

INDEX

PART 1: COMPANY LAW, PRINCIPLES & CONCEPTS (50 MARKS).....	3
UNIT1: INTRODUCTION TO COMPANY LAW	4
UNIT 2: SHARE & SHARE CAPITAL	10
CONCEPT OF CAPITAL & FINANCING OF COMPANIES	10
PRIVATE PLACEMENT & PROSPECTUS	25
ALLOTMENT AND ISSUE OF CERTIFICATES.....	37
TRANSFER & TRANSMISSION OF SHARES	45
UNIT 3: MEMBERS & SHAREHOLDERS	49
UNIT 4: DEBT INSTRUMENTS	56
DEBENTURES.....	56
DEPOSITS	61
UNIT 5: CHARGES	71
UNIT 6: DISTRIBUTION OF PROFITS	77
UNIT 7: CORPORATE SOCIAL RESPONSIBILITY.....	83
UNIT 8: ACCOUNTS, AUDIT & AUDITORS.....	90
UNIT 9: TRANSPARENCY & DISCLOSURES	119
UNIT 10: AN OVERVIEW OF INTER CORPORATE LOANS, INVESTMENTS, GUARANTEES AND SECURITY, RELATED PARTY TRANSACTIONS	124
UNIT 11: REGISTERS & RECORDS	134
UNIT 12: AN OVERVIEW OF CORPORATE REORGANISATION.....	146
AMALGAMATION.....	146
MAJORITY RULES & MINORITY RIGHTS.....	158
WINDING – UP OF THE COMPANIES	167
UNIT 13: INTRODUCTION TO MCA 21 & FILING IN XBRL.....	171
UNIT 14: GLOBAL TRENDS AND DEVELOPMENTS IN COMPANY LAW	179
PART 2: COMPANY ADMINISTRATION & MEETINGS – LAW & PRACTICE (40 MARKS)	180
UNIT 15: BOARD CONSITUTION & ITS POWERS	180
UNIT 16: DIRECTORS	187
UNIT 17: KEY MANAGERIAL PERSONNEL.....	212
UNIT 18: MEETINGS OF BOARD & ITS COMMITTEES.....	225
UNIT 19: GENERAL MEETINGS	234
UNIT 20: VIRTUAL MEETINGS	251
PART 3: COMPANY SECRETARY AS A PROFESSION (10 MARKS)	259
UNIT 21: LEGAL FRAMEWORK GOVERNING COMPANY SECRETARIES	259
UNIT 22: SECRETARIAL STANDARD BOARD	278
UNIT 23: MEGA FIRMS	281
COMPANIES (AUDITORS REPORT) ORDER, 2020.....	288

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PART 1: COMPANY LAW, PRINCIPLES & CONCEPTS (50 MARKS)
UNIT1: INTRODUCTION TO COMPANY LAW

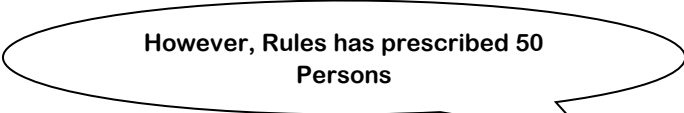
STRUCTURE OF THE ACT	The Companies Act, 2013 has 470 Sections (covered in 29 Chapters) and 7 Schedules as against 658 Sections (covered in 13 Parts) and 15 Schedules of the Companies Act, 1956. It may be noted that the number of Sections has been drastically reduced, but at the same time the Central Government has been empowered, in number of Sections, to prescribe various aspects in the form of Rules, thereby recognizing the more importance of delegated legislation. It can be said Companies Act, 2013 has been structured on skeleton approach. This has been done for ensuring that the law remains relevant at all times in the changing economic environment.
APPLICABILITY OF THE ACT	Section 1 provides that the Companies Act, 2013 applies on whole of India.
SECTION 1 OF COMPANIES ACT	Short Title, Extent, Commencement and Application: (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. <u>[Shiromani Gurdwara Prabandhak Committee vs. Shri Sam Nath Dass]</u> <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	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
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						

	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.
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>[Macaura 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 SUED	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 Dipaloo]</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> - One of the contentions put forth on behalf of STC was that if the corporate veil is pierced, one sees three persons who are admittedly the citizens of India and therefore the corporation should also be regarded as a citizen. But it was held that neither the provisions of the

	Constitution of India nor the Citizenship Act, 1955, either confer the right of citizenship on or recognize as citizen any person other than a natural person. In the words of Justice Hidayatullah: “If all of them (the members) are citizens of India, the company does not become a citizen of India, any more than, if all are married, the company would be a married person.” 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. [R. C. Cooper v. Union of India]
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. [Tulika v. Parry & Co.] - 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	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”. Statutory Recognition of Lifting Of Corporate Veil The Companies Act, 2013 itself contains some provisions [Section 7(7), 251(1) and 339] which lift the corporate veil to reach the real forces of action. Section 7(7) deals with punishment for incorporation of company by furnishing false information; Section 251(1) deals with liability for making fraudulent application for removal of name of company from the register of companies and Section 339 deals with liability for fraudulent conduct of business during the course of winding up.
LIFTING OF CORPORATE VEIL UNDER JUDICIAL INTERPRETATION	
1.FRAUD IMPROPER CONDUCT or	Fraud vitiates everything. In Gilford Motor Co. v. Horne, 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, Jones v. Lipman, 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] It will thus be noticed that as a result of statutory provisions and judicial pronouncements, <u>the Salomon's Case</u> no longer holds good. In appropriate cases, the courts disregard the corporate entity and look behind the legal person.
	 However, Rules has prescribed 50 Persons
ILLEGAL ASSOCIATION (Section 464)	Section 464 of the Companies Act provides that not more than 100 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 BY 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: SHARE & SHARE CAPITAL

CONCEPT OF CAPITAL & FINANCING OF COMPANIES

MEANING OF THE TERM CAPITAL	Capital means an amount which is required to start a business and it is a long term borrowing to the company. The word Capital means the Share Capital either Equity or Preference.
MEANING OF A SHARE	Total capital of the company is divided into a number of small indivisible units of a fixed amount and each such unit is called a share. The fixed value of a share, printed on the share certificate, is called nominal/par/face value of a share. However, a company can issue shares at a price different from the face value of a share. The liability of holder of shares (called shareholders) is limited to the issue price of shares acquired by them.
KINDS OF SHARES (SECTION 43)	(a) Equity Share Capital: A company can issue two kinds of Equity Share Capital: i) Equity Share Capital with Voting Rights; ii) Equity Share Capital with differential rights as to Dividend, Voting or otherwise; (b) Preference Share Capital;
EQUITY SHARE	Equity Share Capital with reference to any company limited by shares,

CAPITAL	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.
EQUITY SHARES WITH DIFFERENTIAL VOTING RIGHTS	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: (a) Authorization in the Articles of Association (AOA): the AOA of the company authorizes the issue of shares with differential rights. (b) Shareholder's Approval: the issue of shares is authorized by an ordinary resolution passed at a general meeting of the shareholders. (c) Maximum Limit: the voting power in respect of shares with differential rights of the company shall not exceed seventy four per cent. of total voting power including voting power in respect of equity shares with differential rights issued at any point of time; [Substituted by The Companies (Share Capital and Debentures) Amendment Rules, 2019. Dated 16th August, 2019] ~~(d) Distributable Profits: The company having consistent track record of distributable profits for the last 3 years.~~ [Omitted by The Companies (Share Capital and Debentures) Amendment Rules, 2019. Dated 16th August, 2019] (e) No Default in Statutory Filing: 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. (f) No Default in the payment of dividend, Deposits or Debentures: 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. Conditions for the Issue of Preference Shares: A company may issue preference shares subject to the fulfilment 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.

INABILITY TO REDEEM:

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.
VOTING RIGHTS (SECTION 47)	Normally, Equity Shareholders have right to vote at the meetings. <u>Voting Rights of Preference Shareholders:</u> 1. have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares and, 2. resolution for the winding up of the company or 3. for the repayment or reduction of its equity or preference share capital and his voting right on a poll shall be in proportion to his share in the paid-up preference share capital of the company. Provided that the proportion of the voting rights of equity shareholders to the voting rights of the preference shareholders shall be in the same proportion as the paid-up capital in respect of the equity shares bears to the paid-up capital in respect of the preference shares. Simply Said, Voting rights of preference shareholders shall be in same proportion i.e paid up capital. <u>Special Voting Power in case of Default in Payment of Dividend to Preference Shareholders:</u> Where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.
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 (words deleted w.e.f 7th May 2018) (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.

CONDITIONS AS PER RULE 8 OF COMPANIES (SHARE CAPITAL AND DEBENTURE) RULES, 2014:

(a) **Special Resolution:** Issue of Sweat Equity shares to be authorized by Special Resolution at a General meeting.

Explanatory Statement to the Special resolution:

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.

Provided further that a startup company, as defined in notification number G.S.R. 127(E), dated the 19th February, 2019 issued by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India, may issue sweat equity shares not exceeding fifty percent of its paid up capital upto ten years from the date of its incorporation or registration;

(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.
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: - Towards the issue of fully paid bonus shares; - in writing off the preliminary expenses of the company; - in writing off the expenses of, or the commission paid or discount allowed on any issue of shares or debentures of the company; - in providing for premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or - for buy back of its own shares or securities;
ISSUE OF SHARES AT A DISCOUNT (SECTION 53)	When a company issues its shares at a price less than the face value of shares is known as "Shares issued at a Discount". As per the provisions of Section 53, no company can issue shares at a Discount 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; [Companies Amendment Act 2019 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 fulfilment 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.

Completion Period : 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.

Rights of Convertible Securities: 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.
RESTRICTIONS ON PURCHASE BY COMPANY OR GIVING OF LOANS BY IT FOR PURCHASE OF ITS SHARES (SECTION 67)	(1) No company limited by shares or by guarantee and having a share capital shall have power to buy its own shares unless the consequent reduction of share capital is effected under the provisions of this Act. (2) No public company shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase or subscription made or to be made, by any person of or for any shares in the company or in its holding company. (3) Nothing in sub-section (2) shall apply to— (a) the lending of money by a banking company in the ordinary course of its business; (b) the provision by a company of money in accordance with any scheme

	approved by company through special resolution and in accordance with such requirements as may be prescribed, for the purchase of, or subscription for, fully paid-up shares in the company or its holding company, if the purchase of, or the subscription for, the shares held by trustees for the benefit of the employees or such shares held by the employee of the company; (c) the giving of loans by a company to persons in the employment of the company other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of six months with a view to enabling them to purchase or subscribe for fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership: Provided that disclosures in respect of voting rights not exercised directly by the employees in respect of shares to which the scheme relates shall be made in the Board's report in such manner as may be prescribed.
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. <u>AUTHORISATION & APPROVALS:</u> (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.

	<u>PROHIBITION OF BUY BACK IN CERTAIN CASES:</u> 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. <u>Rule 12 of Companies (Share Capital and Debenture) Rules, 2014:</u> 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. <u>Who are eligible for an ESOP Scheme?</u> (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; <u>Who are not eligible for an ESOP Scheme?</u> (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; Provided that in case of a startup company, as defined in notification number G.S.R. 127(E), dated 19th February, 2019 issued by the Department for Promotion of industry and Internal Trade, Ministry of Commerce and Industry Government of India, Government of India, the conditions mentioned in sub-clause (i) and (ii) shall not apply upto ten years from the date of its incorporation or registration. <u>Disclosures in Explanatory Statement of Notice for passing Special Resolution:</u> (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; <u>Varying the Terms of ESOP requires Special Resolution:</u> 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; <u>Minimum One year Vesting Period:</u> 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. <u>Company has freedom to specify the lock in period:</u> The Company shall have the freedom to specify the lock in period for the shares issued pursuant to exercise of option. <u>No Right of Dividend or Voting till exercise of option:</u> 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. <u>Forfeiture/Refund:</u> 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-fulfilment of conditions relating to vesting of option as per the ESOP scheme. <u>Status of ESOP in case of Death/Permanent Disablement/ Resignation of Employees:</u> (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.
ALTERATION OF SHARE CAPITAL (SECTION 61)	A limited company having a share capital may, if so authorized by its articles, alter its 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. Penalty & Prosecution: 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 five hundred rupees for each day during which such default continues, subject to a maximum of five lakh rupees in case of a company and one lakh rupees in case of an officer who is in default. <i>(Penalty changed by Companies Amendment Act, 2020 w.e.f. 21.12.2020)</i> Penalty & Prosecution: 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. When Share Capital Stands Automatically Increased? 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 (SECTION 66)	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 :

Procedure for Reduction of Share Capital:

- (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 :
 - (a) The amount of share capital;
 - (b) The number of shares into which it is to be divided;
 - (c) The amount of each share; and Reduction of share capital;
 - (d) 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 –

- (a) Knowingly conceals the name of any creditor entitled to object to the reduction;
- (b) Knowingly misrepresents the nature or amount of the debt or claim of any creditor; or
- (c) 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.

PRIVATE PLACEMENT & PROSPECTUS

PUBLIC OFFER (SECTION 23)	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 (SECTION 26)	<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 filing a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his duly authorized 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 filing 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 Filing 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.~~ [Omitted by The Companies (Amendment) Act, 2019 - Effective From 15th August 2019] (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.~~ <i>(Imprisonment removed w.e.f. 21.12.2020 by Companies Amendment Act, 2020)</i>
VARIATION IN TERMS OF CONTRACTS OF OBJECTS AS REFERRED IN THE PROSPECTUS (SECTION 27)	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. <u>Rule 7 of Companies (Prospectus and Allotment of Securities) Rules, 2014:</u> 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) <i>excluding</i> 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.

Provided also that in case of offer or invitation of any securities to Qualified Institutional Buyers, it shall be sufficient if the company passes a previous special resolution only once in a year for all the allotments to such buyers during the year. *(Inserted w.e.f. 16.10.2020)*

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. 17. Record Keeping: The Company shall maintain a complete record of private placement offers in Form PAS-5. The payment to be made for subscription to bank account of the person subscribing to such keep the record of the bank account from where been received: Provided that 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: Provided further that the provisions of this sub-rule shall not apply in case of issue of shares for consideration other than cash.
CLASSIFICATION OF PROSPECTUS	
DEEMED PROSPECTUS (SECTION 25) OFFER FOR SALE	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 directors of the company or by not less than ½ 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 : (a) Underwriting Agreement : 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) No offered to the Public: Where the securities are not offered to the public; (c) Rights Issue: Where the offer is made only to the existing members or debenture holders of the company with or without a right to renounce; (d) Uniform Shares: 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. CONDITIONS FOR SHELF PROSPECTUS (a) Eligibility for issue of Shelf Prospectus: 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) Validity Period: 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) No requirement of filing fresh prospectus within 1 year: 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) Changes in the Material Information: 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) Refund of Money without filing Information Memorandum: 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	Red Herring Prospectus (RHP) means a prospectus which does not include

PROSPECTUS (SECTION 32)	complete particulars of the quantum or price of the securities included therein. 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: In re. R. V. Kysant (1932) K. B. 442 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)	WHAT IS AN UNTRUE STATEMENT? 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.

CRIMINAL LIABILITY FOR MIS – STATEMENTS

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 :

- (a) Such statement or omission was immaterial, or
- (b) 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.

Penalty & Prosecution (Sec. 447):

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.

If the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years.

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.

Onus for Proof of Mis-statement

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:

- (i) The misrepresentation was of a fact;
- (ii) It was in respect of a material fact. What is a material statement of fact will depend upon the circumstances of each case;
- (iii) He acted on the misrepresentation; and
- (iv) He suffered damages in consequence.

CIVIL LIABILITY FOR MIS-STATEMENTS

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.

WHEN CIVIL LIABILITY CAN BE AVOIDED?

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 filing a copy of the prospectus with the Registrar or, to the defendant's knowledge, before allotment thereunder. *Inserted by Companies Amendment Act, 2017 Words “delivery of a copy of the prospectus for registration” replaced with the words “Filing a copy of the prospectus with the registrar” [Companies Amendment Act 2019 w.e.f 15.08.2019] <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 of Global Depository Receipt) Rules, 2014]	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 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.

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.

Provided that proceeds of issue of depository receipts may be remitted in

	an International Financial Services Centre Banking Unit (IBU) and utilised in accordance with the instructions issued by the Reserve Bank of India from time to time
PUBLIC OFFER OF SECURITIES TO BE IN DEMATERIALIZED FORM (SECTION 29)	(1) Notwithstanding anything contained in any other provisions of this Act,— (a) every company making public offer; and (b) such other class or classes of public companies as may be prescribed, [Omitted by The Companies (Amendment) Act, 2019- Effective From 15th August 2019] <i>The promoters of every public company making a public offer of any convertible securities may hold such securities only in dematerialised form:</i> <i>Provided that the entire holding of convertible securities of the company by the promoters held in physical form up to the date of the initial public offer shall be converted into dematerialised form before such offer is made and thereafter such promoter shareholding shall be held in dematerialized form only.</i> shall issue the securities only in dematerialised form by complying with the provisions of the Depositories Act, 1996 and the regulations made thereunder. (1A) In case of such class or classes of unlisted companies as may be prescribed, the securities shall be held or transferred only in dematerialised form in the manner laid down in the Depositories Act, 1996 and the regulations made thereunder. [Inserted by The Companies (Amendment) Act, 2019- Effective From 15th August 2019] (2) Any company, other than a company mentioned in sub-section (1), may convert its securities into dematerialised form or issue its securities in physical form in accordance with the provisions of this Act or in dematerialised form in accordance with the provisions of the Depositories Act, 1996 (22 of 1996) and the regulations made thereunder.

ALLOTMENT AND ISSUE OF CERTIFICATES

ALLOTMENT OF SHARES	<u>MEANING:</u> 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. <u>GENERAL PRINCIPAL REGARDING ALLOTMENT OF SHARES</u> (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. <u>CASE LAW JUDGEMENTS:</u> • 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)	❖ <u>ALLOTMENT BY BOARD:</u> The Board of Directors or its committee authorized to allot the securities after receiving the minimum subscription. ❖ <u>MINIMUM SUBSCRIPTION & APPLICATION MONEY [SECTION 39(2)]:</u> No allotment of any securities of a company offered to the public for subscription shall be made unless the amount stated in the prospectus as the minimum amount has been subscribed and the sums payable on application for the amount so stated have been paid to and received by the company by cheque or other instrument. 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. ❖ <u>SEPARATE BANK ACCOUNT:</u> 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. ❖ <u>FILING OF RETURN OF ALLOTMENT:</u> 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. <u>PENALTY FOR DEFAULT:</u> 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 9A) (w.e.f. 10th September 2018)	(1) Every unlisted public company shall - (a) Issue the securities only in dematerialised 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 dematerialised 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 dematerialised 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. <i>(8) Every unlisted public company governed by this rule shall submit Form PAS-6 to the Registrar with such fee as provided in Companies (Registration Offices and Fees) Rules, 2014 within sixty days from the conclusion of each half year duly certified by a company secretary in practice or chartered accountant in practice.</i> <i>(8A) The company shall immediately bring to the notice of the depositories any difference observed in its issued capital and the capital held in dematerialised form.</i> Rule 8 & 8A substituted w.e.f 30.09.2019 (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. (11) This rule shall not apply to an unlisted public company which is:- (a) a Nidhi; (b) a Government company or (c) a wholly owned subsidiary Sub Rule 11 inserted w.e.f. 22.01.2019
LISTING SHARES [SECTION 40]	OF	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 imposed 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 authorized by the Board for the purpose.

(b) a director or company secretary 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 or company secretary 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;

[Word Director substituted by Director or Company Secretary by The Companies (Share Capital and Debentures) Amendment Rules, 2019. Dated 16th August, 2019]

LEGAL EFFECT OF SHARE CERTIFICATE

A share certificate once issued by the company binds it in two ways, namely :

➤ **Estoppel as to Title:**

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.

➤ **Estoppel as to Payment:**

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. 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 instalments 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. <u>QUANTUM AND INTERVAL BETWEEN TWO CALLS :</u> 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.

Facts: In this case, Calcutta Stock Exchange. (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)

TRANSFER & TRANSMISSION OF SHARES

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 dematerialised 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 Paisa 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
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	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. 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 TRANSFEE BEFORE REGISTRATION OF TRANSFER	<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)	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 Hostpur 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.
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.
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. CONSEQUENCES OF A FORGED TRANSFER: (i) Transfer null and void: 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) No denial of transfer of shares sold to innocent purchaser: 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) Indemnify the losses: 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 filing 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.

UNIT 3: MEMBERS & SHAREHOLDERS

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 o 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.
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MODES OF ACQUIRING MEMBERSHIP	(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 void ab – initio. But the Company Law Board in Miss Nandita Jain v. Bennett Coleman & Co. Ltd. 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.

There is, however, no objection in law to the guardian of a minor entering into a contract on behalf of a minor, by virtue of the statutory right conferred on the guardian of a minor under Section 8 read with Section 4 to 6 of the Hindu Minority and Guardianship Act, 1956.

Since Section 56 of the Companies Act, 2013 enables execution of transfer deed by or on behalf of the transferor or the transferee, the transfer deed can be executed by a minor through his natural guardian as transferee, and the contract so entered into by a minor through his natural guardian is a binding and valid contract under Section 8 of the Hindu Minority and Guardianship Act, 1956.

The articles of association of a company cannot impose a blanket ban prohibiting transfer of shares in favour of a minor, as such a restriction is unreasonable and not sustainable.

Section 44 of the Companies Act, 2013 provides that shares in a company are movable property and are transferable in the manner provided by the Articles. The expression 'in the manner provided by the articles of association of the company' can only be interpreted to mean the procedure to be adopted for transfer and impose restrictions, which are meaningful and reasonable.

In case, the restriction imposed on transfer to a minor is accepted, it would mean that the shares of a deceased member can never be inherited by the legal heir who might be a minor. This would lead to a highly unjust situation and cannot be accepted as tenable. Accordingly, if the shares can be transmitted in favour of a minor, there is no reason why the shares which are fully paid-up and in respect of which no financial liability devolves on the minor are to be held as not transferable merely because of the ban imposed in the articles of association [Saroj v. Britannia Industries Ltd.]

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 MEMBER	OF	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 :- (1.) Not to have his financial obligation increased by the company without his consent. (2.) To transfer his shares. (3.) To have a share certificate issued to him in respect of his shares. (4.) To vote on resolutions at meetings of the company. (5.) To inspect various registers of the company. (6.) To requisition an extraordinary general meeting of the company. (7.) To receive notice of general meetings and to attend and speak at general meetings. (8.) To appoint proxy and inspect proxy registers. (9.) To demand for poll. (10.) To appoint the representative to attend and vote at general meetings of the company on its behalf, if the member is a body corporate. (11.) To require the company to circulate his resolution. (12.) To enjoy the profits of the company in the shape of dividend. (13.) To elect directors and thus to participate in the management through them. (14.) 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'	AND	A member is a person whose name appears on the Register of Members of

'SHAREHOLDER'	the company. Whereas the shareholder is a person who holds the shares of the Company. Ordinarily, these terms are used interchangeably 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.
SHAREHOLDER'S AGREEMENT	- Shareholders' agreement is a <u>contractual arrangement</u> between the shareholders of a company describing how the company should be operated and the defining inter-se shareholders' rights and obligations. - SHAs are the result of <u>mutual understanding</u> among the shareholders of a company to which, the company generally becomes a consenting party. - Such agreements are specifically drafted to <u>provide specific rights, impose definite restrictions over and above those provided by the Companies Act.</u> - SHA creates personal obligation between the members signing such agreement however, such agreements do not become a regulation of the company in the way the provisions of Articles are. - While shareholders' agreements are enforceable in England regardless of whether they have been incorporated in the articles of association of the company, in India courts have either refused to recognize clauses in shareholders agreements or, even when consistent with company legislation, enforced such clauses only if they have been incorporated in the articles of association of the company. - There is a series of rulings where the courts have upheld that in case of any conflict between the Articles and the SHA, the former (i.e Articles) will always prevail. - The Supreme Court in V.B. Rangaraj v. V.B. Gopalakrishnan held that a restriction which is not specified in the articles of association is not binding either on the company or on the shareholders. This decision was reiterated by the Bombay High Court in IL & FS Trust Co. Ltd. v. Birla Perucchini Ltd. - In Indian context, while the landmark decision of the Supreme Court in V.B. Rangaraj case mentioned above is often cited in the context of shareholders' agreements, most other decisions have been rendered by the High Courts in various states especially the Bombay High Court. The decisions on shareholders' agreements are not uniformly inclined in a direction. The High Court decisions are limited in their applicability as they are susceptible to disagreements by other High Courts, thereby conferring limited precedential value. It is difficult to come to clear and crisp answers as to enforceability of shareholders' agreements.
VETO POWER	A right is inherent. Shareholders rights refer to rights enshrined in the constitutional document of the company or as provided by the law. A

	power has its genesis under the provisions of law. • As per the provisions of the Companies Act, 2013 there are some resemblance where the management can take decisions own their own, by virtue of law. However, there are some instances where the consent of the shareholders is mandatory to approve any decision or transaction which is said to be as the veto power or veto right of shareholders of the company. • The instance where the law provides veto power to shareholders is in case of class action suits. Section 245 of Companies Act, 2013 provides for class action to be instituted against the company as well as the auditors of the company. • Under the provisions of sub-section (3) of Section 245, in the case of a company having a share capital, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than such percentage 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;
VETO POWER VS. CASTING VOTE	• Veto power is different than casting vote of Chairman. • Casting vote is applicable on in case of equality of votes in favour and against. In case of equality the Chairman may give vote either in favour or against the resolution and it can be carried accordingly. • Veto power has not been defined in Companies Act. However, dictionary meaning of veto power is: "to refuse to admit or approve; specifically: to refuse assent to (a legislative bill) so as to prevent enactment or cause reconsideration."

UNIT 4: DEBT INSTRUMENTS DEBENTURES

POWER COMPANY BORROW	OF TO	The power of the company to borrow is exercised by its directors, who cannot borrow more than the sum authorized (covered under the Chapter of Directors). The powers to borrow money and to issue debentures can only be exercised by the directors at a duly convened meeting. The Board of Directors cannot borrow money in excess of the aggregate of the paid up share capital and free reserves of the company apart from temporary loans. The prior approval of shareholders via Special Resolution is required in case the company exceeds the above limits of borrowing. <u>UNAUTHORIZED OR ULTRA VIRES BORROWING:</u> Where a company borrows without the authority as given in the AOA or beyond the amount set out in the articles, it is an ultra vires borrowing. In such a case, the contract is void and the lender cannot sue the company for the return of the loan. The securities given for such ultra vires loans are also void and inoperative. (Directors will be personally liable for such acts) The following remedies are available to the lender in case of ultra vires borrowing: i) Injunction & Recovery: The lender can obtain an Injunction (Stay) Order from the court and recover any property which the company has bought with borrowed amount. ii) Suit Against Directors: In case of ultra vires borrowing, the lender may be able to sue the directors for breach of warranty of authority, especially if directors deliberately misrepresented their authority. iii) Subrogation: Where the money of an ultra vires borrowing has been used to pay off debts of the company, he would be subrogated to the position of the credit paid off and to that extent would have the right to recover his loan from the company. <u>INTRAVIRES BORROWING BUT OUTSIDE THE SCOPE OF AGENT'S (DIRECTORS) AUTHORITY:</u> A Distinction should always be made between a company's borrowing powers and authority of the directors to borrow. Where the directors borrow money beyond their authority and the borrowing is not ultra vires the company, such borrowing is called Intra Vires borrowing but outside the scope of Agent's Authority. The company will be liable to such borrowing if the borrowing is within the director's ostensible authority and the lender acted in the good faith or if the transaction was ratified by the company. Case Law: <u>V.K.R.S.T Firm vs. Oriental Investment Trust Ltd (1944)</u> Facts: Under the authority of the company, its Managing Director borrowed large sums of money and misappropriated it. Such borrowed amount is within the limit of paid up share capital and free reserves of the company. Judgment: in this case, the company was held liable stating that where the borrowing is within the powers of the company, the lender will not be prejudiced simply because its officer have applied the loan to unauthorized activities provided the lender had no knowledge of the intended misuse.
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	Case Law: <u>T. R Pratt Ltd vs. E. D Sasson and Co Ltd (1936)</u> Facts: There was no limit on the borrowing for business in the memorandum of the company. But the directors could not borrow beyond the limit of issued share capital of the company without the sanction of the members in general meeting. The directors borrowed money from the plaintiff beyond their powers. Judgment: it was held that the money having been borrowed and used for the benefit of the principle either in paying its debts or for its legitimate business, the company cannot repudiate its liability on the ground that the agent had no authority from the company to borrow.
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> <i>(a) the instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934; and</i> <i>(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;”</i> * Inserted by Companies Amendment Act, 2017
TYPES OF DEBENTURES	1) <u>ON THE BASIS OF SECURITY</u> a. Secured debentures: Secured by charge (Fixed or Floating) on some or all of the assets. Normally, Fixed Charge is created on Fixed Assets like Land & Building, Plant & Machinery, etc. Floating Charge is created on current assets like Stock & Debtors. b. Unsecured debentures : Not secured by any charge upon any assets 2) <u>ON THE BASIS OF CONVERTIBILITY</u> a. Convertible debentures: That can be converted into Equity Shares after a certain period of time at the option of the holder. It can be Fully Convertible (FCD) or Partly Convertible (PCD). b. Non - Convertible debentures (NCD): There is no option to the holder for conversion into Equity Shares. 3) <u>ON THE BASIS OF PERMANENCE:</u> a. Redeemable debentures: These types of debentures are redeemable after a specified period of time in lump sum or in instalments during the lifetime of the company. b. Irredeemable debentures (Perpetual debentures): These types of debentures are not redeemable during the lifetime of company. These are redeemable at the time of liquidation of company. Cannot be issued as per Companies Act, 2013. 4) <u>ON THE BASIS OF NEGOTIABILITY: (TRANSFERABILITY)</u> a. Registered debentures: these are those which are payable to the person whose name appears in the Register of Debenture Holders. They can be transferred only by executing a transfer deed. Interest is paid to the registered holders.

	b. Non registered debentures (Bearer Debentures): These are payable to the bearer thereof. These can be transferred by mere delivery. Interest is paid to the person who produces the interest coupon attached to such debentures. 5) ON THE BASIS OF PRIORITY OF CHARGE a. First mortgage: These have the first claim on the assets charged. b. Second mortgage: These have the second claim on the assets charged.
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 Securitised 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 (SECTION 71)	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. <u>COMPLIANCE FOR ISSUE OF SECURED DEBENTURES</u> (a) <u>Redemption period:</u> 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, Infrastructure Finance & Companies Infrastructure Debt Fund Non-Banking Financial companies may issue secured debentures for a period exceeding 10 years but not exceeding 30 years. (b) <u>Creation of Charge:</u> 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) <u>Appointment of Debenture Trustee:</u> 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) <u>Creation of Charge in favour of Debenture Trustee</u> : 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. <u>CREATION OF DEBENTURE REDEMPTION RESERVE (DRR)</u> 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 comply with the requirements with regard to Debenture Redemption Reserve (DRR) and investment or deposit of sum in respect of debentures maturing during the year ending on the 31st day of March of next year, in accordance with the conditions given below:-

(a) Debenture Redemption Reserve shall be created out of profits of the company available for payment of dividend;

(b) the limits with respect to adequacy of Debenture Redemption Reserve and investment or deposits, as the case may be, shall be as under:-

(i) Debenture Redemption Reserve is not required for debentures issued by All India Financial Institutions regulated by Reserve Bank of India and Banking Companies for both public as well as privately placed debentures;

(ii) For other Financial Institutions within the meaning of clause (72) of section 2 of the Companies Act, 2013, Debenture Redemption Reserve shall be as applicable to Non -Banking Finance Companies registered with Reserve Bank of India.

(iii) For listed companies (other than All India Financial Institutions and Banking Companies as specified in sub-clause (i)), Debenture Redemption Reserve is not required in the following cases -

(A) in case of public issue of debentures -

A. for NBFCs registered with Reserve Bank of India under section 45- IA of the RBI Act, 1934 and for Housing Finance Companies registered with National Housing Bank;

B. for other listed companies;

(B) in case of privately placed debentures, for companies specified in sub items A and B.

(iv) for unlisted companies, (other than All India Financial Institutions and Banking Companies as specified in sub-clause (i)) -

(A) for NBFCs registered with RBI under section 45-IA of the Reserve Bank of India Act, 1934 and for Housing Finance Companies registered with National Housing Bank, Debenture Redemption Reserve is not required in case of privately placed debentures.

(B) for other unlisted companies, the adequacy of Debenture Redemption Reserve shall be ten percent. of the value of the outstanding debentures;

(v) In case a company is covered in item (A) or item (B) of sub-clause (iii) of clause (b) or item (B) of sub-clause (iv) of clause (b), it shall on or before the 30th day of April in each year, in respect of debentures issued by a company covered in item (A) or item (B) of sub-clause (iii) of clause (b) or item (B) of sub-clause (iv) of clause (b), invest or deposit, as the case may be, a sum which shall not be less than fifteen per cent., of the amount of its debentures maturing during the year, ending on the 31st day of March of the next year in any one or more methods of investments or deposits as provided in sub-clause (vi):

Provided that the amount remaining invested or deposited, as the case may be, shall not at any time fall below fifteen percent. of the amount of the debentures maturing during the year ending on 31st day of March of that year.

(vi) for the purpose of sub-clause (v), the investments, as the case may be, are as follows: -

(A) in deposits with any scheduled bank, free

(B) in unencumbered securities of the Central methods of deposits or from any charge or lien; Government or any State Government;

(C) in unencumbered securities mentioned in sub-clause (a) to (d) and (ee) of section 20 of the Indian Trusts Act, 1882;

(D) in unencumbered bonds issued by any other company which is notified under sub-clause (f) of section 20 of the Indian Trusts Act, 1882 :

Provided that the amount invested or deposited as above shall not be used for any purpose other than for redemption of debentures maturing during the year referred above.

(c) in case of partly convertible debentures, Debenture Redemption Reserve shall be created in respect of non-convertible portion of debenture issue in accordance with this sub-rule.

(d) the amount credited to Debenture Redemption Reserve shall not be utilized by the company except for the purpose of redemption of debentures.

[Substituted by The Companies (Share Capital and Debentures) Amendment Rules, 2019. Dated 16th August, 2019]

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 :

(i) Beneficially holds shares in the company;

(ii) Is a promoter, director or key managerial personnel or any other officer or an employee of the company or its holding, subsidiary or associate company;

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

(iv) Is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;

(v) Has furnished any guarantee in respect of the principal debts secured by the debentures or interest thereon;

	(vi) Has any pecuniary relationship with the company amounting to two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year; (vii) is a relative of any promoter or any person who is in the employment of the company as a director or key managerial personnel; <u>DUTIES OF DEBENTURES TRUSTEES</u> 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. <u>DEBENTURE CERTIFICATE:</u> 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. <u>REGISTER OF DEBENTURE HOLDERS:</u> Every company has to keep an Index and register of debenture holders. <u>CLOSURE OF REGISTER OF DEBENTURES</u> (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.
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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
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	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	WHAT IS DEPOSITS?[SECTION 2(31)] Deposit <i>includes</i> any receipt of money by way of deposit or loan or in any other form by a company, <i>but does not include</i> such categories of amount as may be prescribed in consultation with the Reserve Bank of India. WHAT IS NOT A DEPOSIT? (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 to the company at the time of giving the money, a declaration in</i>

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 fulfilment 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: [Section 73(2)]</u> 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 Form DPT-1 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.

Exemption for Private Companies

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).

❖ ACCEPTANCE OF DEPOSITS FROM PUBLIC:

Eligible companies, may accept deposits from persons other than its members

- subject to the fulfilment 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 FOR ACCEPTANCE OF PUBLIC DEPOSITS	Eligible Company means a public company, having : (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 fulfils 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. So, total deposits that can be accepted is 35% (10%+25%) 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 20% 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 20% of the amount of deposits maturing during the 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	OF	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	OF &	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	OF	(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)]
RETURN OF DEPOSITS	OF	Every company to which these rules apply, shall on or before the 30 th 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 31 st day of March of that year duly audited by the auditor of the company.

	Explanation.- It is hereby clarified that Form DPT-3 shall be used for filing return of deposit or particulars of transaction not considered as deposit or both by every company other than Government 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 3 years from such commencement or on or before the expiry of the period for which the deposits were accepted, whichever is earlier; Provided that renewal of any such deposits shall be done in accordance with the provisions of Chapter V and rules made thereunder; Clause (b) Substituted by Companies Amendment act, 2017 w.e.f 15.08.2018 vide notification dated 05.07.2018. Earlier the Clause (b) was as under: 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 but which may extend to ₹ 2 Crores;

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.

Penalty & Prosecution (Sec. 447):

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.

If the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years.

*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.*

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 5: CHARGES

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. <u>EFFECT OF CRYSTALLIZATION OF A FLOATING CHARGE</u> 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;
- (v) The supplier of goods to the company under a hire-purchase agreement on terms that goods are to remain the property of the seller until they are paid for in full, has priority over the floating charge.

Debenture – holders with a floating charge do not, therefore, enjoy the same rights as the secured creditors, for claims against the company.

The deed creating the floating charge may, however, contain a clause restricting the power of the company to create charges in priority to or paripassu with it. But even in such a case a person who takes mortgage without notice of floating charge gets priority. But such a contingency can be safeguarded by registering the charge.

RESTRAINT ON THE POWER TO CREATE CHARGES WITH PRIORITY TO A FLOATING CHARGE

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.

INVALIDITY OF FLOATING CHARGE

A floating charge remains afloat till the commencement of the winding up of the Company or a floating charge can also be crystallized by the intervention of the debenture holders or the creditors. A floating charge is valid only against the unsecured creditors, whether in a winding-up or otherwise. But the provision of this Act prevents an unsecured creditor to get priority over the other creditors by obtaining a floating charge when he learns that the company's liquidation is imminent.

Section 332: A floating charge on the property of the company, which is created within 12 months immediately preceding the commencement of the winding up proceedings of a company, shall be invalid, unless it is proved that the company was solvent immediately after the creation of

	the 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. The ROC shall issue a certificate of registration after registering the charge in favor of the person who has created the 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 Act 2019, 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 Act 2019, 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 Act 2019, 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; [Companies Amendment Act 2019 w.e.f 2nd November 2018] 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> FAILURE BY COMPANY TO REGISTER THE CHARGE:(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 any company is in default in complying with any of the provisions of this Chapter, the company shall be liable to a penalty of five lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees. 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. <i>(Penalty changed & Imprisonment removed by Companies Amendment Act, 2020 w.e.f. 21.12.2020)</i>
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. SATISFACTION PROCESS 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.
RECTIFICATION BY CENTRAL GOVERNMENT IN REGISTER OF 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. (Substituted by Companies Amendment Act 2019 w.e.f 2nd November 2018) 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.
REGISTERS AND RECORDING OF CHARGES	COMPANY'S REGISTER OF CHARGES 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.

INSPECTION OF REGISTRATION OF CHARGES

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

REGISTRAR'S REGISTER OF CHARGES

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 6: DISTRIBUTION OF PROFITS
(Incorporating SS 3 “Dividends”)

MEANING OF DIVIDEND	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. Note: Until and unless dividend is declared, the shareholder has no claim against the company.
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>
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)	1. Dividend should be paid within thirty days of declaration. 2. 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. 3. Dividend should be paid out of such bank account within thirty days of declaration. 4. Dividend should be paid in cash, not in kind. 5. 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.

		6. 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 CASE ABSENCE OR INADEQUACY OF PROFITS	IN OR OF 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 fulfilment 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. Transfer of dividend to a Special Account: 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. Transfer to Investors Education and Protection Fund (IEPF): 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 : (a) Amounts in the unpaid dividend accounts of companies; (b) Unpaid or unclaimed application moneys received by companies for allotment of any securities and due for refund; (c) Unpaid or unclaimed amount of matured deposits with companies; (d) Unpaid or unclaimed amount of matured debentures with companies; (e) The interest accrued on the account referred to in clauses (a) to (d); (f) 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 (g) The interest or other income received out of the investments made from the Fund. (h) sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years; (i) redemption amount of preference shares remaining unpaid or unclaimed for seven or more years; (j) 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; (k) such other amount as may be prescribed: <u>UTILIZATION OF INVESTOR EDUCATION AND PROTECTION FUND</u> The amount of IEPF shall be utilized for : (a) The refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon; (b) Promotion of investors' education, awareness and protection; (c) 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; (d) 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.

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)	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.

UNIT 7: CORPORATE SOCIAL RESPONSIBILITY

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. There is no bifurcation of Listed or Unlisted, Public or Private. All types of Companies can be covered. 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) A private company having only two directors on its Board shall constitute its CSR Committee with two such directors; With respect to a foreign company covered under these rules, the CSR Committee shall comprise of at least two persons of which one person shall be as specified under clause (d) of sub-section (1) of section 380 of the Act and another person shall be nominated by the foreign company. 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 the 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,
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Scope increased/relaxed by adding the words "in areas or subject specified".

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:—

- (i) 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;
- (ii) Promoting education including special education and employment enhancing vocation skills especially among children, women and others;
- (iii) promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;
- (iv) 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;
- (v) Protection of national heritage, art and culture including restoration of building and sites of historical important and works of art, setting up public libraries; promotion and development of traditional art and handicrafts;
- (vi) measures for the benefit of armed forces veterans, war widows and their dependents, Central Armed Police Forces (CAPF) and Central Para Military Forces (CPMF) veterans, and their dependents including widows;
- (vii) training to promote rural sports, nationally recognised sports, paralympic sports and olympic sports;
- (viii) Contribution to the Prime Minister's National Relief Fund or Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES 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.
- (ix) (a) Contribution to incubators or research and development projects in the field of science, technology, engineering and medicine, funded by the Central Government or State Government or Public Sector Undertaking or any agency of the Central Government or State Government; and
(b) Contributions to public funded Universities; Indian Institute of

	Technology (IITs); National Laboratories and autonomous bodies established under Department of Atomic Energy (DAE); Department of Biotechnology (DBT); Department of Science and Technology (DST); Department of Pharmaceuticals; Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH); Ministry of Electronics and Information Technology and other bodies, namely Defence Research and Development Organisation (DRDO); Indian Council of Agricultural Research (ICAR); Indian Council of Medical Research (ICMR) and Council of Scientific and Industrial Research (CSIR), engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals (SDGs). <i>(clause ix substituted w.e.f. 24.08.2020)</i> (x) Rural Development Projects; (xi) Slum area development; (xii) Disaster Management, including, relief, rehabilitation and reconstruction activities. 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 fulfilment 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 POLICY RULES 2014 (Important points)	<u>Rule 2: Definition</u> “CSR Policy” relates to the activities to be undertaken by the company in areas or subjects specified in Schedule VII to the Act and the expenditure thereon, excluding activities undertaken in pursuance of normal course of business of a company; Provided that any company engaged in research and development activity of new vaccine, drugs and medical devices in their normal course of business may undertake research and development activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22 and 2022-23 subject to the conditions that- (i) such research and development activities shall be carried out in collaboration with any of the institutes or organisations mentioned in item (ix) of Schedule VII to the Act. (ii) details of such activity shall be disclosed separately in the Annual Report on CSR included in the Board's Report. <i>(Proviso Inserted w.e.f. 24th August 2020)</i> <u>Rule 3(2)</u> Every company which ceases to be a company covered under subsection (1) of section 135 of the Act for three consecutive financial years shall not be required to - (a) constitute a CSR Committee; and (b) comply with the provisions contained in sub-section (2) to (5) of the said section, till such time it meets the criteria specified in sub-section (1) of section 135. <u>Rule 4(6)</u> Companies may build CSR capacities of their own personnel as well as those of their Implementing agencies through Institutions with established track records of at least three financial years but such expenditure "including expenditure on administrative overheads," shall not exceed five percent of total CSR expenditure of the company in one financial year. <u>Rule 6 CSR Policy:</u> (1) The CSR Policy of the company shall, inter-alia, include the following namely :- (a) a list of CSR projects or programs which a company plans to undertake areas or subjects specified in of the Schedule VII of the Act, specifying modalities of execution of such project or programs and

	implementation schedules for the same; and (b) monitoring process of such projects or programs: ~~Provided that the CSR activities does not include the activities undertaken in pursuance of normal course of business of a company.~~ Provided further that the Board of Directors shall ensure that activities included by a company in its Corporate Social Responsibility Policy are related to the areas or subjects specified in Schedule VII of the Act. <i>(First proviso deleted w.e.f. 19.09.2020)</i> (2) The CSR Policy of the company shall specify that the surplus arising out of the CSR projects or programs or activities shall not form part of the business profit of a company.
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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?

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:

(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.

COVID-19 related Frequently Asked Questions (FAQs) on Corporate Social Responsibility (CSR)
General Circular No. 15/2020 dated 10.04.2020

Whether contribution made to 'PM CARES Fund' shall qualify as CSR expenditure?	Contribution made to 'PM CARES Fund' shall qualify as CSR expenditure under item no (viii) of Schedule VII of the Companies Act, 2013 and it has been further clarified vide Office memorandum F. No. CSR-05/1/2020-CSR-MCA dated 28th March, 2020
Whether contribution made to 'Chief Minister's Relief Funds' or 'State Relief Fund for COVID-19' shall qualify as CSR expenditure?	'Chief Minister's Relief Fund' or 'State Relief Fund for COVID-19' is not included in Schedule VII of the Companies Act, 2013 and therefore any contribution to such funds shall not qualify as admissible CSR expenditure.
Whether contribution made to State Disaster Management	Contribution made to State Disaster Management Authority to combat COVID-19 shall qualify as CSR expenditure

Authority shall qualify as CSR expenditure?	under item no (xii) of Schedule VII of the 2013 and clarified vide general circular No. 10/2020 dated 23rd March, 2020.
Whether spending of CSR funds for COVID-19 related activities shall qualify as CSR expenditure?	Ministry vide general circular No. 10/2020 dated 23rd March, 2020 has clarified that spending CSR funds for COVID-19 related activities shall qualify as CSR expenditure. It is further clarified that funds may be spent for various activities related to COVID-19 under items nos. (i) and (xii) of Schedule VII relating to promotion of health care including preventive health care and sanitation, and disaster management. Further, as per general circular No. 21/2014 dated 18.06.2014, items in Schedule VII are broad based and may be interpreted liberally for this purpose.
Whether payment of salary/wages to employees and workers, including contract labour, during the lockdown period can be adjusted against the CSR expenditure of the companies?	Payment of salary/ wages in normal circumstances is a contractual and statutory obligation of the company. Similarly, payment of salary/ wages to employees and workers even during the lockdown period is a moral obligation of the employers, as they have no alternative source of employment or livelihood during this period. Thus, payment of salary/ wages to employees and workers during the lockdown period (including imposition of other social distancing requirements) shall not qualify as admissible CSR expenditure.
Whether payment of wages made to casual /daily wage workers during the lockdown period can be adjusted against the CSR expenditure of the companies?	Payment of wages to temporary or casual or daily wage workers during the lockdown period is part of the moral/ humanitarian/ contractual obligations of the company and is applicable to all companies irrespective of whether they have any legal obligation for CSR contribution under section 135 of the Companies Act 2013. Hence, payment of wages to temporary or casual or daily wage workers during the lockdown period shall not count towards CSR expenditure.
Whether payment of exgratia to temporary /casual /daily wage workers shall qualify as CSR expenditure?	If any ex-gratia payment is made to temporary / casual workers/ daily wage workers over and above the disbursement of wages, specifically for the purpose of fighting COVID 19, the same shall be admissible towards CSR expenditure as a onetime exception provided there is an explicit declaration to that effect by the Board of the company, which is duly certified by the statutory auditor.

UNIT 8: ACCOUNTS, AUDIT & AUDITORS

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 :- (a) The company must keep the books of account., (b) The books of account must show all money received and expended, sales and purchases of goods and the assets and liabilities of the company. (c) The books of account must be kept on accrual basis and according to the double entry system of accounting. (d) 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 : (a) All sums of money received and expended by a company and matters in relation to which the receipts and expenditure take place; (b) All sales and purchases of goods and services by the company; and (c) 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) <u>Director:</u> 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) <u>Inspection by the ROC/Officers of SEBI:</u> 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) <u>Member's right of inspection of accounting records:</u> 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) <u>Auditor's right of inspection of accounts:</u> 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	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 [Section 128(6)]	If the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person of a company charged by the Board with the duty of complying with the provisions of this section, contravenes such provisions, 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.~~ <i>(Imprisonment removed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</i>
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 (SECTION 129)	❖ The financial statements shall: ○ give a true and fair view of the state of affairs of the company or companies, ○ Comply with the accounting standards notified under section 133 and ○ 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. ❖ <i>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):</i> <i>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:</i> <i>Provided further that the Central Government may provide for the consolidation of accounts of companies in such manner as may be prescribed.</i>

- ❖ **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 [Section 2(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 Act 2019, shall be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement. [Companies Amendment Act 2019 w.e.f 2nd November 2018]
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. (1) Without prejudice to the provisions contained in this Act the accounts so revised or re-cast under sub-section (1) shall be final. (2) 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) (NFRA Rules, 2018)	- 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. - The National Financial Reporting Authority shall perform its functions through such divisions as may be prescribed.
OBJECTIVES OF NFRA	Sub Section (2) of 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. <u>Function & Duties of NFRA: (Rule 4)</u> (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.
ANNUAL RETURN BY AUDITOR	Every auditor referred to in rule 3 shall file a return with the Authority on or before 30th November every year in Form NFRA-2.
PUNISHMENT FOR CONTRAVENTION	If a company or any officer of a company or an auditor or any other person contravenes any of the provisions of these rules, the company and every officer of the company who is in default or the auditor or such other person shall be punishable as per the provisions of section 450 of the Act.
CG TO	The Central Government may prescribe the standards of accounting or any

PRESCRIBED ACCOUNTING STANDARDS (SECTION 133)	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) SIGNING OF FINANCIAL STATEMENTS: 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;
- Provided that the requirement of furnishing information and details under this sub-rule shall not apply to a government company engaged in producing defence equipment
- (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 REPORT: 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 is in default in complying with the provisions of this section, the company shall be liable to a penalty of three lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees. <i>(Penalty changed & Imprisonment removed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</i>
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 a company fails to file the copy of the financial statements under sub-section (1) or sub-section (2), as the case may be, before the expiry of the period specified therein, the company shall be liable to a penalty of ten thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of two lakh rupees, and 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 ten 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 fifty thousand rupees. <i>(Penalty changed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</i>
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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><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> <u>(d) 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: </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	<u>(d) 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:
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	<u>(d) 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	(g) a person who is in full time employment elsewhere or a

	EMPLOYMENT ELSEWHERE OR OF BREACH CEILING	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 (June 2016) &	(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. 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.
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	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 OTHER THAN GOVERNMENT COMPANY	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. 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- COMPANIES OTHER THAN GOVERNMENT COMPANY: (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 RESIGNATION OF AN

	AUDITOR, 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; GOVERNMENT COMPANY: (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 two lakh rupees. <i>(Penalty lowered by Companies Amendment Act 2020 w.e.f. 21.12.2020; earlier it was maximum of five lakh rupees)</i>
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:

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.

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.

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. (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:
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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.

CEILING ON NUMBER OF AUDITS

It has been mentioned earlier that before appointment is given to any auditor, the company must obtain a certificate from him to the effect that the appointment, if made, will not result in an excess holding of company audit by the auditor concerned over the limit laid down in section 141 (3)(g) of the Companies Act, 2013 which prescribes that 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;

In the case of a firm of auditors, it has been further provided that 'specified number of companies' shall be construed as the number of companies specified for every partner of the firm who is not in full time employment elsewhere.

This limit of 20 company audits is per person. In the case of an audit firm having 3 partners, the overall ceiling will be $3 \times 20 = 60$ company audits. Sometimes, a chartered accountant is a partner in a number of auditing firms. In such a case, all the firms in which he is partner or proprietor will be together entitled to 20 company audits on his account. Subject to the overall ceiling of company audits, how they allocate the 20 audits between themselves is their affair.

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)]. It may be noted that according to section 2(59) of the Act, the term 'officer' includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act; The phrase 'books, accounts and vouchers' includes all books which have any bearing, or are likely to have any bearing on the accounts, whether these be the usual financial books or the statutory or statistical books; memoranda books, e.g., inventory books, costing records and the like may also be inspected by the auditor. Similarly the term 'voucher' includes all or any of the correspondence which may in any way serve to vouch for the accuracy of the accounts. Thus, the right of access is not restricted to books of account alone and it is for the auditor to determine what record or document is necessary for the purpose of the audit. The right of access is not limited to those books and records maintained at the registered or head office so that in the case of a company with branches, the right also extends to the branch records, if the auditor considers it necessary to have access thereto. [Section 143(8)] 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. [Section 143(1)]
RIGHT TO OBTAIN INFORMATION AND EXPLANATION	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. In

FROM OFFICERS	the absence of such power, the auditor would not be able to obtain details of amount collected by the directors, etc. from any other company, firm or person as well as of any benefits in kind derived by the directors from the company, which may not be known from an examination of the books. It is for the auditor to decide the matters in respect of which information and explanations are required by him. When the auditor is not provided the information required by him or is denied access to books, etc., his only remedy would be to report to the members that he could not obtain all the information and explanations he had required or considered necessary for the performance of his duties as auditors.
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. '
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DUTIES OF AUDITORS

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 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 :
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	“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	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 auditor's 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)]	❖ 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 does not comply with the provisions of sub-section (12), he shall,— (a) in case of a listed company, be liable to a penalty of five lakh rupees; and (b) in case of any other company, be liable to a penalty of one lakh rupees. <i>(Penalty changed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</i> ❖ 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.~~

	<u>(Imprisonment removed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</u> (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)	• 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. • 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

Every: L U: S: 50 L:100 T: 250	(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; or (d) Every company having outstanding loans or borrowings from banks or public financial institutions of ₹ 100 Crores or more. (Inserted w.e.f 01.04.2020) Explanation :- For the purposes of this sub-rule, it is hereby clarified that the paid up share capital, turnover, or outstanding loans or borrowings as the case may be, existing on the last date of latest audited financial statement shall be taken into account. (Inserted w.e.f 01.04.2020) Who will conduct the Secretarial Audit of the Companies? 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. If Provisions of this sections are Violated? If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section, the company, every officer of the company or the company secretary in practice, who is in default, shall be liable to a penalty of two lakh rupees. <i>(Penalty changed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</i>
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. Who will conduct the Cost Audit of the Companies? 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. The Companies (Cost Records and Cost Audit) Rules, 2014 (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 the cost records of a company, shall submit the cost audit report along with his or its reservations or qualifications or observations or suggestion in Form CRA – 3.
COST AUDIT REGULATIONS Regulated: O:50 I:25 Unregulated: O:100 I:35	A. REGULATED SECTORS Companies having an overall turnover from all its products and services of ₹ 50 Crores or more during the immediately preceding financial year AND The aggregate turnover of the individual product or products or service or services for which cost records are required to be maintained is ₹ 25 Crores or more. B. NON REGULATED SECTORS Companies having an overall turnover from all its products and services of ₹ 100 Crores or more during the immediately preceding financial year AND The aggregate turnover of the individual product or products or service or services for which cost records are required to be maintained is ₹ 35 Crores or more.
COST RECORDS	• REGULATED SECTORS & UNREGULATED SECTORS BOTH Companies having an overall turnover from all its products and services of ₹ 35 Crores or more during the immediately preceding financial year.
EXEMPTION FROM THE REQUIREMENTS	The Requirement for cost audit under these rules shall not apply to a company which is covered rule 3, and- ○ whose revenue from exports, in foreign exchange, exceeds seventy five per cent of its total revenue; or ○ which is operating from a special economic zone.

UNIT 9: TRANSPARENCY & DISCLOSURES

ANNUAL REPORT	The annual report is a comprehensive report provided by most public companies to disclose their corporate activities over the past year. The report is typically issued to shareholders and other stakeholders who use it to evaluate the firm's performance including both operating and financial highlights. LISTED COMPANIES: According to Regulation 34 of SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015 [SEBI (LODR)] a listed entity shall submit the annual report to the stock exchange within twenty one working days of it being approved and adopted in the annual general meeting as per the provisions of the Companies Act, 2013. CONTENTS OF ANNUAL REPORT: Such annual report shall contain the following: (a) audited financial statements i.e. balance sheets, profit and loss accounts etc, and Statement on Impact of Audit Qualifications, if applicable; (b) consolidated financial statements audited by its statutory auditors; (c) cash flow statement presented only under the indirect method as prescribed in Accounting Standard-3 or Indian Accounting Standard 7, as applicable, specified in Section 133 of the Companies Act, 2013 read with relevant rules framed thereunder or as specified by the Institute of Chartered Accountants of India, whichever is applicable; (d) directors report; (e) management discussion and analysis report - either as a part of directors report or addition thereto; (f) for the top five hundred listed entities based on market capitalization (calculated as on March 31 of every financial year), Business Responsibility Report describing the initiatives taken by them from an environmental, social and governance perspective, in the format as specified by the Board from time to time: Listed entities other than top five hundred listed companies based on market capitalization and listed entities which have listed their specified securities on SME Exchange, may include the Business Responsibility Reports on a voluntary basis in the format as specified. Further it is provided that the annual report shall contain any other disclosures specified in Companies Act, 2013 along with other requirements as specified in Schedule V of above mentioned regulations. ADDITIONAL DISCLOSURES AS PER SEBI LODR: 1) RELATED PARTY DISCLOSURES: • The listed entity shall make disclosures in compliance with the Accounting Standard on "Related Party Disclosures". • The disclosure requirements shall be as follows: <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 30%; text-align: center;">In the Accounts of</td><td>Disclosures of amounts at the year end and the maximum amount of loans/ advances/ Investments outstanding during the year.</td></tr> <tr> <td style="text-align: center;">Holding Company</td><td> • Loans and advances in the nature of loans to subsidiaries by name and amount. </td></tr> </table>	In the Accounts of	Disclosures of amounts at the year end and the maximum amount of loans/ advances/ Investments outstanding during the year.	Holding Company	• Loans and advances in the nature of loans to subsidiaries by name and amount.
In the Accounts of	Disclosures of amounts at the year end and the maximum amount of loans/ advances/ Investments outstanding during the year.				
Holding Company	• Loans and advances in the nature of loans to subsidiaries by name and amount.				

	- Loans and advances in the nature of loans to associates by name and amount. - Loans and advances in the nature of loans to firms/companies in which directors are interested by name and amount.
Subsidiary Company	Same disclosures as applicable to the parent company in the accounts of subsidiary company.
Holding Company	Investments by the loanee in the shares of parent company and subsidiary company, when the company has made a loan or advance in the nature of loan.

- The above disclosures shall be applicable to all listed entities except for listed banks.

2) MANAGEMENT DISCUSSION & ANALYSIS:

- This section shall include discussion on the following matters within the limits set by the listed entity'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.

Disclosure of Accounting Treatment

Where in the preparation of financial statements, a treatment different from that prescribed in an Accounting Standard has been followed, the fact shall be disclosed in the financial statements, together with the management's explanation as to why it believes such alternative treatment is more representative of the true and fair view of the underlying business transaction.

3) CORPORATE GOVERNANCE REPORT:

The following disclosures shall be made in the section on the corporate governance of the annual report.

(1) A brief statement on listed entity's philosophy on code of governance.

(2) Board of directors:

(a) composition and category of directors (e.g. promoter, executive, non-executive, independent nonexecutive, nominee director - institution represented and whether as lender or as equity investor);

(b) attendance of each director at the meeting of the board of directors and the last annual general meeting;

(c) number of other board of directors or committees in which a directors is a member or chairperson;

(d) number of meetings of the board of directors held and dates on which held;

	(e) disclosure of relationships between directors inter-se; (f) number of shares and convertible instruments held by non- executive directors; (g) web link where details of familiarisation programmes imparted to independent directors is disclosed. <u>DISSEMINATION TO THE SHAREHOLDERS</u> According to Reg 36 of SEBI (LODR) the listed entity shall send the annual report in the following manner to the shareholders: (a) Soft copies of full annual report to all those shareholder(s) who have registered their email address(es) for the purpose; (b) Hard copy of statement containing the salient features of all the documents, as prescribed in Section 136 of Companies Act, 2013 or rules made thereunder to those shareholder(s) who have not so registered; (c) Hard copies of full annual reports to those shareholders, who request for the same. The listed entity shall send annual report to the holders of securities, not less than twenty-one days before the annual general meeting.
BOARD REPORT	• The Board's Report is the most important means of communication by the Board of Directors of a company with its shareholders. • It is a comprehensive document which serves to inform the shareholders about the performance and various other aspects of the company, its major policies, relevant changes in management, future programmes of expansion, modernization and diversification, capitalization or reserves, etc. • The Board's Report enables not only the shareholders but also the lenders, bankers, government and the public to make an appraisal of the company's performance and provides an insight into the future growth and profitability of the company. • The Companies Act, 2013 is based on enhanced disclosures and transparency. The Board's Report is a document, preparation of which requires thorough understanding of the subject. • The Act requires the Board of Directors to disclose on various parameters including the risk management, board evaluation, implementation of Corporate Social Responsibility, a statement of declaration given by independent directors. • The Secretarial Audit Report is also required to be annexed to the Board's Report. • The matters to be included in the Board's Report have been specified in Section 134 of the Companies Act, 2013 and Rule 8 of the Companies (Accounts) Rules, 2014. Apart from this, under Sections 67, 92, 129, 131, 135, 149, 160, 168, 177, 178, 188, 197, 204 of the Companies Act, 2013, relevant information has to be disclosed in the Board's Report. The Board's Report of companies whose shares are listed on a stock exchange must include additional information as specified in the SEBI (LODR), 2015.

ISSUE OF EQUITY SHARES WITH DIFFERENTIAL VOTING RIGHTS	Section 43 of the Act provides that a company limited by shares can issue equity shares with differential rights as to dividend, voting or otherwise in accordance with rules prescribed under Rule 4 of the Companies (Share Capital and Debentures) Rules, 2014. Rule 4(4) of the Companies (Share Capital and Debentures) Rules, 2014, provides that the Board of Directors shall, inter alia, disclose in the Board's Report for the financial year in which the issue of equity shares with differential rights as to dividend, voting or otherwise was completed, the following details, namely:- (a) total number of shares allotted with differential rights; (b) details of the differential rights relating to voting rights and dividends; (c) percentage of shares with differential rights to the total post-issue equity share capital with differential rights issued at any point of time and percentage of voting rights which the equity share capital with differential voting rights shall carry to the total voting rights of the aggregate equity share capital; (d) price at which such shares have been issued; (e) particulars of promoters, directors or key managerial personnel to whom such shares are issued; (f) change in control, if any, in the company consequent to the issue of equity shares with differential voting rights; (g) diluted Earnings Per Share pursuant to the issue of each class of shares, calculated in accordance with the applicable accounting standards; (h) pre and post issue shareholding pattern along with voting rights in the format specified under sub rule (2) of rule 4.
ISSUE OF SWEAT EQUITY SHARES	Already covered in CHAPTER 2: SHARE & SHARE CAPITAL.
EMPLOYEE STOCK OPTION SCHEME	Already covered in CHAPTER 2: SHARE & SHARE CAPITAL.
BUY BACK	Proviso to Section 67(3) read with Rule 16(4) of Companies (Share Capital and Debentures) Rules, 2014 provides that where the voting rights are not exercised directly by the employees in respect of shares to which the scheme for provision of money for purchase of or subscription for shares by employees or by trustees for the benefit of employees relates, the Board of Directors shall, inter alia, disclose in the Board's report for the relevant financial year the following details, namely:- (a) the names of the employees who have not exercised the voting rights directly; (b) the reasons for not voting directly; (c) the name of the person who is exercising such voting rights; (d) the number of shares held by or in favour of, such employees and the percentage of such shares to the total paid up share capital of the company; (e) the date of the general meeting in which such voting power was exercised; (f) the resolutions on which votes have been cast by persons holding such voting power; (g) the percentage of such voting power to the total voting power on each resolution; (h) whether the votes were cast in favour of or against the resolution.
CONSOLIDATED FINANCIAL STATEMENTS	Rule 8(1) of the Companies (Accounts) Rules, 2014 specifies that the Board's Report • shall be prepared on the basis of standalone financial statements of the company. • shall report on the highlights of performance of subsidiaries, associates and joint venture companies and their contribution to the overall performance of the company during the period under report.

	Proviso to Section 129(3) read with Rule 5 of the Companies (Accounts) Rules, 2014 states that the company shall also attach along with its financial statement a separate statement containing the salient features of the financial statements of a company's subsidiary or subsidiaries, associate company or companies and joint venture or ventures in Form AOC-1.
VOLUNTARY REVISION OF FS OR BOARD REPORT	Section 131(1) of the Act provides that revised financial statements or a revised report may be prepared in respect of any of the three preceding financial years where it appears to the directors of a company that the financial statements or the report of the Board, do not comply with the provisions of section 129 or section 134 and the <u>detailed reasons for revision</u> of such financial statements or report should be disclosed in the Board's report in the relevant financial year in which such revision is being made.
RE-APPOINTMENT OF INDEPENDENT DIRECTORS	Subject to the provisions of Section 152, an independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for reappointment <u>on passing of a special resolution</u> by the company and disclosure of such appointment in the Board's report. Thus, if an independent director is appointed by passing a special resolution after completing a term of five years, the Board's report should <u>contain a disclosure of such appointment.</u>
COMPOSITION OF AUDIT COMMITTEE	The Board's report shall disclose the following – • Composition of an Audit Committee • Where the Board had not accepted any recommendation of the Audit Committee, the same shall be disclosed in the report along with the reasons therefor.
RESIGNATION OF DIRECTOR	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 <u>fact of resignation of a director in report</u> of directors laid in the immediately following general meeting by the Company.
VIGIL MECHANISM	Section 177(9) read with Rule 7 of the Companies (Meeting of Board and its Powers) Rules, 2014 provides that every listed company and the following class or classes of companies shall establish a vigil mechanism for their directors and employees to report their genuine concerns or grievances- (a) Companies which accept deposits from the public; (b) Companies which have borrowed money from banks and public financial institutions in excess of fifty crore rupees.
RELATED PARTY TRANSACTIONS	Every contract or arrangement entered into under Section 188(1) <u>shall be referred to</u> 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 (pursuant to Section 134(3)(h) and Section 188(2)).
POLICY ON REMUNERATION OF DIRECTORS, KMP & OTHER EMPLOYEES	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.
DISCLOSURES U/S 134(3)	Already covered in CHAPTER 8: ACCOUNTS, AUDIT & AUDITORS.
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
APPROVAL OF BOARD REPORT	Already covered in CHAPTER 8: ACCOUNTS, AUDIT & AUDITORS.
SIGNING OF BOARD REPORT	Already covered in CHAPTER 8: ACCOUNTS, AUDIT & AUDITORS.
CIRCULATION OF BOARD REPORT	Already covered in CHAPTER 8: ACCOUNTS, AUDIT & AUDITORS.

UNIT 10: AN OVERVIEW OF INTER CORPORATE LOANS, INVESTMENTS, GUARANTEES AND SECURITY, RELATED PARTY TRANSACTIONS

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)	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:

[Companies (Restriction on number of layers) rules, 2017]	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. <i>Explanation.—For the purposes of this sub-section, the word "person" does not include any individual who is in the employment of the company</i>

	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 <i>securities premium account and debit or credit balance of profit and loss account</i>, 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).
CONTRAVENTION WITH THE PROVISIONS [Section 186(3)]	<u>Company:</u> Fine not less than ₹ 25,000 but which may extend to ₹5,00,000. <u>Officer:</u> 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. For the purposes of clause (a) of sub-section (11) of section 186, the expression "business of financing industrial enterprises" shall include, with regard to a Non-Banking Financial Company registered with Reserve Bank of India, "business of giving of any loan to a person or providing any guaranty or security for due repayment of any loan availed by any person in the ordinary course of its business".
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 instalments 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 is in default in complying with the provisions of this section, the company shall be liable to a penalty of five lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees. <i>(Imprisonment removed & penalty changed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</i>
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.
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

RELATED PARTIES (Section 188)

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

[Section 188(1)]

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.

Rule 15 of Companies (meetings of board and its powers) Rules, 2014

For the purposes of first proviso to sub-section (1) of section 188, except with the prior approval of the company by a resolution, a company shall not enter into a transaction or transactions, where the transaction or transactions to be entered into,-

- (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 ten percent or more of the turnover of the company ~~or rupees one hundred 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 ten percent or more of net worth of the company ~~or rupees one hundred 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 ten per cent or more of the turnover of the company, 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 ten percent or more of the turnover of the company ~~or rupees fifty crore, whichever is lower~~ as mentioned in clause (d) and clause (e) respectively of sub-section (1) of section 188:

[Omitted/Substituted by the Companies (Meetings of Board and its Powers) Second Amendment Rules, 2019 Dated 18th November, 2019]

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 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.

(2) In case of wholly owned subsidiary, the resolution is passed by the holding company shall be sufficient for the purpose of entering into the transaction between the wholly owned subsidiary and the holding company.

(3) The explanatory statement to be annexed to the notice of a general meeting convened pursuant to section 101 shall contain the following particulars, namely:-

(a) name of the related party;

(b) name of the director or key managerial personnel who is related, if any;

(c) nature of relationship;

(d) nature, material terms, monetary value and particulars of the contract or arrangements;

(e) any other information relevant or important for the members to take a decision on the proposed resolution.

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

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.*

Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall,—

(i) in case of listed company, be liable to a penalty of twenty-five lakh rupees; and

(ii) In case of any other company, be liable to a penalty of five lakh rupees.

(Imprisonment removed & Penalty changed by Companies Amendment Act 2020 w.e.f. 21.12.2020)

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.

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;

(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.

Penalty for Non – Disclosure: Punishment – upto 1 year or with fine which may extend to ₹ 1,00,000/- or both.

UNIT 11: REGISTERS & RECORDS

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. <u>STATUTORY BOOKS VS. STATISTICAL BOOKS:</u> (June 2012) (Dec 2008) <u>Statutory Books:</u> 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. <u>Statistical Books:</u> 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
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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 <u>more than one-tenth of the total number of members entered in the register of members reside</u>, 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; - Register of members for each class of equity and preference shares (separately); - Register of debenture holders; - Register of any other security holders; and - 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: - Name of the member; - Address; - e – mail address; - Permanent Account Number or CIN; - Father's/Mother's/Spouse's name; - Occupation; - Status; - Nationality; - In case member is a minor, name of the guardian and the date of birth of the member; name and address of nominee; - Date of becoming member; - Date of cessation; - Amount of guarantee and instructions etc. If a company does not maintain a register of members or debenture-holders or other security holders or fails to maintain them in accordance with the provisions of sub-section (1) or sub-section (2), the company shall be liable to a penalty of three lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees. <u>(Penalty Changed by Companies Amendment Act, 2020 w.e.f. 21.12.2020)</u>
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 8 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: - Present Name & Surname in full; - DIN (if KMP not has DIN, then PAN) - Any former name or surname in full; - Date of birth; - Fathers name, mothers name and spouse name (if married); - Residential Address - Nationality - Occupation - Date of Board Resolution in which appointment was made; - Membership Number of ICSI in case of CS; - 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 BENEIFICAL OWNERS IN A COMPANY (SECTION 90)	(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.

Rule 2A. Duty of the reporting company.

(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.

(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:-

(a) shares, or

(b) voting rights, or

(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.

Rule 3: Declaration of significant beneficial ownership under section 90

(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.

(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.

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

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

(Inserted by the Companies (Significant Beneficial Owners) Amendment Rules, 2019 Dated 08.02.2019)

(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.

(Inserted by the Companies (Significant Beneficial Owners) Amendment Rules, 2019 Dated 08.02.2019)

(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;

(Amended by Companies Amendment Act 2019 w.e.f 2nd November 2018)

(9A) The Central Government may make rules for the purposes of this section. **(Inserted by Companies Amendment Act 2019 w.e.f 15.08.2019)**

(10) If any person fails to make a declaration as required under sub-section (1), he shall be liable to a penalty of fifty thousand rupees and in case of continuing failure, with a further penalty of one thousand rupees for each day after the first during which such failure continues, subject to a maximum of two lakh rupees.

(11) If a company, required to maintain register under sub-section (2) and file the information under sub-section (4) or required to take necessary steps under sub-section (4A), fails to do so or denies inspection as provided therein, the company shall be liable to a penalty of one lakh rupees and in case of continuing failure, with a 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 of twenty-five thousand rupees and in case of continuing failure, with a further penalty of two hundred rupees for each day, after the first during which such failure continues, subject to a maximum of one lakh rupees.

(Sub Section 10 & 11 Substituted by Companies Amendment Act, 2020 w.e.f. 21.12.2020)

(12) If any person wilfully 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 AS PER COMPANIES ACT 2013	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 8 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.
PRESERVATION OF REGISTERS & RECORDS AS PER SEBI LODR REGULATION 2015	In case of listed entities SEBI(LODR), requires certain policies to be adopted by the companies for the purpose of preserving documents <u>A. Policy for preservation of documents</u> Regulation 9 of the SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 provides following for preservation of documents: The listed entity shall have a policy for preservation of documents, approved by its board of directors, classifying them in at least two categories as follows- (a) documents whose preservation shall be permanent in nature; (b) documents with preservation period of not less than eight years after completion of the relevant transactions: Provided that the listed entity may keep documents specified in clauses (a)

	and (b) in electronic mode. B. Preservation of documents as per the Archival Policy Further, Regulation 30 of the SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 provides for disclosure of material events or information, which shall be disclosed with or without any application of the guidelines for materiality as specified under sub-regulation (4) of Regulation 30. As per sub-regulation (8) of Regulation 30 every listed entity shall disclose on its website all such events or information as provided under the provisions of Regulation 30 and such disclosures shall be hosted on the website of the listed entity for a minimum period of five years and thereafter as per the archival policy of the listed entity, as disclosed on its website.
ANNUAL RETURN (Section 92)	(1) Every company shall prepare a return (hereinafter referred to as the annual return) in the prescribed form (Every company shall prepare its annual return in Form No. MGT.7.) 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.

Provided that a company shall not be required to attach the extract of the annual return with the Board's report in Form No. MGT.9, in case the web link of such annual return has been disclosed in the Board's report in accordance with sub-section (3) of section 92 of the Companies Act, 2013

(3) 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;*

(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 ten 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 two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default.

(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 liable to a penalty of two lakh rupees.

(Sub Section 5 & 6 Substituted by Companies Amendment Act 2020 w.e.f. 21.12.2020)

UNIT 12: AN OVERVIEW OF CORPORATE REORGANISATION AMALGAMATION

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 REPRESENTATION	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, ⇒ 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.
MERGER & AMALGAMATION OF COMPANIES	<u>TRIBUNAL'S POWER TO CALL MEETING OF CREDITORS OR MEMBERS</u> 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, <u>order a meeting of the creditors or class of creditors or the members or class of members</u>, 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 <i>mutatis mutandis</i>. <u>CIRCULATION OF DOCUMENTS FOR THE MEETINGS:</u> 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 <u>draft of the proposed terms</u> of the scheme drawn up and adopted by the directors of the merging company; (b) <u>confirmation</u> that a copy of the draft scheme has been <u>filed with the Registrar</u>;

(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 shall be cancelled or extinguished;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer;

(d) dissolution, without winding-up, of any transferor company;

(e) the provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement;

(f) where share capital is held by any non-resident shareholder 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 transfer of the employees of the transferor company to the transferee company;

(h) when the transferor company is a listed company and the transferee company is an unlisted company,—

	(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 <i>fee</i>, if any, paid by the transferor company <i>on its authorised capital shall be set-off</i> 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 company fails to comply with sub-section (5), the company and every officer of the company who is in default shall be liable to a penalty of twenty thousand rupees, and where the failure is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such failure continues, subject to a maximum of three lakh rupees. <i>(Imprisonment removed & penalty changed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</i>
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. Merger of small companies/holding and subsidiary companies 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 **issued by the transferor company** 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 **files a declaration of solvency**, in the prescribed form, **with the Registrar** of the place where the registered office of the company is situated; and

(d) the scheme is **approved by majority representing nine-tenths in value** 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.

APPLICATION BY CG TO TRIBUNAL:

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 **scheme is not in public interest or in the interest of the creditors**, it may file an application before the Tribunal **within a period of sixty days** of the receipt of the scheme under sub-section (2) stating its objections and **requesting that the Tribunal may consider the scheme** under section 232.

TRIBUNAL'S ACTION TO CG APPLICATION:

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.

EFFECTS OF REGISTRATION OF SCHEME:

(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.
Purchase of Minority Shareholding (Section 236)	(1) In the event of an acquirer, or a person acting in concert with such acquirer, becoming registered holder of 90% or more of the issued equity share capital of a company, or in the event of any person or group of persons becoming 90% majority or holding 90% of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, such acquirer, person or group of persons, as the case may be, <u>shall notify the company of their intention to buy the remaining equity shares.</u> (2) The acquirer, person or group of persons under sub-section (1) <u>shall offer</u> to the minority shareholders of the company for buying the equity shares held by such shareholders <u>at a price determined on the basis of valuation by a registered valuer</u> in accordance with such rules as may be prescribed. (3) Without prejudice to the provisions of sub-sections (1) and (2), the minority shareholders of the company <u>may offer</u> to the majority shareholders to purchase the minority equity shareholding of the company at the price determined in accordance with such rules as may be prescribed under sub-section (2). (4) The majority shareholders <u>shall deposit</u> an amount equal to the value of shares to be acquired by them under sub-section (2) or sub-section (3), as the case may be, in a <u>separate bank account</u> to be operated by company whose shares are being transferred <u>for at least one year</u> for payment to the minority shareholders and such amount shall be disbursed to the entitled shareholders within sixty days: Provided that such disbursement shall continue to be made to the entitled shareholders for a period of one year, who for any reason had not been made disbursement within the said period of sixty days or if the disbursement have been made within the aforesaid period of sixty days, fail to receive or claim payment arising out of such disbursement. (5) In the event of a purchase under this section, company whose shares are being transferred shall act as a transfer agent for receiving and paying the price to the minority shareholders and for taking delivery of the shares and delivering such shares to the majority, as the case may be. (6) In the absence of a physical delivery of shares by the shareholders within the time specified by the company, the share certificates shall be deemed to be cancelled, and company whose shares are being transferred shall be authorised to issue shares in lieu of the cancelled

shares and complete the transfer in accordance with law and make payment of the price out of deposit made under sub-section (4) by the majority in advance to the minority by despatch of such payment.

(7) In the event of a majority shareholder or shareholders requiring a full purchase and making payment of price by deposit with the company for any shareholder or shareholders who have died or ceased to exist, or whose heirs, successors, administrators or assignees have not been brought on record by transmission, the right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be **available for a period of three years** from the date of majority acquisition or majority shareholding.

(8) Where the shares of minority shareholders have been acquired in pursuance of this section and as on or prior to the date of transfer following such acquisition, the shareholders holding **seventy-five per cent. or more minority equity shareholding** negotiate or reach an understanding on a higher price for any transfer, proposed or agreed upon, of the shares held by them without disclosing the fact or likelihood of transfer taking place on the basis of such negotiation, understanding or agreement, the majority shareholders shall share the additional compensation so received by them with such minority shareholders on a pro rata basis.

Explanation.—For the purposes of this section, the expressions “acquirer” and “person acting in concert” shall have the meanings respectively assigned to them in clause (b) and clause (e) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

(9) When a shareholder or the majority equity shareholder fails to acquire full purchase of the shares of the minority equity shareholders, then, the provisions of this section **shall continue to apply to the residual minority equity shareholders**, even though,—

(a) the shares of the company of the residual minority equity shareholder had been delisted; and

(b) the period of one year or the period specified in the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, had elapsed.

Rule 26A of Companies (Compromises, Arrangements and Amalgamations) Rules 2016 [inserted w.e.f. 17.12.2020]

Purchase of minority shareholding held in demat form:

(1) The company shall within two weeks from the date of receipt of the amount equal to the price of shares to be acquired by the acquirer, under section 236 of the Act, verify the details of the minority shareholders holding shares in dematerialised form.

(2) After verification under sub-rule (1), the company shall send notice to such minority shareholders by registered post or by speed post or by courier or by email about a cut-off date, which shall not be earlier than one month after the date of sending of the notice, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specified in such

notice, before the cut-off date.

(3) A copy of the notice served to the minority shareholders under sub-rule (2), shall also be published simultaneously in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situated and also be uploaded on the website of the company, if any.

(4) The company shall inform the depository immediately after publication of the notice under sub-rule (3) regarding the cut-off date and submit the following declarations stating that:-

(a) the corporate action is being effected in pursuance of the provisions of section 236 of the Act;

(b) the minority shareholders whose shares are held in dematerialised form have been informed about the corporate action [a copy of the notice served to such shareholders and published in the newspapers to be attached];

(c) the minority shareholders shall be paid by the company immediately after completion of corporate action;

(d) any dispute or complaints arising out of such corporate action shall be the sole responsibility of the company.

(5) For the purposes of effecting transfer of shares through corporate action, the Board shall authorise the Company Secretary, or in his absence any other person, to inform the depository under sub-rule (4), and to submit the documents as may be required under the said sub-rule.

(6) Upon receipt of information under sub-rule (4), the depository shall make the transfer of shares of the minority shareholders, who have not, on their own, transferred their shares in favour of the acquirer, into the designated DEMAT account of the company on the cut-off date and intimate the company.

(7) After receiving the intimation of successful transfer of shares from the depository under sub-rule (6), the company shall immediately disburse the price of the shares so transferred, to each of the minority shareholders after deducting the applicable stamp duty, which shall be paid by the company, on behalf of the minority shareholders, in accordance with the provisions of the Indian Stamp Act, 1899 (2 of 1899).

(8) Upon successful payment to the minority shareholders under sub-rule (7), the company shall inform the depository to transfer the shares of such shareholders, kept in the designated DEMAT account of the company TO the DEMAT account of the acquirer.

Explanation. - The company shall continue to disburse payment to the entitled shareholders, where disbursement could not be made within the specified time, and transfer the shares to the DEMAT account of acquirer after such disbursement.

(9) 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 (22 of 1996), the depository shall not transfer the shares of the minority shareholders to the designated DEMAT account of the company under

	sub-rule (6). Explanation. - For the purposes of this rule, if “cut-off date” falls on a holiday, the next working day shall be deemed to be the “cut-off date”.”
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AMIT TALDA CLASSES

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 "<i>Subject to the provisions of this Act</i>, 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. EXCEPTIONS TO THE RULE IN FOSS V. HARBOTTLE

	The cases in which the majority rule does not prevail are commonly known as exceptions to the rule in <i>Foss v. Harbottle</i> 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) <u>Fraud on Minority:</u> Where an act done by the majority amounts to a fraud on the minority; an action can be brought by an individual shareholder. (c) <u>Wrongdoers in Control:</u> 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) <u>Resolution requiring Special Majority but is passed by a simple majority:</u> 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) <u>Personal Actions:</u> 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) <u>Breach of Duty:</u> 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) <u>Prevention of Oppression and Mismanagement:</u> 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 <i>Re. Hindustan Co-operative Insurance Society Ltd.</i> 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 Re. <i>Bellador Silk Ltd.</i>, (1965)]. It was held in the case of <i>Ajit Singh Ahuja v. Sapphire (India) (P) Ltd.</i> [(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— - 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 - 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. - Where in the opinion of the Central Government there exist circumstances suggesting that— - any person concerned in the conduct and management of the affairs of a company is or has been in connection therewith guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law or of breach of trust;

	(b) the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices; (c) a company is or has been conducted and managed by such person in a manner which is likely to cause, or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains; or (d) the business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest, the Central Government may initiate a case against such person and refer the same to the Tribunal with a request that the Tribunal may inquire into the case and record a decision as to whether or not such person is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company. (4) The person against whom a case is referred to the Tribunal under sub-section (3), shall be joined as a respondent to the application. (5) Every application under sub-section (3)— (a) shall contain a concise statement of such circumstances and materials as the Central Government may consider necessary for the purposes of the inquiry; and (b) shall be signed and verified in the manner laid down in the Code of Civil Procedure, 1908, for the signature and verification of a plaint in a suit by the Central Government [Inserted by Companies (Amendment), Act 2019- Effective From 15th August 2019]
POWERS OF THE TRIBUNAL [SECTION 242]	(1) 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. (2) 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 **within three months before** 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 **transfer to** Investor Education and Protection Fund or repayment to identifiable victims;

(j) the manner in which the managing director or manager of the company **may be appointed subsequent** 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.

(3) A certified copy of the order of the Tribunal under sub-section (1) shall be **filed by the company with the Registrar** within thirty days of the order of the Tribunal.

(4) The Tribunal may, on the application of any party to the proceeding, make any **interim order** 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.

(4A) At the conclusion of the hearing of the case in respect of sub-section (3) of section 241, the Tribunal shall record its decision stating therein specifically as to whether or not the respondent is a fit

	and proper person to hold the office of director or any other office connected with the conduct and management of any company. [Inserted by Companies (Amendment), Act 2019- Effective From 15th August 2019] (5) 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. (6) 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.~~ <i>(Imprisonment removed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</i>
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: (1A) The person who is not a fit and proper person pursuant to sub-section (4A) of section 242 shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision: Provided that the Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years. (1B) Notwithstanding anything contained in any other provision of this Act, or any other law for the time being in force, or any contract, memorandum or articles, on the removal of a person from the office of a director or any other office connected with the conduct and management of the affairs of the company, that person shall not be entitled to, or be paid, any compensation for the loss or termination of office. [Inserted by Companies (Amendment), Act 2019- Effective From 15th August 2019] 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) or Sub Section 1A, 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.~~ <u>(Imprisonment removed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</u>
WHO CAN APPLY (Section 244)	(7) 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. (8) 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 <u>ultra vires</u> the articles or memorandum of the company; (b) to restrain the company from committing <u>breach of any provision</u> 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 <u>suppression of material facts</u> 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.

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. • 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.
POWERS OF TRIBUNAL (Section 273)	(1) The Tribunal may, on receipt of a petition for winding up under section 272 pass any of the following orders, namely:— (a) dismiss it, with or without costs;

	(b) make any interim order as it thinks fit; (c) appoint a provisional liquidator of the company till the making of a winding up order; (d) make an order for the winding up of the company with or without costs; or (e) any other order as it thinks fit: Provided that an order under this sub-section shall be made within ninety days from the date of presentation of the petition.
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. <u>Section 59</u> (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— (i) 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 (ii) 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:— (i) 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; (ii) 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 13: INTRODUCTION TO MCA 21 & FILING IN 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. Features of e – form and e – filing process: ◆ 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 filing 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. <u>FRONT OFFICE (FO):</u> 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 fulfilment ◆ 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: (i) All companies listed on any stock exchange in India and their Indian Subsidiaries; (ii) All companies having paid up capital of ₹ 5 Crores or above; (iii) All companies having turnover of ₹ 100 Crores or above; (iv) 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>
APPROVAL SERVICES	APPROVAL SERVICES- HEADQUARTERS It is required in the following cases: (a) Exemption from attaching annual accounts of subsidiary(s) (b) Exemption or extension time for repayment of deposits (c) Recognition as a Nidhi company (d) Appointment of sole selling agent (e) Appointment of sole buying agent (f) Declaration of dividend out of reserves (g) Exemption from providing depreciation (h) Consent for holding office or place of profit (i) Providing loan or guarantee or security in connection with the loan to or by specified category of persons (ii) Modification of the form and content of Balance Sheet and Profit and Loss Account (iii) Appointment of Cost Auditor Forms APPROVAL SERVICES – REGIONAL DIRECTOR: The approval of the Regional Director is required in respect of the following matters: (a) Issue of license under Section 8 to an existing company (b) Issue of license under Section 8 to a new association (c) Approval for entering into contract under Section 188 (d) Rectification of name of company (e) Appointment/Removal of auditor (f) Shifting of registered office of the company from the jurisdiction of one ROC to another within the same State (g) Opening of new branches by a Nidhi Company Forms

	APPROVAL SERVICES – ROCS: ROCs are empowered to accord approval, or to give any direction in relation to the matters pertaining to the change of name of an existing company and the conversion of a public company to private company. In addition, ROC approval is required in following cases: (a) Extension of time period for holding AGM (b) Holding AGM at place other than registered address (c) Declaring of company as defunct (d) Extension of the period of annual accounts (e) Amalgamation of companies (f) Compounding of offences
INFORMATIONAL SERVICES	Informational services cover those forms, which are to be filed with ROC for informational purposes, in compliance with the provisions of the Companies Act, 2013. In following cases, forms relating to following informational services are required to be filed: (a) Consent and withdrawal of consent of persons charged as officers in default (b) Reporting of Corporate Social Responsibility (CSR) (c) Resolutions and agreements (d) Notice of address of place where books of account are kept (e) Information in relation to any offer of scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company (f) Order received from Court or Tribunal

UNIT 14: GLOBAL TRENDS AND DEVELOPMENTS IN COMPANY LAW

NOT RELEVANT FROM EXAM POINT OF VIEW; REFER MODULE FOR THIS CHAPTER.

COMPANY LAW HIGHLIGHTS ARE COVERED IN THIS CHAPTER OF THE BELOW MENTIONED COUNTRIES:

- UNITED KINGDOM
- UNITED STATES OF AMERICA
- AUSTRALIA
- CANADA
- HONGKONG CHINA
- SINGAPORE

Author's Opinion: Different Countries have difference rules regarding company administration. Hence, after reading the Company Law provisions of above countries, it will be very difficult to remember exactly which rule is of which country and above all, students might get confused regarding what's the provisions of our Indian Companies Act as well. Hence, Author's opinion is to avoid this chapter.

(GALTI SE BHI MAT PADHNA)

PART 2: COMPANY ADMINISTRATION & MEETINGS – LAW & PRACTICE (40 MARKS)

UNIT 15: BOARD CONSITUION & ITS POWERS

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. ✓ TRANSITIONAL PROVISION: Any person holding office as director in companies more than the limits as specified in sub-section (1), immediately before the commencement of this Act shall, within a period of one year from such commencement,— (a) choose not more than the specified limit of those companies, as companies in which he wishes to continue to hold the office of director; (b) resign his office as director in the other remaining companies; and (c) intimate the choice made by him under clause (a), to each of the companies in which he was holding the office of director before such

	commencement and to the Registrar having jurisdiction in respect of each such company. ✓ 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: If a person accepts an appointment as a director in violation of this section, he shall be liable to a penalty of two thousand rupees for each day after the first during which such violation continues, subject to a maximum of two lakh rupees. <i>(Penalty changed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</i>
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. (h) to diversify the business of the company; (i) to approve amalgamation, merger or reconstruction; (j) to take over a company or acquire a controlling or substantial stake in another company; (k) any other matter which may be prescribed: In addition to the powers specified under sub-section (3) of section 179 of the Act, the following powers shall also be exercised by the Board of Directors only by means of resolutions passed at meetings of the Board.- (1) to make political contributions; (2) to appoint or remove key managerial personnel (KMP); (3) [Omitted] (4) to appoint internal auditors and secretarial auditor; 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) <u>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</u>

	<u>the ordinary course of business:</u> 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. <u>Explanation.</u>—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 & 182 of Companies Act)	<u>Section 181:</u> 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. <u>PROHIBITIONS AND RESTRICTIONS REGARDING POLITICAL CONTRIBUTIONS: (SECTION 182)</u> <u>Who Cannot Give Political Contributions:</u> • Government Company and • Company who has a Existence of Less than 3 years. <u>Quantum of Contribution:</u> 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.
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: - Audit - Compensation - Executive - Governance and nomination - 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) Every: L U S: 10 L: 50 T: 100	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; (b) Review and monitor the auditors' independence and performance, and effectiveness of audit process; (c) Examination of the financial statement and the auditors' report thereon; (d) 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> (e) Scrutiny of inter – corporate loans and investments; (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: (1) 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. (2) The companies which are required to constitute an audit committee shall oversee the vigil mechanism through the committee and if any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the others on the committee would deal with the matter on hand. (3) In case of other companies, the Board of directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism to whom other directors and employees may report their concerns. (4) The vigil mechanism shall provide for adequate safeguards against victimization of employees and directors who avail of the vigil mechanism and also provide for direct access to the Chairperson of the Audit Committee or the director nominated to play the role of Audit Committee, as the case may be, in exceptional cases. (5) 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	The nomination and Remuneration Committee helps the Board relating to the appointment of the members of the Board. This Committee finalizes

COMMITTEE (Section 178)	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 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'	❖ A company has to constitute a “Stakeholders Relationship Committee”

RELATIONSHIP COMMITTEE [Section 178(5)]	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: In case of any contravention of the provisions of section 177 and this section, the company shall be liable to a penalty of five lakh rupees and every officer of the company who is in default shall be liable to a penalty of one lakh rupees. <i>(penalty changed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</i> 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.
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UNIT 16: DIRECTORS

DIRECTOR IDENTIFICATION NUMBER [DIN] (SECTION 153 TO SECTION 159)	<u>PROCEDURE FOR ALLOTMENT OF DIN</u> <u>APPLICATION FOR DIN:</u> 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. <u>SUBMISSION OF DOCUMENTS:</u> 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; <u>TIME LIMIT FOR ALLOTMENT: (Section 154)</u> (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
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(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 2019-20 ONWARDS - Every Director who holds DIN on or before the end of the financial year, and whose DIN status is 'Approved', would be mandatorily required to file e-form DIR-3 KYC for the said financial year to the Central Government on or before **30th September** of the immediately next financial year.

[Substituted by Companies(Appointment and Qualification of Directors) Third Amend Rules 2019 Dated 25th July 2019]

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

Provided further that where an individual who has already submitted e-form DIR-3 KYC in relation to any previous financial year, **submits web-form DIR-3 KYC-WEB** through the web service in relation to any subsequent financial year it shall be deemed to be compliance of the provisions of this rule for the said financial year:

Provided also that in case an individual desires to update his personal mobile number or the e-mail address, as the case may be, he shall

update the same by submitting e-form DIR-3 KYC only:

Provided also that fee for filing e-form DIR-3 KYC or web-form DIR-3 KYC-WEB through the web service, as the case may be, shall be payable as provided in Companies (Registration Offices and Fees) Rules, 2014. **[Inserted by Companies(Appointment and Qualification of Directors) Third Amend Rules 2019 Dated 25th July 2019]**

Note: For the financial year ending on 31st March 2019, the individual shall submit e-form DIR-3 KYC or web form DIR-3 KYC-WEB, as the case may be, on or before the 14th October, 2019.

[Inserted by Companies (Appointment and Qualification of Directors) Fourth Amendment Rules 2019 Dated 30th September 2019]

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 may 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 Act 2019 w.e.f 2nd November

	2018) <u>OBLIGATION TO OBTAIN DIN:</u> 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. <u>PUNISHMENT FOR CONTRAVENTION</u> 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 Act 2019 w.e.f 2nd November 2018)
TYPES OF DIRECTORS	A director so appointed may either be executive director or non-executive director. An Executive Director can be either a Whole-time Director of the company (i.e., one who devotes his whole time of working hours to the company and has a significant personal interest in the company as his source of income), or a Managing Director (i.e., one who is employed by the company as such and has substantial powers of management over the affairs of the company subject to the superintendence, direction and control of the Board). They are generally responsible for overseeing the administration, programs and strategic plan of the organization. Other key duties include fund raising, marketing, and community out reach. The position reports directly to the Board of Directors. In contrast, a non-executive Director is a Director who is neither a Whole-time Director nor a Managing Director. A director to the Board may be appointed as • First Director • Resident Director • Women Director • Independent Director • Alternate Director • Additional Director • Small Shareholder Director • Nominee Director • Casual Vacancy
FIRST DIRECTOR	Section 152 of the Act provides for the appointment of first directors, accordingly, where there is no provision made in Articles of Association of the company for appointment of first directors then the <u>subscribers to the memorandum who are individuals</u> shall be deemed to be the first directors of the company until the directors are duly appointed.
RESIDENT DIRECTOR	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.

[SECTION 149 (3)]	<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 LISTED COMPANY 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. <i>(If he is a Small Shareholder then he cannot continue to hold the shares as a Shareholder. Any other capacity means capacity other than Shareholder)</i> Please Note: "Small Shareholder Director" need not be a Small Shareholder Himself. He can be any person nominated by Small Shareholders.
INDEPENDENT DIRECTOR	WHICH COMPANIES ARE REQUIRED TO HAVE INDEPENDENT DIRECTORS? 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. DEFINITION OF INDEPENDENT DIRECTOR 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 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 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.

DECLARATION BY INDEPENDENT DIRECTOR

Every independent director shall at the first meeting of the Board in which he 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.

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.

TERM OF INDEPENDENT DIRECTOR:

- ❖ 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.

ROLE AND FUNCTIONS OF AN INDEPENDENT DIRECTOR

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
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	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.

MANNER OF SELECTION OF AN INDEPENDENT DIRECTOR

(a) Selection from Data Bank: 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 like ICSI).

(b) Approval from Shareholders: 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) Application for adding the name in the databank: 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.

COMPLIANCES REQUIRED BY A PERSON ELIGIBLE AND WILLING TO BE APPOINTED AS AN INDEPENDENT DIRECTOR (RULE 6 SUBSTITUTED W.E.F 01.12.2019)

(1) Every individual –

(a) who has been appointed as an independent director in a company, on the date of commencement of the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019, shall within a period of **Thirteen months from such commencement**; or
(time limit increased from ten months to thirteen months w.e.f. 28.09.2020)

(b) who intends to get appointed as an independent director in a company after such commencement, shall before such appointment,

apply online to the institute for inclusion of his name in the data bank **for a period of one year or five years or for his life-time,**

and from time to time take steps as specified in sub-rule (2), till he continues to hold the office of an independent director in any company:

Provided that any individual, including an individual not having DIN, may voluntarily apply to the institute for inclusion of his name in the data bank.

(2) Every individual whose name has been so included in the data bank **shall file an application for renewal** for a further period of one year or five years or for his life-time, **within a period of thirty days** from the date of expiry of the period upto which the name of the individual was applied for inclusion in the data bank, failing which, the name of such individual shall stand removed from the data bank of the institute:

Provided that no application for renewal shall be filed by an individual who has paid life-time fees for inclusion of his name in the data bank.

(3) Every independent director shall submit a declaration of compliance of sub-rule (1) and sub-rule (2) to the Board, each time he submits the declaration required under sub-section (7) of section 149 of the Act.

(4) Every individual whose name is so included in the data bank under sub-rule (1) **shall pass an online proficiency self-assessment test** conducted by the institute **within a period of Two year from the date of inclusion of his name in the data bank**, failing which, his name shall stand removed from the databank of the institute:

(time limit increased from one year to two years w.e.f. 18.12.2020)

Provided that an individual shall not be required to pass the online proficiency self-assessment test when he has served for a total period of not less than three years as on the date of inclusion of his name in the data bank, –

(A) As a director or key managerial personnel, as on the date of inclusion of his name in the databank, in one or more of the following, namely:-

(a) Listed public company; or

(b) Unlisted public company having a paid-up share capital of rupees ten crore or more; or

(c) Body corporate listed on any recognized stock exchange or in a country which is a 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; or

(d) Bodies corporate incorporate outside India having a paid-up share capital of US\$ 2 million or more; or

(e) Statutory corporations set up under an Act of Parliament or any

State Legislature carrying on commercial activities; or

(B) in the pay scale of Director or above in the Ministry of Corporate Affairs or the Ministry of Finance or Ministry of Commerce and Industry or the Ministry of Heavy Industries and Public Enterprises and having experience in handling the matters relating to corporate laws or securities laws or economic laws; or

(C) in the pay scale of Chief General Manager or above in the Securities and Exchange Board or the Reserve Bank of India or the Insurance Regulatory and Development Authority of India or the Pension Fund Regulatory and Development Authority and having experience in handling the matters relating to corporate laws or securities laws or economic laws:

Provided further that for the purpose of calculation of the period of three years referred to in the first proviso, any period during which an individual was acting as a director or as a key managerial personnel in two or more companies or bodies corporate or statutory corporations at the same time shall be counted only once.

(Proviso's Substituted w.e.f. 18.12.2020)

Explanation: For the purposes of this rule,-

(a) the expression "institute" means the 'Indian Institute of Corporate Affairs at Manesar' notified under sub-section (1) of section 150 of the Companies Act, 2013 as the institute for the creation and maintenance of data bank of Independent Directors;

(b) an individual who has obtained a score of not less than sixty percent. in aggregate in the online proficiency self-assessment test shall be deemed to have passed such test;

(c) there shall be no limit on the number of attempts an individual may take for passing the online proficiency self-assessment test.

THE COMPANIES (CREATION AND MAINTENANCE OF DATABANK OF INDEPENDENT DIRECTORS) RULES, 2019

Rule 1: Short Title and Commencement

The provisions of these rules, other than rule 2 and 5, shall come into force with effect from the 1st day of December, 2019.

The provisions of rule 2 and 5 shall come into force on the date of publication of this notification in the Official Gazette.

Rule 3: Creation and maintenance of data bank.

(1) The institute shall create and maintain a databank of persons willing and eligible to be appointed as independent directors, and such databank shall be an online databank which shall be placed on the website of the institute.

(2) The data bank referred to in sub-rule (1) shall contain the following details in respect of each person included in the data bank to be eligible and willing to be appointed as independent director

- (a) DIN (Director Identification Number), if applicable;
- (b) Income Tax PAN;
- (c) the name and surname in full;
- (d) the father's name;

- (e) the date of Birth;
- (f) gender;
- (g) the nationality;
- (h) the occupation;
- (i) full Address with PIN Code (present and permanent);
- (j) phone number;
- (k) e-mail id;
- (l) the educational and professional qualifications;
- (m) experience or expertise, if any;
- (n) any pending criminal proceedings as specified in clause (d) of sub-section (1) of section 164;
- (o) the list of limited liability partnerships in which he is or was a designated partner along with-
 - (i) the name of the limited liability partnership;
 - (ii) the nature of industry; and
 - (iii) the duration- with dates;
- (p) the list of companies in which he is or was director along with-
 - (i) the name of the company;
 - (ii) the nature of industry;
 - (iii) the nature of directorship-Executive or Non-executive or Managing Director or Independent Director or Nominee Director; and
 - (iv) duration – with dates.

(3) The information available in the data bank shall be provided only to companies required to appoint independent director after paying a reasonable fees to the institute.

(4) A person whose name is included in the data bank, may restrict his personal information to the institute, to be disclosed in the data bank.

(5) Any individual whose name appears in the data bank, shall make changes in his particulars within thirty days of such change through web based framework made available by the institute for this purpose.

(6) A disclaimer shall be conspicuously displayed on the website hosting the data bank that a company must carry out its own due diligence before appointment of any person as an independent director.

(7) The institute, shall with the prior approval of the Central Government, fix a reasonable fee to be charged from :-

- (a) individuals for inclusion of their names in the data bank of independent directors; and
- (b) companies for providing the information on independent directors available on the data bank.

Explanation:- For the purpose of this rule, the expression “persons willing and eligible to be appointed as independent director” shall include individuals already serving as independent directors on the Board of companies.

Rule 4: Duties of the institute.

(1) The institute shall comply with the following, in respect of individuals referred to in sub rule (1) of rule 6 of the Companies (Appointment and Qualification of Directors) Rules, 2014 , namely:-

- (a) conduct an online proficiency self-assessment test covering companies law, securities law, basic accountancy, and such other areas relevant to the functioning of an individual acting as an independent director;
- (b) prepare a basic study material, online lessons, including audio-

	visuals for easy reference of individuals taking the online proficiency self-assessment test; (c) provide an option for individuals to take advanced tests in the areas specified in clause (a) and prepare the necessary advanced study material in this respect: Provided that no separate fees shall be charged by the institute in respect of clauses (a), (b) and (c). (2) The institute shall daily, share with the Central Government, a cumulative list of all individuals- (a) whose names have been included in the data bank along with the date of inclusion and their Income Tax PAN or Passport number in case of foreign director (not required to have Income-Tax PAN); (b) whose applications for inclusion in the data bank have been rejected along with grounds and the dates of such rejection; and (c) whose names have been removed from the data bank along with grounds and the dates of such removal. Rule 5: Panel (1) There shall be a panel of not more than ten members nominated by the Central Government, for the purpose of approving the outline of the courses and study material prepared by the institute. (2) Panel referred to in sub-rule (1) shall consist of:- (a) Secretary, Ministry of Corporate Affairs or his nominee; (b) Director General and Chief Executive Officer of the institute or his nominee; (c) one member nominated by the Department of Economic Affairs; (d) one member nominated by the Department of Public Enterprises; (e) one member nominated by the Securities and Exchange Board of India; (f) at-least one representative from the stock exchange nominated by the Central Government; (g) at-least one representative from the industry nominated by the Central Government; and (h) at-least one representative from the academia nominated by the Central Government
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)]	The provisions applicable to an alternate director are as follows. (i) Applicability: Section 161(2) of the Act applies to all companies, whether public or private. (ii) Conditions for appointment of an alternate director:

	(a) The Board of Directors of a company must be authorised by its articles or by a resolution passed by the company in general meeting for appointment of the alternate director. (b) The person in whose place the Alternate Director is being appointed should be absent for a period of not less than 3 months from India. (c) The person to be appointed as the Alternate Director shall be the person other than the person holding any alternate directorship for any other Director in the company. (d) If it is proposed to appoint an Alternate Director to an Independent Director, it must be ensured that the proposed appointee also satisfies the criteria of Independence as per section 149(6) of the Act. <u>(iii) Power to appoint:</u> The Board may appoint an alternate director only if it is authorized by the articles or by an ordinary resolution passed at a general meeting. The right to appoint an alternate director vests in the Board. The original director has no right to appoint an alternate director. The members have no right to appoint an alternate director, the members can only empower to appoint alternate director as and when board thinks fit. <u>(iv) Method of appointment:</u> There is no condition that an alternate director shall be appointed only by passing a resolution at a Board meeting. Therefore, an alternate director can be appointed by passing a resolution by circulation. <u>(v) Terms of office of an alternate director:</u> (a) Not exceeding the term permissible to original director: An alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed. If the original director ceases to be a director by reason of death or vacation of office under section 167, the alternate director shall immediately cease to hold his office. (b) On the return of original director: The alternate director shall vacate his office when the original director in whose place he has been appointed returns to India. (vi) Automatic reappointment applies to the original director: If the term of office of an original director expires before he returns back to India, the provision for automatic reappointment of a director as envisaged under section 152(7)(b) shall be applicable to the original director, and not to the alternate director. As per section 165, an alternate directorship in a company shall also be included while counting the number of directorship held by a 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 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.
APPOINTMENT OF DIRECTORS	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. <u>PROVISIONS RELATING TO APPOINTMENT OF DIRECTORS:</u> <u>1. APPOINTMENT OF DIRECTORS IN THE GENERAL MEETING:</u> Every director shall be appointed by the company in general meeting except otherwise provided. <u>2. DIN:</u> 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. <u>3. FILLING OF CONSENT:</u> 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. 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 $\frac{2}{3}$ 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, $\frac{1}{3}$ 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 $\frac{1}{3}$, shall retire from office.

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

5. 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.

At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

6. 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. 7. 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.
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.
OPTION TO ADOPT PRINCIPLE OF PROPORTIONAL REPRESENTATION FOR APPOINTMENT	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

OF DIRECTORS (SECTION 163)	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.
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 Act 2019 w.e.f 2nd November 2018) ADDITIONAL DISQUALIFICATION based on Non-Compliances by Company (Section 164(2): 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> <u>Rule 14 of the Companies (Appointment and Qualification of Directors) Rules, 2014</u> 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.
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>

	(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 (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 (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. Imprisonment & Fine: If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in subsection (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 five lakh rupees, ~~or with both.~~ <u>(Imprisonment removed by Companies Amendment Act 2020 w.e.f. 21.12.2020)</u>
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 may 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. <u>1. How will company File DIR 12 when all Directors has resigned:</u> 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.
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.
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. <u>Explanation.</u>—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; (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 (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. (3) <u>Exemptions from this Section:</u> 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 instalments 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.
Disclosure of Interest by Director (Section 184)	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: If a director of the company contravenes the provisions of sub-section (1) or subsection (2), such director shall be liable to a penalty of one lakh rupees. <i>(Imprisonment removed by Companies Amendment Act 2020 w.e.f 21.12.2020)</i>
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. Important provisions (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. Penalty: 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.

	Prior Approval from Shareholders: 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. Voidable Contract: 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.
Members right to inspect (Section 171)	(i) The register of directors and Key Managerial Personnel kept under section 170(1) shall be open for inspection during business hours and the members shall have the right to take extracts there from and copies thereof, on request and will be provided within 30 days free of cost. [Section 171(1)(a)] (ii) Such register shall also be kept open for inspection at every annual general meeting of the company and shall be made accessible to any person attending the meeting. [Section 171(1)(b)] (iii) If any inspection during business hours is refused, or if any copy required as above is not sent within thirty days from the date of receipt of such request, the Registrar shall on an application made to him order immediate inspection and supply of copies required there under. [Section 171(2)] In case of Government Company - Section 171 shall not apply to Government Company in which the entire share capital is held by the Central Government, or by any State Government or Governments or by the Central Government or by one or more State Governments.

UNIT 17: KEY MANAGERIAL PERSONNEL

MEANING OF KEY MANAGERIAL PERSONNEL	Key Managerial Personnel: Section 2(51) 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 - 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; and (Inserted by Companies Amendment Act, 2017 w.e.f. 9th Feb 2018) - such other officer as may be prescribed Functions of Company Secretary (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. Additional Functions - 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
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	under this Act; (e) To assist the Board in the conduct of the affairs of the company; (f) To assist and advise the Board in ensuring good corporate governance; and (g) 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	<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: (a) Managing Director, or Chief Executive Office or Manager and in their absence, a whole – time director; (b) Company Secretary; and (c) Chief Financial Officer. <u>Insertion of New Rule 8A of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, w. e. f. 9th June, 2014.</u> Every Private company which has a paid up share capital of Ten Crore rupees or more shall have a whole – time company secretary. (Limit increased from 5 crore to 10 crore w.e.f 01.04.2020) Section 2(24) of the Companies Act, 2013 defines “company secretary” or “secretary” means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a company secretary under this Act. According to clause (c) of Sub-section (1) of Section 2 of the Company Secretaries Act, 1980, a company secretary means a person who is a member of the Institute of Company Secretaries of India. <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. <u>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> Note: A whole – time key managerial personnel holding office in more than one company at the same time has to choose one company within 6 months from the date of commencement of this Act. <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 Act 2019 w.e.f 2nd November 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. <u>Note:</u> 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. <u>Note:</u> <i>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.</i> <u>No company shall appoint at the same time a Managing Director or a Manager.</u> An individual shall not be appointed or reappointed as the chairperson of the company, as well as the managing director or Chief Executive Officer of the company at the same time unless the articles of such a company provide otherwise; or the company does not carry multiple businesses. However, such class of companies engaged in multiple businesses and which has appointed one or more Chief Executive Officers for each such business as may be notified by the Central Government are exempted from the above. MCA vide its notification S.O. 1913(E) dated 25-7-2014 notified that public companies having paid up Share capital of Rs. 100 Cr or more and annual turnover of Rs. 1000 Cr or more which are engaged in multiple businesses and have appointed Chief Executive Officer for each such business can appoint an individual as Chairperson and Managing Director. <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 in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person;

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 Act 2019 w.e.f 2nd November 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

SCHEDULE - V
CONDITIONS FOR APPOINTMENTS OF KMPS AND THEIR REMUNERATIONS
PART - I of the Schedule V

**REMUNERATION
UNDER SECTION
197.**

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;

Provided further that the limits specified under items (A) and (B) of this section shall apply, if-

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

Information about the appointee:

- (a) Background details
- (b) Past remuneration
- (c) Recognition or awards
- (d) Job profile and his suitability
- (e) Remuneration proposed

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)

Parameters for Consideration of Remuneration:

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.

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) where the company—

(i) is a newly incorporated company, for a period of seven years from the date of its incorporation, or

(ii) is a sick company, for whom a scheme of revival or rehabilitation has been ordered by the Board for Industrial and Financial Reconstruction for a period of five years from the date of sanction of scheme of revival, or

(iii) is a company in relation to which a resolution plan has been approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 for a period of five years from the date of such approval, it may pay remuneration up to two times the amount permissible under section II

(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

: XXXX

(Excluding Application money or advances against shares)	
Add:	
(a) Credit of share premium account;	: XXXX
(b) Reserves and surplus (excluding revaluation reserve);	: XXXX
(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)	: XXXX
Less:	
(a) Aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities)	: XXXX
(b) Accumulated Losses	: XXXX
(c) Preliminary Expenses not written off	: XXXX
Effective Capital	: XXXX

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 12th September 2018)
CONSEQUENCE S 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 12th 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. Thus, the Managing Director is not bound to refund the compensation.

UNIT 18: MEETINGS OF BOARD & ITS COMMITTEES

(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)	For Private or Public Company 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. For OPC, Dormant Company & Small Company 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. Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into— (a) with a body corporate in which such director or such director in association with any other director, holds more than two per cent. shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or (b) with a firm or other entity in which, such director is a partner, owner or member, as the case may be, shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting: 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	Issued by: 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. Time Limit: 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)

Mode of Sending Notice: 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 Meeting of the Board could not be held for want of Quorum, then, unless otherwise provided in the Articles, the Meeting shall automatically stand adjourned to the same day in the next week, at the same time and place or, if that day is a National Holiday, to the next succeeding day which is not a National Holiday, at the same time and place. <u>If there is no Quorum at the adjourned Meeting also, the Meeting shall stand cancelled.</u>
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. <u>Convening of Board Meetings:</u> 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. <i>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.</i> <u>Safeguards during Board Meetings:</u> The Chairperson and the company secretary shall take due and reasonable care: - To safeguard the integrity of the meeting by ensuring sufficient security and identification procedures; - 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; - To record the proceedings of the Board Meeting and prepare the minutes of the meeting; - 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; - 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. <u>Notice to the Directors:</u> The notices of the meeting shall be sent to all the directors. - 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. For the period beginning from the commencement of the Companies (Meetings of Board and its Powers) Amendment Rules, 2020 and ending on the 31st December 2020, the meetings on matters referred to in sub-rule (1) may be held through video conferencing or other audio visual means in accordance with rule 3. <i>(Last date extended from 30.09.2020 to 31.12.2020 vide notification dated 28.09.2020)</i>
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. Minutes Books shall be kept at the Registered Office of the company or at such other place as may be approved 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)	- 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 General Business Items • 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. Specific Items • 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. Corporate Actions • 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.
AGENDA OF FIRST BOARD MEETING	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.

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| | <ol style="list-style-type: none">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. |
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UNIT 19: 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 <u>Government company</u>, 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 <u>all the members in advance</u>. (Inserted by Amendment Act, 2017)
BUSINESS TRANSACTED AT AN AGM	An AGM of a company must consider the following <i>Ordinary Businesses</i>: (a) Annual Accounts; (b) Declaration of dividend; (c) Appointment of directors (retire by rotation); and (d) 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 extent to ₹ 5,000/- for every day during which such default continues. In the case of <u>Smith v. Paringa 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 : (a) By the Board of Directors on its own, or (b) By the Board of Directors on the requisition of members, or (c) By the requisitionists, or (d) By the Tribunal (NCLT)
WHO MAY CONVENE AN EGM	✓ BY THE BOARD OF DIRECTORS ON ITS OWN 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 : (a) Holding 10% of the paid-up share capital and having a right to vote of the Company, or (b) 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 21days 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.

	<u>NOTICE ISSUED BY THE REQUISITIONISTS:</u> 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. ✓ <u>Meeting to be convened by the requisitionists:</u> 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 only transact the special business 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	<u>DAY:</u> 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.). <u>TIME:</u> 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. <u>MEETINGS OF DEBENTURES HOLDERS:</u> 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)	<u>Meaning:</u> Quorum means presence of minimum number of members in a meeting. Quorum is required for transaction of business. <u>Quorum:</u> 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. 2. Proxies shall be excluded for determining the Quorum. 3. Two joint holders shall be counted as two for quorum if both joint holders personally present in the General Meeting. 4. 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. 5. 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 : (a) The meeting shall stand adjourned to the same day in the next week at the same time and place; or (b) To such other date and such other time and place as fixed by the Board; or (c) The meeting, if called by <u>requisitionists</u> shall stand <u>cancelled</u>. 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 ½ an hour from the time appointed for holding meeting, the members present, <u>being not less than two in number</u>, 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 : (a) Every member of the company, legal representative of any deceased member or the assignee of an insolvent member; (b) The auditor or auditors of the company; and (c) 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.
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 Act 2019 w.e.f 2nd November 2018)
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 Act 2019 w.e.f 2nd November 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.
- ❖ If after appointment of proxy, the member himself attends the meeting, it amounts to automatic revocation of proxy. But once the proxy has

	voted, it cannot be revoked. if a Proxy had been appointed for the original meeting and such meeting is adjourned, any Proxy given for the adjourned Meeting revokes the Proxy given for the original Meeting. A proxy later in date revokes any Proxy/Proxies dated prior to such Proxy. A Proxy is valid until written notice of revocation has been received by the company before the commencement of the Meeting or adjourned Meeting, as the case may be. An undated notice of revocation of Proxy shall not be accepted. A notice of revocation shall be signed by the same Member (s) who had signed the Proxy, in the case of joint Membership. A Proxy need not be informed of the revocation of the Proxy issued by the Member.
CHAIRMAN OF GENERAL MEETINGS	The Chairman plays a crucial role in a company meeting and is <u>usually appointed by the articles</u>. 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 <u>show of hands</u>. 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.
ADJOURNMENT OF MEETING	A duly convened Meeting shall not be adjourned unless circumstances so warrant. The Chairman may adjourn a Meeting with the consent of the

(SS 2)	Members, at which a Quorum is present, and shall adjourn a Meeting if so directed by the Members. If a Meeting is adjourned sine-die or for a period of thirty days or more, a Notice of the adjourned Meeting shall be given in accordance with the provisions contained hereinabove relating to Notice. If a Meeting is adjourned for a period of less than thirty days, the company shall give not less than three days' Notice specifying the day, date, time and venue of the Meeting, to the Members either individually or by publishing an advertisement in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and in an English newspaper in English language, both having a wide circulation in that district.
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. If 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.
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.

VOTING BY POSTAL BALLOT

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.

Definition: 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 and**
- **Any business in respect of which directors or auditors have a right to be heard at any meeting**

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.

VOTING BY ELECTRONIC MODE: (E-VOTING)

Every listed company or a company having One Thousand 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'.

PROVISIONS RELATING TO E-VOTING:

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 dematerialised 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 ten thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of two 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 ten thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of fifty thousand rupees. <u>(Sub Section 2 Substituted by Companies Amendment Act 2020 w.e.f. 21.12.2020)</u> (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) <u>RECORD MINUTES WITHIN 30 DAYS:</u> 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>PRESERVATION OF MINUTES:</u> Minutes of all Meetings shall be preserved permanently in physical or in electronic form with Timestamp. Office copies of Notices, scrutiniser's report and 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) <u>CUSTODY:</u> Minutes Books shall be kept in the custody of the Company Secretary. Where there is no Company Secretary, Minutes shall be kept in the custody of any Director duly authorised for the purpose by the Board. Minutes Books shall be kept at the Registered Office of the company. (g) <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/-. (h) <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. <u>Default in filing the Report:</u> 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;
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(Substituted by Companies Amendment Act 2019 w.e.f 2nd November 2018)

AMIT TALDA CLASSES

UNIT 20: VIRTUAL MEETINGS

DEFINTION	• A meeting held totally by means of either Video conferencing or other audio-visual means is known as Virtual Meeting. • A virtual meeting is when people around the world, regardless of their location, use video, audio, and text to link up online. • Virtual meetings allow people to share information and data in real-time without being physically located together. • In virtual meeting, there is no physical presence of participants and there is no designated venue for the purpose of meetings. Participants located at different places participate in the meeting either by teleconference or video conference or combination of them at predetermined time. • Virtual meetings are becoming an increasingly common aspect at corporate world when it comes to professional communication and the way business are done, for most company's Virtual meetings is the fact of life. Companies today operate across multiple time zones from different countries and continents. • Employees, Board Members, stakeholders and investors are not from any particular region, city or country, in fact they are spread wide and far. By using Virtual technology, it is possible to replace physical meetings which require the presence of people at the designated place and time. • With rapid change in technology and wide spread of internet and audio and video combination, which is readily available, affordable and reliable, many companies and organizations are adopting and favoring virtual meetings. The use of audio and video conferences, webinars and web meetings via computers, telephones or other devices is more frequent. The potential gains are in terms of reduced travel costs, timesaving, efficiency improvements, and less environmental impact in terms of savings on fuel and transport. • Virtual Meetings are held at a distance in real time basis with the help of digital technology. The meetings are mainly 1) audio- and/or video based, such as audio conferencing, video conferencing, and on-line meetings or webinars, often they are supported by other forms like chat, white boards, document sharing, etc. 2) Audio conferencing means conference calls with three or more participants, either by connecting the different participants by using a conference phone, or both. 3) Video conferencing, a technology now a day commonly used in board meetings.
BASIC REQUIREMENTS OF A VRITUAL MEETING	• Meeting Rooms • Software which can be either purchased, or can be provided by a vendor for a fee on yearly rental basis • Hardware Equipment like Monitor or LED Screen, Webcams • High Quality mike system • Projectors • Document Scanners • Leased Lines • High Speed WIFI • Recording & Storage Equipment for recording the proceeding and Proper Storage for future reference as many be required by Law. • Have Trial Run before the meeting to ensure all the systems are working

	properly • Ensure that the proper arrangements are made in the meeting room
VIRTUAL BOARD MEETINGS	The Section 173 of Companies Act, 2013 read with Rule 3 & 4 of Companies (Meetings of Board and its Powers) Rules, 2014 and Secretarial Standards on Board meetings give a much wanted platform for holding virtual meetings. SS-1 defines electronic mode as “Electronic Mode” in relation to Meetings means Meetings through video conferencing or other audio-visual means. “Video conferencing or other audiovisual means” means audio visual electronic communication facility employed which enables all the persons participating in a Meeting to communicate concurrently with each other without an intermediary and to participate effectively in the Meeting. “Secured Computer System” means computer hardware, software, and procedure that – (a) are reasonably secure from unauthorized access and misuse; (b) provide a reasonable level of reliability and correct operation; (c) are reasonably suited to performing the intended functions; and (d) adhere to generally accepted security procedures. “Timestamp” means the current time of an event that is recorded by a Secured Computer System and is used to describe the time that is printed to a file or other location to help keep track of when data is added, removed, sent or received. Words and expressions used and not defined herein shall have the meaning respectively assigned to them under the Act. RELEVANT PROVISIONS: 1. 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. • Directors shall not participate through Electronic Mode in the discussion on certain restricted items. Such restricted items of business include <u>approval of the annual financial statement, Board’s report, prospectus and matters relating to amalgamation, merger, demerger, acquisition and takeover</u>. Similarly, participation in the discussion through Electronic Mode shall not be allowed in Meetings of the Audit Committee for consideration of annual financial statement including consolidated financial statement, if any, to be approved by the Board. • It means that directors can participate in a board meeting through video conference or by teleconference and can be counted for the purpose of quorum expect for those items which are under law, Audit Committee meetings and their presence shall not be counted for the purpose of quorum. 2. 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. • The Notice shall be sent to the postal address or e-mail address, registered by the Director with the company or in the absence of such details or any change thereto, any of such addresses appearing in the Director Identification Number (DIN) registration of the Director. • Even if the notice is sent by e-mail or by any electronic means to the email id provided by the Director, then such notice sent through electronic platform shall be constituted as valid notice served on the director.

	3. The Notice shall inform the Directors about the option available to them to participate through Electronic Mode and provide them all the necessary information. • If a Director intends to participate through Electronic Mode, he shall give sufficient prior intimation to the Chairman or the Company Secretary to enable them to make suitable arrangements 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. Though such declaration shall not debar him from participation in the meeting in person, in such case a sufficient intimation of attending in person is required to be sent to the company. • The Notice shall also contain the contact number or e-mail address(es) of the Chairman or the Company Secretary or any other person authorized by the Board, to whom the Director shall confirm in this regard. In the absence of an advance communication or confirmation from the Director as above, it shall be assumed that he will attend the Meeting physically. • Every notice served on the director shall clearly specify that proper arrangements have been made for video or tele conferencing and the director has option of participating in the meeting through such means. • The Director should be sent the link through which he can log in and attend the meeting. The Director should inform the Chairman or the Secretary of the Company his option regarding participating the meeting through Electronic mode. 4. Directors participating through Electronic Mode in a Meeting shall be counted for the purpose of Quorum, unless they are to be excluded for any items of business under the provisions of the Act or any other law. Directors participating through Electronic mode are counted for quorum unless prohibited as per law. The chairperson shall ensure that the required quorum is present throughout the meeting.
ATTENDENCE REGISTER	The attendance register shall be deemed to have been signed by the Directors participating through Electronic Mode, if their attendance is recorded in the attendance register and authenticated by the Company Secretary or where there is no Company Secretary, by the Chairman or by any other Director present at the Meeting, if so authorized by the Chairman and the fact of such participation is also recorded in the Minutes. In case of Directors participating through Electronic Mode, the Chairman shall confirm the attendance of such Directors. For this purpose, at the commencement of the Meeting, the Chairman shall take a roll call. The Chairman or Company Secretary shall request the Director participating through Electronic Mode to state his full name, location from where he is participating, confirm that he has received the agenda and other relevant material and that no one other than the concerned director is attending or having access to the proceedings of the meeting at the location. This shall also be recorded in the Minutes. The proceedings of such Meetings shall be recorded through any electronic recording mechanism and the details of the venue, date and time shall be mentioned.
VENUE OF MEETING	With respect to every meeting conducted through video conferencing or other audio visual means authorised under these rules, the scheduled venue of the meeting as set forth in the notic/e convening the meeting shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.

ROLE OF CHAIRPERSON & SECRETARY OF COMPANY	The Chairperson of the meeting and the company secretary shall take due and reasonable care with respect to the following: (a) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures; (b) to ensure availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorised participants at the Board meeting; (c) to record proceedings and prepare the minutes of the meeting; (d) to store for safekeeping and marking the tape recording(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; and (f) to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting. The persons, who are differently abled, may be facilitated by the Board to allow a person to accompany him.
PROCEDURE FOR CONVENING & CONDUCTING BOARD MEETING	Directors may participate in the meeting either in person or through video conferencing or other audio visual means. Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides for the requirements and procedures, in addition to the procedures required for Board meetings in person, for convening and conducting Board meetings through video conferencing or other audio visual means: (1) Every Company shall make necessary arrangements to avoid failure of video or audio visual connection. (2) The Chairperson of the meeting and the company secretary, if any, shall take due and reasonable care, the same has been discussed above. (3) (a) The notices of the meeting shall be sent to all the directors in accordance with the provisions of sub-section (3) of section 173 of the Act. (b) The notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio visual means. (c) A director intending to participate through video conferencing mode or audio visual means shall communicate his intention to the Chairman or the company secretary of the company. (d) If the director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect sufficiently in advance so that company is able to make suitable arrangement in this behalf.

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

(4) At the commencement of the meeting, a roll call shall be taken by the Chairperson when every director participating through video conferencing or other audio visual means shall state, for the record, the following namely:

(a) name;

(b) the location from where he is participating;

(c) that he can completely and clearly see, hear and communicate with the other participants;

(d) that he has received the agenda and all the relevant material for the meeting; and

(e) that no one other than the concerned director is attending or having access to the proceedings of the meeting at the location mentioned in (b) above.

(5) (a) 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 and confirm that the required quorum is complete.

Explanation: It is clarified that a director participating in a meeting through video conferencing or other audio visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under any provisions of the Act or the Rules.

(b) The roll call shall also be made at the conclusion of the meeting and at the re-commencement of the meeting after every break to confirm the presence of a quorum throughout the meeting.

(6) With respect to every meeting conducted through video conferencing or other audio visual means authorised under these rules, the scheduled venue of the meeting as set forth in the notice convening the meeting, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.

(7) The statutory registers which are required to be placed in the Board meeting as per the provisions of the Act shall be placed at the scheduled venue of the meeting and where such registers are required to be signed by the directors, the same shall be deemed to have been signed by the directors participating through electronic mode if they have given their consent to this effect and it is so recorded in the minutes of the meeting.

(8)

(a) Every participant shall identify himself for the record before speaking on any item of business on the agenda.

(b) If a statement of a director in the meeting through video conferencing or other audio visual means is interrupted or garbled, the Chairperson or company secretary shall request for a repeat or reiteration by the director.

(9) If a motion is objected to and there is a need to put it to vote, the Chairperson shall call the roll and note the vote of each director who shall identify himself while casting his vote.

(10) From the commencement of the meeting until the conclusion of such meeting, no person other than the Chairperson, directors, Secretary and any other person whose presence is required by the Board shall be allowed

	access to the place where any director is attending the meeting either physically or through video conferencing without the permission of the Board. (11) (a) At the end of discussion on each agenda item, the Chairperson of the meeting shall announce the summary of the decision taken on such item along with names of the directors, if any, dissented from the decision taken by majority (b) The minutes shall disclose the particulars of the directors who attended the meeting through video conferencing or other audio visual means. (12) (a) The draft minutes of the meeting shall be circulated among all the directors within fifteen days of the meeting either in writing or in electronic mode as may be decided by the Board. (b) Every director who attended the meeting, whether personally or through video conferencing or other audio visual means, shall confirm or give his comments, about the accuracy of recording of the proceedings of that particular meeting in the draft minutes, within seven days or some reasonable time as decided by the Board, after receipt of the draft minutes failing which his approval shall be presumed. (c) After completion of the meeting, the minutes shall be entered in the minute book as specified under section 118 of the Act and signed by the Chairperson. Explanation - For the purposes of this rule, 'video conferencing or other audio visual means' means audio-visual electronic communication facility employed which enables all the persons participating in a meeting to communicate concurrently with each other without an intermediary and to participate effectively in the meeting.
VIRTUAL AGM/EGMs	Section-108 of the Companies Act, 2013 provides for Voting through electronic means. —The Central Government may prescribe the class or classes of companies and manner in which a member may exercise his right to vote by the electronic means General meetings, particularly when large numbers of shareholders are involved, can be very expensive and are not considered to be a cost-effective. Virtual meetings of members have advantages for companies and their shareholders. When compared to couple of decade back present-day shareholders are spread across the country and also in different countries, and as the AGMs can only conducted in the city or place in which the registered office of the company is located, it makes it more difficult for the shareholders located in faraway locations and cites to attend the meetings as it involves lot of travel time and cost. With less participation, the agenda items are often passed without any discussion with fewer members. Virtual meetings will help in increasing shareholder participation as compared to physical meetings because of improved access, shareholders who cannot attend in person due to location or other reasons can attend virtually and do not have to incur the time and costs of travel to a physical meeting. Similarly, companies may find virtual meetings help to achieve wider shareholders participation. Virtual annual meetings offer benefits to both companies and shareholders. With companies and investors becoming

increasingly global, virtual meetings can save travel time and costs for shareholders, avoid traffic and other logistical delays and be easier to schedule. It will also eliminate the costs of an in-person meeting, including travel for shareholders and a company's directors and management, thereby allowing shareholders more time to attend more meetings in which they hold shares, as well as minimizing the amount of time that directors and management must spend at meetings. This in turn will increase the participation of shareholders who would otherwise not attend the meetings.

Advantages of Virtual AGM/EGMs

- Increase shareholder participation in meetings,
- Save time on travel and cost because of remote voting.
- Encourages more participation by investors across the world.
- Provides greater accessibility to shareholders who cannot be physically present due to distance.
- Enables institutional investors to attend more than one meeting in a day and protect shareholders interest.
- Reduce the cost of holding and conducting shareholder meeting, including the costs of the venue, stationary, transport and refreshments.
- Saves time of the Company's personal.

Difficulties in holding Virtual Meetings of Members:

- Security of the systems used.
- Streaming with quality without interruption.
- Providing with secure login and shareholder authentication for attendance, with ease of access for shareholders, and remote voting.
- Combined registration, voting and reporting software.
- Customized instant results screen and detailed audit reporting.
- Data Security of Logins and Passwords.
- Allowing the shareholders, the choice of device.
- the technology used must give all shareholders a reasonable opportunity to participate
- the technology must be secure and must provide reasonable measures for verifying/validating those allowed to attend and vote at the meeting
- The company must provide a digital record of the meeting.

As of today, holding of total virtual shareholder meeting is not allowed, at present Hybrid meeting are permitted. "hybrid" to refer to those meetings are combination of online participation as well as option of attending the meeting in-person. "virtual meetings" are those conducted wholly online with no physical meeting of shareholders.

Voting by electronic means is a facility given to the members of a company to cast their votes on the resolutions through electronic mode. It provides an opportunity to shareholders residing in far-flung area to take part in the decision making process of the company. They may or may not attend the meeting physically. Boards in their fiduciary capacity are now looked upon for greater accountability and transparency for the effectiveness of their overall governance process. E-Voting is a further /step to encourage corporate democracy and to promote good corporate governance.

E-voting allows a voter to record his or her secure and secret ballot electronically. E-voting are generally used in government elections like general elections, state legislative assembly elections etc. and considered as a tool of effective governance in voting infrastructure. E-voting is a common Internet infrastructure that enables the investors to vote electronically on resolution of companies. Shareholders normally exercised their votes on resolutions proposed by companies through postal ballot. If a company decides to pass any resolution by resorting to postal ballot, it will send a

	notice to all the shareholders, requesting them to send their assent or dissent in writing on a postal ballot. The Companies Act, 2013 had ushered in the concept of e-voting to ensure wider shareholder participation in the decision-making process in companies. The concept has been discussed in earlier chapter.
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AMIT TALDA CLASSES

PART 3: COMPANY SECRETARY AS A PROFESSION (10 MARKS)
UNIT 21: LEGAL FRAMEWORK GOVERNING COMPANY SECRETARIES

LEGAL PROVISIONS	Company Secretaries Act, 1980 Company Secretaries Regulations, 1982
ASSOCIATES & FELLOWS	The members of the Institute shall be divided into two classes designated respectively as Associates and Fellows. Any person whose name is entered in the Register of members maintained by Institute of Company Secretaries of India shall be deemed to have become an Associate and as long as his name remains so entered, shall be entitled to use the letters "A.C.S." after his name to indicate that he is an Associate. A person, being an Associate who has been in continuous practice in India as a Company Secretary for at least five years and a person who has been an Associate for a continuous period of not less than five years and who possesses such qualifications or practical experience as the Council may prescribe with a view to ensuring that he has experience equivalent to the experience normally acquired as a result of continuous practice for a period of five years as a Company Secretary shall, on payment of fees, be entered in the Register as a Fellow.
CERTIFICATE OF PRACTICE	A member is entitled to continue the practice of Company Secretary, whether in India or elsewhere, only after obtaining a Certificate of Practice. Deemed "to be in practice" A member of the Institute shall be deemed "to be in practice" when, individually or in partnership with one or more members of the Institute in practice or in partnership with members of such other recognised professions as may be prescribed, he, in consideration of remuneration received or to be received,— (a) engages himself in the practice of the profession of Company Secretaries to, or in relation to, any company; or (b) offers to perform or performs services in relation to the promotion, forming, incorporation, amalgamation, reconstruction, reorganisation or winding up of companies; or (c) offers to perform or performs such services as may be performed by— (i) an authorised representative of a company with respect to filing, registering, presenting, attesting or verifying any documents (including forms, applications and returns) by or on behalf of the company (ii) a share transfer agent, (iii) an issue house, (iv) a share and stock broker, (v) a secretarial auditor or consultant, (vi) an adviser to a company on management, including any legal or procedural matters (vii) issuing certificates on behalf of, or for the purposes of, a company; or (d) holds himself out to the public as a Company Secretary in practice; or (e) renders professional services or assistance with respect to matters of principle or detail relating to the practice of the profession of Company Secretaries; or (f) renders such other services as, in the opinion of the Council, are or may be rendered by a Company Secretary in practice;
REGISTER OF MEMBERS	The Council shall maintain in the prescribed manner a Register of the members of the Institute. The Register shall include the following particulars about every member of the Institute, namely:—

	(a) his full name, date of birth, domicile, residential and professional addresses; (b) the date on which his name is entered in the Register; (c) his qualifications; (d) whether he holds a certificate of practice; and (e) any other particulars which may be prescribed. The Council shall cause to be published in the list of members of the Institute as on the 1st day of April of each year. Every member of the Institute shall, on his name being entered in the Register, pay annual membership fee as may be decided by the council from time to time. <u>Removal from the Register of Members</u> (1) in the following cases the Council may remove from the Register the name of any member of the Institute— (a) who is dead; or (b) from whom a request has been received to that effect; or (c) who has not paid any prescribed fee required to be paid by him; or (d) who is found to have been subject at the time when his name was entered in the Register, or who at any time thereafter has become subject, to any of the disabilities mentioned in section 8, or who for any other reason has ceased to be entitled to have his name borne on the Register. The Council shall remove from the Register the name of any member in respect of whom an order has been passed under this Act removing him from membership of the Institute.
DISCIPLINARY MECHANISM	The member of the Institute is subject to the Disciplinary mechanism provided for under Chapter V of the Company Secretaries Act, 1980 (the Act). <u>Disciplinary Directorate</u> Section 21 of the Act provides for the establishment of a Disciplinary Directorate headed by an officer of the Institute designated as Director (Discipline) and such other employees for making investigations in respect of any information or complaint received by it. On receipt of any information or complaint along with the prescribed fee, the Director (Discipline) shall arrive at a prima facie opinion on the occurrence of the alleged misconduct. The Disciplinary Directorate shall follow such procedure as may be specified to make investigations under the Act. Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the First Schedule, the matter shall be placed before the Board of Discipline. Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the Second Schedule or in both the Schedules, the matter shall be placed the Disciplinary Committee. <u>Board of Discipline</u> The Board of Discipline shall be constituted by the Council of the Institute under section 21A of the Companies Act, 1980. The Board of Discipline shall follow summary disposal procedure in dealing with all the cases before it. Where the Board of Discipline is of the opinion that a member is guilty of a professional or other misconduct mentioned in the First Schedule, it shall afford to the member an opportunity of being heard before making any

	order against him and may thereafter take any one or more of the following actions, namely:— - reprimand the member; - remove the name of the member from the Register up to a period of three months; - impose such fine as it may think fit which may extend to rupees one lakh. The Director (Discipline) shall submit before the Board of Discipline all information and complaints where he is of the opinion that there is no prima facie case and the Board of Discipline may, if it agrees with the opinion of the Director (Discipline), close the matter or in case of disagreement, may advise the Director (Discipline) to further investigate the matter. Disciplinary Committee According to Section 21B a Disciplinary Committee shall be constituted by the Council. The Disciplinary Committee shall consist of the President or the Vice-President of the Council as the Presiding Officer and two members to be elected from amongst the members of the Council and two members to be nominated by the Central Government from amongst the persons of eminence having experience in the field of law, economics, business, finance or accountancy: The Council may constitute more Disciplinary Committees as and when it considers necessary. The Disciplinary Committee, while considering the cases placed before it, shall follow such procedure as may be specified. Where the Disciplinary Committee is of the opinion that a member is guilty of a professional or other misconduct mentioned in the Second Schedule or both the First Schedule and the Second Schedule, it shall afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely:— - Reprimand the member; - Remove the name of the member from the Register permanently or for such period, as it thinks fit; - impose such fine as it may think fit, which may extend to rupees five lakhs. <u>Authority, Disciplinary Committee, Board of Discipline and Director (Discipline) to have powers of civil court</u> Section 21C provides that for the purposes of an inquiry under the provisions of this Act, the Authority, the Disciplinary Committee, Board of Discipline and the Director (Discipline) shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, in respect of the following matters, namely:— - summoning and enforcing the attendance of any person and examining him on oath; - the discovery and production of any document; and - receiving evidence on affidavit. <u>Explanation</u> – For the purposes of sections 21, 21A, 21B, 21C and 22, “member of the Institute” includes a person who was a member of the Institute on the date of the alleged misconduct although he has ceased to be a member of the Institute at the time of the inquiry.
APPEAL TO	Under section 22A of the Act the Appellate Authority constituted under

AUTHORITY	sub-section (1) of section 22A of the Chartered Accountants Act, 1949, shall be deemed to be the Appellate Authority for the purposes of this Act, subject to certain modifications. Accordingly, any member of the Institute aggrieved by any order of the Board of Discipline or the Disciplinary Committee imposing on him any of the penalties referred to in section 21A and section 21B, may within ninety days from the date on which the order is communicated to him, prefer an appeal to the Authority: The Director (Discipline) may also appeal against the decision of the Board of Discipline or the Disciplinary Committee to the Authority if so authorised by the Council, within ninety days: The Authority may entertain any such appeal after the expiry of the said period of ninety days, if it is satisfied that there was sufficient cause for not filing the appeal in time. (2) The Authority may, after calling for the records of any case, revise any order made by the Board of Discipline or the Disciplinary Committee under sub-section (3) of section 21A and sub-section (3) of section 21B and may — (a) confirm, modify or set aside the order; (b) impose any penalty or set aside, reduce, or enhance the penalty imposed by the order; (c) remit the case to the Board of Discipline or Disciplinary Committee for such further enquiry as the Authority considers proper in the circumstances of the case; or (d) pass such other order as the Authority thinks fit: Provided that the Authority shall give an opportunity of being heard to the parties concerned before passing any order.
PROFESSIONAL MISCONDUCT	Professional misconduct in relation to members of the Institute is broadly structured under Schedule I and Schedule II of the Act: (a) Professional misconduct in relation to Company Secretaries in Practice. (Part I of the First Schedule) (b) Professional misconduct in relation to members of the Institute in service. (Part II of the First Schedule) (c) Professional misconduct in relation to members of the Institute generally. (Part III of the First Schedule) (d) Other misconduct in relation to members of the Institute generally (Part IV of the First Schedule) (e) Professional misconduct in relation to Company Secretaries in practice requiring action by disciplinary committee (Part I of the Second Schedule) (f) Professional misconduct in relation to members of the Institute generally, requiring action by disciplinary committee (Part II of the Second Schedule). (g) Other misconduct in relation to members of the Institute generally (Part III of the Second Schedule) The detailed provisions relating to misconduct and disciplinary mechanism are contained in Sections 21, 21A, 21B, 21C, 21D & 22 and the First and the Second Schedules to the Act and the Rules.
PROFESSIONAL MISCONDUCT IN RELATION TO CS dIN PRACTICE	PART I OF FIRST SCHEDULE TO THE ACT: Clause (1) provides that a Company Secretary in Practice shall be deemed to be guilty

of professional misconduct, if he—
“allows any person to practice in his name as a Company Secretary unless such person is also a Company Secretary in Practice and is in partnership with or employed by him.”

Clause (2)

provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

“pays or allows or agrees to pay or allow, directly or indirectly, any share, commission or brokerage in the fees or profits of his professional business to any person other than a member of the Institute or a partner or a retired partner or the legal representative of a deceased partner or a member of any other professional body or with such other persons having such qualifications as may be prescribed, for the purpose of rendering such professional services from time to time in or outside India.

Explanation — in this item, ‘partner’ includes a person residing outside India with whom a Company Secretary in Practice has entered into partnership which is not in contravention of item (4) of this part.”

Clause (3)

provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

“accepts or agrees to accept any part of the profits of the professional work of a person who is not a member of the Institute:

Provided that nothing herein contained shall be construed as prohibiting a member from entering into profit sharing or other similar arrangements, including receiving any share commission or brokerage in the fees, with a member of such professional body or other person having qualifications, as is referred to in item (2) of this part.”

Clause (4)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

“enters into partnership, in or outside India, with any person other than a Company Secretary in Practice or such other person who is a member of any other professional body having such qualifications as may be prescribed, including a resident who but for his residence abroad would be entitled to be registered as a member under clause (e) of sub-section (1) of section 4 - or whose qualifications are recognised by the Central Government or the Council for the purpose of permitting such partnerships .”

Membership of Professional body for Partnership —

(1) For the purposes of entering into partnership under clauses (4) and (5) of Part I of the First Schedule to the Act, a person shall be a member of any of the following professional bodies, namely:

- (a) The Institute of Chartered Accountants of India established under the Chartered Accountants Act, 1949 (No. 38 of 1949);
- (b) The Institute of Cost and Works Accountants of India established under the Cost and Works Accountants Act, 1959 (No. 23 of 1959);
- (c) Bar Council of India established under the Advocates Act, 1961 (No.25 of 1961);
- (d) The Institute of Engineers or Engineering from a University established by law or an institution recognized by law;
- (e) The Indian Institute of Architects established under the Architects Act, 1972 (No.20 of 1972);
- (f) The Institute of Actuaries of India established, under the Actuaries Act, 2006 (No. 35 of 2006);

(g) Professional bodies or institutions outside India whose qualifications relating to Company Secretary recognized by the Council under sub-section (2) of Section 38 of the Act.”

Clause (5)

provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

“secures, either through the services of a person who is not an employee of such Company Secretary or who is not his partner or by means which are not open to a Company Secretary, any professional business.

Provided that nothing herein contained shall be construed as prohibiting any arrangement permitted in terms of items (2), (3) and (4) of this part.”

Clause (6) *(Most Important for exams)*

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

“solicits clients or professional work, either directly or indirectly, by circular, advertisement, personal communication or interview or by any other means: Provided that nothing herein contained shall be construed as preventing or prohibiting

(i) any Company Secretary from applying or requesting for or inviting or securing professional work from another Company Secretary in practice; or
(ii) a member from responding to tenders or enquires issued by various users of professional services a organisations from time to time and securing professional work as a consequence.”

A true professional should command honour and not demand it. Means of solicitation may be a circular, advertisement, personal communication or by any other means. The phrase ‘by any other means’ used in this clause would perhaps exhaust other means like telephonic conversation, mail, electronic means and messages/social media or even third party solicitation.

In the following cases, Clause 6 shall attract & member shall be guilty:

(1) Circular or advertisement in newspapers indicating the range of services offered by him.

(2) A circular letter offering secretarial services and professional work.

(3) Any circular, advertisement or communication which creates an impression that certain professional work would be done much more expeditiously than is normally the case. Like for instance, registration of a company in, say, two days’ time or registration of a charge in one day’s time, etc.

(4) Circular, advertisement or personal communication highlighting any provision of any law, to person other than existing clients, which provides for certification/ authentication by a Company Secretary in Practice of any form/return/application/document.

(5) Issuing hand bills covering matters in (1) to (4) above.

(6) Publication in the telephone directory, name and address in extra bold typeface or opting for more than one listing. However, where separate sections are devoted in the telephone directory (yellow pages, for instance) for a classified list, publishing the name and address by a member in such sub-section in the directory would not be treated as misconduct. But any kind of message or writing which indicates tall claims, supremacy and superiority in professional attainments will tantamount to solicitation of

clients, indirectly.

(7) Communicating or holding out, as being prepared to provide professional services at fees that are less than reasonable and appropriate in the circumstances, in order to obtain professional work.

(8) Communicating or describing himself as a '**specialist**' in any branch of law/work or knowingly permitting himself to be so described.

(9) A member allowing a company to carry in its prospectus or other circular letters that 'Mr. X a specialist in corporate laws is the adviser to the company' would offend clause (6). However printing the name of Practicing Company Secretary as Secretarial Auditor in Annual Report will not violate the provisions of the Act.

(10) Requesting his client(s) to recommend his/their acquaintances to him for professional work.

(11) Frequent press announcements or circulars about his not being available for professional work for a certain period at the place whereat he normally has his office.

(12) Highlighting or causing to be highlighted in public interviews over the television, AIR, etc. their professional attainments, more than just necessary or warranted by the circumstances of such an interview, making tall claims, indicating supremacy over other professional colleagues, etc. However sending bio data to organizers of the programmes/seminars, etc., where they have been invited as a faculty, is not violative of this clause.

(13) Writing to any institution/agency that though, he is in the panel; no work has been allotted to him. Even approaching through a third person is violative of this clause.

(14) Approaching any trade association/chamber of commerce/ business forum, communicating his ready availability for rendering any professional service to the constituents of any association or chamber.

(15) Sending his profile to persons/companies/firms without any requisition for the same.

(16) Including names of other professionals in his profile circulated to various persons.

However, the following would not be treated as violation of clause (6):

(1) publishing in the journal of the Institute or newspaper any change in the professional address;

(2) publishing in professional journals, newspapers and magazines in any classified column, any advertisement for recruitment of staff without in any way giving an impression about the services that he can render, or in other manner smacking of solicitation of work;

(3) publishing information regarding changes in the constitution of firm, provided the information contained therein is limited to bare facts and consideration given to appropriateness of the area in which the newspaper or magazine is circulating and the number of insertions

(4) sending New Year or any other seasonal greetings without narrating the list of services, professional attainments, supremacy or any kind of

indication seeking clients.

(5) appearance in AIR, TV or any stage in private capacity as a speaker, actor or otherwise on programmes having no nexus with his profession. Any reference to him only as a Company Secretary and nothing beyond that in such programmes would not offend clause (6);

(6) appearance or participation in professional capacity in the AIR/TV or other forums where a reasonable amount of biographical material may be given without in any way referring to the member as specialist in any branch of work;

(7) editing/publishing any professional journal, newspaper and magazines;

(8) writing articles/comments in professional journals, magazines and newspapers;

(9) associating with charitable, other welfare associations and trade associations without in any way using such position to solicit clients/professional work;

(10) writing to his existing clients about implications/interpretations of any law or amendments thereof by way of any circular, newsletter or any personal communication or by way of print/electronic means of communication.

The Council of the Institute in a case held that the Conduct of the member in practice by mentioning against his name 'Company Secretary' in the issue of 'Secretarial Aid' a journal edited by him was violative of Clause (6) of Part I of First Schedule to the Act. It was observed that the words 'for further clarification please contact the Editor' was an indirect attempt to solicit professional work.

Responding to a specific letter or a follow up of personal discussions and sending a profile of a firm/individual to specific addresses is not prohibited.

(11) Stating the assignments handled by him in his profile. However, the name of the clients should be supplied only against specific request of the client for the same.

(12) Issuing advertisement in Chartered Secretary for opening branch or seeking partnership with other members.

(13) Issuing advertisement or launching website within the frame work of guidelines issued by the council about advertisement by PCS.

(14) Securing professional work from another PCS is now expressly permitted

(15) Responding to tenders or enquires issued by various users of professional services and securing professional work as a consequence is now expressly permitted.

Clause (7) (Most Important for exams)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

“advertises his professional attainments or services, or uses any designation or expressions other than Company Secretary on professional documents, visiting cards, letterheads or signboards, unless it be a degree of a University established by law in India or recognised by the Central Government or a title indicating membership of the Institute of Company Secretaries of India or of any other institution that has been recognised by

the Central Government or may be recognised by the Council.

Provided that a member in practice may advertise through a write up setting out the services provided by him or his firm and particulars of his firm subject to such guidelines as may be issued by the Council.”

As regards the ban on advertisement of professional attainments or services, almost all the professions all over the world had this type of restriction at least to start with. The idea behind this restriction was that advertisement by professionals is incompatible with the qualities of integrity and independence which a professional is expected to possess, especially when these acts are motivated by a desire for personal gain.

THINGS NOT ALLOWED:

A PCS cannot include in his advertisement following particulars like the infrastructure available in his own office, details of Associate PCS, details of his networking in other places within & outside India, infrastructure at such networked offices, number of trainees who have completed training from his office, certain landmark achievements like number of companies incorporated since he started his practice, number of appearances made before CLB/NCLT, CBDT, Tribunals, Regulatory Authorities, Commissions, number of Foreign Collaborations handled, number of Merger & Acquisitions handled, Number of due diligence carried out etc.

What amounts to advertisement of professional attainments or services is to be decided on a case to case basis, having regard to the attendant facts. For instance, where in the visiting card or name board or letterhead, a member in practice mentions that he is a **specialist or expert in company law, tax law, etc.** it would amount to advertisement of professional attainments or services.

Where in the letterhead or visiting card, a member in practice mentions that he was or is holding directorships in any company; it would be offending this clause.

The use of certain adjectives like **“a reputed firm”, “a well-known firm”,** etc. may be treated as inconsistent with the spirit of this clause. Similarly, announcement in the press by a Practicing member in regard to certain attainments like having been named for certain public awards, acquisition of merit in other professional examinations and other recognitions in any important committee, commission, governing body, etc. should be suitably modified so as not to be construed as amounting to advertisement of professional attainments or services. **Advertisement for part-time assignments fall under the mischief of this clause.**

Where a Company Secretary in Practice has been appointed as retainer/consultant by certain companies, it would not be proper to either list the names of such companies in letterheads, visiting cards or signboards or to circulate the list among prospective clients by way of circular. *However, including such names, while sending individual profile in response to a specific enquiry is permitted.*

Designations like Company Law Consultant, Income Tax Consultant, Corporate Adviser, Investment Adviser, Management Consultant etc. are prohibited.

Where a member in practice had described himself in visiting cards and letter heads as “Company Secretary & Advocate, High Court”, the Council held the member guilty of professional misconduct under this clause.

THINGS ALLOWED:

Council is of the view that a PCS can be permitted to allow his clients to use his name in their brochure/ hoardings etc. e.g. Builders invariably write the names of Architects, RCC Consultants, legal advisors on the Board at the construction site. Similarly the name of PCS may also be written. Certain software companies desire to use the name of PCS in their marketing brochure for their products while giving a list of satisfied customers. A PCS is permitted to allow his name to be used as one of the satisfied customers of particular software.

Where a member in practice furnishes upon a specific request by a prospective client, a list of companies for whom he is a consultant/ retainer or writes his specific subjects of specialisation, it may not be objectionable.

The use of descriptions indicating membership of the Institute of Chartered Accountants of India, The Institute of Cost and Works Accountants of India and the Bar Councils is permitted provided members are not holding certificate of practice issued by the Institute or using the description 'Company Secretary'. The use of the designation "Practicing Company Secretary". "Company Secretary in whole-time practice", etc. is not violative of this clause.

Clause (8)

Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

"accepts the position of a Company Secretary in Practice previously held by another Company Secretary in Practice without first communicating with him in writing."

With the advent of use of the technology, it would proper communication in this regard made by any other electronic medium viz., **SMS, Whats App and such other Messenger apps is also permitted**, provided the sender (the PCS taking up the assignment) is able to establish that the message is delivered to the recipient before he or she takes up the assignment.

Needless to mention, that a reasonable time should be given to the previous incumbent to offer his response, if any, and it is not just a kind of formality. For sake of better clarity, the new incumbent should express clearly in the communication the details of assignment being taken up by him. Oral communication is no communication as far as this clause is concerned.

In respect of following it shall not be mandatory (though desirable) to send a prior written communication to the earlier incumbent:

- a. certifying e-forms for various companies.
- b. giving Due Diligence Certificate for consortium borrowers.
- c. holding assignment as retainer for a company or group of companies
- d. issuing search reports.
- e. Issuing certificates as contemplated under SEBI (LODR) Regulation, 2015.
- f. Giving legal opinion

In respect of the following, it shall be mandatory to send a prior written communication

- (i) Signing / Certification of Annual Return
- (ii) Issuance of Secretarial Audit Report in terms of Section 204 of the Companies Act, 2013

- (iii) Issuance of Certificate of Securities Transfers.
- (iv) Certificate of reconciliation of capital, updation of Register of Members, etc. as per the Securities & Exchange Board of India's Circular D & CC/Cir-16/2002 dated December 31, 2002.
- (v) Conduct of Internal Audit of Operations of the Depository Participants.
- (vi) Certification of corporate governance under SEBI (LODR) Regulation, 2015.

Clause (9)

provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

“charges or offers to charge, accepts or offers to accept, in respect of any professional employment, fees which are based on percentage of profits or which are contingent upon the findings or results of such employment, except in cases which are permitted under any regulations made under this Act.”

Clause (10)

provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he—

“engages in any business or occupation other than the profession of Company Secretary unless permitted by the Council so to engage:

Provided that nothing contained herein shall disentitle a Company Secretary from being a director of a company except as provided in the Companies Act.”

The Council has expressly permitted a PCS to take up following vocations:

- (i) Acting as Private tutor.
- (ii) Authoring Books and Articles.
- (iii) Holding of Life Insurance Agency License for the limited purpose of getting renewal commission.
- (iv) Holding of public elective offices such as M.P., M.L.A., M.L.C. and others.
- (v) Honorary office-bearer ship of charitable, educational or other non-commercial organisations.
- (vi) Acting as Justice of Peace, Special Executive Magistrate and the like
- (vii) Teaching assignment under the Coaching Organisation of the Institute and other Institutes such as the Institute of Cost & Works Accountants of India, the Institute of Chartered Accountants of India, Management Institutes, Universities and any college affiliated to a University, and such other organisation as may be recognised by the Council of the Institute from time to time, so long as the hours during which a member in practice is so engaged in teaching do not exceed average three hours in a day irrespective of the manner in which such assignment is described or the remuneration receivable (whether by way of fixed amount or on the basis of any time scale of pay or in any other manner) by the member in practice for such assignment.
- (viii) carrying out valuation of papers, acting as a paper-setter, head examiner or a moderator, for any examination.
- (ix) Acting as editor of professional journals

Permission to be granted specifically

Members of the Institute in practice may engage in the following categories of business or occupation, after obtaining the specific and prior approval of the Executive Committee of the Council in each case:

1. Interest or association in family business enterprises even when he does not hold substantial interest in such enterprises.
2. Office of Managing Director or whole-time Director of a body corporate within the meaning of the Companies Act, 2013. The Council may refuse

	permission in individual cases though covered under any of the above categories. For the purpose of the above, a member shall be deemed to have a “substantial interest” in a concern: (i) in a case where the concern is a company, if its shares (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than twenty five per cent of voting power at any time during the previous year, are owned beneficially by such member. (ii) in the case of any other concern, if such member is entitled at any time during the previous year, to not less than 25% of the profits of such concern. A PCS can function as a non-executive director of a company. This does not require any prior approval Clause (11) Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “allows a person not being a member of the Institute in practice or a member not being his partner to sign on his behalf or on behalf of his firm anything which he is required to certify as a Company Secretary, or any other statements related thereto.”
PROFESSIONAL MISCONDUCT IN RELATION TO MEMBER IN SERVICE	PART II OF FIRST SCHEDULE Part II of First Schedule to the Act deals with professional misconduct of a member of the Institute (other than a member in practice) if he is an employee of any company, firm or person. Part II of the First Schedule recognises the need for a member in employment also to observe a certain code of conduct. To be in ‘employment’ connotes to be in a ‘contract of service’ and not ‘contract for service’. There are four indicia of a contract of service, namely : - master’s power of selection of his servant; - payment of wages or other remuneration; - master’s right to control the method of doing the work; and - the master’s right of suspension or dismissal. Part II and Part III of the First Schedule to the Act specify certain instances of misconduct to which a Company Secretary in employment may stand attracted. It has been mentioned earlier that under section 21 of the Act, the Council’s power to direct enquiry is not limited only to those contained in the Schedule to the Act, in view of the fact that the phrase ‘other misconduct’ used in section 21 is sufficiently broad enough to cover instances not enumerated in the Schedule. Clause (1) of Part II of the First Schedule provides that a member of the Institute (other than member in practice) shall be deemed to be guilty of professional misconduct, if he, being an employee of any company, firm or person— “pays or allows or agrees to pay, directly or indirectly, to any person any share in the emoluments of the employment undertaken by him.” This clause is analogous to clause (2) of Part I of the First Schedule in

	some respects. A member in employment shall not share emoluments of the employment with any other person, not even a member. Both direct and indirect sharing of the emoluments is prohibited. However, it may be noted that under Part I of the First Schedule, a member in practice can share the fee, commission or brokerage or profits with any other member of the Institute who is his partner. Clause (2) of Part II of the First Schedule provides that a member of the Institute (who is in service) shall be deemed to be guilty of professional misconduct, if he, being an employee of any company, firm or person— “accepts or agrees to accept any part of fees, profits or gains from a lawyer, a Company Secretary or broker engaged by such company, firm or person or agent or customer of such company, firm or person by way of commission or gratification.” This clause vindicates the confidence and trust that an employer reposes in an employee while the latter deals with any outsider on matters relating to business. It is an implied term of any employment that the employee concerned shall not secretly benefit from the employment. This clause is also analogous in some respects to clause (3) of Part I of First Schedule.
PROFESSIONAL MISCONDUCT IN REALTION TO MEMBES GENERALLY	Part III of the First Schedule to the Act covers cases of professional misconduct in relation to members of the Institute generally. Under this Part, three specific instances have been categorised as professional misconduct. Clause (1) of Part III of the First Schedule provides that a member of the Institute whether in practice or not shall be deemed to be guilty of professional misconduct, if he— “not being a Fellow of the Institute, acts as a Fellow of the Institute.” This clause prohibits the practice of styling oneself as a Fellow, while in fact he is not a Fellow member. A person is entitled to have his name entered in the Register as a Fellow as per regulation 4(2) of the Regulations. The Fellowship of the Institute suggests a certain degree of status and seniority and obviously any wrongful representation of such seniority amounts to breach of code of conduct. Clause (2) of Part III of the First Schedule provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he— “does not supply the information called for or does not comply with the requirements asked for by the Institute, Council or any of its Committees, Director (Discipline) Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority.” It is the duty of a member to supply information called for or to supply the requirements asked for by the Council or any of its Committees and other authorities. Non-compliance with this clause would tantamount to breach of code of conduct. The Council of the Institute in a case of professional misconduct, held a member guilty of professional misconduct under this clause for failure to disclose the fact of holding of the certificate practice of the Institute of Chartered Accountants of India to the Council of ICSI which was required to be made at the time of renewal of Certificate of Practice.

	A member of ICSI bound to give any and every kind of information called from him since not providing information is a misconduct under clause (2) of Part III of the First Schedule. It is presumed that the concerned authorities would call only relevant information. Clause (3) of Part III of the First Schedule provides that a member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he— “while inviting professional work from another Company Secretary or while responding to tenders or enquiries or while advertising through a write up, or anything as provided for in items (6) and (7) of Part I of this Schedule, gives information knowing it to be false.”
OTHER MISCONDUCT IN RELATION TO MEMBER GENERALLY	Clause 1 of Part IV A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding six months; Clause 2 of Part IV A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if in the opinion of the Council, he brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work. Clause 2 of Part IV of the First Schedule provides that it shall be misconduct if in the opinion of the Council, a member of ICSI brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work. Making an exhaustive list of such misconduct may not be possible. Following may amount to misconduct under Clause 2 of Part IV of the First Schedule; • Sending an e-mail to number of members (e-groups) criticizing the decisions of the Council in derogatory and filthy language. • Discussing through e-forums failures of the Council/ president/ secretary by using derogatory and filthy language. • Writing letter(s) in an aggressive, loud and filthy language to the Ministry of Corporate Affairs, about working of ROC offices/ MCA site, inability to upload forms etc. • Arranging DHARANA/ agitations at the gates of the Govt. Offices/Institute's offices in a manner not befitting a professional. • Instigating Students or other members by creating a pandemonium in or around Institute's offices by raising issues pertaining to syllabus, training, examination or any other reason what so ever. • Misusing the confidential data available with the offices of the Institute for personal purposes. • Inviting Govt. Officers for Chapter's / Regional Council's Programs by spending heavily on their travel & stay arrangements, with an intention to get personal mileage. • Tampering with the Books of Accounts/ Minutes of the meetings of the Managing Committees of Chapter/ Regional Councils.

PROFESSIONAL MISCONDUCT IN RELATION TO MEMBERS IN PRACTICE, WHICH REQUIRE ACTION BY A DISCIPLINARY COMMITTEE	PART I OF SECOND SCHEDULE Clause (1) Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “Discloses information acquired in the course of his professional engagement to any person other than the client so engaging him, without the consent of such client, or otherwise than as required by any law for the time being in force.” Clause (2) Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “Certifies or submits in his name or in the name of his firm a report of an examination of the matters relating to Company Secretarial practice and related statements unless the examination of such statements has been made by him or by a partner or any employee in his firm or by another Company Secretary in practice.” Clause (3) Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “Permits his name or the name of his firm to be used in connection with any report or statement contingent upon future transactions in a manner which may lead to the belief that he vouches for the accuracy of the forecast.” Clause (4) provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “expresses his opinion on any report or statement given to any business enterprise in which he, his firm or a partner in his firm has a substantial interest;” In this connection it may be stated that the Council has, pursuant to Regulation 168 of the Regulations passed a resolution in which ‘substantial interest’ has been defined to mean an interest to the extent of 25%. Clause (5) provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “fails to disclose a material fact known to him in his report or statement but the disclosure of which is necessary in making such report or statement, where he is concerned with such report or statement in a professional capacity.” Clause (6) Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “fails to report a material misstatement known to him and with which he is concerned in a professional capacity.” This clause deals with non-disclosure by a member in practice of a material misstatement known to him in any report with which he is concerned. Clause (7) provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “does not exercise due diligence, or is grossly negligent in the conduct of
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	his professional duties.” Clause (8) Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion.” Clause (9) Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “fails to invite attention to any material departure from the generally accepted procedure relating to the secretarial practice.” Clause (10) Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “fails to keep moneys of his client other than fees or remuneration or money meant to be expended in a separate banking account or to use such moneys for purposes for which they are intended within a reasonable time.”
PROFESSIONAL MISCONDUCT IN RELATION TO MEMBERS OF THE INSTITUTE GENERALLY	PART II TO SECOND SCHEDULE Clause (1) of Part II of Second Schedule Provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he— “contravenes any of the provisions of this Act or the regulations made there under or any guidelines issued by the Council.” This clause requires every member to pay due obedience to the Act, the Regulations and Guidelines issued by the council from time to time. For instance, a member of the Institute not having a certificate of practice representing that he is in practice (under section 24) or any violation of the rules relating to the conduct of elections (under Rule 42 of the Rules) would become guilty under this Clause; besides becoming liable for prosecution under section 24 of the Act. The Council of the Institute, found a member guilty of professional misconduct under this clause for contravention of Section 6 of the Act as he certified an Annual Return of a company without holding a certificate of practice. Following guidelines have been issued by the council so far 1. Display of particulars on website 2. Approving firm's name 3. Compulsory attendance at PDP 4. Dress Code 5. Issuing Compliance Certificate 6. Maintenance of Register of attestation services 7. Issue of advertisement by PCS 8. Change of Name of a Concern/Firm 9. Guideline for use of own Logo by PCS It is necessary for all the members to understand the guidelines and follow the same in spirit and letter. It is also necessary to mention here that contravention of any of the provisions of the Company Secretaries Act, 1980 or the Company Secretaries Regulations, 1982 made there under or any guidelines issued by the council falls within the ambit of clause (1),

	part II of the Second Schedule to the Company Secretaries Act, 1980 and invites sterner actions. Clause (2) of Part II of Second Schedule Provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he— “being an employee of any company, firm or person, discloses confidential information acquired in the course of his employment, except as and when required by any law for the time being in force or except as permitted by the employer.” Clause (3) of Part II of Second Schedule Provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he— “includes in any information, statement, return or form to be submitted to the Institute, Council or any of its Committees, Director (Discipline), Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority any particulars knowing them to be false.” Clause (4) of Part II of Second Schedule Provides that: “a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he defalcates or embezzles moneys received in his professional capacity.”
PART III TO SECOND SCHEDULE	This part is about other misconduct in relation to members of the Institute generally if a member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term exceeding six months. Part III does not get attracted at the very first instance of being held guilty but it is attracted only after the final appeal, as it may be, is disposed off and the member is held guilty. It may be observed that this clause does not provide that the offence for which a member is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term exceeding six months involves moral turpitude. Therefore even for an imprisonment for a term exceeding six months in an offense which does not involve moral turpitude would attract the consequences.
OTHER MISCONDUCT	(1) Subject to the provisions of this regulation, any complaint received against a member of the Institute under Section 21 shall be investigated, and any enquiry relating to misconduct of such member shall be held, by the Disciplinary Committee. Provided that if the subject matter of a complaint is, in the opinion of the President, substantially the same as or has been covered in any previous information of complaint received, the Secretary may file the complaint without any further action or inform the complainant, accordingly, as the case may be. (2) A complaint under Section 21 shall be made to the Council in the appropriate form, duly verified as required therein. (3) Every complaint shall contain the following particulars, namely- (a) the acts or omissions which, if proved, would render the member complained against guilty of any professional or other misconduct;

(b) the oral and/or documentary evidence relied upon in support of the allegations made in the complaint.

(4) Every complaint other than a complaint made by or on behalf of the Central or any State Government, shall be accompanied by a deposit of rupees fifty which shall be forfeited, if the Council, after considering the complaint, comes to the conclusion that no prima facie case is made out and, moreover, that the complaint is either frivolous or has been made with mala fide intention.

(5) The Secretary shall return a complaint which is not in the proper form or which does not contain the aforesaid particulars or which is not accompanied by the deposit of rupees fifty to the complainant for resubmission after compliance with such requirements and within such time as the Secretary may specify.

(6) Ordinarily within sixty days of the receipt of a complaint under Section 21 the Secretary shall,-

(a) if it is against an individual member send particulars of the acts of omissions alleged or a copy of the complaint, as the case may be, to such member at his address as entered in the Register;

(b) if it is against a firm, send particulars of the acts or omissions or a copy of the complaint, as the case may be, to the firm concerned at the address of the head office of the firm as entered in the Register of offices and firms which a notice calling upon the firm to disclose the name(s) of the member(s) concerned and to send particulars of acts or omissions or a copy of the complaint, as the case may be to member(s).

Explanation-A notice shall be deemed to be a notice to all the members who are partner or employees of that firm.

(7) A member who has been intimated of the complaint made against him under sub-regulation (6) (hereinafter referred to as the respondent) shall, within fourteen days of issue of such intimation or within such further time as the Secretary may allow, forward to the Secretary a written statement in his defence verified in the same manner as the complaint.

(8) On a perusal of the complaint and written statement in any, the Secretary may call for such additional particulars or documents connected there with either from the complainant or the respondent, as he may consider necessary or as may be directed by the President, for perusal of the Council.

(9) Where on a perusal of the complaint, the written statement, if any, of the respondent and other relevant documents and papers, the Council is prima facie of opinion that any member has been guilty of professional or other misconduct, the Council shall cause an enquiry to be made in the matter by the Disciplinary Committee and where the Council is prima facie of opinion that there is no case against the respondent, the case shall be dismissed and the complainant, if any, and the respondent shall be informed accordingly.

Provided that the Council may, if deemed necessary, call for any additional particulars or documents connected therewith from the complainant, if any, or the respondent.

(10)(i) Every notice issued by the Secretary or by the Disciplinary Committee under this Regulation shall be sent to the member or the firm

	concerned by registered post with acknowledgement due. (ii) If the notice is returned unserved with an endorsement to the effect that the addressee had refused to accept the notice, it shall be deemed to have been served. (iii) If the notice is returned with an endorsement indicating that the addressee cannot be found at the address given, the Secretary shall ask the complainant to supply to him the correct address to the member or firm concerned and send a fresh notice to the member or firm at the address so supplied. (11) The provision relating to a notice shall apply mutatis mutandis to a letter.
PROCEDURE IN ENQUIRY BEFORE THE DISCIPLINARY COMMITTEE	Applicable to the complaint or information pending before the Council or any inquiry initiated by the Disciplinary Committee or any reference or appeal made to a High Court prior to 17.11.2006. (1) It shall be the duty of the Secretary to place before the Disciplinary Committee all facts brought to his knowledge which are relevant for the purpose of any enquiry by the Disciplinary Committee. (2) The Disciplinary Committee shall have the power to regulate its procedure in such manner as it considers necessary and during the course of enquiry, may examine witnesses on oath and receive evidences on affidavits and any other oral or documentary evidence, exercising its powers as provided in Sub-section (8) of Section 21. (3) The Disciplinary Committee shall give the complainant and respondent a notice of the meeting at which the case shall be considered by the Committee. (4) Such complainant and respondent may be allowed to defend themselves before the Disciplinary Committee either in person or through a legal practitioner or any other member of the Institute. (5) Where, in the course of a disciplinary enquiry, a change occurs in the composition of the Disciplinary Committee, unless any of the parties to such enquiry makes a demand within fifteen days of receipt of a notice of a meeting of such Disciplinary Committee, that the enquiry be made de novo report of the Disciplinary Committee shall be called in question on the ground that any member of the Disciplinary Committee did not possess sufficient knowledge of the facts relating to such inquiry. (6) The Disciplinary Committee shall after investigation report the result of its enquiry to the Council for its Consideration

UNIT 22: SECRETARIAL STANDARD BOARD

INTRODUCTION	The Institute of Company Secretaries of India (ICSI), recognizing the need for integration, harmonization and standardization of diverse secretarial practices prevalent in the corporate sector, has constituted the Secretarial Standards Board (SSB) with the objective of formulating Secretarial Standards. SSB was constituted in the year 2000. The formulation of SSB is a unique and pioneering step by the Institute of Company Secretaries of India (ICSI) since there was no such Board or body throughout the world. The purpose of constituting this Board was for long-term benefits for the growth and enhanced visibility of the profession and setting up international benchmarks. The SSB comprises of representatives from major industry associations viz, ❖ The Federation of Indian Chambers of Commerce and Industry (FICCI), ❖ Confederation of Indian Industry (CII), ❖ The Associated Chambers of Commerce & Industry of India (ASSOCHAM), ❖ PHD Chamber of Commerce and Industry, ❖ Representatives of regulatory authorities, such as ○ The Ministry of Corporate Affairs, ○ Securities & Exchange Board of India, ○ Reserve Bank of India, ○ Bombay Stock Exchange, ○ National Stock Exchange of India Ltd. And ○ the sister professional bodies viz. the Institute of Chartered Accountants of India and the Institute of Cost Accountants of India and eminent members of the Institute of Company Secretaries of India in employment and in practice. The scope of SSB is to identify the areas in which Secretarial Standards need to be issued by the Council of ICSI and to formulate such Standards. SSB also clarify issues, if any, arising out of such Standards and issue guidance notes for the benefit of members of ICSI, corporates and other stakeholders.
FUNCTIONS OF SECRETARIAL STANDARD BOARD	The main functions of SSB are: (i) Formulating Secretarial Standards; (ii) Clarifying issues arising out of the Secretarial Standards; (iii) Issuing Guidance Notes; and (iv) Reviewing and updating the Secretarial Standards / Guidance Notes at periodic intervals.
NEED OF SECRETARIAL STANDARDS	❖ Companies follow diverse secretarial practices and, therefore, there is a need to integrate, harmonise and standardise such practices so as to promote uniformity and consistency. ❖ SSB formulates Secretarial Standards taking into consideration the applicable laws, business environment, practical applicability and the best secretarial practices prevalent. ❖ Secretarial Standards are developed in a transparent manner after extensive deliberations, analysis, research and after considering the views of corporates, regulators and the public at large.
SCOPE OF SECRETARIAL	Secretarial Standards do not seek to substitute or supplant any existing laws or rules and regulations framed thereunder but, in fact, seek to

STANDARDS	supplement such laws, rules and regulations. Secretarial Standards are issued in conformity with the provisions of the applicable laws. However, if, due to subsequent changes in the law, a particular Standard or any part thereof becomes inconsistent with such law, the provisions of the said law shall prevail.
PROCESS OF MAKING SECRETARIAL STANDARDS	The following procedure is adopted for formulating and issuing Secretarial Standards: (i) SSB, in consultation with the Council, determine the areas in which Secretarial Standards need to be formulated and the priority thereof. (ii) In the preparation of Secretarial Standards, SSB may constitute Working Groups to formulate preliminary drafts of the proposed Standards. (iii) The preliminary draft of the Secretarial Standard prepared by the Working Group shall be circulated amongst the members of SSB for discussion and shall be modified appropriately, if so required. (iv) The preliminary draft will then be circulated to the members of the Central Council, as well as to Regional Councils/ Chapters of ICSI, various professional bodies, Industry Association/Chambers of Commerce, regulatory authorities such as the Ministry of Corporate Affairs, the Securities and Exchange Board of India, Reserve Bank of India, Department of Public Enterprises and to such other bodies/organisations as may be decided by SSB, for ascertaining their views, specifying a time-frame within which such views, comments and suggestions are to be received. (v) On the basis of suggestions received on the preliminary draft, an Exposure Draft of proposed Secretarial Standard will be prepared and published in the “Chartered Secretary”, the journal of ICSI, and placed on the Website of ICSI for inviting suggestions/comments from public at large. The exposure draft will also be circulated to: - All Council Members - Regional Council/Chapters - Professional Bodies (ICAI/ICoAI). - Chambers of Commerce/Industry Associations - MCA/SEBI/RBI and such other bodies/organisations as may be decided by SSB - All members of the Institute through bulk e-mail/website link etc. (vi) After taking into consideration the comments received, the draft of the proposed Secretarial Standard will be finalised by SSB and submitted to the Council of ICSI. (vii) The Council will consider the final draft of the proposed Secretarial Standard and finalise the same in consultation with SSB. The Secretarial Standard on the relevant subject will then be issued under the authority of the Council. Section 118 (10) of Companies Act, 2013 provide that the every company shall observe secretarial standards with respect to general and board meetings specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved as such by the Central Government.

	Hence ICSI has so far issued the following Standards:
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| | <ul style="list-style-type: none">• Secretarial Standards on Meetings of Board of Directors(SS-1)• Secretarial Standards on General Meetings(SS-2)• Secretarial Standard on Dividend (SS-3)(adoption of the same is voluntary) |
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AMIT TALDA CLASSES

UNIT 23: MEGA FIRMS

INTRODUCTION	In a rapidly changing economy, industrial environment and emergence of the need for corporate governance and ethical business practices of voluntary disclosures, role of a practicing company secretary has also changed substantially over last three decades. Company Secretary in Practice has become a crucial player. The stakeholders are becoming vigilant towards the compliances. It is the prime duty of a professional to meet the expectations of the stakeholders at any given point of time. The Company Secretaries profession has also obtained new dimensions from being conscience keeper to compliance officer, governance professionals, Advisor, strategist for the growth of corporate. Presently the Company Secretaries profession has achieved a significant position in corporate world to step in a leadership role in guiding the corporates for the success and sustainable growth. The Company Secretaries to assume the leadership position with new role, values and approach. It is now imperative for Company Secretaries to act as catalyst for change and, help decision makers in setting the direction of corporate to achieve excellence. The Companies Act, 2013, so also Insolvency and Bankruptcy Code 2016, has considerably enhanced the role and responsibilities of company secretaries both in employment and in practice. Company secretary is a key managerial person in a company, responsible to ensure the effective and efficient administration of the company and certifying the company's compliance with the provision of the Act. This is challenging.
ADOPTION OF MODE OF PRACTICE	To meet the expectation and to survive competition, moulding, changing and upgrading oneself is a must. For stability as well as growth one needs to join hands with professional fraternity and have synergy. Synergy is possible by way of establishing big firms, putting minds, hands and intelligence together. Such flow of synergies would enable the Practicing community as a whole to grow big, achieve higher goals and maintain highest degree of quality which otherwise one would not be able to achieve as a sole proprietor. Before we talk about big firms let us understand the features of being in practice. Decision whether to join a company as whole time secretary or to start one's own practice itself is a tough decision to make. Features (Limitations) of a single practicing professional are enumerated as under: 1. Irregular Cash flows; 2. Capital investment. (Fixed as well as Working); 3. No limit on working hours , clients expect PCS to be available 24*7; 4. No work no pay— ---is a rule; 5. Need to continuously update oneself; 6. No body to protect your mistakes, PCS is directly exposed to all kinds of acts of omission & commission; 7. Has to create his own infrastructure – right from acquiring office premises, PCs, Computer networking, Office furniture, hardware, software, its maintenance; 8. Has to have staff, their appointments, promotions, incentives, salaries, HR management; 9. Cannot directly or indirectly solicit clients. Lesson 23 Mega Firms 7 3 1 10. No pension, no provident fund, no gratuity, no perquisites, no fringe benefits;

11. May not afford air travel or even train travel in first class, on the first day;
 12. No paid leave, no leave travel concession, No casual leave, No sick leave;
 13. Encroachment on family time.

Of course there are lots of positive aspects of being in practice the most important being, Quid Pro Co i.e. more you work more you get. PCS is his own master, he generates employment, has flexibility of working hours, has reasonable assurance of sustained earnings in long run, no fear of losing employment at advanced age.

FIRM WITH SEVERAL PARTNERS	PROPRIETOR
Various avenues of practice can be explored	Likely to get restricted to the Routine procedural matters
Knowledge management becomes easier as partners can help each other in their respective areas of expertise	Knowledge Management becomes difficult being the only person. No other person is available to guide. Keeping track of latest developments, case laws, notifications, circulars becomes a difficult task.
Inherent risks associated with the practice shared by others	Risk bearing has to be shouldered by one person. No one available to share the risk.
Several partners can render multidimensional services	Difficult for a Single individual to provide multiple services.
Partners inter se should have faith & trust	Not relevant
Frequencies of the partners should match. It is desirable that their family background, culture, political thinking should be more or less similar	Not relevant
Freedom of decision making gets restricted	No required. Full Freedom.
All partners should be mentally prepared to share revenue	No required. No sharing of revenue.
One is responsible to the wrongs & liability of his partners	Not relevant
There should not be communication gap inter se	Not relevant

APPLICABLE RULES, REGULATIONS AND GUIDELINES FOR PCS OR FIRM OF PCS

Whether a Company Secretary in Practice or a Firm of Company Secretaries they are subject to Rules, Regulations and Guidelines enumerated as under:

- (i) Company Secretaries Regulations, 1982
- (ii) Schedule I and III of Company Secretaries Act, 1980 in relation to Professional misconduct
- (iii) Guidelines for requirement of maintenance of a register of attestation certification services rendered by practising company secretary/firm of practising company secretaries
- (iv) Guidelines for issuing compliance certificate and signing of annual return
- (v) Guidelines framed by the council relating to approval of proprietorship concern/firm's name under regulation 169 of the company secretaries Regulations, 1982
- (vi) Guidelines for advertisement by Company Secretary in Practice
- (vii) Guidelines for compulsory attendance of Professional development programmes by the members
- (viii) Mechanism for maintenance of attendance records of members at

	professional development programmes and issuance of Certificates for programme credit hours (PCH) (ix) Guidelines for peer review of attestation services by Practising Company Secretaries (x) Guidelines for professional dress of Company Secretaries (xi) Guidelines for setting up and Conversion of Firms of PCS into LLP.
WHAT IS MULTI DISCIPLINARY/ MEGA FIRM?	Mega Firm can be described as a Partnership firm with more than twenty five partners. A firm which provides core professional service of a particular profession along with the allied and ancillary service with equal competence under one roof is a multidisciplinary firm. For example, company and corporate law is core knowledge for company secretaries, however, they can acquire expertise in any other area like direct indirect taxation, labour laws, economic laws, finance, accounting, insurance, international business and IPRs and they may be in position to provide single window business solutions. Regulation 168B of Company Secretaries Regulations, 1982 determines the membership of professional body for partnership, accordingly For the purposes of entering into partnership under clauses (4) and (5) of Part I of the First Schedule to the Act, a person shall be a member of any of the following professional bodies, namely:- • The Institute of Chartered Accountants of India established under the Chartered Accountants Act, 1949 • The Institute of Cost and Works Accountants of India established under the Cost and Works Accountants Act, 1959 • Bar Council of India established under the Advocates Act, 1961 • The Institute of Engineers or Engineering from a University established by law or an institution recognized by law; • The Indian Institute of Architects established under the Architects Act, 1972 • The Institute of Actuaries of India established, under the Actuaries Act, 2006 • Professional bodies or institutions outside India whose qualifications relating to Company Secretary recognized by the Council under Sub-section (2) of Section 38 of the Act This actually introduces the concept of multi-disciplinary firms or mega firms.
WHY MEGA FIRMS	Keeping in view of the present needs of the corporate and multi-dimensional growth of CS profession especially in the areas of practicing in the areas of Corporate Laws, Labour laws, RBI/ FEMA, acting as Secretarial Audit, Resolution Professional Insolvency Bankruptcy Code, GST Practitioner there is a need to structure and build the Multidisciplinary(MDF)/mega firms. There is a huge demand and scope for a multifunctional firm, where several services are provided under one roof. Clients always have a comfort level in dealing with such firms. They are assured of timely and quality service since even if one of the Partners is not available for consultancy they can bank on the others. Unless there are MDF/Mega firms, it may not be possible to cater to the bigger assignments.
PRE REQUISITES	1. All minds should work together and in union; 2. Say go to ego; 3. Mutual faith and respect lays strong foundation; 4. Unanimity shall be the rule on important policy decisions; 5. Financial discipline is a must; 6. Founder partners shall be given equal status; 7. Income of the firm shall be distributed at short regular intervals; 8. One shall not put undue influence on the others or show that he is king pin of the association.

BENEFITS	The nature of a multidisciplinary firm fosters collaboration. The common office space, with professionals working in close proximity to one another, provides each professional with a strong set of resources in the firm. In addition, this spirit of working together creates greater opportunity for collaboration so the total needs of the client are best met. • <u>Working in a team environment:</u> The concept of MDF will have an opportunity to work with team members who share interests, expertise, ideas, and work ethically. • <u>Exposure to various and different works:</u> Every client has different expectations, needs, audience, products and services, so consultants get to oversee projects of all kinds. In MDF being more than two partners having different experience in different fields the apprentice and employee will have an exposure to various and different works. With each partners specialized knowledge the MDF may venture into new areas of practice. • <u>Cost effective:</u> the With large investment budgets, the MDF have not only create state-of-the-art training facilities, they also may have much more developed infrastructure, processes and tools which can make your life less stressful when trying to sell or deliver a project. The overheads and the risks get distributed amongst the partners. • <u>Exceptional training and on-boarding:</u> MDF provides an opportunity to have a good training facilities whether on job training or off job training to get things started off on the right foot. The goal of on job training or off job training is to set you up for success, so during this training you can expect to receive the resources, knowledge, and tools to do so. • <u>Continuous learning:</u> The partners of MDF having multi-dimensional experience they can impart continuous training by adapting to new trends in the Profession. The great thing about staying on your toes is that clients appreciate it because you'll be able to develop relevant and successful ideas. Though it might sound overwhelming to always be on top of news and trends, it will eventually become habit – and the results are worth it! • <u>Big growth opportunities:</u> With the right work ethic and dedication, MDF can experience professional growth early compared to the other small firms. MDF may attract big multinationals. They get comfort about availability of at least one of the partners, if they are dealing with a firm rather than an individual. Senior partners can concentratre on critical assignments which obviously are more lucrative. • The MDF have an international or global scope and reach, offer diversified services and can draw from a large pool of consultants, skills and expertise, and hence become a Mega Firm. • <u>Revenue sharing:</u> By appropriate revenue sharing model a PCS who himself may not have subject expertise can get a share from the assignments of that subject being executed by others. • <u>Structure & Processes:</u> The structure for execution of works or assignments will be more systematic and the process will be cost effective due to the standard processes and procedure. The hiring and training of people will be more systematic there by productivity of the company will be improved
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	• Corporate or Industry perception: When considering different professional firms, the corporate client may be preferring to one of the familiar, renowned MDF having brand image. The MDF may appear like a known quantity and can draw from a large pool of partners and associates. • Reputation & risk-adjusted value: Many of the bigger client's organizations may prefer that "you never go wrong when hiring one of the MDF", since the renowned brands of the MDF are perceived as proxy for high levels of professionalism, quality and reputation. Credibility of the firm and brand gets established in long term.
RISKS	1. More cost on infrastructure and technology. 2. Dominance of senior partners over the younger partners. 3. Defining exit route is difficult. 4. Lack of transparency may lead to disputes. 5. If crack develops in mutual faith & trust, very difficult to cure. 5. Communication gap between partners
PROCESS OF CONSTITUTION	• The process of formation of MDF shall be an outcome of conscious and sincere decision and it is essential that the like minded professional should deliberate and take this decision. • It shall be ensured that the proposed constituents have expertise in different disciplines. There could be series of meetings before MOU is reached. It is advisable to work under MOU for one year. This works as a cooling period and for better understanding each other such trial period help in getting acclimatised. • Mutual faith and understanding is sine qua non. Time has to be given to understand the compatibility of the individuals to each other. Once the initial bridge is successfully crossed then formal partnership may be constituted on the agreed terms. • It will be in the long term interest of the MDF to have all the founder partners on equal footing. Their intellectual level shall be at par. During the reasonable period individual practice existing if any, shall be introduced in the firm. • When it is proposed to add new partner, apart from settling commercial terms, it is suggested that the MDF shall enter into MOU effective at least for one year with the proposed partner and after understanding each others compatibility he or she may be admitted to the MDF. <u>AGREEMENT BETWEEN PARTNERS</u> Partners must enter into a partnership agreement defining inter alia the process of decision making, allocation of duties, responsibilities, delegation of authorities, revenue sharing and exit route. <u>Management of Firms</u> The mega firm requires effective management skills including skills for handling finance, dealing with human resources and day to day administration of the office. The management of a MDF is in itself a major challenge. (a) Operational functions Operational functions are for providing services by the firms, the operational functions requires expertise in the domain areas by each of the partners

(b) administrative functions

Partners should allocate different administrative functions required for day to day functionality of the firm. For example infrastructure availability-right from acquiring office premises, handling reception, attending to calls, inward-outward, record keeping, PCs, library, computer networking, office furniture, hardware, software, its maintenance, brand building, etc.

(c) Human resources

The Mega firms over a period of time creates aa large pool of talented people. They need to be offered extremely competitive salaries and benefits, career and learning opportunities. Right from appointment of staff, promotions, incentives, salaries, HR management, require proper knowledge of human resources skills

(d) Client relationship

Michael R. Caplan, chief operating officer of Goodwin Procter, argues the benefits of a multi-disciplinary, full service model in the New York Law Journal: “When law firms treat client relationships as strategic partnerships, flexibility, transparency, and communication are paramount, investment in risk and reward is shared, and all firm resources are leveraged for the client’s benefit. Only then does the relationship grow and prosper.”

(e)Public Relationship and Brand building:

Admittedly a PCS firm cannot advertise or solicit clients . The only way to grow is rendering excellent timely and quality service to the client who certainly recommend the name of a good consultants to their peers.

There cannot be a marketing department in MDF but there has to be PR department which ensures cordial relations with the existing and probable clients.

REVENUE SHARING MODELS

In the long term success of the MDF the revenue sharing model has to be designed to suit the given situation. Partners may adopt simple revenue sharing model to share profits and losses equally. In this model it is assumed that each one is bringing equal business and generating equal revenue.

However, in reality if it doesn’t happen it may give rise to sense of discomfort against the person who is continuously showing less contribution but at the same time getting equal share of profits.

Therefore, it is essential to device “performance, contribution and efficiency based” revenue sharing model. Assume a situation where A,B,C,D and E are the partners expert in different disciplines. The revenue sharing model could be the following:

1. Partner bringing new client shall be given referral or induction share, say, @ 15% of the fees settled and received; it can be for the first year or for given number of years;
2. Certain percentage of fees, say 15% shall be retained in business in common pool for meeting expenses;
3. 70% of the fees shall be given to the partner or partners who actually work on the assignment (assignment share). When more than one partners are involved in an assignment their share can be determined based on respective role;
4. At the year end after meeting expenses resultant profit shall be shared in proportion of contribution of individual in the gross earnings/ net profit of the firm.

	5. Internally, different verticals can be created and surplus generated by each one can be assessed as an independent cost centre. This model motivates each partner to bring more and more business into the firm and also to work for maximization of his share and wealth of the firm. There could be more tailor made revenue sharing models, however, the model based on performance, contribution and efficiency is likely to work better.
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AMIT TALDA CLASSES

COMPANIES (AUDITORS REPORT) ORDER, 2020
DATED 25.02.2020

SHORT TITLE, APPLICATION AND COMMENCEMENT	(1) This Order may be called the Companies (Auditor's Report) Order, 2020. (2) It shall apply to every company including a foreign company as defined in clause (42) of section 2 of the Companies Act, 2013 (18 of 2013) [hereinafter referred to as the Companies Act], except– (i) a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949); (ii) an insurance company as defined under the Insurance Act, 1938 (4 of 1938); (iii) a company licensed to operate under section 8 of the Companies Act; (iv) a One Person Company as defined in clause (62) of section 2 of the Companies Act and a small company as defined in clause (85) of section 2 of the Companies Act; and (v) a private limited company, not being a subsidiary or holding company of a public company, having a paid up capital and reserves and surplus not more than one crore rupees as on the balance sheet date and which does not have total borrowings exceeding one crore rupees from any bank or financial institution at any point of time during the financial year and which does not have a total revenue as disclosed in Scheduled III to the Companies Act (including revenue from discontinuing operations) exceeding ten crore rupees during the financial year as per the financial statements. (3) It shall come into force on the date of its publication in the Official Gazette.						
AUDITORS REPORT TO CONTAIN MATTERS SPECIFIED IN PARAGRAPH 3 & 4	Every report made by the auditor under section 143 of the Companies Act on the accounts of every company audited by him, to which this Order applies, for the financial years commencing on or after the 1st April, 2020, shall in addition, contain the matters specified in paragraphs 3 and 4, as may be applicable: Provided this Order shall not apply to the auditor's report on consolidated financial statements except clause (xxi) of paragraph 3.						
MATTERS TO BE INCLUDED IN AUDITOR'S REPORT	The auditor's report on the accounts of a company to which this Order applies shall include a statement on the following matters, namely:- (i) (a) (A) whether the company is maintaining proper records showing full particulars, including quantitative details and situation of Property, Plant and Equipment; (B) whether the company is maintaining proper records showing full particulars of intangible assets; (b) whether these Property, Plant and Equipment have been physically verified by the management at reasonable intervals; whether any material discrepancies were noticed on such verification and if so, whether the same have been properly dealt with in the books of account; (c) whether the title deeds of all the immovable properties (other than properties where the company is the lessee and the lease agreements are duly executed in favour of the lessee) disclosed in the financial statements are held in the name of the company, if not, provide the details thereof in the format below:- <table><tr><th>Description of property</th><th>Gross Carrying value</th><th>Held in the name</th><th>Whether promoter, director</th><th>Period held – indicate range,</th><th>Reason for not being</th></tr></table>	Description of property	Gross Carrying value	Held in the name	Whether promoter, director	Period held – indicate range,	Reason for not being
Description of property	Gross Carrying value	Held in the name	Whether promoter, director	Period held – indicate range,	Reason for not being		

			of	or their relative or employee	where appropriate	held in the name of company Also indicate if in dispute

(d) whether the company has revalued its Property, Plant and Equipment (including Right of Use assets) or intangible assets or both during the year and, if so, whether the revaluation is based on the valuation by a Registered Valuer; specify the amount of change, if change is 10% or more in the aggregate of the net carrying value of each class of Property, Plant and Equipment or intangible assets;

(e) whether any proceedings have been initiated or are pending against the company for holding any benami property under the Benami Transactions (Prohibition) Act, 1988 (45 of 1988) and rules made thereunder, if so, whether the company has appropriately disclosed the details in its financial statements;

(ii) (a) whether physical verification of inventory has been conducted at reasonable intervals by the management and whether, in the opinion of the auditor, the coverage and procedure of such verification by the management is appropriate; whether any discrepancies of 10% or more in the aggregate for each class of inventory were noticed and if so, whether they have been properly dealt with in the books of account;

(b) whether during any point of time of the year, the company has been sanctioned working capital limits in excess of five crore rupees, in aggregate, from banks or financial institutions on the basis of security of current assets; whether the quarterly returns or statements filed by the company with such banks or financial institutions are in agreement with the books of account of the Company, if not, give details;

(iii) whether during the year the company has made investments in, provided any guarantee or security or granted any loans or advances in the nature of loans, secured or unsecured, to companies, firms, Limited Liability Partnerships or any other parties, if so,-

(a) whether during the year the company has provided loans or provided advances in the nature of loans, or stood guarantee, or provided security to any other entity [not applicable to companies whose principal business is to give loans], if so, indicate-

(A) the aggregate amount during the year, and balance outstanding at the balance sheet date with respect to such loans or advances and guarantees or security to subsidiaries, joint ventures and associates;

(B) the aggregate amount during the year, and balance outstanding at the balance sheet date with respect to such loans or advances and guarantees or security to parties other than subsidiaries, joint ventures and associates;

(b) whether the investments made, guarantees provided, security given and the terms and conditions of the grant of all loans and advances in the nature of loans and guarantees provided are not prejudicial to the

	company's interest; (c) in respect of loans and advances in the nature of loans, whether the schedule of repayment of principal and payment of interest has been stipulated and whether the repayments or receipts are regular; (d) 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; (e) whether any loan or advance in the nature of loan granted which has fallen due during the year, has been renewed or extended or fresh loans granted to settle the overdues of existing loans given to the same parties, if so, specify the aggregate amount of such dues renewed or extended or settled by fresh loans and the percentage of the aggregate to the total loans or advances in the nature of loans granted during the year [not applicable to companies whose principal business is to give loans]; (f) whether the company has granted any loans or advances in the nature of loans either repayable on demand or without specifying any terms or period of repayment, if so, specify the aggregate amount, percentage thereof to the total loans granted, aggregate amount of loans granted to Promoters, related parties as defined in clause (76) of section 2 of the Companies Act, 2013; (iv) in respect of loans, investments, guarantees, and security, whether provisions of sections 185 and 186 of the Companies Act have been complied with, if not, provide the details thereof; (v) in respect of deposits accepted by the company or amounts which are deemed to be 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 and the rules made 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 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 Goods and Services Tax, 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 statutory dues referred to in sub-clause (a) 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 any transactions not recorded in the books of account have been surrendered or disclosed as income during the year in the tax assessments under the Income Tax Act, 1961 (43 of 1961), if so, whether
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the previously unrecorded income has been properly recorded in the books of account during the year;

(ix) (a) whether the company has defaulted in repayment of loans or other borrowings or in the payment of interest thereon to any lender, if yes, the period and the amount of default to be reported as per the format below:-

Nature of borrowing, including debt securities	Name of lender	Amount not paid on due date	Whether principal or interest	No. of days of delay or unpaid	Remarks if any
	Lender wise details to be provided in case of defaults to banks, financial institutions and government				

(b) whether the company is a declared wilful defaulter by any bank or financial institution or other lender;

(c) whether term loans were applied for the purpose for which the loans were obtained; if not, the amount of loan so diverted and the purpose for which it is used may be reported;

(d) whether funds raised on short term basis have been utilised for long term purposes, if yes, the nature and amount to be indicated;

(e) whether the company has taken any funds from any entity or person on account of or to meet the obligations of its subsidiaries, associates or joint ventures, if so, details thereof with nature of such transactions and the amount in each case;

(f) whether the company has raised loans during the year on the pledge of securities held in its subsidiaries, joint ventures or associate companies, if so, give details thereof and also report if the company has defaulted in repayment of such loans raised;

(x) (a) whether moneys raised by way of initial public offer or further public offer (including debt instruments) during the year 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;

(b) whether the company has made any preferential allotment or private placement of shares or convertible debentures (fully, partially or optionally convertible) during the year and if so, whether the requirements of section 42 and section 62 of the Companies Act, 2013 have been complied with and the funds raised have been used for the purposes for which the funds were raised, if not, provide details in respect of amount involved and nature of non-compliance;

(xi) (a) whether any fraud by the company or any fraud on the company has been noticed or reported during the year, if yes, the nature and the

	amount involved is to be indicated; (b) whether any report under sub-section (12) of section 143 of the Companies Act has been filed by the auditors in Form ADT-4 as prescribed under rule 13 of Companies (Audit and Auditors) Rules, 2014 with the Central Government; (c) whether the auditor has considered whistle-blower complaints, if any, received during the year by the company; (xii) (a) whether the Nidhi Company has complied with the Net Owned Funds to Deposits in the ratio of 1: 20 to meet out the liability; (b) whether the Nidhi Company is maintaining ten per cent. unencumbered term deposits as specified in the Nidhi Rules, 2014 to meet out the liability; (c) whether there has been any default in payment of interest on deposits or repayment thereof for any period and if so, the details thereof; (xiii) whether all transactions with the related parties are in compliance with sections 177 and 188 of Companies Act where applicable and the details have been disclosed in the financial statements, etc., as required by the applicable accounting standards; (xiv) (a) whether the company has an internal audit system commensurate with the size and nature of its business; (b) whether the reports of the Internal Auditors for the period under audit were considered by the statutory auditor; (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 of Companies Act have been complied with; (xvi) (a) whether the company is required to be registered under section 45-IA of the Reserve Bank of India Act, 1934 (2 of 1934) and if so, whether the registration has been obtained; (b) whether the company has conducted any Non-Banking Financial or Housing Finance activities without a valid Certificate of Registration (CoR) from the Reserve Bank of India as per the Reserve Bank of India Act, 1934; (c) whether the company is a Core Investment Company (CIC) as defined in the regulations made by the Reserve Bank of India, if so, whether it continues to fulfil the criteria of a CIC, and in case the company is an exempted or unregistered CIC, whether it continues to fulfil such criteria; (d) whether the Group has more than one CIC as part of the Group, if yes, indicate the number of CICs which are part of the Group; (xvii) whether the company has incurred cash losses in the financial year and in the immediately preceding financial year, if so, state the amount of cash losses; (xviii) whether there has been any resignation of the statutory auditors during the year, if so, whether the auditor has taken into consideration the issues, objections or concerns raised by the outgoing auditors; (xix) on the basis of the financial ratios, ageing and expected dates of
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	realisation of financial assets and payment of financial liabilities, other information accompanying the financial statements, the auditor's knowledge of the Board of Directors and management plans, whether the auditor is of the opinion that no material uncertainty exists as on the date of the audit report that company is capable of meeting its liabilities existing at the date of balance sheet as and when they fall due within a period of one year from the balance sheet date; (xx) (a) whether, in respect of other than ongoing projects, the company has transferred unspent amount to a Fund specified in Schedule VII to the Companies Act within a period of six months of the expiry of the financial year in compliance with second proviso to sub-section (5) of section 135 of the said Act; (b) whether any amount remaining unspent under sub-section (5) of section 135 of the Companies Act, pursuant to any ongoing project, has been transferred to special account in compliance with the provision of subsection (6) of section 135 of the said Act; (xxi) whether there have been any qualifications or adverse remarks by the respective auditors in the Companies (Auditor's Report) Order (CARO) reports of the companies included in the consolidated financial statements, if yes, indicate the details of the companies and the paragraph numbers of the CARO report containing the qualifications or adverse remarks.
REASONS TO BE STATED FOR UNFAVOURABLE OR QUALIFIED ANSWERS	(1) Where, in the auditor's report, the answer to any of the questions referred to in paragraph 3 is unfavourable or qualified, the auditor's report shall also state the basis for such unfavourable or qualified answer, as the case may be. (2) where the auditor is unable to express an opinion on any specified matter, his report shall indicate such fact together with reasons as to why it is not possible for him to give his opinion on the same.