FREQUENTLY ASKED QUESTIONS ON COMPANIES ACT, 2013

Disclaimer:

The Institute has set up a dedicated e-mail id for posting operational difficulties and views relating to Companies Act, 2013. Several pertinent and relevant queries with regard to the Companies Act, 2013 have been received from the stakeholders. The queries which were common and related have been compiled together and response to the same is being provided in the form of Frequently Asked Questions.

These FAQs are academic interpretation of the provisions of the Companies Act, 2013 and rules made thereunder. Due care has been taken in the preparation of responses to reflect true intention of the law. The Institute shall not be responsible for any loss or damage resulting from any action taken on the basis of these responses.

Frequently Asked Questions on Companies Act, 2013

1. **Section 2(49) defines the term 'interested directors' whereas at various sections reference to section 184 is drawn to mean/define interested director. Section 2(49) is wider than Section 184 leading to confusion – which definition should be applied?**

Ans. Section 2(49) of the Companies Act, 2013 defines interested director as a director who is in any way, whether by himself or through any of his relatives or firm, body corporate or other association of individuals in which he or any of his relatives is a partner, director or a member, interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into by or on behalf of a company;

Section 184 (2) provides that 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.

Wherever the term 'interested director' appears in the Act and the Rules thereon, read sections 2(49) and 184 together.

2. **Whether a private Company having paid-up share capital 45 Lakhs and turnover of Rs. 20 Crores as per last audited balance sheet will be treated as small company or not?**

ANS: Such company will be treated as small company. Section 2(85) define a small company as a company other than a public company,—

(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or

(ii) turnover of which as per its last profit and loss account does not exceed 2 crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to—
(A) a holding company or a subsidiary company;
(B) a company registered under section 8; or
(C) a company or body corporate governed by any special Act .

Here the word **"OR"** is written**,** it means that a private company fulfilling any one condition i.e either turnover less than Rs. 2 crores or paid up capital less than Rs. 50 lacs will be considered as small company.

3. Whether every company is required to alter its Articles of Association as per the new format under the Companies Act, 2013?

Ans. Sub-section (6) of Section 5 provides that the articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company.

Sub-section (9) of section 5 provides that nothing in this section shall apply to the articles of a company registered under any previous law unless amended under the Act.

It is not necessary but suggested that whenever a company amends its articles, it should ensure that subsequent to the amendment, the AOA is as per the format specified under the Companies Act, 2013.

Since certain provisions of Companies Act, 2013 require specific clauses in the Articles to carry out operations of any organization, such as for issuance of bonus shares, it is advisable Articles should be altered in line with the new requirements as various provisions themselves require specific clauses to be incorporated in the Articles.

4. Is section 42 applicable for Right Issue of shares under section 62(1)(a)? Are PAS 4 (Letter of Offer) and PAS 5 (Record of Offer) applicable for Rights Issue of shares?

Ans: As per section 23 of the Companies Act, 2013 a public company can issue securities:-

- To public through prospectus;

- Through private placement by complying with the provisions of part II of chapter III; or
- Through a right issue or bonus issue.

In case of a private company it can issue securities by any method as mentioned above other than to public through prospectus.

Thus, there is no need to comply with the provisions of section 42 in case of right issue and accordingly PAS-4 and PAS-5 shall not be applicable in case of right issue.

5. **Section 46 read with the Companies (Share Capital and Debentures) Rules, 2014 requires passing of Board Resolution for issuance of share certificates. Under the Companies Act, 1956 such power could be delegated to Committee of the Board. Companies Act, 2013 is silent on this issue**.

Ans. Section 179 which deals with powers of Board lists items which are required to be approved by Board at its duly convened meeting. These items are such which require deliberation and discussion at the meeting and of important nature. One such item is 'issue of securities'.

This matter has already been examined by the MCA and it has, vide its General Circular 19/2014 dated June 12, 2014, clarified with regard to issue of duplicate share certificates, that a committee of Directors may exercise such powers subject to any restrictions imposed by the Board in this regard [in the light of the provisions of section 179, 180 and regulation 71 of table "F" of Schedule I to the Companies Act, 2013].

6. **On further issue of shares to existing shareholders under section 62(1)(a): What would be the intimation form viz return of allotment form as form PAS-3 doesn't mention section 62. It mentions only section 39 which is for public issue and section 42 which is private placement? Whether shareholder's approval is required for the said issue?**

ANS: For every issue, return of allotment (refer section 39) Form PAS 3 will be filed with the ROC irrespective of whether the share is allotted through private, ESOP, Right Issue or Bonus issue. No, shareholder approval is not for a rights issue.

7. **In terms of Section 73 of Companies Act, 2013 read with Rule 2(1)(c)(vii) of Companies (Terms and conditions of acceptance of Deposit) Rules, 2014, deposits do not include receipt of money from**

Director of the Company, but money received from a member is treated as deposit. In case deposit is taken from a person who is both a director and a member of the Company, will such receipt of money be treated as deposit or not?

ANS: Any amount received from a person who, at the time of the receipt of the amount, was a director of the company furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others is not considered as deposit.

Although, there is no specific provision which clarifies the question above but a deposit from a member who is also a director should be treated as deposit from a member.

8. **By what time are companies are required to switch over to the new format of Register of Members, Register of Directors and Key Managerial Personnel and their Shareholding?**

ANS: As per Rule 3 of the Companies (Management & Administration) Rules, 2014 all the existing companies, registered under the Companies Act, 1956, shall prepare its registers of members as per the provisions of section 88 of the Companies Act, 2013 within a period of 6 months from the date of commencement of Companies (Management & Administration) Rules, 2014.

Further after 1st April 2014 all the registers of Directors & KMP shall be prepared as per the provisions of the section 170 of the Companies Act, 2013. The register of directors & director's shareholding maintained before 1 April, 2014 as per the provisions of the companies Act, 1956 needs not to be converted as per the provisions of the section 170 of Companies Act, 2013.

9. **Are companies required to file compliance certificate required in terms of Companies Act, 1956 for the financial year ended March 31, 2014?**

Ans. For the financial year ending March 31, 2014, specified companies would be required to file the Compliance certificate as per the provisions of proviso to Sub-section (1) of Section 383A of the Companies Act, 1956.

MCA has vide General Circular 08/2014 dated 04.04.2014 clarified that the financial statements (and documents required to be attached thereto), auditors report and Board's report in respect of financial years that commenced earlier than 1st April, 2014 shall be governed by the relevant provisions/ Schedules/ rules of the Companies Act, 1956 and that in respect of financial years commencing on or after 1st April, 2014, the provisions of the new Act shall apply. As the compliance certificate forms part of the Board's Report it shall be filed and attached with the Board's Report for the year financial year 2013-14.

10. The Annual Return for the financial year ended 31st March 2014 is to be filed in which form?

Ans. MCA vide General Circular dated 25th June, 2014 clarified that Form MGT-7 shall not apply to annual returns in respect of companies whose financial year ended on or before 1st April, 2014 and for annual returns pertaining to earlier years. These companies may file their returns in the relevant Form applicable under the Companies Act, 1956.

Accordingly, the annual return in terms of section 92 of the Companies Act, 2013 in form MGT. 7 as covered in this guidance note will be applicable for the financial years commencing on or after 1st April, 2014.

11. According to section 103 of Companies Act, 2013, in case of a Private Limited Company, 2 members personally present shall be the Quorum.

If Quorum is not present within half an hour from the time appointed for holding a meeting, then the meeting shall stand adjourned, and if at the adjourned meeting also, Quorum is not present, the members present shall be the Quorum.

In case, there are only 2 shareholders. Out of these, one cannot attend AGM, according to above, whether one person attending the AGM, would be taken as quorum in case of adjourned meeting?

ANS: No, one person can not form quorum of an adjourned meeting. Please refer to Department of Company Affairs' (now Ministry of Company Affairs) Letter No. 8/16(1)/61-PR dated May 19, 1961 wherein the views of the Department on this issue are also that a single person cannot by himself constitute a quorum at the adjourned AGM.

12. Whether show of hands under section 107 is possible in case of companies which are covered under Rule 20 of Companies (Management and administration) Rules, 2014 relating to voting through electronic means?

Ans. According to Rule 20(1) every listed company or a company having not less than one thousand shareholders, shall provide to its members facility to exercise their right to vote at general meetings by electronic means. For all the transactions put to vote by electronic means by such companies, impliedly the provisions of section 107 become ineffective.

The same has been clarified by the MCA vide General Circular 20/2014 dated 17th June, 2014 wherein it is stated that voting by show of hands under section 107 would not be allowable in cases where rule 20 of Companies (Management and Administration) Rules, 2014 is applicable.

Note: Referring to General Circular 20/2014 dated 17th June, 2014 the MCA while considering the some practical difficulties in respect of voting through electronic means and conduct general meetings, decided not to treat the relevant provisions of Section 108 of the Companies Act, 2013 read with rule 20 of the Companies (Management and Administration) Rules, 2Ol4 dealing with the exercise of right to vote by members by electronic means (e-means as mandatory till 31st December, 2O14

13. Whether concept of demand for poll u/s 109 of the Companies Act, 2013 is relevant for companies covered under Rule 20 of Companies (Management and administration) Rules, 2014 relating to voting through electronic means.

Ans. The Ministry of Corporate Affairs vide General Circular 20/2014 dated 17th June, 2014 clarified that companies which are covered under section 108 read with rule 20 of Companies (Management and Administration) Rules, the provisions relating to demand for poll would not be relevant.

14. Whether a person who has voted through e-voting facility provided by the company, can participate in general meeting? Further, can he change his vote?

Ans. A member of the company who has voted through electronic means may attend the general meeting and participate in the deliberations,

though in accordance with the section 108 and Rule 20 of Companies (Management and administration) Rules, 2014, the member is not allowed to change his vote once casted.

It has been clarified by MCA vide General Circular 20/2014 dated 17th June, 2014 that a person who has voted through e-voting mechanism in accordance with rule 20 shall not be debarred from participation in the general meeting physically. But he shall not be able to vote in the meeting again, and his earlier vote (cast through e-means) shall be treated as final.

15. Whether concept of proxy is relevant for a person who has voted electronically?

Ans. Proxy is a facility given to the members to exercise his voting rights in case the member is unable to attend and vote himself. The provision for electronic voting is a platform facilitating the members to vote on their own. Hence if a member himself votes electronically, the concept of appointment and voting by proxy becomes irrelevant.

16. With regard to resolution requiring special notice, Section 115 of the Companies Act, 2013 who can move such resolution- whether such number of members holding shares on which aggregate sum not exceeding five lakhs has been paid up or by such number of members holding shares on which aggregate sum not less than five lakh rupees has been paid up?

Ans. Section 115 of the Companies Act, 2013 provides notice of the intention to move a resolution can be given to the company by such number of members holding shares on which such aggregate sum not exceeding five lakh rupees, as may be prescribed, has been paid-up.

Accordingly, Rule 23 of the Companies (Management and Administration) Rules, 2014 prescribes such number of members holding shares on which – not less than five lakh rupees has been paid up.

Therefore, resolution requiring special notice may be moved by such number of members holding shares on which such aggregate sum of not less than five lakh rupees has been paid up.

17. Is it mandatory for a company to keep its documents records, registers and minutes in electronic form?

Ans. According to Section 120 the documents, records, registers, minutes may be kept and inspected in electronic form. As per Rule 27 of Companies (Management and Administration) Rules, 2014, it is mandatory for every

listed company or a company having not less than one thousand share holders, debenture holders and other security holders, to maintain its records, as required to be maintained under the Act or rules made there under, in electronic form.

18. Whether all statutory registers maintained under the provisions of the Companies Act, 1956 need to be converted to electronic mode within the stipulated period of six months pursuant to the provisions of Companies Act, 2013?

Ans: As per Rule 27 of the Companies (Management and Administration) Rules, 2014 every listed company or a company having not less than 1000 shareholders, debenture holders and other security holders, shall maintain its records in electronic form. In case of existing companies, data shall be converted from physical mode to electronic mode within six months from the date of notification(w.e.f 1-4-2014 therefore by 30-09-2014).

19. As per section 124(6) all the shares in respect of which unpaid or unclaimed dividend has been transferred to Investor Education and Protection Fund shall also be transferred by the company to Investor Education and protection Fund. Whether a shareholder can claim back the shares and whether he can attend general meeting and give vote thereat.

Ans. As per proviso to section 124(6) claimant of shares shall be entitled to claim the transferred shares from IEPF and the procedure for that would be specified in the IEPF Rules. The Rules are yet to be notified.

20. What is the relevant financial year, with effect from which such provisions of the new Act relating to maintenance of books of account, preparation, adoption and filing of financial statements (and attachments thereto), auditors report and Board's report will be applicable.

Ans. As per MCA Circular No.08/2014 dated 4th April, 2014, the financial statements (and documents required to be attached thereto), auditors report and Board report in respect of financial years that commenced earlier than 1st April, 2014 shall be governed by the relevant provisions/ Schedules/ rules of the Companies Act, 1956 and that in respect of financial years commencing on or after 1st April, 2014, the provisions of the new Act shall apply. This means that the financial statements etc for the year ending 31st March 2014 shall be prepared as per Companies Act, 1956 and for the year ending 31st March 2015 and thereafter shall be prepared as per the Companies Act, 2013.

21. What are the provisions with respect to signing of financial statements under the Companies Act, 2013

Ans. As per section 134(1), Financial Statement is required to be signed by:

- the chairperson of the company where he is authorised by the Board or by two directors out of which one shall be managing director;
- the Chief Executive Officer, if he is a director in the company,
- the Chief Financial Officer; and
- the company secretary of the company,

wherever they are appointed,

In the case of a One Person Company, the Financial Statement is required to be signed only by one director.

22. Whether the activity a company is required to do as per statutory obligation under any law, would be termed as CSR activity?

Ans. No, the activity undertaken in pursuance of any law would not be considered as CSR activity.

In this regard, please refer to the Ministry of Corporate Affairs Circular No. 21/2014 dated June 18, 2014 where it is clarified that expenses incurred by companies for the fulfilment of any Act/ Statute of regulations (such as Labour Laws, Land Acquisition Act etc.) would not count as CSR expenditure under the Companies Act, 2013.

23. There are certain corporate groups who run hospitals and educational institutions, will this be considered as CSR?

Ans. If the hospitals and educational institutions are part of the business activity of the company they would not be considered as CSR activity. However, if some charity is done by these hospitals or educational institutions, without any statutory obligation to do so, then it can be considered as CSR activity.

24. What are the consequences for non-compliance of CSR provisions?

Ans. The concept of CSR is based on the principle ‘comply or explain’. Section 135 of the Act does not lay down any penal provisions in case a company fails to spend the desired amount. However, sub-section 8 of section 134 provides that in case the company fails to spend such amount, the Board shall in its report specify the reasons for not spending the amount.

In case the company does not disclose the reasons in the Board’s report, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to twenty- five lakh rupees and every

officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both. (Section 134(8).

25. Whether section 135 is required to be complied by the company including its holding or subsidiary company?

Ans. Rule 3(1) of Companies (CSR Policy) Rules, 2014, every company including its holding or subsidiary which fulfils the criteria specified in sub-section (l) of section 135 of the Act with regard to networth/ turnover or net profit shall comply with the provisions of section 135 of the Act and these rules.

As per section 135(1), every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

The criterion needs to be fulfilled by individual company**.** Therefore, if the holding company or the subsidiary company fulfils the criteria specified in Section 135, all the provisions mentioned therein becomes applicable to such company.

26. For compliance under section 135 i.e. Corporate Social Responsibility, from which Financial Year CSR Expenditure & Reporting Begins?

Ans. Since section 135 relating to Corporate Social Responsibility and schedule VII has become effective from April 01, 2014, every company which meets the criteria specified under sub-section (1) of section 135 is required to comply the same from April 01, 2014. Companies have to spend the amount on CSR activities as required by section 135 during the F.Y. 2014-15 and Reporting of the same would be in 2015 Board's Report or otherwise state the justification for the same in Board Report.

Accordingly, amongst other things, the constitution of CSR Committee, preparation of CSR Policy, the spending of amount on CSR activities needs to be during the financial year 2014-15.

27.**Whether the provisions of CSR are applicable to section 8 companies?**

Ans. Since section 8 companies are supposed to apply their profits in promoting the objects such as commerce, art, science, sports, education etc., these companies are perhaps not, required to follow CSR provisions.

Rather, under Rule 4 of Companies (CSR Policy) Rules, 2014 companies may route their CSR activities through a section 8 company (Rule 4 of Companies (CSR Policy) Rules, 2014).

28. In case of companies having multi-locational operations, which local area of operations should the company choose for spending the amount earmarked for CSR operations?

Ans. Proviso to Section 135(5) of the Companies Act 2013 provides that a company shall give preference to the local area and the areas around it where it operates for spending the amount earmarked for CSR activities. In case of multi-locational operations, the company could exercise discretion in choosing the area for which it wants to give preference.

29. In case the company has appointed personnel exclusively for implementing the CSR activities of the company, can the expenditure incurred towards such personnel in terms of staff cost etc. be included in the expenditure earmarked for CSR activities?

Ans. The Ministry of Corporate Affairs vide General Circular No. 21/2014 dated 18th June, 2014 clarifies that Salaries paid by the companies to regular CSR staff as well as to volunteers of the companies (in proportion to company's time/hours spent specifically on CSR) can be factored into CSR project cost as part of the CSR expenditure.

30. Are the provisions with regard to CSR applicable to foreign companies?

Ans. In terms of Rule 3(1) of the Companies (Corporate Social Responsibility Policy) Rules, 2013, a foreign company having its office or project office in India which fulfils the criteria specified in Section 135(1) is required to comply with the provisions of Section 135 of the Act and the Rules thereunder.

The networth, turnover or net profit of a foreign company is to be computed in accordance with the balance sheet and profit and loss account of the foreign company prepared with respect to its Indian business operations in accordance with schedule III or as near thereto as may be possible for each financial year.

Therefore foreign company having its branch office or project office in India which fulfils the criteria specified under section 135(1) is required to constitute a CSR Committee and comply with the spending of 2% of average net profits as per financial statement of its Indian business operations in CSR activities in India.

31. Where CSR activities lead to profits then what about such surplus?

Ans. Rule 6(2) of the Companies (CSR Policy) Rules, 2014 provides that 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. This impliedly means that the surplus arising out of CSR projects or programs or activities of the company shall not form part of the business profit of a company.

Ideally, the surplus should be rolled over to CSR Corpus.

32. If a company having turnover of more than Rs. 1000 crores or more but has incurred loss any of the preceding three financial years then whether such company is required to comply with the provisions of the section 135 Companies Act, 2013?

Ans. As per the provisions of section 135 of the Act, one of the three criteria has to be satisfied to attract Section 135. Therefore, if a company satisfies the criterion of turnover although it does not satisfy the criterion of net profit, it wil have to comply with the provisions of Section 135 and the Companies (CSR Policy) Rules, 2014.

33. In case the appointment of an auditor is not ratified by the shareholders at annual general meeting as required under proviso to Section 139(1), what recourse does the company have?

Ans. Explanation to Rule 3(7) of the Companies (Audit and Auditors) Rule 2014 explains that in case the appointment is not ratified by the members of the company, the Board of Directors shall appoint another individual or firm as its auditor or auditors after following the procedure laid down in this behalf under the Act.

34.**For the purpose of rotation of auditors, whether 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 consideration for calculating the period of five consecutive years, in case of individual; or ten consecutive years for firm**.

Ans. Yes, as per rule 6(3) of Companies (Audit and Auditors) Rules, 2014, 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 consideration for the purpose of rotation of auditors.

For example, in case of listed and prescribed companies, if an individual has completed four years as an auditor on April 01, 2014, he can continue for one more year in the same company and not more than that.

Further, if he wishes to again get appointed there, he may do so after the cooling period of five years from the completion of his term of five years.

35. Please Clarify whether the appointment of Cost auditor shall be for a period of 5/ 10 years like that of the Statutory Auditor as prescribed under Section 139.

ANS: The Concepts of Cost auditor and statutory auditor are completely different from each other. No Order has been issued by the Central Government till date. Hence, old Orders, guidelines rules and regulation regarding the cost audit issued under Companies Act, 1956 will continue to be applicable to the Company for 2014-15.

36. What is the time limit within which the Board has to appoint an Independent Director and at which meeting whether Board Meeting or General Meeting?

Ans: Section 149(5) of the Companies Act, 2013 inter alia provides that company existing on before the commencement of this Act, which are falling within the ambit of section 149(4), shall have to appoint Independent Directors within one year from the commencement of Companies Act, 2013 or rules made in this behalf, as may be applicable.

Further, Schedule IV to the Companies Act, 2013, inter alia provides that, the appointment of the Independent Director shall be approved by the Company in its meeting of shareholders.

37. As per provision of Section 149(5) appointment of independent directors is being given one year transition period but there is no such transition time for remuneration or nomination committee. Under Section 178 Nomination & Remuneration committee is to have min. 2 independent directors. If a company does not have Independent directors as of now, how can the committee be constituted as one year transition time given for appointment of Independent Directors? Can

remuneration and nomination committee constitution be also assumed to be formed in one year transition time?

Ans: Ministry has, vide its Notification dated June 12, 2014, clarified that the public companies required to constitute Nomination and Remuneration committee can constitute the same within one year from the commencement of the relevant rule or appointment of Independent Directors by them, whichever is earlier.

38. Can existing independent directors continue up to the their original tenure as if the Companies Act, 1956 had been in force and be re-appointed for a period of 5 years under the Companies Act 2013 on the completion of original tenure?

Ans. In terms of the explanation provided for the purpose of Sub-section (5) and (10) & (11) of Section 149, any tenure of an independent director on the date of commencement of this Act shall not be counted as a term under sub-sections (10) and (11) of Section 149. Further Section 149(5) provides a transitionary period of one year to comply with the requirement of independent directors, referring to General Circular No. 14/2014 dated 9th June, 2014 it has been clarified by the Ministry that if it is intended to appoint existing independent directors under the new Act, such appointment shall be made in accordance with Section 149(10) and (11) read with Schedule IV of the Act within one year from April 1, 2014 i.e. by March 31, 2015.

Further the appointment of existing directors also needs to be formalized through a letter of appointment.

39.**Can an Independent Director of a Company be appointed as Independent Director of its holding, subsidiary or associate company?**

Ans. Yes, an Independent Director of a Company can be appointed as Independent Director of its Associate/sister concern.

Also, as per clause 49 III. (i) of the listing agreement, at least one independent director on the Board of Directors of the holding company shall be a director on the Board of Directors of a material non listed Indian subsidiary company.

40. Whether the directors appointed by entity/ies which have the interest in the Company in the nature of Equity, shall be treated as nominee directors?

Ans: As per explanation to section 149(7) “nominee director” means a director:-

- nominated by any financial institution in pursuance of the provisions of any law for the time being in force; or of any agreement;
- appointed by any Government; or
- any other person to represent its interests.

Thus, the directors appointed by any private equity investor may be covered in the above third category.

41. As per Section 149(10) Independent Director shall hold office for a term up to five consecutive Years and as per Section 149(11) No Independent Director shall hold office for more than two consecutive terms.

Independent Director is appointed in the AGM of 2014 for less than Five Years (Say Three Years). – FIRST TERM

He is again appointed in the AGM of 2017 for Five Years. – SECOND TERM.

In 2022 he will complete two consecutive terms but he will not complete total term of ten years.

Whether he can be appointed in the AGM of 2022 for another 2 years to complete his total term of 10 years?

Ans: Ministry has, vide its General Circular 14/ 2014 dated June 09, 2014, clarified that the appointment of an Independent Director (the ID) for a term less than five years would be permissible, appointment for any term (whether for five year or less) is to be treated as a one term under section 149(10) of the COMPANIES ACT, 2013.

Further, section 149(11) provides that no person can hold office of ID for more than ‘two consecutive terms’. Such a person shall have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years.

Thus, in view of the above, in the above query ID cannot be appointed in the AGM of 2022 for another 2 years to complete his total term of 10 years.

42. **Whether independent directors shall be included in the total number of directors for the purpose of sub-section (6) and (7) of section 152 of the Companies Act, 2013**

Ans. Section 152(6) of the Companies Act, 2013 provides that unless the Articles of Association provide for retirement by rotation of all directors at every annual general meeting, at least two-thirds of the total number of directors of a public company shall be persons whose office is liable to retirement by rotation and sub-section (7) provides that one-third of such directors shall retire by rotation at each annual general meeting of the company after the first annual general meeting. Independent directors shall not be included in the total number of directors for the purpose of sub-sections (6) and (7).

Pursuant to section 149 (13), the requirement of retirement by rotation pursuant to sub-section (6) and (7) of Section 152 is also not applicable to independent directors.

43. **In case a public company has three directors. Out of three directors 1 director is an independent director whose office is not liable to retire by rotation, 1 director is a managing director appointed for a fixed term and 1 is the promoter director/ director appointed pursuant to share purchase agreement/ nominee director etc. whose office also is not liable to retirement by rotation. How can such a company ensure the compliance of section 152 (6) and (7**)?

Ans. In such situations it is advised that companies appoint such number of non-executive directors whose office is liable to retire by rotation and thereby ensure compliance of Section 152(6) and (7).

44. Whether alternate director vacates office when the original director joins video conference at a Board meeting even though he does not return to India.

Ans. The office of Alternate Director is nowhere related to the attendance of the Original Director in the Board Meeting [**also refer MCA Letter No. 6/16/(313)/68-PR, dated 5-2-1963**]. The office of Alternate Director shall be terminated if and when the director in whose place he has been appointed returns to India. Therefore, joining meeting by video conferencing by the original director will not vacate the office of the alternate director.

45. If a *private company* has failed to file its financial statements for the F.Y. 2008-09 and onwards and such default was not covered under section 274(1)(g) of the COMPANIES ACT, 1956 and now it is a default under section 164(2) of the COMPANIES ACT, 2013:

- **Whether the Director shall be disqualified on and from April 01, 2014; and**
- **He shall also vacate the all directorships in all other Companies?**

Ans: This issue is not completely clear and a clarification is expected on this issue.

However, Section 164(2) provides that ***any person who is or has been a director*** of a company which—

- *has not filed financial statements* ***or*** *annual returns* for any continuous period of three financial years; or
- *has failed to repay the deposits etc.* on the due date or *pay interest due thereon* or *pay any dividend declared* *and such failure to pay or redeem continues for one year or more*,

shall not be eligible to be re-appointed as a director of that company or ***appointed in other company for a period of five years*** from the date on which the said company fails to do so.

From the above, it can infer that any person is falling under the purview of above said section, then such person shall be not be eligible to be appointed as a director in the same company as well as shall not be appointed as a director in any other company for a period of five years; and in view of section 167(1)(a) his office of director shall also be vacated in the company in which the default has committed.

46. A public limited company incorporated received certificate of commencement of business (CCOB) in March, 2014.

As per the provisions of section 165 of the Companies Act, 1956, every company limited by shares shall within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business hold a general meeting of the members of the Company which shall be called the statutory meeting.

ANS: The Company is required to hold its statutory meeting as per the provisions of the companies Act, 1956. This is because that public company was incorporated under the act, 1956 and as it has received COB in March 2014, at that time the provisions of the section 165 were in force. Further, the e-form 22 is also available on the MCA portal.

47. When a foreign director joins the meeting by audio/video conference, (where he is counted for the purpose of quorum u/s 174), is it sufficient to say that foreign director was not absent u/s 167(1) (b) even if he does not physically attend even a single Board meeting in a period of 12 months?

Ans. The requirement of section 167(1)(b) is only for attendance of a Director in the Board Meeting himself; however this section doesn't deal or regulate the manner of attending the Board Meeting. Therefore, the Board Meeting attended by any Director, whether in person or through video conferencing or other audio visual means, shall be sufficient attendance for the purpose of section 167(1)(b).

48. Please clarify whether vacation of office of director on account of not attending board meetings under Section 167(1)(b) has prospective or retrospective effect?

ANS: The said section is applicable from 1st April 2014, it means that a director absent himself from the entire board meeting held during a period of twelve months with or without obtaining leave of absence, his office as director shall vacate.

49. Are notices of disclosure of interest received from directors in terms of Section 184 of the Companies Act, 2013 required to be filed with the ROC? If yes in what form?

ANS: In terms of section 117(3)(g) resolutions passed as per section 179(3) the Company is required to file e-form MGT-14 within 30 days of passing the resolution. 179(3) deals with the powers of the boards which may be exercised at board meetings only and as per section 179(3)(k) the rules may prescribe additional matters and rule 8 of Companies (Meeting of Board & its Power) Rules, 2014 requires that the disclosure of directors' interest and shareholding should be taken note of only by means of a resolution passed at board meeting. Therefore a company is required to file resolution for taking note of disclosure of director's interest and shareholding in Form MGT-14.

50. With reference to Section 117 read with Section 179(3) of the Companies Act, 2013 it states that the financial statements approved by the Board has to be filed with ROC in MGT-14.

However, the Circular no.08/2014 states that the financial statements has to be prepared as per the Companies Act, 1956 and all the relevant provisions of 1956 Act will apply.

Considering this circular there was no obligation on the part of the Company under 1956 Act to file the resolution for approving the financial statement.

So is there any need to file the resolution with ROC in MGT-14 this year? Or it will be applicable from this year only.

ANS: It is clarified by the ministry that the financial statements are to be prepared under the provisions of Companies Act, 1956. Section117 says that every resolution passed under the section 179(3) of the companies act, 2013 is required to be filed by the company with ROC in MGT-14. Here the board is not preparing the financial statement, the board is approving it and approval of audited financial statement whether quarterly, half yearly or annual by the board falls under the purview of section 179(3) of the Companies Act, 2013 and accordingly form MGT-14 is required to be filed.

51. In case the board delegates its powers to borrow to one of its committee, is the company required to file Form MGT 14 for delegation its power to Committee and also each time the committee exercises the power which is delegated to it?

ANS: The Company is required to file e-form MGT 14 with the ROC only when the board delegates its power to its committee to borrow and no MGT - 14 is required to be filed each time the committee exercise its power to borrow money within the limits authorized by the board.

52. After filling form for Disclosure of interest of Directors, if any changes have been made, whether disclosure from Directors is required again?

Ans: As per section 184, whenever there is any change occurred in the disclosures already made then at first Board Meeting held after such change, shall be disclosed.

53. In context of Section 185 & 186 of Companies Act 2013, if any group private limited company gives/provides corporate guarantee and

equitable mortgage of its property in favour of its group public limited company, is it possible to give the same. What if both the companies are private limited companies?

ANS: As per the provisions of section 185 no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person. However 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 is exempted from the requirements under this section; and 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 is exempted from the requirements under this section.

54. If a Company has granted stock options prior to the promulgation of the Companies Act, 2013, then whether such stock options can be exercisable by the Independent Directors?

Ans: As section 197(7), section 62(1)(b) and Rule 12 of the Companies (Share Capital and Debentures) Rule, 2014, an Independent Director has been disentitled to any stock option but nowhere the Independent Directors has been prohibited to exercise the stock options which has been granted to them before Companies Act, 2013. Therefore, they can exercise the stock options prior to the commencement of the Companies Act, 2013; however, they shall not be entitled to have any stock option after the commencement of Companies Act, 2013.

55. Is it compulsory for Company Secretary to attend the All Board, Committee and General Meeting?

ANS : Yes, it is compulsory for a company secretary to attend all Board, committee and general meeting of the Company as it is the one of the duties of the company secretary as mentioned in section 205 of the Companies Act, 2013.

56. Is it mandatory to file the return of appointment of KMPs appointed in terms of Section 203?

Ans. Yes – it is mandatory for a company to file a return of appointment of a managing director, whole time director or manager, chief executive officer,

company secretary and Chief Financial officer in Form no. MR.1 as prescribed in Rule 3 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.

Further, particulars of appointment of KMP and any change among them are also required to be filed in Form DIR-12.

57. Can the KMP of Holding Co. be appointed in only one subsidiary or in all subsidiaries of holding company at the same time?

Ans: As per section 203(3) of the Companies Act, 2013,a Whole-time KMP of a company shall not hold office in more than one company except in its subsidiary company. This section restricts a person to hold office in more than one company, while at the same time enables a person to hold office in its subsidiary company and ideally he may be appointed in only one subsidiary.

58. Can a company have two Managing Directors?

Ans: As per third proviso to section 203 of the COMPANIES ACT, 2013 a company may appoint or employ a person as its MD, if he is the MD or Manager of one and not more than one other company with the consent of all directors present at meeting.

59. Whether provisions related to the Managerial Remuneration are applicable on all KMPs?

Ans: Section 203 of the COMPANIES ACT, 2013 provides that certain class of companies [refer rule 8 and 8A of the Companies (Appointment and Remuneration of Managerial) Rules, 2014] are required to appoint following whole time KMP:-

- Managing Director or Chief Executive Officer or Manager and in their absence whole-time director;
- Company Secretary; and
- Chief Financial Officer.

Section 197 and Schedule V to the COMPANIES ACT, 2013. Section 197 prescribes certain caps and compliance only in regard to the remunerations of Directors including MD, WTD and Manager.

Therefore, the provisions related to the managerial remuneration are not applicable on all KMPs but they are applicable only on such managerial

personnel as mentioned in Section 197 and Schedule V to the COMPANIES ACT, 2013. Therefore, CS and CFO not being managerial personnel as mentioned in Section 197, the provisions of Section 197 will not apply on them.