SECTION 226)	An investigation under this Chapter may be initiated notwithstanding, and no such investigation shall be stopped or suspended by reason only of, the fact that— (a) an application has been made under <u>section 241</u>; (b) the company has passed a special resolution for voluntary winding up; or (c) any other proceeding for the winding up of the company is pending before the Tribunal: Provided that where a winding up order is passed by the Tribunal in a proceeding referred to in clause (c), the inspector shall inform the Tribunal about the pendency of the investigation proceedings before him and the Tribunal shall pass such order as it may deem fit: Provided further that nothing in the winding up order shall absolve any director or other employee of the company from participating in the proceedings before the inspector or any liability as a result of the finding by the inspector.
LEGAL ADVISORS &	Nothing in this Chapter shall require the disclosure to the Tribunal or to the

BANKERS NOT TO DISCLOSE CERTAIN INFORMATION (SECTION 227)	Central Government or to the Registrar or to an inspector appointed by the Central Government— (a) by a legal adviser, of any privileged communication made to him in that capacity, except as respects the name and address of his client; or (b) by the bankers of any company, body corporate, or other person, of any information as to the affairs of any of their customers, other than such company, body corporate, or person.
INVESTIGATION OF FOREIGN COMPANY (SECTION 228)	The provisions of this Chapter shall apply mutatis mutandis to inspection, inquiry or investigation in relation to foreign companies.
PENALTY FOR FURNISHING FALSE STATEMENT, MULTILATION, DESTRUCTION OF DOCUMENTS (SECTION 229)	Where a person who is required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or an officer or other employee of a company or other body corporate which is also under investigation,— (a) destroys, mutilates or falsifies, or conceals or tampers or unauthorisedly removes, or is a party to the destruction, mutilation or falsification or concealment or tampering or unauthorised removal of, documents relating to the property, assets or affairs of the company or the body corporate; (b) makes, or is a party to the making of, a false entry in any document concerning the company or body corporate; or (c) provides an explanation which is false or which he knows to be false, he shall be punishable for fraud in the manner as provided in <u>section 447</u>.

UNIT 26: WINDING – UP OF THE COMPANIES

INTRODUCTION	Winding up involves various steps such as administration of properties for the benefit of members and creditors, appointment of administrators/liquidators, members/creditors meeting, as the case may be. Winding up may be voluntary winding up or by Court. Voluntary winding up may be member's voluntary winding up or creditor's voluntary winding up.
WINDING – UP	Winding – up is the process by which management of a company's affairs is taken out of its directors' hands, its assets are realized by a liquidator and its debts are discharged out of proceeds of realization. Any surplus of assets which remains after such discharge is returned to its members or shareholders. In simple words, it is a process whereby the life of a company is ended and its property administered for the benefits of its creditors and members. An administrator duly appointed by court is called a liquidator and he takes control of Company, realizes its assets, pays debts and finally distributes surplus, if any among members.
METHODS OF WINDING – UP (Section 270)	The winding up of a company may be either— (a) by the Tribunal; or (b) voluntary.
WINDING UP BY TRIBUNAL (Section 271)	• A company may, on a petition under section 272, be wound up by the Tribunal,— (Circumstances) (a) if the company is unable to pay its debts; (b) if the company has, by special resolution, resolved that the company be wound up by the Tribunal; (c) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality; (d) if the Tribunal has ordered the winding up of the company under Chapter XIX; (e) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up; (f) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or (g) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up. • A company shall be deemed to be unable to pay its debts,— (a) if a creditor, by assignment or otherwise, to whom the company is indebted for an amount exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand requiring the company to pay the amount so due and the company has failed to pay the sum within twenty-one days after the receipt of such demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor;

	(b) if any execution or other process issued on a decree or order of any court or tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part; or (c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.
WHO MAY FILE WINDING UP PETITION (Section 272)	- Subject to the provisions of this section, a petition to the Tribunal for the winding up of a company shall be presented by— (a) the company; (b) any creditor or creditors, including any contingent or prospective creditor or creditors; (c) any contributory or contributories; (d) all or any of the persons specified in clauses (a), (b) and (c) together; (e) the Registrar; (f) any person authorised by the Central Government in that behalf; or (g) in a case falling under clause (c) of sub-section (1) of section 271, by the Central Government or a State Government. - A copy of the petition made under this section shall also be filed with the Registrar and the Registrar shall, without prejudice to any other provisions, submit his views to the Tribunal within sixty days of receipt of such petition.
VOLUNTARY WINDING UP	<u>Circumstances in which company may be wound up voluntarily (Section 304)</u> A company may be wound up voluntarily,— (a) if the company in general meeting passes a resolution requiring the company to be wound up voluntarily as a result of the expiry of the period for its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company should be dissolved; or (b) if the company passes a special resolution that the company be wound up voluntarily. <u>Declaration of Solvency (Section 305)</u> - Where it is proposed to wind up a company voluntarily, its director or directors, or in case the company has more than two directors, the majority of its directors, shall, at a meeting of the Board, make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company and they have formed an opinion that the company has no debt or whether it will be able to pay its debts in full from the proceeds of assets sold in voluntary winding up. - A declaration made under sub-section (1) shall have no effect for the purposes of this Act, <u>unless</u>— (a) it is made within five weeks immediately preceding the date of the passing of the resolution for winding up the company and it is delivered to the Registrar for registration before that date; (b) it contains a declaration that the company is not being wound up to defraud any person or persons; (c) it is accompanied by a copy of the report of the auditors of the company prepared in accordance with the provisions of this Act, on the profit and loss account of the company for the period commencing from the date up to which the last such account was prepared and ending with the latest practicable date immediately before the making of the declaration and the balance sheet of the company made out as on that date which would also contain a statement of the assets and liabilities of the company on that date; and (d) where there are any assets of the company, it is accompanied by a report of the

valuation of the assets of the company prepared by a registered valuer.

- Where the company is wound up in pursuance of a resolution passed within a period of five weeks after the making of the declaration, but its debts are not paid or provided for in full, it shall be presumed, until the contrary is shown, that the director or directors did not have reasonable grounds for his or their opinion under sub-section (1).
- Any director of a company making a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full from the proceeds of assets sold in voluntary winding up shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both.

Meetings of Creditors (Section 306)

- The company shall along with the calling of meeting of the company at which the resolution for the voluntary winding up is to be proposed, cause a meeting of its creditors either on the same day or on the next day and shall cause a notice of such meeting to be sent by registered post to the creditors with the notice of the meeting of the company under section 304.
- The Board of Directors of the company shall—
 - (a) cause to be presented a full statement of the position of the affairs of the company together with a list of creditors of the company, if any, copy of declaration under section 305 and the estimated amount of the claims before such meeting; and
 - (b) appoint one of the directors to preside at the meeting.
- Where two-thirds in value of creditors of the company are of the opinion that—
 - (a) it is in the interest of all parties that the company be wound up voluntarily, the company shall be wound up voluntarily; or
 - (b) the company may not be able to pay for its debts in full from the proceeds of assets sold in voluntary winding up and pass a resolution that it shall be in the interest of all parties if the company is wound up by the Tribunal in accordance with the provisions of Part I of this Chapter, the company shall within fourteen days thereafter file an application before the Tribunal.
- The notice of any resolution passed at a meeting of creditors in pursuance of this section shall be given by the company to the Registrar within ten days of the passing thereof.
- If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees and the director of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees, or with both.

Publication of Resolution to wind up voluntarily (Section 307)

Where a company has passed a resolution for voluntary winding up and a resolution under sub-section (3) of section 306 is passed, it shall within fourteen days of the passing of the resolution give notice of the resolution by advertisement in the Official Gazette and also in a newspaper which is in circulation in the district where the registered office or the principal office of the company is situate.

If a company contravenes the provisions of sub-section (1), the company and every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees for every day during which such default continues.

	Appointment of Company Liquidator (Section 310) - The company in its general meeting, where a resolution of voluntary winding up is passed, shall appoint a Company Liquidator from the panel prepared by the Central Government for the purpose of winding up its affairs and distributing the assets of the company and recommend the fee to be paid to the Company Liquidator. - Where the creditors have passed a resolution for winding up the company under sub-section (3) of section 306, the appointment of the Company Liquidator under this section shall be effective only after it is approved by the majority of creditors in value of the company: Provided that where such creditors do not approve the appointment of such Company Liquidator, creditors shall appoint another Company Liquidator. - On appointment as Company Liquidator, such liquidator shall file a declaration in the prescribed form within seven days of the date of appointment disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the company and the creditors and such obligation shall continue throughout the term of his or its appointment.
WINDING UP AND DISSOLUTION	The entire procedure for bringing about a lawful end to the life of a company is divided into two stages: (a) <u>Winding up</u>: Winding – up is the process by which management of a company's affairs is taken out of its directors' hands, its assets are realized by a liquidator and its debts are discharged out of proceeds of realization. Any surplus of assets which remains after such discharge is returned to its members or shareholders. (b) <u>Dissolution</u>: Dissolution is the last stage of liquidation, the process by which a company (or part of a company) is brought to an end, and the assets and property of the company redistributed.
VOLUNTARY WINDING UP	Chapter V of the Insolvency and Bankruptcy Code of India 2016 deals with the Voluntary Liquidation of Corporate Persons. Section 59 (1) A corporate person who intends to liquidate itself voluntarily and has <u>not committed any default</u> may initiate voluntary liquidation proceedings under the provisions of this Chapter. (2) The voluntary liquidation of a corporate person under sub-section (1) shall meet such conditions (3) and procedural requirements as may be specified by the Board. (3) Without prejudice to sub-section (2), voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions, namely:— (a) a <u>declaration from majority of the directors</u> of the company verified by an affidavit stating that— - they have made a <u>full inquiry</u> into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and - the company is <u>not being liquidated to defraud any person</u>; (b) the <u>declaration</u> under sub-clause (a) shall be accompanied with the following documents, namely:— - audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later; - a report of the valuation of the assets of the company, if any prepared by a registered valuer;

- (c) within four weeks of a declaration under sub-clause (a), there shall be—
- (i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or
 - (ii) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator: Provided that the company owes any debt to any person, creditors representing two thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.
- (4) The company shall notify the Registrar of Companies and the Board about the resolution under subsection (3) to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.
- (5) Subject to approval of the creditors under sub-section (3), the voluntary liquidation proceedings in respect of a company shall be deemed to have commenced from the date of passing of there solution under sub-clause (c) of sub-section (3).
- (6) The provisions of sections 35 to 53 of Chapter III and Chapter VII shall apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary.
- (7) Where the affairs of the corporate person have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate person.
- (8) The Adjudicating Authority shall on an application filed by the liquidator under sub-section (7), passan order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.
- (9) A copy of an order under sub-section (8) shall within fourteen days from the date of such order, be forwarded to the authority with which the corporate person is registered.

UNIT 27: PRODUCER COMPANIES

COMPANIES ACT, 2013 AND PRODUCER COMPANIES	Proviso to Section 465(1) of Companies Act, 2013 states that provisions of Part IX A of the Companies Act, 1956 shall be applicable <i>mutatis mutandis</i> to a Producer Company in a manner as if the Companies Act, 1956 has not been repealed until a special Act is enacted for Producer Companies. Accordingly Part IX of Companies Act, 1956 would continue for producer companies.
INTRODUCTION	Producer companies work like co – operative societies. Mainly these types of companies are registered in rural areas by the main producers like farmers and support by either Central Government or State Government. These companies are incorporated to develop the rural economies and bridge the gap between industry and agriculture, rural and urban area and industry and labor etc. These companies are basically for the promotion of rural economies. Note: There is no corresponding section in the new Companies Act, 2013 therefore, the Companies Act, 1956 shall continue to apply.
DEFINITIONS	<i>Producer means any person engaged in any activities connected with or relating to any primary produce.</i> Primary Produce includes: (a) Produce of farmers arising from agriculture, animal husbandry, horticulture etc. (b) Produce of persons engaged in Handloom, Handicraft etc. <i>Producer Institution</i> means a Producer Company or any other institution having only producer or producers or Producer Company or producer Companies as its members.
OBJECTS OF PRODUCER COMPANY (Section 581B of the Companies Act, 1956)	A producer company may be formed for the production, marketing, export of primary produce of members and also for its processing, packaging of produce of its members. It helps and provides assistance to the members and take measures for the benefit of members. OBJECTS OF PRODUCER COMPANY (a) Production, harvesting, procurement, grading, pooling, marketing, selling, export of primary produce of the Members or import of goods or services for their benefit. (b) Processing including preserving, drying, distilling, brewing, venting, canning and packaging of produce of its Members. (c) Manufacture, sale or supply of machinery, equipment or consumables mainly to its Members. (d) Providing education on the mutual assistance principles to its Members and others. (e) Rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its Members. (f) Generation, transmission and distribution of power, revitalization of land and water resources, their use, conservation and communication relating to primary produce. (g) Insurance of producers or their primary produce. (h) Promoting techniques of mutuality and mutual assistance.
FORMATION OF PRODUCER	<i>Any 10 or more individuals; Being a producer or 2 or more producer institutions or</i>

COMPANY AND ITS REGISTRATION	<i>A combination of ten or more individuals and producer institutions,</i> Desirous of forming a producer company may form an incorporated company as such having its objects as specified in Section 581B. The ROC shall register the memorandum, articles and other documents based on the application for registration and issue a certificate of incorporation within 30 days of the receipt of the documents for registration. On registration, the Producer Company shall be deemed to be a private company limited by shares without any limit on the number of members.
MEMBERSHIP AND VOTING RIGHTS OF MEMBERS	Every member shall have a single vote irrespective of the number of shares held. In case, where the membership consists solely of Producer Institutions, the voting rights of such Producer institutions shall be determined on their previous years' participation in the business of the company. However, during the first year of its regulation, the voting rights in a Producer Company shall be determined on the basis of shareholding by producer institutions. Where the membership of Producer Company consists of a combination of individuals and Producer Institutions, every member shall exercise a single vote.
OPTION TO INTER-STATE CO-OPERATIVE SOCIETIES TO BECOME PRODUCER COMPANIES	An 'Inter-State Co-operative Society' means a Multi-State Co-operative Society as defined in Section 3(p) of Multi-State Co-operative Societies Act, 2002 and includes any co-operative society registered under any other law in force and which has after its formation, extended any of its objects to more than one State. Section 581J of the Act provides that any Inter-State Co-operative Society whose objects are not confined to one state may submit an application together with the prescribed documents to the Registrar for registration as Producer Company. The Registrar on being satisfied, that all the requirements relating to registration have been complied with, shall within 30 days of receipt of the application, issue a certificate of incorporation and the words "Producer Company Limited" shall form part of its name to explain its identity. Any Inter-State Cooperative Society willing to register itself as a Producer Company shall submit an application to ROC alongwith following enclosures and documents: 1. a copy of the Special Resolution passed with 2/3rd majority of the members; 2. a statement showing names, addresses and occupation of the directors and the Chief Executive; 3. a list of the members; 4. a statement indicating that the Inter-State Cooperative Society is engaged in any one or more of the objects specified in Section 581-B; 5. a declaration by two or more directors certifying that the particulars given as per Para (1) to (4) above are correct. Upon registration as a producer company, the ROCs who registers the company shall immediately intimate the Registrar with whom the Inter-State Cooperative Society was earlier registered, for appropriate deletion of the society from its register. The 'Inter-State Co-operative Society' shall, upon registration stand transformed into a Producer Company, and shall be governed by the provisions of Part IX-A of the Companies Act, 1956.
BENEFITS TO MEMBERS	Initially every member shall receive only such value of the produce or products pooled and supplied as is determined by the Board of Producer Company and the withheld price may be disbursed later in cash or in kind or by allotment of equity shares. Every such member shall be entitled to receive a limited return and may be allotted bonus shares. "Withheld price" means part of the price due and payable for goods supplied by any member to the Producer Company, and as withheld by the Producer Company for payment on a subsequent date.

	“Patronage bonus” means disbursement of surplus remains after making provision for limited return and reserves. Patronage bonus refers to the payment by Producer Company out of its surplus income to the members in proportion to their respective patronage.
DIRECTORS	Every Producer Company shall have minimum 5 and not more than 15 directors. Provided that in the case of an Inter – State Co-operative Society as a Producer Company, such company may have more than 15 directors for a period of 1 year from the date of its incorporation as a Producer Company.
APPOINTMENT OF DIRECTORS	The subscribers of the Memorandum and Articles may designate or nominate therein, the Board of Directors consisting of not less than five, who shall govern the affairs of Producer Company until directors are elected. The election of directors shall be conducted, within 90 days of registration of Producer Company. In case of an Inter – State Co-operative Society, which has been registered as a Producer Company, election of directors should be conducted within a period of 365 days. A director shall hold office as such for not less than 1 year but not more than 5 years and every director who retires shall be eligible for re-appointment. <u>POWERS AND FUNCTIONS OF BOARD</u> The Board of a Producer Company shall exercise all such powers and do all such acts and things as a Producer Company is authorized so to do. The Board may exercise the following powers: (a) Determination of the dividend payable; (b) Determination of the quantum of withheld price and recommend patronage to be approved at general meeting; (c) Admission of new Members; (d) Pursue and formulate the organizational policy, objectives, establish specific long – term and annual objectives, and approve corporate strategies and financial plans; (e) Appointment of a Chief Executive and such other officers of the Producer Company, as may be specified in the Articles; (f) Ensure the proper books of account to be maintained; (g) Prepare annual accounts to be placed before the annual general meeting with the auditor’s report and the replies on qualifications, if any, made by the auditors; (h) Acquisition or disposal of property of the Producer Company in its ordinary course of business; (i) Investment of the funds of the Producer Company in the ordinary course of its business.
LIABILITY OF DIRECTORS	Anything done by the directors, whether by way of voting on a resolution or approving by any other means, anything, in contravention of the provisions of this Act or any other law for the time being in force, or its Articles, shall make them jointly and severally liable towards the Producer Company to make good the loss or damage suffered by such company. Where as a result of the above, such director has made any profit, the Producer Company shall have the right to recover an amount equal to said profits from such director.
MEETINGS OF THE BOARD AND QUORUM	A Producer Company shall hold a Board Meeting at least once in every 3 months and at least 4 in every year. The Chief Executive shall give notice to every director for the time being in India, and at his usual address in India to every other director at least 7 days prior to the date of meeting. A Board meeting may also be called at a shorter notice after recording reasons in writing. The quorum for the meeting shall be 1/3 of the total strength of the Board, subject to a minimum of 3.

MATTERS TO BE TRANSACTED AT THE GENERAL MEETING	Section 581S states that the following powers shall be exercised by the Board of directors on behalf of the company only by means of passing of resolutions at the annual general meeting of the company: (a) approval of budget and adoption of annual accounts; (b) approval of patronage bonus; (c) issue of bonus shares; (d) declaration of limited return and decision on the distribution of patronage; (e) specify the conditions and limits of loans that may be given by the Board to any director; and (f) approval of any transaction of the nature as is to be reserved in the Articles for approval by the Members.
ANNUAL GENERAL MEETINGS	Every Producer Company shall hold its 1st AGM within 90 days from the date of its incorporation. Not more than 15 months shall elapse between the date of one AGM of the Producer Company and that of the next AGM. Extension of AGM: The Register may permit the extension of time for holding of an AGM (not being the first AGM) by a period not exceeding 3 months. Notice in writing indicating date, time and place shall be given at least 14 days before the meeting and shall also be accompanied by the following documents which shall be sent to every member and auditor of the company. (a) Agenda of the meeting; (b) Minutes of the previous annual general meeting or extraordinary general meeting; (c) Names and qualifications of candidates for election of directors; (d) Audited balance sheet, profit and loss account and Board's report of the company in respect of specified disclosures and its subsidiaries, if any; (e) Draft resolution for appointment of auditors; (f) Draft resolution for proposed amendment, if any, in memorandum or articles. Time & Place: The AGM shall be held during business hours, on a day not being a public holiday at the registered office of the company or at any other place within the city, town or village where the registered office of the company is situated.
QUORUM OF THE GENERAL MEETING	Unless Articles of Association require a larger number, 1/4 of the total membership shall constitute the quorum at a general meeting.
VOTING RIGHTS	Every member of the Producer Company shall have one vote irrespective of the number of shares held by him. In the case of equality of votes, the Chairman or the person presiding over the meeting shall have a casting vote, except in the matter of election of the Chairman.
TRANSFERABILITY OF SHARES AND ATTENDANT RIGHTS	A member of the Producer Company may, transfer whole or part of his shares along with any special rights, to an active member at par value only but after obtaining the previous approval of the Board. Special rights for this purpose means any rights relating to supply of additional produce by the active member or any other rights relating to his produce conferred on him by the Board. Within three months from the date of his becoming a member, such person shall nominate his nominee, to whom the shares shall vest in the event of his death.
BOOKS OF ACCOUNT	The balance sheet and profit and loss account of the Producer Company shall be prepared and covers the following details: 1. Sums of money received and expended. 2. Sales and Purchase of goods. 3. Instruments of liability executed by or on behalf of the company. 4. Assets and liabilities. 5. Utilization of materials or labor or other items of cost.
SECRETARY OF PRODUCER COMPANY	Section 581X of the Act provides that every Producer Company having an average annual turnover exceeding five crore rupees in each of three consecutive financial years shall appoint a member of the Institute of Company Secretaries of India as a whole-time Secretary of the company.

	If a Producer Company fails to appoint Company Secretary, the company and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues. However, in any proceedings against a person in respect of an offence for failure to appoint a Company Secretary, it shall be a defence to prove that all reasonable efforts were taken to comply with the provisions or that the financial position of the company was such that it was beyond its capacity to appoint a whole-time secretary.
GENERAL AND OTHER RESERVES	In addition to other reserves, the Producer Company shall maintain general reserve in every financial year as stipulated by Section 581ZI. The Department of Company Affairs (Now Ministry of Corporate Affairs) has issued Producer Companies (General Reserve) Rules, 2003 <i>vide</i> F.No. 1/1/2003-CL.V dated 7.8.2003, which is applicable to the companies formed and registered under Section 581C of the Companies Act, 1956. These Rules define a “co-operative society” to mean a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State. As per the Rules, a Producer Company shall make investments from and out of its general reserves in the following manner, maintained by it in terms of the provisions of Section 581ZI of the Act: (a) in approved securities, fixed deposits, units and bonds issued by the Central or State Governments or Cooperative Societies or scheduled bank, or (b) in a cooperative bank, State Cooperative Bank, Cooperative land development bank or Central cooperative bank, or (c) with any other scheduled bank, or (d) in any of the securities specified in Section 20 of the Indian Trust Act, 1882, or (e) in the shares or securities of any other multi-state cooperative society or any cooperative society, or (f) in the shares, securities or assets of a public financial institutions specified under Section 4A of the Companies Act, 1956. The Department of Company Affairs has <i>vide</i> Notification No. GSR 146(E) dated 9.03.2006 amended the Producer Companies (General Reserves) Rules, 2003. As per the amended rules investments may be made in any one or in combination of the above.
ISSUE OF BONUS SHARES	A Producer company may, after — the recommendation of the Board, and — passing of a resolution in General Meeting; issue bonus shares to its members in proportion to the shares held by them, on the date of the issuance of such shares, by capitalising the amounts from its general reserves. [Section 581ZJ].
LOAN, ETC. TO MEMBERS [SECTION 581ZK]	The Board may, subject to provisions made in the Articles of the company, provide financial assistance to the members. However, any loan or advance to any director or his relative shall be granted only after the approval of members by a resolution.
INVESTMENT IN OTHER COMPANIES, FORMATION OF SUBSIDIARIES ETC. [SECTION 581ZL]	The Producer Company may invest its general reserves in approved securities, fixed deposits, units, bonds issued by the government or a cooperative or scheduled bank or in such other mode as may be prescribed. It may, for the promotion of its objectives also acquire shares of other Producer Companies. However, special resolution is required to be passed for acquisition of shares of any other Producer Company or entering into agreement for the formation of subsidiaries or joint venture. Investment in shares of any other company other than Producer Company cannot exceed thirty per cent of the aggregate of its paid-up capital and free reserves,

	except where a special resolution has been passed and the prior approval of the Central Government has been obtained. However, such investments should be consistent with the objects of the Producer Company. For disposal of any of its investments, special resolution shall be passed by the Board. A register containing particulars of all investments as prescribed shall be kept in the registered office and shall be open to the members of the company for inspection and taking extracts therefrom.
AMALGAMATION, MERGER OR DIVISION, ETC., TO FORM NEW PRODUCER COMPANIES	Section 581ZN provides comprehensive provisions for the schemes of amalgamation, merger or division, etc. of Producer Company. A Producer Company may, by a resolution passed at its general meeting: (a) transfer its assets and liabilities, wholly or partly, to any other Producer Company, for any of the objectives specified in Section 581B if other Producer Company so agrees by passing a resolution at its general meeting; (b) divide itself into two or more Producer Companies; Also, two or more Producer Companies may, by a resolution passed at any general or special meetings of its members, decide to: (a) amalgamate and form a new Producer Company; or (b) merge one Producer Company with another Producer Company. The resolutions referred to above shall be passed by not less than two-thirds of its members present and voting. However, prior to such resolution a copy of proposed resolution shall be forwarded to all the members and creditors for their consent. Section 581ZN(5) makes provisions to satisfy the claims of dissenting members and creditors of such amalgamating Producer Companies.
STRIKING OFF NAME OF PRODUCER COMPANY	Section 581ZP states that the Registrar can after making an inquiry strike-off the name of a company where the company: (i) has failed to commence its business within one year of its registration; (ii) ceases to transact business; (iii) is no longer carrying on its objectives; (iv) is not following the mutual assistance principles. The Registrar shall, before passing the order issue a show cause notice to the company with a copy to the directors and give a reasonable opportunity of being heard. Any member of the Producer Company aggrieved by an order may appeal to NCLT within sixty days of passing an order.

UNIT 28: MERGER, DE-MERGER, AMALGAMATION, COMPROMISE AND ARRANGEMENT – AN OVERVIEW

POWER TO MAKE COMPROMISE OR MAKE ARRANGEMENTS WITH MEMBERS OR CREDITORS	Section 230(1) states that when a compromise or arrangement is proposed— (a) between a company and its creditors or any class of them; or (b) between a company and its members or any class of them, the Tribunal may, on the application of the (i) company, or (ii) any creditor or (iii) member of the company, or (iv) in the case of a company which is being wound up, of the liquidator, appointed under this Act or under Insolvency and Bankruptcy Code, 2016 order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs. For the purposes of this sub-section, arrangement includes a reorganization of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both these methods.
AFFIDAVIT BY APPLICANT TO DISCLOSE CERTAIN MATERIAL FACTS	Section 230(2) states that the company or any other person, by whom an application is made under subsection(1), shall disclose to the Tribunal by affidavit— (a) <u>all material facts</u> relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company; (b) <u>reduction of share capital</u> of the company, if any, included in the compromise or arrangement; (c) <u>any scheme of corporate debt restructuring</u> consented to by not less than seventy-five per cent of the secured creditors in value, including— (i) a creditors' responsibility statement in the prescribed form; (ii) safeguards for the protection of other secured and unsecured creditors; (iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board; (iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and (v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.
NOTICE OF THE MEETING	Section 230(3) states that when a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (1), a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by ➤ a statement disclosing the details of the compromise or arrangement, ➤ a copy of the valuation report, if any, and ➤ explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders, and ➤ the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and ➤ such other matters as may be prescribed:
WHO CAN OBJECT TO THE SCHEME	Any objection to the compromise or arrangement shall be made only by persons holding: ⇒ not less than ten per cent of the shareholding or ⇒ having outstanding debt amounting to not less than five per cent of the total outstanding debt as per the latest audited financial statement.
NOTICE TO BE SENT TO THE REGULATORS SEEKING THEIR	Section 230(5) states that a notice under sub-section (3) along with all the documents in such form as maybe prescribed shall also be sent to: ⇒ the Central Government, ⇒ the Income-tax authorities,

REPRESENTATION	⇒ the Reserve Bank of India, ⇒ the Securities and Exchange Board, ⇒ the Registrar, ⇒ the respective stock exchanges, ⇒ the Official Liquidator, ⇒ the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and ⇒ such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them <u>shall be made within a period of thirty days</u> from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.
APPROVAL & SANCTION OF SCHEME	Section 230(6) states that when at a meeting held in pursuance of sub-section (1), majority of persons representing <u>three-fourths in value</u> of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, <u>the same shall be binding on the company, all the creditors, or class of creditors or members or class of members</u>, as the case may be, or, in case of a company being wound up, on the liquidator appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be and the contributories of the company.
ORDER OF TRIBUNAL	An order made by the Tribunal under sub-section (6) shall provide for all or any of the following matters, namely:— (a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable; (b) the protection of any class of creditors; (c) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48; (d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate; (e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement. Section 230(8) states that the order of the Tribunal shall be filed with the Registrar by the company within a period of <u>thirty days</u> of the receipt of the order.
POWER OF TRIBUNAL TO ENFORCE COMPROMISE OR ARRANGEMENT	As per section 231(1), when the Tribunal makes an order under section 230 sanctioning a compromise or an arrangement in respect of a company, it— (a) shall have <u>power to supervise</u> the implementation of the compromise or arrangement; and (b) may, at the time of making such order or at any time thereafter, <u>give such directions</u> in regard to any matter or <u>make such modifications</u> in the compromise or arrangement as it may consider necessary <u>for the proper implementation</u> of the compromise or arrangement. Sub-section (2) states that if the Tribunal is satisfied that the compromise or arrangement sanctioned under section 230 <u>cannot be implemented satisfactorily</u> with or without modifications, and the company is unable to pay its debts as per the scheme, <u>it may make an order for winding-up the company</u> and such an order shall be deemed to be an order made under section 273.

TRIBUNAL'S POWER TO CALL MEETING OF CREDITORS OR MEMBERS

Section 232(1) states that when an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

(b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies,

the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply *mutatis mutandis*.

CIRCULATION OF DOCUMENTS FOR THE MEETINGS:

Section 232(2) states that when an order has been made by the Tribunal under sub-section (1), merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:—

(a) the draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;

(b) confirmation that a copy of the draft scheme has been filed with the Registrar;

(c) a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;

(d) the report of the expert with regard to valuation, if any;

(e) a supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

SANCTIONING OF SCHEME BY TRIBUNAL:

Section 232(3) states that the Tribunal, after satisfying itself that the procedure specified in sub-sections (1) and (2) has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:—

(a) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise;

(b) the allotment or appropriation by the transferee company of any shares, debentures, policies or other like instruments in the company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person:

No transferee company can hold shares in its own name or under any trust

A transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on

	behalf of any of its subsidiary or associate companies and any such shares <u>shall be cancelled or extinguished</u>; (c) the <u>continuation</u> by or against the transferee company of <u>any legal proceedings pending</u> by or against any transferor company on the date of transfer; (d) <u>dissolution</u>, without winding-up, of any transferor company; (e) the provision to be made for <u>any persons</u> who, within such time and in such manner as the Tribunal directs, <u>dissent from the compromise or arrangement</u>; (f) where share capital is held by any <u>non-resident shareholder</u> under the foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law for the time being in force, the allotment of shares of the transferee company to such shareholder shall be in the manner specified in the order; (g) the <u>transfer of the employees</u> of the transferor company to the transferee company; (h) when the <u>transferor company is a listed company and the transferee company is an unlisted company</u>,— (A) the transferee company shall remain an unlisted company until it becomes a listed company; (B) if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal: The amount of payment or valuation under this clause for any share shall not be less than what has been specified by the Securities and Exchange Board under any regulations framed by it; (i) where the transferor company is dissolved, the <u>fee</u>, if any, paid by the transferor company <u>on its authorised capital shall be set-off</u> against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation; and (j) such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out.
AUDITORS CERTIFICATION FOR COMPLIANCE WITH ACCOUNTING STANDARDS	No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.
ANNUAL STATEMENT CERTIFIED BY CA/CS/CWA TO BE FILED WITH ROC	Section 232 (7) states that every company in relation to which the order is made shall, until the completion of the scheme, file a statement in such form and within such time as may be prescribed with the Registrar every year duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.
PUNISHMENT	Section 232(8) states that if a transferor company or a transferee company contravenes the provisions of this section, <u>the transferor company or the transferee company</u>, as the case may be, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and <u>every officer of such transferor or transferee company</u> who is in default, shall be

	punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.
MERGER & AMALGAMATION OF CERTAIN COMPANIES	Section 233 prescribes simplified procedure for Merger or amalgamation of — ⇒ two or more small companies, or ⇒ between a holding company and its wholly-owned subsidiary company or ⇒ such other class or classes of companies as may be prescribed. <u>Merger of small companies/holding and subsidiary companies</u> Accordingly, sub-section (1) of Section 233 states that notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered into <u>between two or more small companies</u> or <u>between a holding company and its wholly-owned subsidiary company</u> or such other class or classes of companies as may be prescribed, subject to the following, namely:— (a) a <u>notice</u> of the proposed scheme <u>inviting objections or suggestions</u>, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is <u>issued by the transferor company</u> or companies and the transferee company; (b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent of the total number of shares; (c) each of the companies involved in the merger <u>files a declaration of solvency</u>, in the prescribed form, <u>with the Registrar</u> of the place where the registered office of the company is situated; and (d) the scheme is <u>approved by majority representing nine-tenths in value</u> of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing. Section 233(2) states that the transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated. <u>APPLICATION BY CG TO TRIBUNAL:</u> Section 233(5) states that if the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a <u>scheme is not in public interest or in the interest of the creditors</u>, it may file an application before the Tribunal <u>within a period of sixty days</u> of the receipt of the scheme under sub-section (2) stating its objections and <u>requesting that the Tribunal may consider the scheme</u> under section 232. <u>TRIBUNAL'S ACTION TO CG APPLICATION:</u> Section 233(6) states that on receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit: If the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme. <u>EFFECTS OF REGISTRATION OF SCHEME:</u> (a) transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company;

	(b) the charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company; (c) legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company; and (d) where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company.
MERGER OR AMALGAMATION OF A COMPANY WITH A FOREIGN COMPANY	Section 234(2) states that subject to the provisions of any other law for the time being in force, a foreign company, may <u>with the prior approval of the Reserve Bank of India</u>, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company <u>in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts</u>, as the case may be, as per the scheme to be drawn up for the purpose. For the purposes of sub-section (2), the expression “foreign company” means any company or body corporate incorporated outside India whether having a place of business in India or not. Section 234(1) states that the provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply <i>mutatis mutandis</i> to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. The Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.
POWER TO ACQUIRE SHARES OF DISSENTING SHAREHOLDERS	Section 235(1) provides that where a scheme or contract involving the transfer of shares or any class of shares in a company (the transferor company) to another company (the transferee company) has, within four months after making of an offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved, other than shares already held at the date of the offer by, or by a nominee of the transferee company or its subsidiary companies, the transferee company may, at any time within two months after the expiry of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares. Section 235(2) provides that where a notice under sub-section (1) is given, the transferee company shall, unless on an application made by the dissenting shareholder to the Tribunal, within one month from the date on which the notice was given and the Tribunal thinks fit to order otherwise, be entitled to and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company. Section 235(3) provides that where a notice has been given by the transferee company under sub-section (1) and the Tribunal has not, on an application made by the dissenting shareholder, made an order to the contrary, the transferee company shall, on the expiry of one month from the date on which the notice has been given, or, if an application to the Tribunal by the dissenting shareholder is then pending, after that application has been disposed of, send a copy of the notice to the transferor company together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferor company and on its own behalf by the transferee company, and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which, by virtue of this section, that company is entitled to acquire, and the transferor company shall— (a) thereupon register the transferee company as the holder of those shares; and (b) within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other

	consideration representing the price payable to them by the transferee company. Section 235(4) states that any sum received by the transferor company under this section shall be paid into a separate bank account, and any such sum and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which the said sum or other consideration were respectively received and shall be disbursed to the entitled shareholders within sixty days.
POWER OF CG TO PROVIDE FOR AMALGAMATION IN PUBLIC INTEREST	<u>Power of CG:</u> Section 237(1) states that when the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may be specified in the order. <u>No effect on Pending Legal Proceedings:</u> Section 237(2) states that the order under sub-section (1) may also provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company and such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to the amalgamation. <u>No effect on Rights of Members, Debenture holders or Creditors:</u> As per Section 237(3), every member or creditor, including a debenture holder, of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor, and in case the interest or rights of such member or creditor in or against the transferee company are less than his interest in or rights against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the Official Gazette, and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company. <u>Appeal to Tribunal:</u> As per Section 237(4), any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may, within a period of thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal. <u>APPROVAL OF EACH HOUSE OF PARLIAMENT:</u> As per Section 237(6), the copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament. <u>PRESERVATION OF BOOKS OF ACCOUNTS:</u> As per section 239, the books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company under this Chapter <u>shall not be disposed of without the prior permission of the Central Government</u> and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

UNIT 29: MAJORITY RULES & MINORITY RIGHTS
(Oppression & Mismanagement)

INTRODUCTION	Presently, the concept of shareholders' democracy means the shareholders' supremacy in the governance of the business and affairs of corporate sector either directly or indirectly. The powers for governing a company are divided into two parts: one is the Board of Directors and the other is of shareholders. The directors exercise their powers via Board Meetings whereas shareholders exercise their powers via General Meetings A general power has been conferred on the Board of directors. The section provides that "<u>Subject to the provisions of this Act</u>, the Board of Directors of a company shall be entitled to exercise all such powers and to do all such acts and things, as the company is authorized to exercise and do." The Companies Act, 2013 & the Old Companies Act, 1956 demarcate the area of control of directors as well as of shareholders.
PRINCIPLE OF NON – INTERFERENCE BY THE MINORITY SHAREHOLDERS	This principle says that the court will not intervene at the instance of shareholders in matters of internal administration, and will also not interfere with the management of a company by its directors till the time they are acting within the powers of the articles of the company. Whereas the company law provides for adequate protection for the minority shareholders when their rights are crushed by the majority of shareholders but the protection of the minority is not generally available when the majority does anything within their power. Case Law: Foss v. Harbottle Facts: There are two shareholders (Foss and Turton) brought an action on behalf of themselves and all other shareholders against the directors and solicitor of the company. They alleged that the director of the Company had carried out various fraudulent and illegal transactions whereby the property of the company was wasted and lost. On the basis of such allegations, the minority shareholders brought an action against the directors of the Company. The majority shareholders resolved the action taken by the directors alleging that they were not responsible for the loss to the Company. Judgment: In this case, the court dismissed the suit filed against the directors of the Company since the acts of directors were confirmed by the majority of shareholders of the company. In this case, the court further observed that if the alleged wrong can be confirmed or ratified by a simple majority of the members in a General Meeting, then the court will not interfere. Advantages of the Rule in Foss v. Harbottle (a) Recognition of the separate legal personality of a company. (b) It preserves the right of majority to decide how the affairs of the company shall be conducted. It is fair that the wishes of the majority should prevail. (c) Multiplicity of futile suits can be avoided. (d) Litigation at suit of a minority is futile if the irregularity complained of is one which can be subsequently ratified by the majority. <u>EXCEPTIONS TO THE RULE IN FOSS V. HARBOTTLE</u> The cases in which the majority rule does not prevail are commonly known as exceptions to the rule in Foss v. Harbottle and are available to the minority. (a) <u>Ultra Vires Acts:</u> Where the directors representing the majority of shareholders perform an illegal or ultra vires act for the company, an individual shareholder has right to bring an action. The majority of shareholders have no right to confirm an illegal or ultra vires transaction of the company.

	(b) Fraud on Minority: Where an act done by the majority amounts to a fraud on the minority; an action can be brought by an individual shareholder. (c) Wrongdoers in Control: If the wrongdoers are in control of the company, the minority shareholders' representative action for fraud on the minority will be entertained by the court. (d) Resolution requiring Special Majority but is passed by a simple majority: A shareholder can sue if an act requires a special majority but is passed by a simple majority. Simple or rigid, formalities are to be observed if the majority wants to give validity to an act which purports to impede the interest of minority. (e) Personal Actions: Individual membership rights cannot be invaded by the majority of shareholders. An individual shareholder can insist on the strict compliance with the legal rules, statutory provisions. Provisions in the memorandum and the articles are mandatory in nature and cannot be waived by a bare majority of shareholders. An individual shareholder is entitled to enforce his individual rights against the company, such as, his right to vote, the right to have his vote recorded, or his right to stand as a director of a company at an election. (f) Breach of Duty: The minority shareholder may bring an action against the company, where although there is no fraud, there is a breach of duty by directors and majority shareholders to the detriment of the company. (g) Prevention of Oppression and Mismanagement: The minority shareholders are empowered to bring action with a view to preventing the majority from oppression and mismanagement.
MEANING OF OPPRESSION	The words "oppression" and "mismanagement" are not defined in the Act. The meaning of these words for the purpose of Company Law should be used in a broad generic sense and not in any strict literal sense. CASE LAW An attempt to force new and more risky objects upon an unwilling minority may in circumstances amount to oppression. This was held in <u>Re. Hindustan Co-operative Insurance Society Ltd.</u> wherein the life insurance business of a company was acquired in 1956 by the Life Insurance Corporation of India on payment of compensation. The directors, who had the majority voting power, refused to distribute this amount among shareholders, rather they passed a special resolution changing the objects of the company to utilize the compensation money for the new objects. This was held to be "Oppression". The court observed: "The majority exercised their authority wrongfully, in a manner burdensome, harsh and wrongful. They attempted to force the minority shareholders to invest their money in different kind of business against their will. The minority had invested their money in a life insurance business with all its safeguards and statutory protections. But they were being forced to invest where there would be no such protections or safeguards". Minor acts of mismanagement, however, are not to be regarded as oppression. As far as possible, shareholders should try to resolve their differences by <u>mutual readjustment</u>. Moreover, the courts will not allow these special remedies to become a vexatious source of litigation. A member can complain of oppression <u>only in his capacity as a member</u> and not in his capacity as director or creditor [In <u>Re. Bellador Silk Ltd.</u>, (1965)]. It was held in the case of <u>Ajit Singh Ahuja v. Sapphire (India) (P) Ltd.</u> [(2009) (CLB)] that in a case of oppression, a member has to specifically plead on five facts – - what is the alleged <u>act</u> of oppression; <u>who</u> committed the act of oppression; <u>how</u> it is oppressive; - whether it is in the affairs of the company; and - Whether the company is party to the commission of the act of oppression.

	Oppression must be a <u>continuous process</u>. This is suggested by the words, 'are being conducted in a manner...' used in Section.
PREVENTION OF OPPRESSION (Section 241)	- Any member of a company who complains that— (a) the affairs of the company have been or <u>are being</u> conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or (b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter. - The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it <u>may itself apply</u> to the Tribunal for an order under this Chapter.
POWERS OF THE TRIBUNAL [SECTION 242]	- If, on any application made under section 241, the Tribunal is of the opinion— (a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit. - Without prejudice to the generality of the powers under sub-section (1), an order under that subsection may provide for— (a) the regulation of conduct of affairs of the company in future; (b) the purchase of shares or interests of any members of the company by other members thereof or by the company; (c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital; (d) restrictions on the transfer or allotment of the shares of the company; (e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case; (f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e): Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned; (g) the setting aside of any transfer, delivery of goods, payment, execution or

	other act relating to property made or done by or against the company <u>within three months before</u> the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference; (h) removal of the managing director, manager or any of the directors of the company; (i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilization of the recovery including <u>transfer to</u> Investor Education and Protection Fund or repayment to identifiable victims; (j) the manner in which the managing director or manager of the company <u>may be appointed subsequent</u> to an order removing the existing managing director or manager of the company made under clause (h); (k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct; (l) imposition of costs as may be deemed fit by the Tribunal; (m) Any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made. • A certified copy of the order of the Tribunal under sub-section (1) shall be <u>filed by the company with the Registrar</u> within thirty days of the order of the Tribunal. • The Tribunal may, on the application of any party to the proceeding, make any <u>interim order</u> which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable. • A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same. • If a company contravenes the provisions of sub-section (5), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.
CONSEQUENCE OF TERMINATION OR MODIFICATION OF CERTAIN AGREEMENTS (Section 243)	(1) Where an order made under <u>section 242</u> terminates, sets aside or modifies an agreement such as is referred to in sub-section (2) of that section,— (a) such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise; (b) no managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as the managing director or other director or manager of the company: Provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter. (2) Any person who knowingly acts as a managing director or other director or manager of a company in contravention of clause (b) of sub-section (1), and every other director of the company who is knowingly a party to such contravention,

	shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five lakh rupees, or with both.
WHO CAN APPLY (Section 244)	- The following members of a company shall have the right to apply under section 241, namely:— (a) in the case of a company <i>having a share capital</i>, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares; (b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members: Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241. Explanation.—For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member. - Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.
CLASS ACTION (Section 245)	(1) Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section (3) may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders, namely:— (a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company; (b) to restrain the company from committing breach of any provision of the company's memorandum or articles; (c) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors; (d) to restrain the company and its directors from acting on such resolution; (e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force; (f) to restrain the company from taking action contrary to any resolution passed by the members; (g) to claim damages or compensation or demand any other suitable action from or against— (i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part; (ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or (iii) any expert or advisor or consultant or any other person for any incorrect or

misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) to seek any other remedy as the Tribunal may deem fit.

(2) Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.

(3)(i) The requisite number of members provided in sub-section (1) shall be as under:—

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than 10% of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than 10% of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(ii) The requisite number of depositors provided in sub-section (1) shall not be less than one hundred depositors or not less than 10% of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the company owes 10% of total deposits of the company as may be prescribed.

(4) In considering an application under sub-section (1), the Tribunal shall take into account, in particular—

(a) whether the member or depositor is acting in good faith in making the application for seeking an order;

(b) any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters provided in clauses (a) to (f) of subsection (1);

(c) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;

(d) any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;

(e) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—

(i) authorised by the company before it occurs; or

(ii) ratified by the company after it occurs;

(f) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.

(5) If an application filed under sub-section (1) is admitted, then the Tribunal shall have regard to the following, namely:—

(a) public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;

(b) all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side;

- (c) two class action applications for the same cause of action shall not be allowed;
- (d) the cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.
- (6) Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.
- (7) Any company which fails to comply with an order passed by the Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.
- (8) Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.
- (9) Nothing contained in this section shall apply to a banking company.
- (10) Subject to the compliance of this section, an application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the persons affected by any act or omission, specified in sub section 1.

UNIT 30: STRIKING OFF NAME OF COMPANIES

POWER OF ROC TO REMOVE NAME OF COMPANY FROM REGISTER OF COMPANIES (SECTION 248)

- (1) Where the Registrar has reasonable cause to believe that—
- (a) a company has failed to commence its business within one year of its incorporation [or];
- (b) [Omitted] or
- (c) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455, or
- (d) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation under sub-section (1) of section 10A; or
- (e) the company is not carrying on any business or operations, as revealed after the physical verification carried out under sub-section (9) of section 12
(Inserted by Companies Amendment Ordinance 2018)
- he shall send a notice to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents, if any, within a period of thirty days from the date of the notice.
- (2) Without prejudice to the provisions of sub-section (1), a company may, after extinguishing all its liabilities, by a special resolution or consent of seventy-five per cent. members in terms of paid-up share capital, file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner:
- Provided that in the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.
- (3) Nothing in sub-section (2) shall apply to a company registered under section 8.
- (4) A notice issued under sub-section (1) or sub-section (2) shall be published in the prescribed manner and also in the Official Gazette for the information of the general public.
- (5) At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.
- (6) The Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company:
Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.
- (7) The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved.
- (8) Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies.

RESTRICTION ON MAKING APPLICATION IN CERTAIN CASES (SECTION 249)	(1) An application under sub-section (2) of <u>section 248</u> on behalf of a company shall not be made if, at any time in the previous three months, the company— (a) has changed its name or shifted its registered office from one State to another; (b) has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business; (c) has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement; (d) has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded; or (e) is being wound up under Chapter XX of this Act or under the Insolvency and Bankruptcy Code, 2016.".] (2) If a company files an application under sub-section (2) of <u>section 248</u> in violation of sub-section (1), it shall be punishable with fine which may extend to one lakh rupees. (3) An application filed under sub-section (2) of <u>section 248</u> shall be withdrawn by the company or rejected by the Registrar as soon as conditions under sub-section (1) are brought to his notice.
EFFECT OF COMPANY NOTIFIED AS DISSOLVED (SECTION 250)	Where a company stands dissolved under <u>section 248</u>, it shall on and from the date mentioned in the notice under sub-section (5) of that section cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.
FRAUDULENT APPLICATION FOR REMOVAL OF NAME (SECTION 251)	(1) Where it is found that an application by a company under sub-section (2) of <u>section 248</u> has been made with the object of evading the liabilities of the company or with the intention to deceive the creditors or to defraud any other persons, the persons in charge of the management of the company shall, notwithstanding that the company has been notified as dissolved— (a) be jointly and severally liable to any person or persons who had incurred loss or damage as a result of the company being notified as dissolved; and (b) be punishable for fraud in the manner as provided in <u>section 447</u>. (2) Without prejudice to the provisions contained in sub-section (1), the Registrar may also recommend prosecution of the persons responsible for the filing of an application under sub-section (2) of <u>section 248</u>.
APPEAL TO TRIBUNAL (SECTION 252)	(1) Any person aggrieved by an order of the Registrar, notifying a company as dissolved under <u>section 248</u>, may file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar and if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the company in the register of companies: Provided that before passing any order under this section, the Tribunal shall give a reasonable opportunity of making representations and of being heard to the Registrar, the company and all the persons concerned : Provided further that if the Registrar is satisfied, that the name of the company has been struck off from the register of companies either inadvertently or on the basis of incorrect information furnished by the company or its directors, which requires restoration in the register of companies, he may within a period of three years from the date of passing of the order dissolving the company under <u>section 248</u>, file an application before the Tribunal seeking restoration of name of such

	company. (2) A copy of the order passed by the Tribunal shall be filed by the company with the Registrar within thirty days from the date of the order and on receipt of the order, the Registrar shall cause the name of the company to be restored in the register of companies and shall issue a fresh certificate of incorporation. (3) If a company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal on an application made by the company, member, creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of <u>section 248</u> may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.
Application for Removal of Name Rule 4	(1) An application for removal of name of the company under sub-section (2) of section 248 shall be made in Form STK-2 along with the fee of ten thousand rupees: Provided that no application in Form No. STK-2 shall be filed by a company <u>unless</u> it has filed overdue returns in Form No. AOC-4 (Financial Statement) or AOC-4 XBRL, as the case may be, and Form No. MGT-7 (Annual Return), up to the end of the financial year in which the company ceased to carry its business operations: Provided further that in case a company intends to file Form No. STK-2 after the action under sub-section (1) of section 248 has been initiated by the Registrar, it shall file all pending overdue returns in Form No. AOC-4 (Financial Statement) or AOC-4 XBRL, as the case may be, and Form No. MGT-7 (Annual Return) before filing Form No. STK-2: Provided also that once notice in Form No. STK-7 has been issued by the Registrar pursuant to the action initiated under sub-section (1) of section 248, a company shall not be allowed to file an application in Form No. STK-2.] (2) Every application under sub-rule (1) shall accompany a no objection certificate from appropriate Regulatory Authority concerned in respect of following companies, namely :- (i) companies which have conducted or conducting non-banking financial and investment activities as referred to in the Reserve Bank of India Act, 1934 (2 of 1934) or rules and regulations thereunder; (ii) housing finance companies as referred to in the Housing Finance Companies (National Housing Bank) Directions, 2010 issued under the National Housing Bank Act, 1987 (53 of 1987); (iii) insurance companies as referred to in the Insurance Act, 1938 (4 of 1938) or rules and regulations thereunder; (iv) companies in the business of capital market intermediaries as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder; (v) companies engaged in collective investment schemes as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder; (vi) asset management companies as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder; (vii) any other company which is regulated under any other law for the time being

in force.

(3) The application in Form STK 2 shall be accompanied by -

(i) indemnity bond duly notarised by every director in Form STK 3;

(ii) a statement of accounts in Form No. STK-8 containing assets and liabilities of the company made up to a day, not more than thirty days before the date of application and certified by a Chartered Accountant;

(iii) An affidavit in Form STK 4 by every director of the company;

(iv) a copy of the special resolution duly certified by each of the directors of the company or consent of seventy five per cent of the members of the company in terms of paid up share capital as on the date of application;

(v) a statement regarding pending litigations, if any, involving the company.

UNIT 31: INTRODUCTION TO E-GOVERNANCE & XBRL

MCA 21 PROJECT	MCA – 21 stands for e – governance initiative of Ministry of Corporate Affairs (MCA) of the 21st Century. The project is named MCA – 21 as it aims at repositioning MCA as an organization capable of fulfilling the aspirations of its stakeholders in the 21st Century. It is based on the Government's vision of National e – governance in the country. E – governance or Electronic Governance is the application of Information Technology to the Government functioning in order to bring about Simple, Moral, Accountable, Responsive & Transparent (SMART) Governance. This project of MCA aims at moving from paper based to nearly paperless environment. The project serves the interest of all the key stake holders and the public at large. Also professionals need no longer to visit the offices of ROC and are able to interact with the Ministry using MCA – 21 portal from their offices or home. The services of the Ministry of Company Affairs with the introduction of MCA – 21 will be e – form driven. Form filing will be done using freely downloadable software and it can be done offline. The prerequisite for using the MCA – 21 portal will be P – 4 computer with printer, windows 2000/XP/Vista/7, internet explorer 6.0 version, Adobe Acrobat Reader from version in 9.4 to version 7.5 and digital signature certificate. To known better about how MCA – 21 will function, one needs to known about the set up of the Ministry of Corporate Affairs. Set – up of MCA: Ministry of Corporate Affairs has a three tier organizational set – up: ◆ Headquarters at New Delhi ◆ Regional Directors (RD) at Mumbai, Kolkata, Chennai, Noida, Ahmedabad and Hyderabad ◆ Registrar of Companies (RoC) in State and Union Territories MCA Headquarters handles cases that require approval of the Government of India (GOI) for citizen related functions. RD supervises the functioning of ROCs and handles the matters delegated by GOI while the ROC offices handle the bulk of citizen facing functions. The Official Liquidators (OL) attached to various High Courts functioning in the country are also under the overall administrative control of the MCA. Its headquarters at Delhi also includes two Directors of Inspection and Investigation and Director of Research and Statistics.
GENERAL STRUCTURE OF E – FILING PROCESS	An e – Form contains certain standardized features. Each e – Form contains the form reference and the description as well as the particular section of the Companies Act or the relevant rules or regulations under which it is required to be submitted. It starts with the Corporate Identity Number (CIN), which works as a unique identifier of an Indian Company and the Foreign Company Registration Number in the case of a Foreign Company that is required to be filled up. By Entering the CIN, the company details to the extent these are available in static form in the database, are automatically filled in by using the pre – fill functionally. <u>Features of e – form and e – filing process:</u> ◆ The e – Form contains a number of mandatory fields which are required to be filled – up Certain other fields are non – mandatory in nature which may be filled – in as may be relevant in any particular case. ◆ An instruction kit is available for each e – Form, which contains details of the instructions for properly filling the e – Form. ◆ An e – Form may be filled in either online or offline. Online filling implies that the e – Form is filled while being still concerned to My MCA portal through the Internet. Offline filling denotes that the e – Form is downloaded into the user's computer and filled later without being connected to the Internet. ◆ An e – Form may require certain mandatory attachments to be filed along with it. Optional attachments may also be filed with an e – Form. The list of such attachments is displayed in the e – Form. ◆ Next to attachment, there is a declaration that is sought from the person filing the e – Form to the effect that the information given in the e – Form and the attachments is correct and complete.

	◆ Most of the e – Forms require the digital signature of the Managing Director or Director, Manager or Secretary of the company for successful filing/submission. ◆ Further, the digital signature of a third party may also be required in certain cases. In the case of an e – Form for creation or modification of charges, such digital signature is also required from the Bank or Financial Institution. ◆ In certain cases, certification from the CS or CA or CWA in practice is also required to authenticate the particulars contained in the e – Form. Form example, his requirement is mandatory in the case of an e – Form for creation or modification of charges. ◆ There are built – in facilities to check the filled – in e – Form for requisite validations, to do pre – scrutiny and to modify the e – Form when the same is required to be re – submitted. ◆ When the “Submitted” button is pressed, the e – Form gets uploaded into the MCA central document repository. ◆ Thereafter, the requisite fees as applicable for the e – Form should be paid either on – line or off – line. ◆ Once the e – Form has been accepted and payment of fees has been acknowledged, a work item is created and assigned to the appropriate MCA employee based on pre – defined assignment rules as part of MCA back office workflow automation. ◆ In the case of an e – Form, the authorized officer affixes his/her digital signature for registering/approving/rejecting the same. ◆ After the processing of the e – Form is completed, an acknowledgement email is sent to the user regarding its approval/rejection.
ORGANIZATION OF ROC OFFICES UNDER MCA – 21	The major components involved in this comprehensive e – governance project are front office and back office. FRONT OFFICE (FO): The implementation of FO is done in two ways. These can be called as Virtual Front Office (VFO) and Physical Front Office (PFO). The VFO is what the citizen has in front while accessing the MCA – 21 portal. The PFO will be a replacement to the existing ROC counters. The PFO will also accept paper documents. However, these will be converted into electronic documents by customer service agents manning PFO. Also, the authorized person(s) will have to sign these documents digitally. Consequently the authorized signatories for a given document will need to appear in person at the PFO for the purpose of digitally signing the document. The user can avail the following services on MCA – 21 portal ◆ e – Filing ◆ Viewing public document ◆ Requesting certified copies ◆ Registering investor complaint ◆ Tracking transaction status Back Office: The back office process relates to: ◆ Dynamic routing of documents that have been electronically filed to the concerned official within MCA based on the type of service request. ◆ Electronic workflow systems to support speed and certainty in service delivery ◆ Supporting all routine tasks such as registrations and approvals ◆ Storing of all approved documents of companies as part of electronic records, including provision of access to electronic records for the stakeholders ◆ Enhancing identification of defaulters ◆ Increasing efficiency of Technical Scrutiny ◆ Ensuring close follow – up on matters related to compliance management including prosecutions ◆ Enabling quicker responses to investor grievances ◆ Providing alerts when the tasks are not carried out within stipulated period
KEY BENEFITS OF MCA – 21 PROJECT	The key benefits of MCA – 21 project are: ◆ Expeditious incorporation of companies ◆ Simplified and ease of convenience in filing of Forms/Returns ◆ Better compliance management

	◆ Total transparency through e – Governance ◆ Customer centric approach ◆ Increased usage of professional certificate for ensuring authenticity and reliability of the Forms/Returns ◆ Building up a centralized database repository of corporate operating ◆ Enhanced service level fulfillment ◆ Inspection of public documents of companies anytime from anywhere ◆ Registration as well as verification of charges anytime from anywhere ◆ Timely redressal of investor grievances ◆ Availability of more time for MCA employees for monitoring and supervision
E – FORM	An e – Form is the electronic equivalent of the paper form. The Ministry of Corporate Affairs has recently launched a major e – governance initiative MCA – 21. In the new system, it is envisaged that all company related documents would be filed electronically. The new e – Forms have been devised and notified by the Ministry for this purpose.
SIGN AN E – FORM	An e – Form can be signed by the authorized signatory/representative using the Digital Signature Certificate (DSC). Click the red colour signature box in the e – Form to affix the digital signature. To avoid increase in size of the e – Form beyond permissible limit of 2.5 MB, always affix the DSC using the ‘Sign and Save As’ option.
HOW ARE PAYMENTS MADE ELECTRONICALLY? WHAT TO DO IF SOMEONE DO NOT HAVE A CREDIT CARD OR ACCESS TO BANKING?	Payments can be made electronically through credit card or Internet Banking. During the e – Filing process, the system will prompt you to make payment. You can choose the mode of payment and make the payment accordingly. If you are not having a credit card or Internet banking facility, you can make payment at the counter of an authorized bank through the pre – filled Challan generated by the system after e – Filing.
CAN THE FORM ONCE SUBMITTED, BE RECTIFIED BY THE COMPANY USER?	Once filed, the e – Form cannot be rectified. You may, however, re – submit the e – Form, if the concerned MCA office has marked the status of your SRN as ‘Required Re – submission’.
DIRECTOR IDENTIFICATION NUMBER (DIN)	All existing and any person intending to be appointed as a director are required to obtain the Director Identification Number (DIN). DIN is also mandatory for directors of Indian Companies who are not citizens of India. However, DIN is not mandatory for directors of foreign company having branch offices in India. Only a single DIN is required for an Individual irrespective of number of directorships held by him. “Director Identification Number” means an identification number which the Central Government may allot to any individual, intending to be appointed as director or to any existing directors of a company, for the purpose of his identification as such and includes Designated Partnership Identification Number (DPIN) issued u/s 7 of the Limited Liability Partnership Act, 2008 and rules made there under.” DIN is a unique identification number and once obtained is valid for life time of a director.
CORPORATE IDENTITY NUMBER (CIN)	Every company has been allocated a Corporate Identity Number (CIN). CIN can be found from the MCA – 21 portal through search based on: - ROC Registration No. - Existing Company Name - Old Name of Company (in case of change of name, user is required to enter old name and the system displays corresponding current name). - Inactive CIN [In case of change of CIN, the user is required to enter previous (inactive) CIN Number]. Every foreign company has been allocated a Foreign Company Registration Number (FCRN).

DIGITAL SIGNATURE CERTIFICATE	The e – Forms are required to be authenticated by the authorized signatories using digital signatures as defined under the Information Technology Act, 2000. A digital signature is the electronic signature duly issued by a certifying authority that shows the authority of the person signing the same. It is an electronic analogue of a written signature. Every user who is required to sign an e – form for submission with MCA is required to obtain a Digital Signature Certificate. Under the MCA – 21 system the following four types of users are identified as users of Digital Signatures and are required to obtain digital signature certificate: 1. MCA (Government) Employees. 2. Professionals (CS, CA, CWA & Lawyers) who interact with MCA and companies in the context of Companies Act. 3. Authorized signatories of the company including Managing Director, Directors, Manager or Secretary. 4. Representatives of Banks and Financial Institutions. A person requiring a Digital Signature Certificate can approach any of the Certifying authorities identified by the MCA for issuance of Digital Signature Certificate.
CERTIFIED FILING CENTRE (CFC)	Certified Filing Centre (CFC) is an extended arm of the Ministry which is manned by professionals from three core areas i. e., Company Secretaries, Chartered Accountants and Cost Accountants. It is one of the various channels available to the stakeholders to enable them to do the statutory filing with ROC Offices across the country. These are managed and operated by professionals on user charge basis.
SERVICE REQUEST NUMBER (SRN)	Each transaction under e – filing is uniquely identified by a Service Request Number (SRN). On filing of an e – form, the system will generate and provide a Service Request Number (SRN). A user can check the status of the document/transaction, by entering the SRN.
PRE – CERTIFICATION OF E – FORMS	Apart from authentication of e – forms by authorized signatories using digital signatures, some e – forms are also required to be pre – certified by practicing professionals. Pre – certification means certification of correctness of any document by a professional before the same is filed with the Registrar. This pre – certification is to be carried out by inter – alia, Company Secretaries, Chartered Accountants, Cost Accountants, in whole – time practice.
EXPLAIN THE FOLLOWING TERMS USED UNDER E – FILING: (I) PRE – FILL (II) ATTACHMENT (III) CHECK FORM (IV) PRE - SCRUTINY	<u>PRE – FILL:</u> Pre – fill is functionality in an e – Form that is used for filling automatically, the requisite data from the system without repeatedly entering the same. For example, by entering the CIN of the company, the name and registered office address of the company shall automatically be pre – filled by the system without any fresh entry. <u>ATTACHMENT:</u> An attachment refers to a document that is sent as an enclosure with an e – Form by means of an attached file. The objective of the attachment is to provide details relevant to the e – Form for processing. While some attachments are optional some are mandatory in nature. The attachments to an e – Form will be only in Adobe PDF format. MCA portal shall not accept attachment file of more than 2.5MB and the user is advised to keep the attachment size to minimum. <u>CHECK FORM:</u> By clicking “Check Form”, the user will be in a position to find out whether the mandatory fields in an e – Form are duly filled – in. For example, if the user enters alphabets in “Date of Appointment of Director” field, he/she will be asked to correct the entered information. If the size of attachment is much bigger than the details may be submitted in a floppy or compact disc at the ROC office. For example, In the case of Annual Return filed by the companies having large shareholders base, the list of shareholders may be submitted separately in a CD at the concerned ROC office indicating SRN No. of e – form filed.

	<u>MODIFY:</u> Once the user has done “Check Form”, the form gets locked and it cannot be edited. If the user wishes to make any alternations, the form can be overwritten by clicking “Modify” button. <u>PRE – SCRUTINY:</u> Pre – Scrutiny is a functionality that is used for checking whether certain core aspects are properly filled in the e – Form. The user has to login on MCA portal to perform the pre – scrutiny of e – Form. The necessary attachments and digital signatures should be affixed before submitting the e – Form for pre – scrutiny. <u>ADDENDUM TO E – FORM:</u> The user may have to submit some additional supporting documents that are not submitted during the e – Form (application) filing but are required for the processing of the e – Form. MCA may also ask the applicant to provide some additional documents in support of the e – Form already filed so as to expedite the processing of the same. The user can initiate this on their own by checking the track transaction status on My MCA portal or on being notified by MCA through email. Payment of fees is not required for filing an addendum. The supporting documents that the applicant uploads, as an addendum, gets duly associated with the e – Form that was submitted earlier with the given SRN.
ONLINE INSPECTION OF DOCUMENTS	The documents filed online, once taken on record by ROC Offices shall be available for public viewing on payment of requisite fees. These documents, which shall be in the domain of public documents, include documents relating to incorporation, charges, annual returns and balance sheets and change in directors. A certified copy of the documents can also be obtained by anyone so interested.
XBRL	XBRL is a language for the electronic communication of business and financial data which is revolutionizing business reporting around the world. It provides major benefits in the preparation, analysis and communication of business information. It offers cost savings, greater efficiency and improved accuracy and reliability to all those involved in supplying or using financial data. It is an open standard, free of licence fees, being developed by a non – profit making international consortium. Other pages on this website provide detailed information on XBRL, its technical features and its business opportunities. XBRL is a data – rich dialect of XML (Extensible Markup Language), the universally preferred language for transmitting information via the Internet. It was developed specifically to communicate information between businesses and other users of financial information, such as analysis, investors and regulators. XBRL provides a common, electronic format for business reporting. It does not change what is being reported. It only changes how it is reported. XBRL is a world – wide standard, developed by an international, non – profit – making consortium, XBRL International Inc. (XII). XII is made up of many hundred members, including government agencies, accounting firms, software companies, large and small corporations, academics and business reporting experts. XII has agreed the basic specifications which define how XBRL works.
BENEFITS OF XBRL	XBRL offers major benefits at all stages of business reporting and analysis. The benefits are seen in automation, cost saving, faster, more reliable and more accurate handling of data, improved analysis and in better quality of information and decision – making. All types of organizations can use XBRL to save costs and improve efficiency in handling business and financial information. Because XBRL is extensible and flexible, it can be adapted to a wide variety of different requirements. All participants in the financial information supply chain can benefit, whether they are preparers, transmitters or users of business data. XBRL enables producers and consumers of financial data to switch resources away from costly manual processes, typically involving time – consuming comparison, assembly and re – entry of data. They are able to concentrate effort on analysis, aided by software which can validate and manipulate XBRL information.

	DATA COLLECTION AND REPORTING: By using XBRL, companies and other producers of financial data and business reports can automate the processes of data collection. For example, data from different company divisions with different accounting systems can be assembled quickly, cheaply and efficiently if the sources of information have been upgraded to using XBRL. Once data is gathered in XBRL, different types of reports using varying subsets of the data can be produced with minimum effort. A company finance division, for example, could quickly and reliably generate internal management reports, financial statements for publication, tax and other regulatory filings, as well as credit reports for lenders. Not only can data handling be automated, removing time – consuming, error – prone processes, but the data can be checked by software for accuracy. DATA CONSUMPTION AND ANALYSIS: Users of data which is received electronically in XBRL can automate its handling, cutting out time – consuming and costly collation and re – entry of information. Software can also immediately validate the data, highlighting errors and gaps which can immediately be addressed. It can also help in analyzing selecting, and processing the data for re – use. Human effort can switch to higher, more value – added aspects of analysis, review, reporting and decision – making. In this way, investment analysts can save effort, greatly simplify the selection and comparison of data, and deepen their company analysis. Lenders can save costs and speed up their dealings with borrowers. Regulators and government departments can assemble, validate and review data much more efficiently and usefully than they have hitherto been able to do.
APPLICABILITY OF XBRL (JUNE 2016)	The following class of companies shall file their financial statement and other documents under section 137 of Act, with ROC in e-form AOC 4 XBRL on or after 01.04.2014 using XBRL namely: - All companies listed on any stock exchange in India and their Indian Subsidiaries; - All companies having paid up capital of ₹ 5 Crores or above; - All companies having turnover of ₹ 100 Crores or above; - all companies which are required to prepare their financial statements in accordance with Companies (Indian Accounting Standards) Rules, 2015 <i>Provided that the companies in Banking, insurance, Power Sector and NBFC are exempted from XBRL Filing.</i>
XBRL TAGS AND XBRL TAXONOMIES (JUNE 2018)	XBRL Tags - In XBRL, information is not treated as a static block of text or set of numbers. - Instead, information is broken down into unique items of data (e.g. total liabilities = 100). These data items are then assigned mark-up tags that make them computer-readable. For example, the tag <Liabilities>100</Liabilities> enables a computer to understand that the item is liabilities, and it has a value of 100. - Computers can treat information that has been tagged using XBRL ‘intelligently’; they can recognize, process, store, exchange and analyse it automatically using software. - Because XBRL tags are formed in a universally-accepted way, they can be read and processed by any computer that has XBRL software. XBRL tags are defined and organized using categorization schemes called taxonomies. XBRL Taxonomies: - Different countries use different accounting standards. Reporting under each standard reflects differing definitions. The XBRL language uses different dictionaries, known as ‘taxonomies’, to define the specific tags used for each standard. Different dictionaries may be defined for different purposes and types of reporting. - Taxonomies are the computer-readable ‘dictionaries’ of XBRL. Taxonomies provide definitions for XBRL tags, they provide information about the tags, and they organize the tags so that they have a meaningful structure. - As a result, taxonomies enable computers with XBRL software to: — understand what the tag is (e.g. whether it is a monetary item, a percentage

or text);

— what characteristics the tag has (e.g. if it has a negative value);

— its relationship to other items (e.g. if it is part of a calculation).

This additional information is called meta-data. When information that has been tagged with XBRL is transmitted, the meta-data contained within the tags is also transmitted.

- Taxonomies differ according to reporting purposes, the type of information being reported and reporting presentation requirements. Consequently, a company may use one taxonomy when reporting to a stock exchange, but use a different taxonomy when reporting to a securities regulator. Taxonomies are available for most of the major national accounting standards around the world.

UNIT 32: NATIONAL COMPANY LAW TRIBUNAL (NCLT) PROVISIONS

DISSOLUTION OF COMPANY LAW BOARD	According to this notification Company Law Board (CLB) stand dissolved w.e.f. 1st June, 2016. Notification of this section 466 makes last Chairman of CLB as Provisional and first Chairman of NCLT.
MEANING OF NCLT & NCLAT	The NCLT or “Tribunal” is a quasi-judicial authority created under the Companies Act, 2013 to handle corporate civil disputes arising under the Act. It is an entity that has powers and procedures like those vested in a court of law or judge. NCLT is obliged to objectively determine facts, decide cases in accordance with the principles of natural justice and draw conclusions from them in the form of orders. Such orders can remedy a situation, correct a wrong or impose legal penalties/costs and may affect the legal rights, duties or privileges of the specific parties. The Tribunal is not bound by the strict judicial rules of evidence and procedure. It can decide cases by following the principles of natural justice. NCLAT or “Appellate Tribunal” is an authority provided for dealing with appeals arising out of the decisions of the Tribunal. It is formed for correcting the errors made by the Tribunal. It is an intermediate appellate forum where the appeals lie after order of the Tribunal. The decisions of Appellate Tribunal can further be challenged in the Supreme Court. Any party dissatisfied by any order of the Tribunal may bring an appeal to contest that decision. The Appellate Tribunal reviews the decisions of the Tribunal and has power to set aside, modify or confirm it.
NOTIFICATION OF NCLT	Provisions for constitution of NCLT and NCLAT were notified on 1st June 2016. In the first phase powers of CLB are transferred to NCLT. In the next stage the government will move for second set of notifications by which powers of High Courts and BIFR will also be vested with NCLT. Along with transfer of powers to NCLT, new powers and functions are also vested in NCLT.
TRANSITION FROM CLB TO NCLT	The Act has set out in detail the procedure to deal with cases which are pending in various forums in Section 434. The Government has notified 1st June 2016 for transfer of matters from CLB to NCLT. On that date, all the pending proceedings before CLB will be transferred to NCLT and Tribunal will dispose of such matters in accordance with the provisions of law. Tribunal has discretion to take up the pending CLB proceeding from any stage. At its discretion, it can take up the matter at stage where it was left by CLB or start the proceedings afresh or from any stage it deems fit.
ADVANTAGES OF NCLT & NCLAT	• It shall avoid multiplicity of litigation before various Forums (High Courts, CLB, BIFR, AAIFT). Thus there will be a consolidation of Corporate Jurisdiction. • There shall be at least 11 benches of the NCLT, thereby providing justice almost at one's doorstep. • This tribunal shall comprise of technical experts who will provide more concrete and precise decision. • There will be mixture of judicial and equitable jurisdiction while deciding matters. • There shall be reduction in period of winding up from 20-25 years to 2 years. • Reduction in pendency of cases, expeditious disposal of cases.
CONSTITUTION OF NCLT	NCLT & NCLAT Consist: • There are two classes of members to the National Company Law Tribunal; Judicial Members and Technical Members. • The Tribunal shall be headed by the President while the Appellate Tribunal by Chairperson. • NCLAT not exceeding eleven members for hearing appeals against the orders of the Tribunal.
ROLE OF COMPANY SECRETARY	The establishment of NCLT/NCLAT shall offer various opportunities to Practicing Company Secretaries as they have been authorized to appear before the Tribunal/Appellate Tribunal. Therefore, Practicing Company Secretaries would for the first time be eligible to appear for matters which were hitherto dealt with by the High Court viz. mergers, amalgamations under Section 391-394 and winding up proceedings under the Companies Act, 1956. Areas opened up for company secretaries in practice under NCLT are briefly stated hereunder: PCS as Member of NCLT: A Practicing Company Secretary can be appointed as a

Technical Member of NCLT, provided he has 15 years working experience as secretary in whole-time practice.

Appearance before National Company Law Appellate: Tribunal As stated earlier a Practicing Company Secretary has been authorized to appear before National Company Law Appellate Tribunal.

Insolvency Process: Currently, the law does not support effective participation of professionals and experts in the Insolvency process. There is no shortage of quality professionals in India. Disciplines of chartered accountancy, company secretary ship, cost and works accountancy, law etc. can act as feeder streams, providing high quality professionals for this new activity. In fact, private professionals can play a meaningful role in all aspects of process.

UNIT 33: FOREIGN COMPANIES

APPLICATION OF ACT ON FOREIGN COMPANY (SECTION 379)	(1) Sections 380 to 386 (both inclusive) and sections 392 and 393 shall apply to all foreign companies: Provided that the Central Government may, by Order published in the Official Gazette, exempt any class of foreign companies, specified in the Order, from any of the provisions of sections 380 to 386 and sections 392 and 393 and a copy of every such Order shall, as soon as may be after it is made, be laid before both Houses of Parliament. (2) Where not less than fifty per cent. of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.
FOREIGN COMPANY Section 2(42)	As per section 2(42), “foreign company” means any company or body corporate incorporated outside India which— (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and (b) conducts any business activity in India in any other manner
DOCUMENTS TO BE FILED WITH ROC BY FOREIGN COMPANY FOR REGISTRATION WITHIN 30 DAYS (SECTION 380)	(a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in the English language, a certified translation thereof in the English language; (b) the full address of the registered or principal office of the company; (c) a list of the directors and secretary of the company containing such particulars as may be prescribed; (d) the name and address or the names and addresses of one or more persons resident in India authorized to accept on behalf of the company service of process and any notices or other documents required to be served on the company; (e) the full address of the office of the company in India which is deemed to be its principal place of business in India; (f) particulars of opening and closing of a place of business in India on earlier occasion or occasions; (g) declaration that none of the directors of the company or the authorized representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and (h) any other information as may be prescribed
ACCOUNTS OF FOREIGN COMPANY (Section 381)	(1) Every foreign company shall, in every calendar year,— (a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having annexed or attached thereto such documents <u>as may be prescribed</u>; and (b) deliver a copy of those documents to the Registrar: Provided that the Central Government may, by notification, direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) shall not apply, or shall apply subject to such exceptions and modifications as may be

	specified in that notification. (2) If any such document as is mentioned in sub-section (1) is not in the English language, there shall be annexed to it a certified translation thereof in the English language. (3) Every foreign company shall send to the Registrar along with the documents required to be delivered to him under sub-section (1), a copy of a list in the <u>prescribed form</u> of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in sub-section (1) is made out.
DISPLAY OF NAME (SECTION 382)	Every foreign company shall— (a) conspicuously exhibit on the outside of every office or place where it carries on business in India, the name of the company and the country in which it is incorporated, in letters easily legible in English characters, and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situate; (b) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, billheads and letter paper, and in all notices, and other official publications of the company; and (c) if the liability of the members of the company is limited, cause notice of that fact— (i) to be stated in every such prospectus issued and in all business letters, bill-heads, letter paper, notices, advertisements and other official publications of the company, in legible English characters; and (ii) to be conspicuously exhibited on the outside of every office or place where it carries on business in India, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situate.
SERVICE ON FOREIGN COMPANY (SECTION 383)	Any process, notice, or other document required to be served on a foreign company shall be deemed to be sufficiently served, if addressed to any person whose name and address have been delivered to the Registrar under <u>section 380</u> and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode.
DEBENTURES, ANNUAL RETURN, REGISTRATION OF CHARGES, BOOKS OF ACCOUNTS & INSPECTION	(1) The provisions of <u>section 71</u> shall apply mutatis mutandis to a foreign company. [(2) The provisions of <u>section 92</u> and section 135 shall, subject to such exceptions, modifications and adaptations as may be made therein by rules made under this Act, apply to a foreign company as they apply to a company incorporated in India. (3) The provisions of <u>section 128</u> shall apply to a foreign company to the extent of requiring it to keep at its principal place of business in India, the books of account referred to in that section, with respect to monies received and spent, sales and purchases made, and assets and liabilities, in the course of or in relation to its business in India. (4) The provisions of Chapter VI shall apply mutatis mutandis to charges on properties which are created or acquired by any foreign company. (5) The provisions of Chapter XIV shall apply mutatis mutandis to the Indian business of a foreign company as they apply to a company incorporated in India.
DATING OF PROSPECTUS & PARTICULARS TO BE CONTAINED THEREIN	(1) No person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless the prospectus is dated and signed, and— (a) contains particulars with respect to the following matters, namely:— (i) the instrument constituting or defining the constitution of the company; (ii) the enactments or provisions by or under which the incorporation of the company was effected; (iii) address in India where the said instrument, enactments or provisions, or copies thereof, and if the same are not in the English language, a certified translation thereof in the English language can be inspected; (iv) the date on which and the country in which the company would be or was incorporated; and (v) whether the company has established a place of business in India and, if so, the address of its principal office in India; and (b) states the matters specified under <u>section 26</u>:

	Provided that sub-clauses (i), (ii) and (iii) of clause (a) of this sub-section shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business. (2) Any condition requiring or binding an applicant for securities to waive compliance with any requirement imposed by virtue of sub-section (1), or purporting to impute him with notice of any contract, documents or matter not specifically referred to in the prospectus, shall be void. (3) No person shall issue to any person in India a form of application for securities of such a company or intended company as is mentioned in sub-section (1), unless the form is issued with a prospectus which complies with the provisions of this Chapter and such issue does not contravene the provisions of <u>section 388</u>: Provided that this sub-section shall not apply if it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to securities. (4) This section — (a) shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to securities of the company, whether an applicant for securities will or will not have the right to renounce in favour of other persons; and (b) except in so far as it requires a prospectus to be dated, to the issue of a prospectus relating to securities which are or are to be in all respects uniform with securities previously issued and for the time being dealt in or quoted on a recognised stock exchange, but, subject as aforesaid, this section shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently. (5) Nothing in this section shall limit or diminish any liability which any person may incur under any law for the time being in force in India or under this Act apart from this section.
APPLICATION OF SECTIONS 34 TO 36 AND CHAPTER XX	(1) The provisions of sections 34 to 36 (both inclusive) shall apply to— (i) the issue of a prospectus by a company incorporated outside India under <u>section 389</u> as they apply to prospectus issued by an Indian company; (ii) the issue of Indian Depository Receipts by a foreign company. (2) Subject to the provisions of section 376, the provisions of Chapter XX shall apply mutatis mutandis for closure of the place of business of a foreign company in India as if it were a company incorporated in India in case such foreign company has raised monies through offer or issue of securities under this Chapter which have not been repaid or redeemed.]
PUNISHMENT	Without prejudice to the provisions of <u>section 391</u>, if a foreign company contravenes the provisions of this Chapter, the foreign company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees and in the case of a continuing offence, with an additional fine which may extend to fifty thousand rupees for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twentyfive thousand rupees but which may extend to five lakh rupees, or with both.

UNIT 34: OFFENCES, PENALTIES & COMPOUNDING

PENALTIES	All important penalties and offences are covered under Respective Chapters
COMPOUNDING OF OFFENCES	<u>Notwithstanding anything contained in the Code of Criminal Procedure, 1973</u>, any offence punishable under this Act (whether committed by a company or any officer thereof) not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by— (a) the Tribunal; or (b) where the maximum amount of fine which may be imposed for such offence does not exceed twenty-five lakh rupees, by the Regional Director or any officer authorised by the Central Government, on payment or credit, by the company or, as the case may be, the officer, to the Central Government of such sum as that Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be, may specify: Provided that the sum so specified shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded: Provided further that in specifying the sum required to be paid or credited for the compounding of an offence under this sub-section, the sum, if any, paid by way of additional fee under sub-section (2) of section 403 shall be taken into account: Provided also that any offence covered under this sub-section by any company or its officer shall not be compounded if the investigation against such company has been initiated or is pending under this Act. <u>Notwithstanding anything contained in the Code of Criminal Procedure, 1973</u>, any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable; (Substituted by Companies Amendment Ordinance 2018) Offences may be compounded by • Regional Director • National Company Law Tribunal • Special court <u>Compoundable offences:</u> Where the complainant agrees to enter into compromise and drop the charges against accused i.e., the offences which are eligible to compromise are compoundable. The offences are not of serious nature. Nothing in sub-section (1) shall apply to an offence committed by a company or its officer within a period of three years from the date on which a similar offence committed by it or him was compounded under this section; Explanation: Any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence;
PROCEDURE FOR COMPOUNDING	Subsection 3 of Section 441: (a) Every application for the compounding of an offence shall be <u>made to the Registrar</u> who shall forward the same, together with his comments thereon, to the Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be. (b) Where any offence is compounded under this section, whether before or after the institution of any prosecution, an <u>intimation thereof shall be given by the company to the Registrar</u> within seven days from the date on which the offence is so compounded. (c) Where any offence is <u>compounded before the institution</u> of any prosecution, no

	prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder of the company or by any person authorised by the Central Government against the offender in relation to whom the offence is so compounded. (d) Where the compounding of any offence is made after the institution of any prosecution, such compounding shall be brought by the Registrar in writing, to the notice of the court in which the prosecution is pending and on such notice of the compounding of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged. Subsection 4 of Section 441: The Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be, while dealing with a proposal for the compounding of an offence for a default in compliance with any provision of this Act which requires a company or its officer to file or register with, or deliver or send to, the Registrar any return, account or other document, may direct, by an order, if it or he thinks fit to do so, any officer or other employee of the company to file or register with, or on payment of the fee, and the additional fee, required to be paid under section 403, such return, account or other document within such time as may be specified in the order. Subsection 5 of Section 441: Any officer or other employee of the company who fails to comply with any order made by the Tribunal or the Regional Director or any officer authorised by the Central Government under sub-section (4) shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding one lakh rupees, or with both.
EXAMPLES OF OFFENCES COMPOUNDABLE BY DIFFERENT AUTHORITIES	
REGIONAL DIRECTOR	(a) Failure of company to file Annual Return (b) If a CS in practice certifies the Annual Return otherwise than in conformity with the requirement of this section or rules made thereunder (c) Failure to file report on AGM (d) Failure to transfer the amounts of accumulated profits to unpaid dividend account (e) Failure to file financial statements with ROC (f) Failure to furnish DIN to ROC (g) Acting Director in more than 20 Companies
TRIBUNAL	(a) Committing default in complying with the requirements relating to formation of companies with charitable objects, etc. (b) Fraudulently issuing of duplicate share certificates by a company (c) Committing default in complying with the order of Tribunal relating to rectification of register of members (d) Failure to publish the order of confirmation of the reduction of share capital by the Tribunal (e) Contravening provisions relating to purchase by company or loans by company for purchase of its own shares (f) Committing default in complying with the order of Tribunal relating to redemption of debentures
SPECIAL COURT	(a) Violation of provisions relating to issue of shares at discount (b) Contravention of any provision of Chapter VI relating to Registration of Charges (c) Failure to keep proper books of Account (d) Failure of company to comply with the provisions of sections 139 to 146 with regard to auditors (e) Functioning as a director after vacation of office (f) Failure to disclose of director's interest and participation in Board meeting by interested director (g) Failure to pay the penalty imposed by the adjudicating officer or Regional Director
NON COMPOUNDABLE OFFENCES	(a) Tampering with the minutes of the proceedings of meeting (b) Failure to distribute dividend within thirty days (c) Political contribution made in contravention of this section (d) Contravention of the provisions of this section relating to loans and investment

	(e) Disobeys the direction issued by the Registrar or inspector under this section in relation to investigation (f) Failure to provide information, books or papers, etc. to inspector during investigation (g) Intentionally gives false Evidence (h) Wrongful withholding of Property
PENALTY FOR REPEATED DEFAULT (Section 454A)	Where a company or an officer of a company or any other person having already been subjected to penalty for default under any provisions of this Act, again commits such default within a period of three years from the date of order imposing such penalty passed by the adjudicating officer or the Regional Director, as the case may be, it or he shall be liable for the second or subsequent defaults for an amount equal to twice the amount of penalty provided for such default under the relevant provisions of this Act. (Inserted by Companies Amendment Ordinance 2018)