FAQs on the Companies Act, 2013

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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. However, the Institute shall not be responsible for any loss or damage resulting from any action taken on the basis of these responses.

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PREFACE

The Companies Act, 2013, the Constitution for Governance for well over one million companies in the country emphasizes accountability, sound governance, the fiduciary role of directors and explicit recognition of stakeholders universe in the corporate functioning. It moves from the regime of control to that of liberalization/self-regulation. The Act is also quite outward looking and in several areas attempts to harmonize with international standards and practices.

The Companies Act, 2013 is progressive legislation conforming to current economic, commercial and social realities. As is the case with any new initiative, the stakeholders have a number of queries with regard to the implementation of the Companies Act, 2013.

This handbook is a compilation of Frequently Asked Questions [FAQs] on Companies Act, 2013 and the responses thereon. These questions are based on the queries received on the dedicated e-mail id companiesact2013@icsi.edu created by the Institute for the purpose.

The responses are based on the interpretation of provisions of the Companies Act, 2013, the rules made there under as also the clarifications, notifications and orders issued by the Ministry of Corporate Affairs.

I place on record my sincere thanks to CS Atul Mehta, Council Member, ICSI, Mr. V K Aggarwal, former Principal Director, ICSI and CS V Sreedharan, Practicing Company Secretary for their valuable inputs in finalizing the hand book.

I commend the dedicated efforts put in by team ICSI led by CS Alka Kapoor, Joint Secretary and comprising CS Banu Dandona, Deputy Director, CS Deepa Khatri, Assistant Director and CS Disha Kant, Assistant Education Officer in the Directorate of Professional Development –II in preparing this publication under the overall guidance of CS Sutanu Sinha, Chief Executive, ICSI and the guidance and leadership of CS Sanjay Grover, Central Council Member and Chairman, Corporate Laws and Governance Committee of ICSI.

I am confident that this publication will be of practical value to company directors and practitioners.

I welcome your suggestions for further value additions to this publication.

(CS R Sridharan)

President

Institute of Company Secretaries of India

Place: New Delhi

Date: August 19, 2014

FAQ's on the Companies Act, 2013

1. Whether the subsidiary of a foreign company be termed as public company or private company as per the Companies Act, 2013.

In terms of MCA General Circular no. 23/2014 dated 25th June 2014, an existing company, being a subsidiary of a company incorporated outside India, registered under the Companies Act, 1956, either as private company or a public company by virtue of section 4(7) of that Act, will continue as a private company or public company as the case may be, without any change in the incorporation status of such company.

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

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 advisable 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 such operations for e.g. for issuance of bonus shares, it is advisable that the Articles should be altered in line with the new requirements as various provisions themselves require specific clauses to be incorporated in the Articles.

Note : The Companies Act, 2013 is referred to as 'the Act' or CA, 2013 at several places.

3. Whether a private Company having paid-up share capital of rupees 45 lakhs and turnover of Rs. 20 crores as per last audited balance sheet will be treated as small company?

It is not a small company. Section 2(85) defines 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.

This means that a private company shall not be covered in the definition of small company if either its paid up share capital exceeds Rs. 50 lakhs or its turnover exceeds Rs. 2 crores.

Since the turnover of this company is more than Rs 2 crores i.e. Rs. 20 Crores, it will not be a small company.

4. In terms of Rule 5(3) of the Companies (Share Capital and Debentures) Rules, 2014, Share Certificates shall be signed by the secretary or any person authorized by the Board for the purpose. Provided that, in companies wherein a Company Secretary is appointed under the provisions of the Act, he shall be deemed to be authorized for the purpose of this Rule.

In a company with a large number of shareholders, it may not be practically feasible for the company secretary to sign all the share certificates himself, particularly in situations of corporate actions like bonus issue, rights issue, stock split, merger, demerger etc., where thousands of share certificates are required to be issued within specified timeframes.

In this context, whether company officials, besides the company secretary, can be authorized by the Board to sign the share certificates of the company.

Rule 5(3) of the Companies (Share Capital and Debentures) Rules, 2014 provides that the share certificate shall be signed by -

(a) two directors authorized by the Board or the committee of the Boards, if so authorized by the Board;

(b) the secretary or any other person authorized by the Board for the purpose.

Proviso to clause (b) of rule 5(3) provides that in companies wherein a company secretary is appointed, he shall be deemed to be authorized for the purpose of this rule.

The proviso clearly provides that in case where there is duly appointed company secretary, no other officer can be authorised for the purpose and he shall be deemed to be authorized for signing of share certificates.

5. Section 40(1) of the Act requires a company to make an application to the stock exchanges for listing of securities and obtaining the permission, prior to making an offer. The requirement under Section 73(1) of the Companies Act, 1956 was only to make an application. Whether now, prior permission is required or making an application is sufficient.

As per section 40(1) of the Companies Act, 2013 it is specifically provided that the every company wanting to make public offer should make application to one or more stock exchanges and take prior permission for dealing in securities.

6. Is section 42 applicable for Rights 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?

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 rights 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.

Section 42 relates to private placement only and there is no need to comply with the provisions of section 42 in case of rights issue and accordingly PAS-4 and PAS-5 shall not be applicable in case of rights issue.

7. 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 a Committee of the Board. Companies Act, 2013 is silent on this issue.

In terms of rule 5 of Companies (Share Capital and Debenture) Rules, 2014, a company cannot issue any share certificate except in pursuance of a resolution passed by the Board.

However, MCA vide its General Circular 19/2014 dated June 12, 2014, has clarified that with regard to issue of duplicate share certificates, 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].

8. What would be the intimation form for filing return of allotment 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 under section 62(1)(a)?

For every issue, return of allotment (refer section 39) Form PAS-3 is to be filed with the ROC irrespective of whether the shares are allotted through private placement, ESOP, Rights Issue or Bonus issue. Shareholder approval is not required for a rights issue under Section 62(1)(A). However, companies generally pass special resolution as a matter of abundant precaution.

9. 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?

The definition of deposits under Rule 2(1)(c)(viii) of the Companies (Acceptance of Deposits) Rules, 2014 provides that "deposit includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include .... any amount received from a person who, at the time of the receipt of the amount, was a director of the Company."

The usage of the words "but does not include" provides exemption to items listed thereof and the words "any amount received from a person who, at the time of the receipt of the amount, was a director of the Company" make it clear that any amount received from a person who was a director at the time of receipt of the amount is exempt irrespective of the fact that he might be a shareholder also.

However, such director of the company is required to furnish 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 by accepting loans or deposits from others.

10. On a reading sections 73 and 74, it appears that proviso to section 73 exempts banking Companies and non-banking financial as defined in Reserve Bank of India Act 1934 (2 of 1934) from following the provisions of section 73 of the Companies Act meaning thereby that they can keep accepting deposits from public even after commencement of Companies Act 2013. However, section 74 of the Act states that any Company, which has accepted deposits before commencement of Companies Act 2013 shall repay such deposits within one year from the commencement of this Act or from the date on which such payments are due, whichever is earlier.

This implies that banking and non-banking financial Companies are free to accept deposit after commencement of this Act but shall have to repay the deposits which had been collected before commencement of this Act. This is clearly an ambiguity which needs to be clarified at the earliest.

Acceptance of public deposits by banking companies and NBFCs are out of the preview of the provisions of Section 74 of the Companies Act, 2013. Such companies are governed by RBI Directions.

11. Under section 73, section 76 read with Rule 5 of Companies (Acceptance of Deposits) Rules, 2014, deposit insurance is one of the conditions for acceptance of deposits.

Indian insurance sector does not offer any product for deposit cover as yet. As Deposit insurance cover is available to banks only, pending availability of such products, companies willing to offer deposit insurance will not be in a position to comply with this new requirement. It needs clarity.

Ministry of Corporate Affairs on 6th June, 2014 amended the Companies (Acceptance of Deposits) Rules, 2014 providing that the companies may accept the deposits without deposit insurance contract till the 31st March, 2015.

12. Whether advance taken from customers by real estate company on which no interest has been paid will be treated as advance or deposit as per the Companies Act, 2013?

As per the Rule 2(xii) of the Companies (Acceptance of Deposits) Rules, 2014, any amount received in the course of, or for the purposes of the business of the company - as advance, accounted for in any manner whatsoever, received in connection with consideration for property under an agreement or arrangement is exempted from the definition of the Deposits but if such advance is not adjusted against the property in accordance with the terms of agreement or arrangement then it will be treated as deposit.

Further, whether interest is charged or not is immaterial.

Thus, advance taken from customers by real estate company shall not be considered as deposits. But if it is not adjusted against the property in accordance with the terms of agreement or arrangement, then it will be treated as deposit.

13. Section 88 read with Rule 5(1) of the Companies (Management and Administration) Rules, 2014 requires that entries in the Register of Members maintained under Section 88 of the Act shall be made within seven days after the Board of Directors or its duly constituted committee approves the allotment or transfer of shares.

Whether transfer of shares can be approved only by a

committee comprising directors or can such committee also comprise company executives as was permitted under the Companies Act, 1956.

Rule 5(1) of the Companies (Management and Administration) Rules, 2014 provides that the entries in the registers shall be made within seven days after the Board of Directors or its duly constituted committee approves the allotment or transfer of shares, debentures….. Since the word, its duly constituted committee is used, it seems that the Committee for allotment or transfer of shares may be composed of 'directors' and not the executives.

However, revised clause 49 of the listing agreement provides that to expedite the process of share transfers, the Board of the company shall delegate the power of share transfer to an officer or a committee or to the Registrar & Share Transfer Agent. The delegated authority shall attend to share transfer formalities atleast once in fortnight.

14. What is the preservation period of register of members and annual return under the companies Act, 2013 ?

In terms of Rule 15 of the Companies (Management & Administration) Rules, 2014, the register of members along with the index shall be preserved permanently. Copies of annual returns prepared under section 92 and copies of all certificates and documents required to be annexed thereto shall be preserved for a period of eight years from the date of filing with the Registrar.

15. Section 94 (2) & (3) read with Rules 14 & 16 (relating to inspection and copies of Register of Members and Annual Return), Rule 26 (relating to copies of minutes of general meetings) of the Companies (Management and Administration) Rules, 2014, Rule 12 (relating to extracts from Register of Loans and Investments), Rule 16 (relating to extracts from Registers of Contracts or Arrangements in which Directors are interested) of the Companies (Meetings of Board and its Powers) Rules, 2014 provide that the fees for inspection/providing copies/ providing extracts thereof to members etc. would be such as may be specified in the Articles of Association of the company.

Whether it is not mandatory for a company to charge any fees for inspection/ providing copies / extracts of

records / registers to members etc. under the respective Rules where the Articles of Association of the company are silent with respect to charging of fees for this purpose.

MCA vide its circular no. 22/2014 dated 25th June, 2014, has clarified about permitting free of cost inspection of records under rule 14(2) and Rule 16 of the Companies (Management and Administration) Rules, 2014.

MCA has clarified that until the requisite fee is specified by companies in its Articles, inspections could be allowed without levy of fee.

In view of the above, companies may provide copies and permit inspection of registers, maintained under section 88, and annual return free of cost.

16. As per Section 96 (2), every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate.

However, in case of the EGM, there is no clarity under Section 100 /101 and rule 17 with regard to the time, day, place of holding the EGM?

As per draft Secretarial Standard on General Meetings (SS-2)*, general meeting (including EGM) shall be called during business hours i.e. between 9 a.m. and 6 p.m. and on a day that is not a National Holiday. A meeting called by the requisitionists shall be convened only on a working day.

Annual General Meetings shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated whereas other general meetings may be held at any place within India. As per explanation to Rule 17(2) of Companies (Management and Administration) Rules, 2014. a meeting called by the requisitionists shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated.

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* submitted to Ministry of Corporate Affairs for approval.

17. Section 96(2) provides for holding of Annual General Meeting on a day which is not a 'National Holiday'. The term 'National Holiday' is not defined anywhere.

Explanation to section 96 (2) provides that "National Holiday" means and includes a day declared as National Holiday by the Central Government.

As per draft Secretarial Standard-2*, "National Holiday" includes Republic Day i.e. 26th January, Independence Day i.e. 15th August, Gandhi Jayanti i.e. 2nd October and such other day as may be declared as National Holiday by the Central Government.

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

As per Rule 3 of the Companies (Management & Administration) Rules, 2014 all the existing companies, registered under the Companies Act, 1956, shall prepare their register 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 & KMPs 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 need not to be converted as per the provisions of the section 170 of Companies Act, 2013.

19. 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.

If the private company has only 2 shareholders and out of these, if one cannot attend the AGM then according to above, whether one person attending the adjourned AGM, would be taken as quorum?

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* submitted to Ministry of Corporate Affairs for approval.

No, one person cannot 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 were also that a single person cannot by himself constitute a quorum at the adjourned AGM.

However, if the other person attends the meeting through video conferencing, then he will be counted for the purposes of quorum.

20. 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?

Section 107 relating to voting by show of hands provides that at any general meeting, a resolution put to the vote of the meeting shall, unless a poll is demanded under section 109 or the voting is carried out electronically, be decided on show of hands.

For all the transactions put to vote by electronic means by such companies, the provisions of section 107 become ineffective.

According to rule 20(1) of Companies (Management and Administration) Rules, 2014, 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.

Also, it has been clarified by the MCA vide General Circular 20/2014 dated 17th June, 2014 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 of 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.

21. 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.

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

22. 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?

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.

Therefore, 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.

23. Whether concept of proxy is relevant in respect of a general meeting wherein e-voting facility has been provided to the members.

Proxy is a facility given to a member 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, any member who has not exercised his vote electronically, may attend and vote at the general meeting either personally or by appointing a proxy to attend and vote on his behalf. The concept of proxy is still relevant, though with limited applicability.

24. Whether the provisions of quorum under section 103 requiring specified persons to be physically present need to be complied with even in cases where electronic voting is mandated.

Section 103 requires the personal presence of specified number of members in case of public and private companies for valid conduct of general meetings.

Personal presence of specified number of persons is, therefore, mandatory in all general meetings even though the resolutions have been put to vote by electronic means before the meeting. It may be added that members who have voted by electronic means have a right to attend the general meeting and their presence shall be counted for the purposes of quorum.

25. With regard to resolution requiring special notice under 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 such number of members holding shares on which aggregate sum not less than five lakh rupees has been paid up?

Section 115 of the Companies Act, 2013 provides that 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 that such number of members holding shares on which aggregate sum of not more 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 more than five lakh rupees has been paid up.

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

According to Section 120, the documents, records, registers, minutes, etc. may be kept and inspected in electronic form. Rule 27 of Companies (Management and Administration) Rules, 2014 initially mandated 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. However, MCA has revised the rules

namely the Companies (Management and Administration) Second Amendment Rules, 2014, and amended rule 27 as follows:

- in rule 27, in sub-rule (1) and in the Explanation, for the word "shall", the word "may" shall be substituted.

Therefore, the companies have now been given an option to maintain the records in electronic form.

27. 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.

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.

28. As per second proviso to section 128(1), companies may keep books of accounts in electronic form whereas rule 3 of the Companies (Accounts) Rules, 2014 requires companies to maintain books of accounts compulsorily in electronic form. Needs clarity.

Second proviso to section 128 (1) provides that the company may keep the books of accounts or other relevant papers in electronic mode in the prescribed manner.

Rule 3 of the Companies (Accounts) Rules, 2014 provides the manner of keeping the books of account in electronic mode.

Therefore, the keeping of books of accounts in electronic mode is optional.

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

As per MCA Circular No.08/2014 dated 4th April, 2014, the financial statement (and documents required to be attached

thereto), Auditor's 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. This means that the financial statement etc. for the year ending 31st March, 2014 shall be prepared as per Companies Act, 1956 and those for the year ending 31st March 2015 and thereafter shall be prepared as per the Companies Act, 2013.

30. Which extract of the Annual Return is required to be attached to Board's report in terms of Section 134 (3)(a) of the Companies Act, 2014. Last year's Annual Return which has been filed with ROC or current year's Annual Return, which is yet to be filed with ROC.

An extract of the annual return in the prescribed form relating to the financial year to which the Board's Report relates shall be attached therewith in terms of clause (a) of sub-section (3) of section 134.

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

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.

32. In terms of proviso to section 101(1) of the Companies Act, 2013 the notice of general meeting may be shorter than 21 days if consent in writing or electronic mode is given by members entitled to vote at such meetings. Does this mean that if we follow section 101 for obtaining consent of the members to call the general meeting at

shorter notice, then it will be possible for the company to send the audited financial statement along with the notice at shorter notice?

Section 136 requires that a copy of the financial statements, including consolidated financial statements, if any, auditor's report and every other document required by law to be annexed or attached to the financial statements….. shall be sent to every member of the company, to every trustee for debentureholder..... ' not less than 21 days before the meeting. There is no provision for sending the financial statements with the shorter notice. That is to say that financial statements are required to be sent at least 21 days before the meeting.

33. Whether an activity which a company is required to do as per its statutory obligations under any law, would be termed as CSR activity?

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

In this regard, the Ministry of Corporate Affairs Circular No. 21/2014 dated June 18, 2014 has 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.

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

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.

35. What are the consequences in case a prescribed company does not spend two percent of its average net profits on CSR activities in pursuance of its CSR Policy?

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. Second proviso to sub-section (5) of section 135 provides that if the

company fails to spend such amount, the Board shall in its report specify the reasons for not spending the amount.

However, sub-section 8 of section 134 relating to Board's Report provides that in case the company contravenes the provisions of the section i.e. in case it does not disclose the reasons for not spending 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.

36. Whether section 135 is required to be complied by the company as well as its holding or subsidiary company?

Rule 3(1) of Companies (CSR Policy) Rules, 2014 provides that every company including its holding or subsidiary which fulfils the criteria specified in sub-section (1) 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 themselves fulfils the criteria specified in Section 135, all the provisions mentioned therein become applicable to such company. Merely being a holding or subsidiary company of a company which fulfils the criteria under section 135(1) does not make the company liable to comply with section 135, unless the company itself fulfils the criteria.

37. From which Financial Year does the CSR expenditure & reporting begin ?

Since section 135 relating to Corporate Social Responsibility and schedule VII have 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 under section 135 during the F.Y. 2014-15 and Reporting of the same would be done in 2015 Board's Report.

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

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

There is no specific exemption given to section 8 companies with regard to applicability of section 135, hence section 8 companies are required to follow CSR provisions in case such companies are falling in the criteria specified under Section 135(1).

39. Can donation of money to a trust by a company be treated as CSR expenditure of the company?

The Ministry of Corporate Affairs has vide General Circular No. 21/2014 dated June 18, 2014 has clarified 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.

40. 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?

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.

41. 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?

The Ministry of Corporate Affairs vide General Circular No. 21/2014 dated 18th June, 2014 has clarified 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.

According to Rule 4(6) of the Companies (Corporate Social Responsibility Policy) Rules 2014,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 shall not exceed five percent of total CSR expenditure of the company in one financial year.

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

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.

43. Where CSR activities lead to profits, how should such profits be treated?

Rule 6(2) of the Companies (Corporate Social Responsibility 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.

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

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 is required to comply with the provisions of Section 135 and the Companies (CSR Policy) Rules, 2014. But, since there are no profits, the company may not spend any amount but explain the reasons for not spending the amount in its Boards Report.

45. What is the applicability of Section 135 of the Companies Act, 2013?

Section 135 is applicable to every company having:

- net worth of Rs 500 crore or more, or
- turnover of Rs 1000 crore or more or
- a net profit of Rs 5 crore or more

during any financial year.

46. Does 'any financial year' mentioned in section 135(1) mean at any time in the history of the company.

The Ministry of Corporate Affairs has vide General Circular No. 21/2014 dated June 18, 2014 clarified that 'any financial year' referred under sub-section (1) of section 135 of the Act read with Rule 3(2) of (CSR Policy) Rules, 2014 implies 'any of the three preceding financial years'.

As per the clarification, in case of a company which meets the criteria in any of the preceding three financial years (i.e. 2011-12, 12-13, 13-14) but which does not meet the criteria in financial year 2014-15 will need to constitute CSR Committee and comply with provisions of 135 (2) to (5) in the year 2014-15.

However, if the company has made profits in the years earlier to 2011-12 but not in the years 2011-12, 2012-13 or 2013-14, it need not comply with section 135.

47. Is CSR mandatory for private companies also?

Yes, in terms of section 135, **every company** which meets the criteria of networth, turnover or net profits mentioned therein is required to constitute a CSR Committee of the Board and also comply with the other requirements of section 135.

48. A private company is not required to appoint an independent director, whereas Section 135(1) states that the CSR Committee should have at least one independent director. Do private companies need to appoint an independent director to comply with this section?

In terms of rule 5 of the Companies (CSR Policy) rules, 2014, an unlisted public company or a private company covered under sub-section (1) of section 135 which is not required to appoint an independent director shall have its CSR Committee without such director. Further in case a private company has only 2 directors, its Board shall constitute its CSR Committee with two such directors.

49. Is there any requirement of filing Annual Report on CSR activities with the Registrar of Companies?

In accordance with Rule 8 of Companies (Corporate Social Responsibility) Rules, 2014, an Annual Report on CSR Activities shall form part of the Board's Report. A copy of the Board's Report is required to be filed with the Registrar along with the Annual Report. There is no requirement of separately filing Annual Report on CSR activities with the Registrar of Companies.

50. What is the treatment of expenses incurred beyond that of mandated CSR spend ? or

There are instances of CSR activities that are in the project mode which require funds beyond that of the mandated 2%. Will such expense, where incurred, be counted in subsequent Financial years as part of CSR expenditure?

In terms of section 135(5), the board of every company, to which section 135 is applicable, shall ensure that the company spends, in every financial year, at least 2% of the average net profits of the company made during the three preceding year. There is no provision of spreading over the expenditure incurred in a particular year over the next few years. The words used here is at least. Therefore any expenditure over 2% could be considered as voluntary higher spend. However, in case, a company does not want to spend the 2% in the subsequent

year on account of it having spent a higher amount in the previous year, the Board's report may state so.

51. Whether CSR expenditure of a company can 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. Accordingly, the amount spent by a company towards CSR can not be claimed as business expenditure.

52. Whether the average net profit criteria in section 135(5) is Net profit before tax or Net profit after tax?

The explanation to section 135(5) states that "average net profit" shall be calculated in accordance with section 198 of the Companies Act, 2013. In terms of section 198(5)(a) in making computation of net profits, income-tax and super-tax payable by the company under the Income-tax Act, 1961 shall not be deducted. Therefore, the net profit criterion in section 135(5) is net profit before tax.

53. Can CSR be done in kind ? i.e. If a company is in the business of publications of books whether it can donate books for the purpose of CSR ?

Perhaps yes, but the issue needs further clarification from the Ministry of Corporate Affairs.

54. It has been indicated in the rules that all CSR activities should be in project/programme mode; will intermittent, one-off events such as marathons /awards/ advertisements/sponsorships of TV programmes, etc. be part of CSR expenditure ?

It has been clarified through Circular no. 21/2014 dated June 18, 2014 that CSR activities should be undertaken by the companies in project/programme mode (as referred in Rule 4(1) of Companies CSR Rules, 2014). One off events such as marathons /awards/advertisements /sponsorships of TV programmes, etc. would not qualify as part of CSR expenditure.

55. Whether the CSR Expenditure incurred by Foreign Holding Company eligible to be taken as CSR expenditure by its Indian Subsidiary Company ?

The Ministry of Corporate Affairs vide Circular No. 21/2014 dated June 18, 2014 has clarified that expenditure incurred by Foreign Holding Company for CSR activities in India will qualify as CSR spend of the Indian Subsidiary if, the CSR expenditures are routed through Indian Subsidiaries and if the Indian subsidiary is required to do so a per section 135 of the Act.

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

MCA vide General Circular No. 21/2014 dated June18, 2014 has clarified that the statutory provision and provisions of CSR Rules, 2014, is to ensure that while activities undertaken in pursuance of the CSR policy must be relatable to Schedule VII of the Companies Act 2013. However, 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.

57. 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 ?

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

58. 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 Companies Act, 2013 shall be taken into consideration for calculating the period of five consecutive years, in case of individual, or ten consecutive years, in case of firm.

As per rule 6(3) of the 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 calculating the period of five consecutive years or ten consecutive years, as the case may be, the purpose of rotation of auditors.

Further, 3rd proviso to sub-section (2) to section 139 provides

that every company, existing on or before the commencement of this Act which is required to comply with provisions of this sub-section, shall comply with the requirements of the provisions relating to rotation of auditors within three years from the date of commencement of the Act.

In view of the above provision read with rule 6(3) as also the illustration explaining the rotation, 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 three more years 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.

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

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 No 08/2014 dated 04.04.2014 clarified that the financial statements (and documents required to be attached thereto), Auditor's 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.

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

MCA vide General Circular 22/2014 dated 25th June, 2014 has clarified that Form MGT-7 shall not apply to annual return 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 will be applicable for the financial years commencing on or after 1st April, 2014.

61. Section 139(9) of the Act relating to re-appointment of retiring auditor, states three conditions as follows :-

(a) he is not disqualified for reappointment;

(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.

Do all the three conditions need to satisfied?

Yes, subject to the provisions of sub-section (1) of section 139 read with the rules made thereunder, a retiring auditor may be re-appointed at an annual general meeting if he fulfils each of the three conditions specified in section 139(9).

62. With respect to section 143 (12), is it that only material frauds should be made reportable and the materiality should be left to auditors' discretion?

Section 143(12) casts duty on the auditor to report fraud to the Central Government. Rule 13(1) of the Companies (Audit and Auditors) Rules, 2014 states that for the purpose of sub-section (12) of section 143, in case the auditor has sufficient reason to believe that an offence involving fraud, is being or has been committed against the company by officers or employees of the company, he shall report the matter to the Central Government immediately but not later than sixty days of his knowledge .

63. 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?

Section 149(5) of the Companies Act, 2013 inter alia provides that company existing on or 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, as per Section 152(2) read with Schedule IV to the Companies Act, 2013, the appointment of the Independent Director shall be approved by the Company in its meeting of shareholders.

64. 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 minimum of two independent directors. If a company does not have Independent directors as of now, how can the committee be constituted as one year transition time has been given for appointment of Independent Directors? Can remuneration and nomination committee constitution be also assumed to be formed in one year transition time?

Ministry of Corporate Affairs, vide its Notification dated June 12, 2014, has 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.

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

In terms of the explanation to sub-sections (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.

But, if we talk about applicability of listing agreement over the listed companies, as per revised clause 49 of listing agreement a person who has already served as an independent director for five years or more in a company as on October 1, 2014 shall be eligible for appointment, on completion of his present term, for one more term of up to five years only.

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

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

Yes, an Independent Director of a Company can be appointed as Independent Director of its Associate/sister concern. Also, as per revised clause 49 V A 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.

67. 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?

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.

68. 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 ?

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-sections (6) and (7) of Section 152 is not applicable to independent directors.

69. 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)?

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).

It can provide by its articles that all its directors i.e. all 2 directors shall retire at every AGM of the company.

70. 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?

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 the Independent Directors has not been prohibited to exercise the stock options granted to them which has been granted to them

before Companies Act, 2013. Therefore, they can exercise the stock options granted to them 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.

71. In case of Re-appointment of independent director for second term, whether ordinary or special resolution is required to be passed?

As per the provisions of section 149 (10), 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 on passing of a **special resolution** by the company and disclosure of such appointment in the Board's report.

72. Sub-section (6) of section 149 lays down various eligibility criteria for determining whether a director is independent or not. The criteria given under clause (c) of sub-section (6) of section 149 mentions that an independent director in relation to a company shall mean a director who has or had no pecuniary relationship 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. The term 'pecuniary' has not been defined under the Act, Rules thereof or in the revised Listing Agreement. This leads to confusion over determination of what quantum of pecuniary interests should be considered. Clarity is required for the term 'pecuniary'.

MCA vide its circular no. 14/2014 dated 9th June, 2014 has issued clarifications with regard to 'pecuniary interest'.

With regard to clause (c) of sub-section (6) of section 149, it has clarified that 'pecuniary relationship' provided in section 149(6)(c) of the Act does not include receipt of remuneration from one or more companies, by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission approved by the members, in accordance with the provisions of the Act.

73. Whether an independent director may continue to be so appointed for a maximum period of 10 years, or whether

he can continue to be an ID for maximum two terms, even if each such term is less than 5 years.

MCA vide its clarification no. 14/2014 dated 9th June, 2014 has clarified that while appointment of an 'Independent Director' for a term less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as one term under section 149(10) for the Act.

Further, under section 149(11) of the Act, 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. In such a case the person shall be eligible for appointment as ID only after the expiry of the requisite cooling-off period of three years.

74. Can an alternate director be appointed for an independent director? If so, are there any conditions for appointment of a person as an alternate director to an independent director?

Proviso to sub-section (2) to section 161 provides that no person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of the Act.

75. Rationale for requiring a resigning director to furnish reasons for his resignation to the Registrar is not clear. It is not clear whether this is a mere intimation formality to the Registrar or whether the Registrar will have the power to investigate / call for further information on the basis of such intimation.

There are large number of disputed cases between the directors and the companies with regard to the resignation of directors. In most of the cases, it was found that the fact of resignation by director remains in dispute. To avoid such a situation, the directors are also required to file the copy of resignation along with the reasons.

76. When does the resignation of a director become effective, on the date which he specifies or the date on which the resignation letter is received by the company or the date on which from DIR- 12 is filed?

Sub-section (2) of section 168 provides that the resignation of

director shall be effective from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

77. Is sitting fees payable to a director who participates in a meeting through video conferencing ?

Yes, sitting fee is payable to a director who participates in a meeting through any of two modes viz. in person or through video conferencing or any other audio visual means.

Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides that such sum would be as may be decided by the Board of directors which shall not exceed one lakh rupees per meeting of the Board or the committee.

78. Does an alternate director need to obtain a Director Identification Number under Section 153 of the Companies Act, 2013 ?

As per the provisions of section 153, every individual intending to be appointed as director of a company is required to obtain DIN by complying with the provisions of the Companies Act, 2013 and Director Identification Number, Rules.

Therefore, alternate directors are required to obtain DIN.

79. A private company has failed to file its financial statements for the F.Y. 2008-09 onwards. Such default was not covered under section 274(1)(g) of the Companies Act, 1956 and whereas it is now a default under section 164(2) of the Companies Act, 2013 :

— Whether the Director shall be disqualified on and from April 01, 2014; and

— Whether he shall also vacate the all directorships in all other Companies ?

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.

In view of the above, if any person is falling under the purview of above said section, then such person shall be not be eligible to be re-appointed as a director in the same company and 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.

In this regard, MCA has announced Company Law Settlement Scheme 2014. As per the Scheme, the Companies who have defaulted in filing their Annual Accounts due to be filed on or before 30th June 2014 can file their annual accounts before 15th October 2014 and enjoy the following benefits:

- Only 25% of payable additional fees;
- Immunity from prosecution;
- Director will not be disqualified under section 164(2) of the Companies Act, 2013.

80. As per section 164(2)(a), no 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 shall 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. Under the 1956 Act, such disqualification was with respect to non-filing of annual accounts or annual returns of a public company.

In case, all the directors disqualify, how the company would function. Some time period needs to be given to regularize the default.

In the above situation, many directors of non-compliant private companies are not eligible to be either re-appointed as a director of that company or appointed in any other company for 5 years.

Further as per section 167(3) of the Companies Act, 2013 where all the directors of a company vacate their offices under any of the disqualifications as provided under the provision of this section, the promoter or, in his absence, the Central

Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting. Further, the Ministry of Corporate Affairs, has announced a Company Law Settlement Scheme, 2014 for the companies which have not filed their Annual Reports, financial statements and related documents due for filing on or before 30/06/2014. Such companies can file these documents before 15/10/2014 and enjoy the following benefits:

- Only 25% of additional fees payable;
- Immunity from prosecution;
- Director will not be disqualified under section 164(2) of the Companies Act, 2013

81. Whether section 8 companies and foreign subsidiary companies are covered in the limit of 20 companies, in which a person can hold directorship under section 165.

As per sub-section (1) of the section 165, 'No person shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time.'

Therefore, such twenty companies include every company including section 8 companies and foreign subsidiary companies registered under the Companies Act.

82. When a 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 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?

The requirement of section 167(1)(b) is only for attendance of a Director in the Board Meeting. It does not deal or regulate the manner of attending the Board Meeting. A 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).

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

The said section is applicable from 1st April 2014. It means

that if a director absents himself from all board meetings held during a period of twelve months w.e.f. April 1, 2014 with or without obtaining leave of absence, his office as director shall become vacant. Hence, vacation of office has prospective effect.

84. A director resigns by giving notice in writing to the company. He forwards a copy of resignation in Form DIR-11 to ROC within time. What would be the status of director if the company fails to intimate about the resignation to the Registrar?

As per Section 168 read with Rule 15 and Rule 16 of Companies (Appointment and Qualification of Directors) Rules, 2014, a director may resign from his office by giving a notice in writing to the company and shall also forward a copy of his resignation along with detailed reasons for the resignation in Form DIR-11 to the Registrar within thirty days of resignation.

Further, the company shall intimate to the Registrar about such resignation in Form DIR-12 with in thirty days of receipt of notice of resignation from a director.

As per sub-section (2) of section 168, the resignation of a director shall take effect from the date on which the notice is received by the company. In case of failure of the company to intimate the Registrar, as the director has already informed the Registrar of his resignation within time , the document would get registered in the records of the Registrar.

In terms of section 172, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

85. How do directors participating in a meeting by video conferencing sign the attendance register?

The following provisions in the rules ensure the correct recording of the names of directors who are present through video conferencing:

Rule 3(4) of the Companies (Meetings of Board and its Powers) Rules, 2014 provides that at 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, inter-alia, name and location from where the director is participating.

Rule 3(11)(b) of the Companies (Meetings of Board and its Powers) Rules, 2014 provides that the minutes shall disclose the particulars of the directors who attended the meeting through video conferencing or other audio visual means.

The draft Secretarial Standard-1* provides that the attendance register shall be deemed to have been signed by the directors participating through video conferencing, if their attendance is recorded by the chairman or the company secretary in the attendance register and the minutes of the meeting.

86. Is there any restriction on a company for holding all Board Meetings abroad during the year?

Section 173 of Companies Act, 2013 does not restrict a company from holding any meeting of its Board of Directors at some other place outside India.

Further, as per Rule 3(6) of the Companies (Meetings of Board and it's powers) Rules, 2014, with respect to meetings conducted through video conferencing or other audio visual means, provides that 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.

87. Rule 4 of Companies (Meetings of Board and its Powers), Rules 2014 restricts the transaction of certain items of business through Video Conferencing.

If the number of directors personally present at such meeting form a quorum, can any director participate through video conferencing at the meeting.

As per draft Secretarial Standard–1*, any director may participate through video conferencing in respect of restricted items with the express permission of chairperson. He shall however, neither be entitled to vote nor be counted for the purpose of quorum in respect of such restricted items.

88. In respect of a meeting by Video Conferencing, due to some technical problem, the Video Recording which was done could not be retrieved. Is the meeting valid? What is the remedy?

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* submitted to Ministry of Corporate Affairs for approval.

Rule 3(2) of the Companies (Meetings of Board and its Powers) Rules, 2014 casts duty on chairperson of the meeting and company secretary to take due and reasonable care to record proceedings and prepare the minutes of the meeting.

In case the video recording cannot be retrieved, the chairperson and company secretary should prepare the minutes on the basis of their notings and thereafter, seek confirmation of all the directors present personally or through video conferencing. As per rule 12(b) of the Companies (Meetings of Board and its Powers) Rules, 2014, every director who attended the meeting, whether personally or through video conferencing or other audio visual means, shall confirm or give his comments in writing, 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.

89. Under section 173 (2), the participation of directors in a meeting of the Board can be either in person or through video conferencing.

If a director of a company requests for participation in a meeting through video conferencing, is it mandatory for the company to provide the video conferencing facility, especially where all the other directors are participating in person?

As per the provisions of section 173 of Companies Act, 2013, the participation of directors may be either in person or through video conferencing or other audio visual means.

Thus, it is not mandatory for every company to provide the facility of participation through video conferencing.

Draft Secretarial Standard-1* also provides that any director may participate through electronic mode in a meeting, if the company provides such facility.

90. Please clarify the following with regard to video-conferencing:

a. Whether Section 173 facilitates video conferencing for only Board Meeting or for Board as well as the Committees of the Board.

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* submitted to Ministry of Corporate Affairs for approval.

b. Whether audio-video means audio including video OR it means audio or video.

c. Whether any director present via video-conferencing will suffice the quorum requirement.

a. The facility of video conferencing may be extended to committee meetings also. In case, the Committee meetings are held through video conferencing, the procedure provided in Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014, is required to be followed. However, rule 4 of Companies (Meetings of Board and its Powers), Rules 2014 restricts Meeting of Audit Committee by video conferencing for consideration of financial statement including consolidated financial statement, if any, to be approved by the Board under sub-section (1) of section 134 of the Act.

b. As per the provisions of section 173 of the Companies Act, 2013, the participation of directors may be either in person or through video conferencing or other audio-visual means. As per explanation under rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014, "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.

c. Yes, Directors present through video conferencing or other audio visual means would suffice for the quorum requirement as their presence shall be counted for the purposes of quorum.

91. Section 173(5) provides that a One Person Company, small company and dormant company shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days.

Does this mean that a small company can conduct only two meetings in a year. Whether it should maintain the gap of 90 days between each of its board meeting? If the above is yes, then practically a small company can have only four board meetings with gap of 90 days between each.

Yes, a small company is required to conduct only two meetings in a year. As per the provisions of sub-section (5) of section 173, the requirement of maintaining gap of minimum ninety days between the two Board meetings is mandated only, in case such OPC, small company or dormant company holds one meeting in each half of a calendar year.

The holding of two meetings in each half of a calendar year with minimum gap of ninety days is a minimum requirement for these companies. There is no bar in holding more than two Board meetings in a year. Such companies may have any number of Board meetings, if required for smooth running of business.

92. 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 have to be filed with ROC in MGT-14.

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

There was no obligation on the part of the Company under 1956 Act to file the resolution for approving the financial statements.

So, is there any need to file the resolution with ROC in MGT-14 this year? Will it be applicable from this year itself.

MCA vide its circular number 08/2014 dated 4/4/2014 has clarified that the financial statements (and documents required to be attached thereto), Auditor's 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.

In view of the above, since there is a requirement of filing of every resolution passed under the section 179(3) in MGT -14 as a prudent practice, it is advisable that companies file resolution relating to financial statements for the financial year 2013-14 with ROC in MGT-14.

93. XYZ Pvt. Ltd., has two director X and Y. The shares of the company are held by X, Y and Z in the ratio 40%, 40% and 20%, Z is however not a director. The company desires to enter into a contract in which X is interested where a Board resolution is required. How can the Board resolution be passed since there will be only one uninterested Director and Z is not a director?

As per the Section 174(2) of the Companies Act, 2013, the continuing directors may act notwithstanding any vacancy in the Board; but, if and so long as their number is reduced below the quorum fixed by the Act for a meeting of the Board, the continuing directors or director may act for the purpose of increasing the number of directors to that fixed for the quorum, or for summoning a general meeting of the company and for no other purpose.

Thus, in the above situation, the continuing director i.e. Z should call for the general meeting and in the general meeting the contract may be approved.

94. Guidance is required on evaluation criteria to be considered by the Board for evaluation of the performance of the independent directors.

As per sub-section (4) of section 178, the Nomination and Remuneration Committee while formulating policy relating to remuneration for directors, KMP and other employees are required to ensure that the relationship of remuneration to performance is clear and meets appropriate performance benchmarks.

For this, the committee is under duty to evaluate the performance as per the evaluation criteria framed by it.

95. What is the interest in section 184(2) of the Companies Act, 2013 that has to be disclosed by the director? Is it his shareholding and if so, all his shareholding or only where it is in excess of 2%?

Section 184(2) of the Companies Act, 2013 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 2%

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.

Therefore, it can be inferred that the director needs to disclose his interest in the entities in which he holds 2% or more than 2% of the shareholding of such body corporate.

96. In terms of section 184(2), a director is required to disclose at the meeting of Board, his concern or interest in contract or arrangement with a body corporate.

The term "body corporate" has been defined under section 2(11) to include a company incorporated outside India.

It needs to be clarified whether a director is required to disclose his interest even in companies incorporated outside India.

As per the provisions of section 184(2) read with section 2(11), director is required to disclose his concern with respect to all companies including the companies incorporated outside India. Such disclosure is required to be made in form MBP-1.

97. As per section 185 of the Companies Act 2013, no company can give loan or Guarantee in respect of loan to director or any other person in which such director is interested. Can a company give corporate guarantee or offer security in respect of any loan taken by its subsidiary/ company in which director is interested/ where management is common from the Bank.

Rule 10 of the Companies (Meetings of Board and its powers) Rules, 2014 exempts the applicability of section 185 in case of loans made by a holding company to its wholly owned subsidiary or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary. Further any guarantee given or security provided by a holding company in respect of loans taken by its subsidiary from banks and financial institutions is also exempted from

requirements of Section 185. A company can not directly or indirectly advance any loan to any of its director or any other person in whom a director is interested. Therefore, a loan cannot be advanced to a company in which director is interested.

98. In Section 188 (1), no exemption is given to private companies for approving Related Party Transactions as was given under the Companies Act, 1956. In case there is a private company with two directors and one of whom is interested, they would not be able to pass such resolution for want of quorum. It is not practical to appoint a director (outside person) just for the sake of approving a resolution.

The exemptions available to private companies under Companies Act, 2013 are yet to be notified. In the draft list of exemptions for private companies released by the MCA for public comments, Section 188 (1) is exempted for private companies.

99. In case a company is having a paid-up share capital of ten crore rupees or more, whether such a company requires prior approval of members by special resolution to enter any contract with any related party.

In terms of the Companies (Meetings of Board and its Powers) Second Amendment Rules, 2014, the limit of paid-up capital of ten crore rupees for the purpose of requiring prior approval of members by special resolution for entering any contract with related party has been removed.

The company is required to comply with the provisions of section 188 read with rule 15 of the Companies (Meetings of Board) Rules, 2014 for entering into any contract or arrangement with a related party.

100. If we appoint KMP through Board resolution then is form MGT- 14 to be filed or only DIR -12 and MR-1 are to be filed?

Sub-section (3) of section 179 read with Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014 requires that appointment or removal of KMP should be done only by means of resolutions passed at meetings of the Board.

Section 117 requires filing of resolution passed in pursuance of sub-section (3) of section 179 with the registrar in MGT-14.

Therefore, in case of appointment of KMP, MGT-14 is required to be filed.

DIR-12 is required to be filed in terms of section 170 read with Rule 18 of the Companies (Appointment and Qualification of Directors) Rules, 2014.

MR-1 i.e. return of appointment of KMP is required to be filed in terms of section 196 read with Rule 3of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.

Therefore, all three forms are required to be filed.

101. As per section 184(2) of the Companies Act, 2013, an interested director should not participate in a meeting where a contract/ arrangement is discussed in which he is interested.

(a) Does this mean that the interested directors should leave the meeting or is it enough if he does not participate in the discussions on that item?

(b) Is it necessary that the interested directors should brief the Board about their interest in an item/contract before the discussions take place?

(a) Section 184(2) of the Companies Act, 2013 provides that the "director shall not participate in such meeting." It implies that as a prudent practice, the director should leave the meeting where a contract/arrangement is discussed in which he is interested.

(b) Yes, it is necessary that the interested director should brief the board about his interest in an item/contract before the discussion takes place.

102. What are the matters in respect of which a director shall not be reckoned for quorum.

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 on such item.

For this purpose, a Director shall be interested in a contract or arrangement entered into or proposed to be entered into by the company:

(a) with the Director himself or his relative; or

(b) with any body corporate, if such Director, or such Director along with other Directors holds more than two percent of the paid-up share capital of that body corporate, or he is a promoter, or manager or chief executive officer of that body corporate; or

(c) with a firm or other entity, if such director or his relative is a partner, owner or member, as the case may be, of that firm or other entity.

103. 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?

In terms of section 117(3)(g), a company is required to file resolutions passed as per section 179(3) in e-form MGT-14 within 30 days of passing the resolution. Section 179(3) deals with the powers of the Board which may be exercised at Board Meetings only and as per section 179(3)(k), the rules may prescribe additional matters. Rule 8 of the 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.

104. 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?

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 exercises its power to borrow money within the limits authorized by the Board.

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

As per section 184, whenever any change occurs in the interest of Directors, disclosure of the same is required to be made at the first Board Meeting held after such change.

106. In the context of Section 185 & 186 of Companies Act 2013, if any group private limited company wants to give/provide corporate guarantee and equitable mortgage of its property in favour of its holding public limited company, is it possible to give the same. What if both the companies are private limited companies?

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, as per rule 10 of the Companies (Meeting of Board and its Powers) Rules, 2014, 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.

107. Section 188 requires prior approval of Board for entering into specified contracts or arrangements with related parties. Section 177(4)(iv) requires approval of transactions of company with related party by the Audit committee.

Whether, approval from Audit Committee is required for any transaction with related party in respect of transactions which are covered under section 188?

As per clause (iv) of subsection (4) of section 177 of the Companies Act, 2013, every listed company and other prescribed class of companies is required to take approval of the transaction or any subsequent modification of transactions of the company with related parties from the audit committee.

Therefore, each and every transaction of such company with the related party, requires approval of audit committee.

In addition, pursuant to Section 188 of the Companies Act 2013, Board's approval is also required for the contracts or arrangements with related parties specified in section 188(1) (a) to (g) which are neither in ordinary course of business nor at arm's length basis.

Further, in the case of a company having a paid up share capital of not less than prescribed amount or transactions exceeding prescribed sums, prior approval by special resolution of the company shall be required for entering into such contract or arrangement with related party.

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

As per 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 the Independent Directors have not been prohibited to exercise the stock options which were granted to them before Companies Act, 2013. Therefore, they can exercise the stock options granted to them 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.

109. Is it compulsory for Company Secretary to attend all Board, Committee and General Meetings?

It is the one of the duties of the Company Secretary to attend all Board, Committee and General Meetings as mentioned in section 205 of the Companies Act, 2013 read with Rule 10 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.

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

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.

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

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.

112. Can a person be Managing Director in two companies?

As per third proviso to section 203(3) 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. Therefore, a person can be a Managing Director in two companies.

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

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 prescribes certain caps and compliance only with regard to the remunerations of directors including MD, WTD and manager. Schedule V provides conditions with regard to appointment and remuneration of Managing director, whole-time director 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.

114. As per the second proviso of Section 188 (1) of the Companies Act, 2013, no member of the company shall vote on such special resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party.

What is the meaning of related party in such cases?

MCA vide General Circular No. 30/2014 dated July 17, 2014 has clarified that 'related party' referred to in the second proviso has to be construed with reference to the contract or arrangement for which the said special resolution is being passed. Thus, the term 'related party' in the above context refers only to such related party as may be a related party in the context of the contract or arrangement for which the said special resolution is being passed.

115. Whether a member of section 8 company can appoint proxy?

As per rule 19 (1) of the Companies (Management and Administration) Rules, 2014, 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.

116. Are there any restrictions on a person to act as proxy of more than one member?

As per rule 19(2) of the Companies (Management and Administration) Rules, 2014, 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. However, a member holding more than ten per cent 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.

117. In terms of provision of section 203 of Companies Act, 2013, whether an individual can be appointed as CFO as well as company secretary of a company.

In pursuance to section 203, prescribed class of companies shall have the following whole-time key managerial personnel

(i) managing director, or Chief Executive Officer or manager and in their absence, a whole-time director;

(ii) company secretary; and

(iii) Chief Financial Officer

Here, the term used is 'whole-time' and therefore, three different individuals are required to hold these three key positions.

Further, as per Regulation 78 of Table F, 'a provision of the Act or these regulations requiring or authorising a thing to be done by or to a director and chief executive officer, manager, company secretary or chief financial officer shall not be satisfied by its being done by or to the same person acting both as director and as, or in place of, chief executive officer, manager, company secretary or chief financial officer'.

118. Whether any form is required to be filed with ROC, in case the existing CEO, MD and CS are designated as KMP and if Yes, in which form?

In terms of section 170(2) read with Rule 18 of Companies (Appointment & Qualification) Rules, 2014, Form DIR-12 is required to be filed with the Registrar of companies in case the existing CEO, MD and CS are designated as KMP.

119. Whether a person appointed as an alternate director can participate in the audit committee since audit committee comprises of people with prescribed qualifications such as independent / financially literate, etc.

Should the Board, while appointing alternate directors take into account the original director's special position such as independent director or membership in committee so that it appoints suitable persons as alternate directors?

Yes, the Board, while appointing alternate director has to take into account the original director's special position such as independent director or his membership in Board's Committees. As per proviso to sub-section (2) of section 161, no person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under provisions of the Act.

120. Whether a company is required to file MR-1/DIR -12 for appointment of CFO/CS for the Companies which do not fall under the provisions of section 203?

In case the companies are not within the specified limit of section 203, they are not compulsorily required to appoint KMP.

However where a company appoints CFO or CS, it shall be required to file DIR-12 i.e. return containing particulars of directors and the key managerial personnel as well as MR-1 i.e. return of appointment of KMP.

Section 134(1) specifically provides that the financial statement shall be signed, alongwith others by the Chief Financial Officer and the Company Secretary of the Company, wherever they are appointed. It can be inferred from this also that return of appointment of CFO/CS should be filed with ROC wherever they are appointed.

121. Section 197(2) provides for insurance provision for managing director, whole-time director, manager, chief executive officer, chief financial officer or company secretary for indemnification against any liability. Since the term 'independent director' is not used, whether independent directors are covered under this insurance?

In Schedule IV i.e. Code for independent directors, Para IV (4) (d) requires provision for Directors and Officers (D and O) insurance in the letter of appointment to independent directors.

In gives an implication that a company can make insurance provision for Independent Directors also.

122. Whether the powers of the Board provided under rule 6(2)(a) of Companies (Share Capital and Debentures) Rules, 2014 with regard to issue of duplicate share certificates can be exercised by Committee of Directors.

MCA vide circular no. 19/2014 dated 12th June, 2014 has clarified that in the light of relevant provisions of the Act, particularly sections 179 & 180 and regulation 71 of Table "F" of Schedule I, a Committee of directors may exercise such powers with regard to issue of duplicate share certificates, subject to any regulations imposed by the Board in this regard.

123. Mr. 'X' who is a promoter director of a listed company is proposed to be appointed as WTD/CEO of the Company in terms of Sections 203, 196, 197, 198 and Schedule V of the Companies Act, 2013. Mr. X is also relative of other 2 promoter Directors of the Company. Would the appointment of Mr. X attract the provisions of Section 188(1)(f) i.e. whether holding position as WTD would tantamount to holding of office or place of profit.

In terms of section 188(1)(f) read with section 2(76) and rule 15 of Companies (Meetings of Board and its powers), Rules 2014 the appointment as whole time director of Mr. X , who is a promoter director of the company and also relative of other two promoter directors, would not attract the provisions of section 188(1)(f).

124. Exemption was available to private companies from the application of section 372A under Companies Act, 1956. Is a similar exemption under Section 186 of the new Companies Act, 2013 available?

In terms of Companies Act, 2013, private companies are not exempt from the applicability of section 186.

125. As per General Circular No.16/2001 dated July 24, 2001 issued by Department of Company Affairs, a calendar of events was to be filed with ROC for information within one week of passing of the board resolution authorizing CS and one of the functional directors for the postal ballot process. Does this circular hold good in terms of Companies Act, 2013?

Rule 22 of the Companies (Management and Administration) Rules, 2014 details the procedure to be followed for conducting business through postal ballot. The circular no.16/2001 would not be applicable in terms of Companies Act, 2013.

126. Share Application money with the company in excess of 2 months is treated as Deposit under Companies Act, 2013. Would Share Application money in excess of 2 months existing on 31st March 2014, be termed as deposit?

The Share Application money lying with companies as on 31st March, 2014 may not be termed as deposit in case the same is repaid within 2 months i.e. upto 31st May, 2014. Else the same would also be termed as deposit.

127. As per the General Circular No. 46/2011 issued by Government of India, Ministry of Corporate Affairs dated: 14.07.2011 with respect to the Waiver of approval of Central Government for payment of remuneration to professional managerial person by companies having no profits or inadequate profits as per Schedule XIII under the Companies Act 1956, all listed companies having inadequate profit do not require to take Central

Government approval after meeting the criteria given under the circular. Whether the general circular issued for Schedule XIII shall apply as it is on the new Schedule V under the Companies Act 2013 for Managerial Remuneration?

The General Circular 2011 issued by Government of India, Ministry of Corporate Affairs dated: 14.07.2011 with respect to the Waiver of approval of Central Government for payment of remuneration to professional managerial person by companies having no profits or inadequate profits as per Schedule XIII under the Companies Act 1956, would not be applicable to Schedule V of Companies Act, 2013.

128. As per section 186 (2) of the Companies Act 2013:

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 Loan and investment by company.

(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

1. Are employees and workers of the company covered under the term "Person" used in the section?

2. Will Salary advances made by the Company for only 1 or 2 months (without interest) come in the preview of "Loan"?

Query no. 1 : Section 186 is applicable to loans to 'any person' or other body corporate. 'Any person' will include employees also. Hence loans to employees will also be covered under the Section.

Query No. 2 : There is a difference between advance and loan. Loan is lending of money with absolute promise to repay whereas advance is to be adjusted against supply of goods and services. Advance given to employees against current month's salary will not be in the nature of loan and the same will be out of purview of Section 186.

129. In case, all the directors of the Company jointly get disqualified due to default of non-filing and non-payment how will new directors be appointed?

As per Section 167(3) of the Companies Act, 2013 where all the directors of a company vacate their offices under any of the disqualifications as provided under the provision of this Section, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.

130. Can an Alternate Director be appointed to represent 3 directors? If so, in case of voting on a resolution at the Board meeting, how many votes does he have?

As per section 161 (2), the Board of directors may appoint a person not being a person holding any alternate directorship for any other director in the company, to act as an alternate director. Therefore, an alternate director cannot be appointed to represent three directors.

131. Is a director entitled to inspect the minutes of meetings of the Board held during the period of his directorship, even after he ceases to be a Director?

As per Draft SS-1*, a director is entitled to inspect the minutes of the meetings of the board held during the period of his directorship, even after he ceases to be a director.

132. Is a director who has attended a Board meeting entitled to receive a copy of its signed minutes, even if he has ceased to be a director?

As per Draft SS-1*, a copy of the signed minutes certified by the company secretary or where there is no company secretary, by any other director authorised by the board shall be circulated to all directors within fifteen days after these are signed. Thus, a director who has attended a Board meeting is entitled to receive copy of its signed minutes, even if he has ceased to be a director.

133. Are nominee directors of a company required to file FORM DIR-2?

As per rule 8 of the Companies (Appointment and Qualification of Directors) Rules, 2014, every person who has been identified to hold the office of a director shall on or before the appointment furnish to the company his consent in writing to act as such in form DIR-2. This rule is equally applicable to nominee directors.

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* submitted to Ministry of Corporate Affairs for approval.

134. Many companies have passed resolutions during financial year 2013-14 under the relevant provisions of the Companies Act, 1956 (Old Act) which are/were at different stages of implementation after coming into force of corresponding provisions of the new Companies Act, 2013. Whether such resolutions are valid?

MCA vide its circular no. 32/2014 dated 23rd July, 2014 has clarified that while section 6 of the General Clauses Act, 1897 protects the validity of such resolutions, the resolutions approved or passed by companies under relevant applicable provisions of the Old Act during the period from 1st September, 2O13 to 31st March, 2014, can be implemented, in accordance with provisions of the Old Act, notwithstanding the repeal of the relevant provisions subject to the conditions that (a) the implementation of the resolution actually commenced before 1st April, 2014 and (b) that this transitional arrangement will be available upto expiry of one year from the passing of the resolution or six months from the commencement of the corresponding provision in New Act whichever is later. It has also been clarified that any amendment to the resolution must be in accordance with the relevant provisions of the New Act.

135. Whether borrowings and/or creation of security, based on the basis of ordinary Resolution under section 293 of the Companies Act, 1956 are valid.

MCA vide its circular no. 04/2014 dated 25th March, 2014 has clarified that the resolution passed under section 293 of the Companies Act, 1956 prior to 12.09.2013 with reference to borrowings (subject to the limits prescribed) and / or creation of security on assets of the company will be regarded as sufficient compliance of the requirements of section 180 of the Companies Act, 2013 for a period of one year from the date of notification of section 180 of the Act.

136. Section 2(41) defines the term 'Financial Year'. Proviso to the said section empowers Tribunal for allowing any period as financial Year. The provisions relating to Tribunal are not notified. What is the recourse.

In terms of the Companies (Removal of Difficulties) Third Order, 2014, dated the 2nd June, 2014, until the National Company Law Tribunal is constituted under section 408 of the Companies Act, 2013 (18 of 2013), the Board of Company Law Administration constituted in pursuance of sub-section (1) of

Section 10E of the Companies Act, 1956 (1 of 1956) shall exercise the jurisdiction, powers, authority and functions under the first proviso to clause (41) of Section 2 of the Companies Act, 2013 (18 of 2013).

137. Can a company form a One Person Company (OPC) as its subsidiary?

In terms of rule 3 of the Companies (Incorporation) Rules, 2014, only a natural person who is an Indian citizen and resident in India is eligible to incorporate OPC. Therefore, the question of any "body corporate" or other form of organizations being the single member does not arise.

138. Is section 135 relating to Corporate Social Responsibility applicable to OPCs?

Section 135 is applicable to every company having :

- net worth of Rs 500 crore or more; or
- turnover of Rs 1000 crore or more; or
- a net profit of Rs 5 crore or more

during any of the three preceding financial years.

The word used here is 'every company', However, in terms of rule 6(2) of Companies (Incorporation) Rules, 2014, an OPC loses its status if paid up capital exceeds Rs. 50 lakhs or average annual turnover is more than 2 crores in three immediate preceding consecutive years. In view of this, it is unlikely that an OPC would meet the criteria specified in section 135.

139. What is the requirement as to the minimum and maximum number of directors in an OPC ?

In terms of section 149(1), a One Person Company needs to have minimum of one director. It can have directors up to a maximum of 15 which can also be increased by passing a special resolution as in case of any other company.