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COMPANY LAW REFRESHER COURSE

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Disclaimer

Views expressed are of my own and not of the organisation in which I am employed

This presentation is to the best of my understanding of the subject which is complex in nature

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Key Managerial Personnel

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KEY MANAGERIAL PERSONNEL

- Under section 2(51) KMP 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 as may be prescribed
- **The use of the word “and” denotes** that all these positions are to be exclusive and not alternative

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KEY MANAGERIAL PERSONNEL CONTD

- Pursuant to section 203 appointment of KMP is compulsory to the class of companies notified by the Central Government
- A company which does not fall in such class of companies, but has designated a person by any of the above designations, by default they may not become a KMP, unless so designated

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MANAGING DIRECTOR

- Section 2(54) defines the ‘Managing Director’ and the **characteristics of the definition are as under:**
 - He should be a Director of the company
 - He must be **entrusted with substantial powers of management** of the company
 - Such powers must be entrusted by way of a resolution passed by the Board or General meetings, an agreement or by virtue of the articles of association of the company
 - Such powers are to be exercised subject to the superintendence, control and direction of the Board
 - A person who occupies the position without being designated would be deemed to be a MD

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MANAGER

- Section 2(53) defines the 'Manager' and the **characteristics of the definition are as under:**
 - He must be an individual
 - He must be entrusted with and be **in charge of the management of the whole or substantially the whole of the affairs** of the company
 - He must be subject to the superintendence, guidance and control of the Board
 - He **may or may not be a Director** of the company
 - A person who is not designated as Manager but occupies the position by whatever name called and exercises such powers would be regarded as a Manager
 - He **may or may not be an employee** of the Company



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FAQS

- **Can a factory manager who has substantial powers to run the factory, be considered as a Manager of the company?**
 - “NO” – manager must be overall in-charge of the affairs of the management of the company’s affairs and that of a particular function i.e. factory
- **Can a company have more than one MD**
 - Yes a company can have more than one MD. Both the MDs may be entrusted upon with substantial powers over separate affairs of the company
- **Can a company have more than one Manager**
 - There is no prohibition as such. But when the manager derives powers to have whole or substantially whole of the affairs of the company, how two people can hold such position

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DIFFERENCE BETWEEN MD AND MANAGER

- **Managing director should be necessarily on the Board** of the company. Manager may or may not be on the Board
- Managing director is entrusted with **substantial power of the management of affairs** of the company, whereas a Manager is entrusted with **whole or substantially whole of the affairs** of the company
- **Manager derives powers by virtue of his statutory position**, whereas MD doesn't derives his powers by virtue of his position
- **Managing director is an employee** of the company and a Manager may or may not be so



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CHIEF EXECUTIVE OFFICER (CEO)

- Section 2(18) defines CEO means an officer of a company, who has been designated as such by it
- He is simplicitor an officer of the company **entrusted with some powers of management**
- Accordingly **he is an officer in default** and is liable to punishment under the Act



CHIEF FINANCIAL OFFICER (CFO)

- Section 2(19) defines a CFO – means a person appointed as the Chief Financial Officer of the company
- If a company has to mandatorily appoint a KMP, the CFO is to be appointed by the Board at its meeting
- No qualifications are prescribed for a CFO unlike a Company Secretary



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Appointment of Key Managerial Personnel

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APPOINTMENT OF A KMP

- Pursuant to section 203 every company belonging to such class of companies as may be prescribed **shall have** the whole-time Key Managerial Personnel
- The words used is that such class of companies “shall have” and not “shall appoint”, hence the **whole-time KMP is not required to be in the employment of the company**
- The services of a KMP can be hired or seconded

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APPOINTMENT OF KMP

- Pursuant to Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 the following class of companies have to appoint KMP
 - Every **listed company** and
 - Every other **public company** having a paid up share capital of ten crore rupees or more shall have a whole-time KMP
- **Share capital** means equity as well as preference capital of a company
- **Listed company** as per section 2(52) means 'a company' which has any of its securities listed on any recognized stock exchange

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RULE 8A – APPOINTMENT OF A COMPANY SECRETARY

- A company other than a company covered under Rule 8 which has a paid up share capital of five crore rupees or more shall have a whole-time company secretary
- Vide Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2020 dated January 3, 2020, the above was substituted by
 - “Every private company which has a paid up share capital of ten crore rupees or more shall have a whole -time company secretary.”.
- This means that any company which has a paid up capital less than rupees ten lakhs need not appoint a company secretary

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WHOLE-TIME KMP

- The prescribed class of companies shall appoint the following whole-time KMPs
 - Managing Director or CEO or Manager and **in their absence** a whole-time director
 - Company Secretary and
 - Chief Financial Officer
- Where a company has Managing Director or CEO or Manager and a whole-time director, the first three positions only are to be appointed as KMPs and not the whole-time director.
- Only where there is no MD or CEO or Manager but a whole-time director, then such whole-time director can be appointed as KMP
- Since these are whole-time KMP positions **one person can't hold two positions**

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APPOINTMENT OF WHOLE-TIME KMP

- Every whole-time KMP shall be appointed **by means of a board resolution** containing the terms of the appointment including the remuneration
- **Pursuant to rule 8** of the Companies (Meetings of Board and its powers) Rules, 2014, the **appointment and removal of KMP shall be by means of a resolution passed at the meeting of the Board**
- Hence appointment and removal of KMP can't be by a resolution passed by circulation



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EXCEPTION TO WHOLE-TIME KMP OF A COMPANY

- A whole-time KMP of a company shall not hold office in more than one company
 - except in its subsidiary company at the same time
- However a KMP can be appointed as a Director of a any company, **with the permission of the Board**

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APPOINTMENT OF MD OR MANAGER IN MORE THAN ONE COMPANY

- A company may appoint a person as its MD or Manager of one and of not more than one other company
- Such appointment can be made or **approved by a resolution passed at a meeting of the board**
- Such resolution is to be **consented by all directors present at the meeting**
- **Specific notice** in this regard shall be **given to all the directors** then in India



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VACATION OF A KMP

- If the office of any whole-time KMP is vacated, the resulting **vacancy shall be filled up** by the Board at a meeting of the Board **within a period of six months** from the date of such vacancy

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Appointment of Directors

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APPOINTMENT OF A DIRECTOR

- Articles of association of a company may contain a provision **naming the first directors** of the company
- In case there is no such provision the **subscribers to the memorandum**, who are individuals, shall be deemed to be the directors of the company
- In case of a one person company, the individual being member shall be deemed to be the first director, until the director is appointed
- Every director shall be appointed by the company in general meeting
- Every **director shall have a DIN**
- Every person proposed to be appointed shall **furnish to the company his DIN and a declaration that he is not disqualified to become a director**



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APPOINTMENT OF A DIRECTOR CONTD

- Every director shall give his **consent to act as a director** and such consent shall be filed with the ROC
- In case of appointment of independent director, the **explanatory statement** to the notice shall include a statement that in the opinion of the board such **proposed director fulfils the conditions specified for such appointment**
- Unless the articles provide for retirement of all directors at every AGM, not less than two-thirds of the total number of directors of a public company **shall retire by rotation**
- The directors who have been longest in the office shall retire by rotation
- The retiring director, if eligible and offers himself for re-appointment may be re-appointed



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APPOINTMENT OF A DIRECTOR CONTD

- For counting the total number of directors to arrive the number of directors liable to retire by rotation, independent directors are not to be counted

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APPOINTMENT OF RETIRING DIRECTOR BY ROTATION

- If the vacancy of the retiring director is **not filled up or has not expressly resolved** not to fill the vacancy, the meeting shall stand adjourned to next week
- If at the **adjourned meeting also the same is not decided**, then the retiring director shall be deemed to be re-appointed unless
 - At the meeting a resolution for his re-appointment was put up but lost
 - Retiring director **expressed his unwillingness** to be re-appointed
 - He is not qualified or **disqualified for re-appointment**
 - A resolution for his **appointment is required by virtue of provisions** of this act

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PROPOSAL OF CANDIDATURE

- A person who is not a retiring director, intends to be appointed as a director, shall
 - leave a notice under his hand signifying his candidature as a director,
 - not less than fourteen days before the meeting
- A sum of rupees one lakh shall be deposited
- Such deposit shall be refunded, if the proposed person gets elected or gets more than twenty five percent of total valid votes casted either on a show of hands or by poll
- Such deposit is not required, if the candidature of the person is proposed by NRC or Board of the company

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ADDITIONAL DIRECTOR

- Articles of the company may confer power on its Board to appoint directors on the Board as additional directors
- Such person shall not be the person who fails to get appointed as a director in a general meeting
- Such directors shall hold office up to the date of the next annual general meeting or the last date on which the AGM ought to have been held
- **An additional director can be appointed as a Managing Director** for a period of five years or **designated as independent director** for a period of five years. In case at the AGM he has not been elected as a director, he will be ceased to be a director as well as MD or ID also

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ALTERNATE DIRECTOR

- The board **if so authorized by its articles**, may appoint a person as an alternate director to a director during his absence for a period of **not less than three months from India**
- Such person shall not hold any alternate directorship for any other director in the company or can hold a directorship in the same company
- An alternate director to an independent director shall be qualified to be appointed as an ID
- Board has the privilege to appoint such alternate director and the **director has no right to appoint** an alternate director for himself
- When the **original returns to India** the alternate director shall vacate the office
- For all purposes the alternate director is a director
- He is neither an agent nor a proxy for the original director



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FAQS

- **To whom the meeting notices and agenda papers are to be sent?**
 - **For all purposes both are directors.** Hence all notices and agenda papers of Board and Committee meetings are to be sent to both original and alternate directors
- If the original director is a member of some committees, whether alternate director automatically become member of those committees?
 - No
- If the original director attends the meeting through VC and the alternate director attends in person whose presence is to be taken under the provisions of the Act
 - Its the presence of alternate director is only counted for the purpose of quorum and he can only participate and vote at the meeting.
 - The original director's presence is to be taken as an invitee only. He neither has a right to participate nor vote at the meeting



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APPOINTMENT OF DIRECTOR IN CASUAL VACANCY

- The **director who was appointed by the company in a general meeting** is vacated before the expiry of his term, such vacancy is known as casual vacancy
- If the articles provide such vacancy can be **filled by the Board at a meeting**
- This means a director who is appointed in a casual vacancy **can't be appointed by a circular resolution**
- Such appointment shall be subsequently approved by the members in the immediately next AGM of the company
- Such director shall hold office only up to the date up to which the director in whose place he is appointed would have held office if he had not vacated



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WHAT IS A CASUAL VACANCY?

- If a director who was **appointed by the Board as an additional director vacates** his office before the AGM, such vacancy is not a casual vacancy
- The director who was **appointed by the Board in the casual vacancy vacates** his office before the AGM such vacancy is not casual vacancy
- **Casual vacancy means** a vacancy which occurs by reason of death, resignation, disqualification or vacation
- It is **not mandatory for the board to fill such vacancy**
- If the vacancy is not filled in means the size of the board is reduced



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Cessation of Directors

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RESIGNATION OF A DIRECTOR

- A director **may cease to a director by** Resignation, Removal, Disqualification, Vacation or by Death
- A director **may resign from his office** by simply giving his resignation in writing to the company
- The Board should **take note of the resignation** and no need to accept the resignation
- The **board shall report such resignation in its Report** to be laid before the next AGM
- The resignation comes **shall take effect from the date of receipt** of such resignation letter or the such **date as mentioned** in the resignation letter



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REMOVAL OF A DIRECTOR

- A company may remove a director **by an ordinary resolution**
- A **special notice shall be given** for such removal and such director is to be given an opportunity of being heard
- Such director i.e who was so removed, shall not be re-appointed as a director by the Board of directors
- In case of an **independent director who has been appointed for a second term** can only be removed by passing a special resolution



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DISQUALIFICATION / VACATION OF A DIRECTOR

- A person shall not be appointed as a director, who attracts the disqualifications provided under section 164(1) of the Act
- The office of a **director shall become vacant** who attracts the provisions of section 167 of the Act
- A person who disqualifies to act as a director shall deemed to vacate his office as a director
- In case a director **disqualifies under section 164(2) he shall vacate his directorship in all companies**
- **A private company may provide some additional grounds** under which the director shall vacate his office



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Appointment of Managerial Personnel & Remuneration

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APPOINTMENT OF MD, WTD, MANAGER

- **No company shall appoint** a Managing Director and a Manager **at the same time**
- No company shall appoint a Managing Director or a Manager or a Whole-time Director for a **term exceeding five years** at a time (this is not applicable in case of a Government company)
- No re-appointment shall be made **earlier than one year before** the expiry of the term

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RESTRICTIONS ON APPOINTMENT

- Such person shall not be **below the age of 21 years or has attained the age of seventy years**
- Appointment of a person who has attained the age of seventy years shall be **by way of a special resolution** and the explanatory statement shall give **justification for such appointment**
- However in case the **special resolution is not passed** but the votes casted for the motion exceed the votes against and if the **Central Government** is satisfied that such appointment is most beneficial to the company **may permit it**
- Has any time **suspended payment to his creditors**
- Has at **any time convicted by the court and was sentenced** for a period more than six months



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APPROVAL OF MEMBERS & CENTRAL GOVERNMENT

- The appointment and remuneration of managerial personnel shall be **subject to the provisions of section 197 and Schedule V of the Act**
- The appointment and remuneration approved by the board is **subject to the approval by a resolution at the next general meeting of the company**
- In case the appointment is at variance to part – I of schedule V the same requires the **approval of the Central Government**
- Return in MR-I shall be filed **within a period of 60 days** of such appointment
- **If shareholders have not approved** such appointments the **acts done shall not be deemed to be invalid**
- The **above provisions are not applicable to** Private companies and to Government companies



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CEILING ON REMUNERATION

- Overall remuneration payable by a public company to its directors including MD, WTD and a Manager in a financial year **shall not exceed 11 percent of the net profits** of the company.
- This is **exclusive of sitting fee** payable for attending the meetings
- The net profits shall be computed in the manner laid down under section 198
- Remuneration payable shall not exceed **5% if one managerial personnel, 10% if there is more** than one managerial personnel and to all directors 11%
- Remuneration payable to non-executive directors **shall not exceed 1% of the net profits** where there is a managerial personnel and **3% in any other case**
- However **with the approval of the company by special resolution** remuneration may be payable more than the aforesaid ceilings



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DEFAULT IN PAYMENT OF DUES

- **Prior approval of the following shall be obtained**, before obtaining the approval of members at the general meeting
 - Defaults in payment of dues to banks and financial institutions or
 - Defaults in payment of dues to non convertible debenture holders or
 - Defaults in payment of dues to any secured creditors

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NO PROFITS OR INADEQUACY OF PROFITS

- Where a company has no profits or its profits are inadequate the remuneration can be payable only in accordance with the provisions of Schedule-V
- Under the companies (amendment) act, 2017 the provision for the approval of Central Government is deleted
- Hence companies can only pay as per schedule V of the Act

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PAYMENTS OUTSIDE THE CEILINGS

- Remuneration for services rendered by any director in other capacity shall not be included in the said ceilings provided that
 - the services rendered are of a professional nature and
 - in the opinion of NRC or the Board such director has the requisite qualification
- Sitting fee paid to the directors shall not be part of the remuneration, provided that the same is within the limits prescribed
- If any director draws or receives the remuneration in excess of the limits, he shall refund such amounts to the company
- Such recoveries are not to be waived unless the company approves by special resolution



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SCHEDULE - V

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SCHEDULE - V

- **Schedule V is divided into five parts as under:**
 - Part I – Appointment of managerial personnel without Central Government approval
 - Part II – Remuneration
 - Part III – provisions applicable to parts I and II of schedule V
 - Part IV – Exemption to certain companies

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Part – I
Appointment

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PART - I CONDITIONS FOR APPOINTMENT

- To become eligible for appointment as MD, WTD and Manager the following conditions are to be satisfied
 - Not sentenced to imprisonment **for any period** under the 19 Acts or
 - fined exceeding **one thousand rupees** under the 19 Acts
 - Not **detained for any period** under **COFEPOSA**
 - He has completed the age of twenty one years and has not attained the age of seventy years
 - He is resident of India
- If above conditions are not satisfied prior approval of Central Government is required
- Once Central Government has given its approval, **no such approval is required for subsequent appointments**, unless he has been convicted again

Part – II
Remuneration

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PART – II REMUNERATION

- Part – II of Schedule V deals with Remuneration
- The following five sections deals with Remuneration as under:
 - Section I – Remuneration payable by companies **having profits**
 - Section II – Remuneration payable by companies having **no profits or adequate profits**
 - Section III – Remuneration payable by companies with **no profits under special circumstances**
 - Section IV – **perquisites** not included in managerial remuneration
 - Section V – Remuneration payable **in two companies**

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SECTION – I COMPANIES WITH PROFITS

- **Where a company has profits** may pay remuneration to managerial personnel not exceeding the limits prescribed
- **In case the limits are exceeded** the same was approved by members by way of a **special resolution**
- This means when companies have profits they **can pay any amount** with the approval of the members by way of a special resolution

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SECTION –II NO PROFITS OR INADEQUACY OF PROFITS

- When the company has **no profits or inadequacy of profits** the remuneration payable can be only as per schedule V
- Provision for **Central Government approval is deleted**
- The remuneration what can be paid is **linked to effective capital** of the company
- Part A of section II prescribes the minimum remuneration that can be paid in different slabs depending upon the effective capital
- If the period is less than an year the limits shall be prorated
- Remuneration **in excess of the limits can be paid** provided the same is approved by shareholders by way of a **special resolution**

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MANAGERIAL PERSON IS A PROFESSIONAL

- In case such managerial person is **functioning in a professional capacity part B of section II prescribes the remuneration to 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
- If such **managerial person is not 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 specialized knowledge in the field in which the company operates
- He is not holding shares of the company exceeding 0.5% of its paid up shares capital, including ESOPs



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CONDITIONS FOR PAYMENT OF REMUNERATION

- The remuneration may be paid as per the slabs provided and in excess with the approval by way of a special resolution, if the following conditions are satisfied
 - Proposed remuneration was **approved by the NRC and the Board**
 - The company has **not committed any default in payment of dues** to banks, FIs, non-convertible debentures or any other secured creditors and if so their prior approval shall be obtained
 - The proposed remuneration is **only for a period of three years**
 - Statement to the **Notice contains the requisite information**
- An ordinary or special resolution is passed for part A of section II and special resolution in case of part B of section II

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SECTION – III REMUNERATION IN SPECIAL CIRCUMSTANCES

- (a) In the following circumstances remuneration may be paid in excess of the limits provided under section – II
- Remuneration in excess of section I or II is paid by another company
- Such company is a foreign company or
- Such company which pay the remuneration has its shareholders approval and it treats such remuneration as managerial remuneration and such remuneration together with the remuneration for its own managerial personnel is within the permissible limits under section 197
- This indicates that such company can't pay remuneration in excess of permissible limits

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PAY ANY REMUNERATION

- (b) Following companies may pay **any remuneration** to its managerial personnel
 - The company is a **newly incorporated company**, for a period of seven years from the date of incorporation
 - The company is a **sick company and rehabilitation or revival has been ordered**, for a period of five years from the date of sanction of the scheme
 - A company to which **resolution plan was approved by NCLT**, for a period of five years from the date of such approval

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REMUNERATION IN EXCESS OF LIMITS SET IN SECTION - II

- (c) Remuneration exceeds the limits specified under section – II, but was fixed by BIFR or NCLT
- To pay remuneration in (a), (b) or (c), all conditions specified under section II are to be complied with and also the following additional conditions
 - Except as provided earlier (remuneration from some other company), he is **not receiving remuneration from any other company**
 - **Auditor or company secretary of the company or PCS has certified** that all secured creditors and term lenders stated that they have no objection
 - They also certified that there is **no default on payments** to any creditors or deposit holders

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SECTION – IV PERQUISITES

- A managerial person shall be eligible for various perquisites which shall not be included in the computation of the ceiling on remuneration specified in sections II and III

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EFFECTIVE CAPITAL

- **Effective capital means**
 - the **aggregate of** the paid-up share capital, share premium, reserves and surplus (excluding revaluation reserves), long term loans and deposits repayable after one year (excluding working capital)
 - **as reduced by** the aggregate of any investments (except in case of investment by an investment company whose principle business is acquisition of shares, stock, debentures or other securities) accumulated losses and preliminary expenses not written off

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CALCULATION OF EFFECTIVE CAPITAL

- Where the appointment of managerial person is made **in the year of incorporation**, the effective capital shall be calculated **as on the date of such appointment**
- **For other cases** the effective capital shall be calculated as on the **last date of the financial year preceding the financial year** in which the appointment is made

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SECTION - V – REMUNERATION FROM TWO COMPANIES

- A managerial person **can draw remuneration from two companies**, provided the following conditions are satisfied
 - **total remuneration** drawn from the companies **does not exceed the higher maximum limit admissible from any of the companies** of which he is a managerial person

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PART – III OTHER COMPLIANCES

- Appointment and Remuneration to managerial personnel in Part I and II shall be subject to approval by resolution of the shareholders in general meeting
- Auditor, company secretary of the company or PCS shall certify that the requirements of Schedule V have been complied with
- Such certificate shall be filed with ROC together with MR-I

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PART IV EXEMPTION TO CERTAIN COMPANIES

- **Central Government may by notification exempt** any class or classes of companies from any of the requirements contained in this Schedule

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THANK YOU