

FAQs ON THE COMPANIES ACT, 2013

(Revised Edition)



**THE INSTITUTE OF
Company Secretaries of India**

IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

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June 2017

Price : Rs. 100/- (Excluding Postage)

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Published by :

THE INSTITUTE OF COMPANY SECRETARIES OF INDIA

ICSI House, 22, Institutional Area, Lodi Road, New Delhi - 110 003

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Website : www.icsi.edu, E-mail : info@icsi.edu

ISBN : 978-93-82207-95-5

Laser typesetting at AArushi Graphics

Printed at : Chandu Press/500

PREFACE

The corporate form of business has always hogged limelight for reasons more than one. Legislative authorities, the world over, have been very forthcoming in rolling out an apt legal structure for the governance of companies. The Companies Act, 2013 has brought forth a sea change not only in the mannerisms of doing business and adhering to compliances, but has also laid down with clarity, the expectations as regards their roles and responsibilities from professionals in the arena.

Post the enactment of the legislation in force, the Ministry has rolled out numerous Rules, circulars, clarifications and notifications to provide an ease of understanding to the existing legal structure. The Institute of Company Secretaries of India, being a pioneer in corporate governance aiming at effective compliance of the legislations in place, has on various occasions made efforts to provide its members and the public at large with interpretations of law befitting all the stakeholders. The rolling out of 'Frequently Asked Questions or FAQs on Companies Act, 2013', is one such initiative.

The present document is a revised edition to the 'FAQs on Companies Act, 2013'. The intent behind preparing the same has been to elucidate the law in line with the practical issues facing the professionals as have been brought before the Institute in the form of queries through dedicated e-mail for the purpose.

I place on record my sincere thanks to CS Savithri Parekh, Chief Legal & Secretarial at Pidilite Industries Ltd., CS B. Shanmugasundaram, Assistant General Manager – Secretarial Sundram Fasteners Limited, CS Vijay Sharma and CS Arun Gupta, Practicing Company Secretaries for their valuable inputs in finalizing the hand book.

I commend the dedicated efforts of CS (Dr.) Pooja Rahi, Executive (Academics) under the guidance of CS Banu Dandona, Joint Director, Directorate of Corporate Laws and Governance and able leadership of CS Dinesh Chandra Arora, Secretary, ICSI in preparing this publication.

I am confident that this publication will be of practical value to not only members, practitioners and students but other stakeholders as well.

Your valuable suggestions are solicited on this publication.

CS (Dr.) Shyam Agrawal

President

Institute of Company Secretaries of India

Place : New Delhi

Date : June 21, 2017

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CHAPTER I
PRELIMINARY

1. The definition of associate company under section 2(6) of the Act includes two specific terms, 'significant influence' and 'joint venture'. While 'significant influence' has been explained the latter has not been. What do these terms mean ?

The Companies (Amendment) Bill, 2016 has modified the explanation given under the existing section 2(6) as follows :

- (a) The expression 'significant influence' means control of at least twenty per cent of total voting power, or control of or participation in business decisions under an agreement;
- (b) The expression 'joint venture' means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

2. As per section 2(30) of the Companies Act, 2013, "debenture" includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not. Are there any exclusions from this definition ?

As per the proviso to this section to be inserted by the Companies (Amendment) Bill, 2016, the following shall not be considered as debenture:

- (a) The instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934; and
- (b) Such other instrument, as may be prescribed by the Central Government in consultation with Reserve Bank of India, issued by a company.

3. The definition of 'small company' stands altered once the Companies (Amendment) Bill, 2016 is passed. What is the new definition accorded to this term in the said bill ?

"Small company" means a company, other than a public company, –

- (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and
- (ii) turnover of which as per profit and loss account for the immediately preceding financial year does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees.

4. Is the term 'vanishing company' defined under the Companies Act, 2013 ? What does it include ?

The term 'vanishing company' is not defined under section 2 of the Companies Act, 2013. Rather, it is defined under the Explanation to rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016. 'Vanishing company' means a company, registered under the Act or previous company law or any other law for the time being in force and listed with Stock Exchange which has failed to file its returns with the Registrar of Companies and Stock Exchange for a consecutive period of two years, and is not maintaining its registered office at the address notified with the Registrar of Companies or Stock Exchange and none of its directors are traceable

5. A director getting remuneration is an Executive director. Can this be taken as a true and correct interpretation of the term since a proper definition of executive director is not mentioned in the Act ?

As per rule 2(k) of the Companies (Specification of Definitions Details) Rules, 2014, 'Executive Director' means, "a whole-time director as defined in clause (94) of section 2 of the Act". Further, section 2(94) defines that "whole-time director includes a director in whole-time employment of the company Hence, if a person is appointed as a director of the company and he is also in employment of the company, he becomes a director in whole-time employment of the company, accordingly will be called as whole-time director of the company and therefore, the executive director of the company.

Also, it has been provided under section 2(78) that "remuneration" means any money or its equivalent given or passed to any person for services rendered by him and includes perquisites as defined under the Income-tax Act, 1961.

Thus, remuneration is not the only criteria to determine whether the director

is Executive director or not. A person may be an executive director without drawing any remuneration and may also draw remuneration in professional capacity though not holding any executive position.

6. A private limited company has a paid-up share capital Rs. 40 lakh and its turnover as per the last audited financial statements is Rs. 20 crore. Will the company be treated as a small company ?

As per section 2(85), small company means a company other than a public company, –

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

The above section 2(85) after issuance of Companies (Removal of Difficulties) Order 2015 dated 13.02.2015 has used the word “AND” between sub clauses (i) and (ii), and not the word “OR”. Accordingly, a private company fulfilling both the criteria of the abovementioned two conditions, i.e., either turnover less than Rs. 2 crore or paid up capital less than Rs. 50 lacs will be considered as small company. Hence, the company in question shall not be a treated as a ‘small company’.

CHAPTER II

**INCORPORATION OF COMPANY AND
MATTERS INCIDENTAL THERETO**

1. In a company, the minimum number of members required to form a company has been stated under section 3 of the Act. What shall be the effect of the number of members falling below the minimum requirement ?

The Companies (Amendment) Bill, 2016 proposes to insert a new section 3A. The newly proposed section 3A shall provide for the effect of number of members falling below the minimum. The said section states that if at any time the number of members of a company is reduced, in the case of a public company, below seven; in the case of a private company, below two, and the company carries on business for more than six months while the number of members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with less than seven members or two members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

2. SPICe Form INC-32 for incorporation of a company contains a specific list of documents to be attached therewith. Are there any additional documents in which may be attached apart from those mentioned therein ?

Certain additional documents other than those listed as attachment to SPICe Form INC-32 are required to be attached while filing the form. Some of these documents include:

- (i) Consent from proposed directors in Form DIR-2 along with ID and address proof;

- (ii) Certified copy of COI and Board resolution in case the subscriber/promoter is a Company incorporated outside India (duly notarized and apostilled, as per the rule); and
- (iii) Declaration from all the proposed directors holding valid DIN that the particulars in their respective DIN are same as of date and there is no change.

3. It has always remained a pre-condition that the proposed name of a company to be incorporated must not be similar or akin to the name of a company already in existence. How can a rejection on these lines be avoided at the ROC end ?

Before filing Form INC-1 or SPICe Form INC-32, it is advised that rule 8 of the Companies (Incorporation) Rules, 2014 should be referred to, so as to avoid this issue. Furthermore, the key words of proposed name must be checked beforehand at the MCA web portal as well as at the web portal of Intellectual Property India – trademarks to rule out the existence of similar name.

On a practical note, if and in case the proposed name of a company to be incorporated looks general, then one may add name of a promoter or a mix of the initials of the promoters before such general word to avoid ambiguity as well as rejection. For example, if the proposed name of a company is 'King Private Limited', then, instead of filing an application for such a name which is common and may be rejected, the initials of one or more promoters of the company may be prefixed and the form may be filed for the name 'PKM King Private Limited'. Chances are likely that the latter name shall be approved of on the basis that it being a specific word and not general.

4. A person may make an application, in such Form INC-1 accompanied by such fee, as may be prescribed, to the Registrar for the reservation of a name set out in the application as the name of the proposed company or the name to which the company proposes to change its name. What is the time limit for which such name is reserved by the Registrar against the application received in this regard ?

While the original time period for reservation of name with the Registrar was 60 days from the date of filing the application, the same was a point of concern for the fact that it began from the date of application.

However, the Amendment Bill of 2016 proposes that the time limit for

reservation of name shall be altered. As per section 4(5)(i), upon receipt of an application, the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of twenty days from the date of approval or such other period as may be prescribed.

5. A company already registered with a certain name enters into new set of activities of business which are not in consonance with the name of the company. Can a company continue with such activities of business ?

As per sub-rule (2) of rule 8 of the Companies (Incorporation) Rules, 2014,

- (b) The name shall also be considered undesirable, if –
 - (iii) the company's main business is financing, leasing, chit fund, investments, securities or combination thereof, such name shall not be allowed unless the name is indicative of such related financial activities, viz., Chit Fund or Investment or Loan, etc....
 - (xiii) the proposed name include words such as 'Insurance', 'Bank', 'Stock Exchange', 'Venture Capital', 'Asset Management', 'Nidhi', 'Mutual fund' etc., unless a declaration is submitted by the applicant that the requirements mandated by the respective regulator, such as IRDA, RBI, SEBI, MCA, etc., have been complied with by the applicant.

As per the law, a company can continue with the same name even when it enters a new set of activities of business provided that the name of the company would have been allowed for such business activities. For example, if a company is incorporated as a normal operating company and does not have indicative financial activities in its name, it will not be compliant for such a company to then start financing business without changing its name. The principle of law is what cannot be done directly cannot be done indirectly. Accordingly, the new business must also be evaluated in the context of name requirements to stay compliant.

6. Can a company have a registered office from the date of its incorporation ?

The Companies (Amendment) Bill, 2016 intend to remove the barrier upon

the companies of having a registered office only after 15 days of incorporation and has proposed to increase the number of days available to a company for having a registered office. As per proposed section 12(1) of the Companies Act, 2013, a company shall, within thirty days of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. Presently, a company has to comply with existing provisions of section 12 of the Companies Act, 2013.

7. Can a trust or society or an LLP become a subscriber of a company ?

According to the Companies (Incorporation) Rules, 2014, the MoA and AoA of a company shall be signed by each subscriber to the memorandum. Rule 13(2), (3), (4) and (5) of the said Rules detail the various circumstances of subscription. Rule 13(4) reveals the manner in which a body corporate and an LLP being a subscriber to the memorandum of the company shall sign. While a cooperative society is categorized under body corporate under section 2(11) of the Act, there is no specific mention about trust. At the same time, under the 2013 Act there is no bar that a Trust cannot hold shares in a company. Accordingly there is no specific legal provision which bars a Trust to become a subscriber of a company.

Hence, it may be concluded that a Cooperative Society or an LLP can be a subscriber of a company, and in so far as a registered trust is concerned it can subscribe to the memorandum through its Trustee acting for the trust and all compliances similar to those applicable for a body corporate must be complied with as if the trust is a body corporate and the Trustee should sign as subscriber in the capacity of the Trustee. Further a society registered under the provisions of Society Registration Act, 1860 cannot be subscriber to Memorandum of Association.

8. For a company incorporated in the Companies Act, 2013, the AOA & MOA have already been drafted under the previous Act ? Do we need to file SPICe Forms INC-33 & INC-34 in case of alteration ?

1. Pass a special resolution in an EGM & file Form MGT-14 for alteration of AOA.
2. In case of conversion of public company to private company or vice versa – Form INC-27.

3. For the alteration of MOA the following forms are required to be filed with the MCA :
 - (a) Name clause - Form INC-1, Form INC-24 and Form MGT-14
 - (b) Registered Office clause - Form MGT-14, Form INC-23 & Form GNL-2
 - (c) Object clause - Form MGT-14
 - (d) Capital clause - Form SH-7.
4. For the alteration of AOA, for effecting the conversion of a private company into a public company or vice versa, the application shall be filed in Form INC-27.

SPICe Form INC-33 (E-Memorandum of Association) and & Form INC-34 (E-Articles of Association) are only for incorporation and not for alteration.

9. A newly incorporated company intends to receive the subscription money in cash. Can it do so ?

There is no prohibition/restriction under the Companies Act, 2013 for receiving the subscription money in cash (*i.e.*, not through account payee cheque or other banking channel). However, the company and/or subscriber(s) has(ve) to comply with the provisions of the Income Tax Act, 1961 with regard to cash transaction.

10. A company incorporated under the Companies Act, 1956 had its MOA and AOA drafted according to the said Act. Is it mandatory for the company to alter its MOA & AOA as per the Companies Act, 2013 ? Further, if the MOA and AOA are altered to fall in sync with the Companies Act, 2013, Is it mandatory for the company to file Form MGT-14 ?

Section 5(6) of the Companies Act, 2013 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.

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

There is no mandatory provisions in the Companies Act, 2013 to alter the clauses of MOA and AOA to sync with new provisions of Companies Act 2013. However, it is 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, 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.

As regards the filing of form, as per the Companies Act, 2013, it is mandatory to pass a special resolution and file Form MGT-14 if the MOA or/and AOA is/are altered.

11. A company incorporated under the previous Companies Act has not adopted new AOA as per the Companies Act, 2013. The Articles of the company do not contain provisions pertaining to dematerialisation of equity shares. Should the company amend the AOA to include the clause empowering such dematerialisation or adopt new AOA as per the Companies Act, 2013 ?

It is advisable to adopt new AOA as per the Companies Act, 2013 and add a clause related to dematerialisation of shares. If the company intends to amend its existing AOA by simply adding a dematerialisation clause and file Form MGT-14, the same may invite an objection by the Registrar who may insist upon the adoption of the new Articles of Association as prescribed under the Companies Act, 2013 depending upon the provisions of the subsisting AOA. In any case, the Companies Act, 2013 by virtue of section 6 overrides any provisions in the subsisting AOA which are at variance with the Companies Act, 2013.

12. A company incorporated through SPICe Form INC-32, Form INC-33 and Form INC-34 wants to alter MOA & AOA. Are physical copies of MOA and AOA required to be attached with Form MGT-14 ? Also, is the company required to file amended SPICe Form INC-33 and Form INC-34 in case of alteration ?

The Companies Act, 2013 has provided the format of MOA (Table A to E of Schedule I) and AOA (Table F to J of Schedule I) and the SPICe Form INC-33 and Form INC-34 have also adopted the said format of respective table as applicable to the company.

Accordingly, for alteration of MOA and/or AOA, scanned copy of amended MOA and/or AOA will be required to be attached with the e-

Form MGT-14. However, the SPICe Form INC-33 and /or Form INC-34 need not be amended and filed again.

13. A company intends to change its main objects. Can it do so without changing its name ?

The main objects of a company can be changed without changing name of the company after complying with the provisions of section 13 of the Companies Act, 2013. In certain situations, there are guidelines about the name of the company and the business to be carried on by the company. The same will also be needed to be kept in view depending upon the change in the objects clause and consequential effect on the feasibility of continuing with the old name.

14. A company already registered with a certain name enters into new set of activities of business which are not in consonance with the name of the company. Can the company continue with such activities of business ?

In case the new set of activities of business is as per the approved objects of MOA, the company can continue with the same name.

15. The Companies (Incorporation) Rules, 2014 have been amended on 25th January, 2017 to substitute the existing Certificate of Incorporation issued by the Registrar in Form INC-11 so as to inculcate which important element ?

As per the Companies (Incorporation) Amendment Rules, 2017, the Certificate of Incorporation issued by the Registrar in Form INC-11, apart from the Corporate Identity Number (CIN) shall also include the Permanent Account Number (PAN) of the company issued to it by the Income-tax department.

CHAPTER III

PRIVATE PLACEMENT

1. A company intends to make a preferential offer to its existing members only. Is the company required to maintain a complete record of Private Placement Offer in Form PAS-5, in such case ?

Proviso to rule 13(1) of the Companies (Share Capital and Debentures) Rules, 2014 provides that in case of any preferential offer made by a company to one or more existing members only, the provisions of sub-rule (1) and proviso to sub-rule (3) of rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014 shall not apply.

Accordingly, in such cases, the company is not required to make a Private Placement offer letter in Form PAS-4 and file the same with the Registrar of Companies.

However, a complete record of private placement offer is required to be maintained in Form PAS-5 as the same has not been exempted.

It may also be noted that the proviso to rule 14(3) of the Companies (Prospectus and Allotment of Securities) Rules, 2014 shall not apply due to the insertion of a new proviso under rule 13 of the Companies (Share Capital & Debentures) Amendment Rules, 2015 notified w.e.f. 18th March, 2015, filing of record through Form PAS-5 is not required.

2. What is the time limit prescribed for filing a return of allotment under section 42 pertaining to private placement ? Are there any penalties leviable for the non-compliance of the said provisions ?

A company making any allotment of securities under section 42(9) of the Companies Act, 2013, shall file with the Registrar a return of allotment within thirty days as per rule 14(4) of the Companies (Prospectus and Allotment of Securities) Rules, 2014 from the date of the allotment in such manner as may be prescribed, including a complete list of all allottees, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed.

There is no penalty prescribed in section 42 w.r.t. penalty for non filing of such return of allotment, so the penalty as prescribed in section 450 of the Act shall be leviable. Further, the Companies (Amendment) Bill, 2016 has proposed amendment to sub-section (9) to section 42, which states that if a company defaults in compliance of section 42 with regard to filing the return of allotment within the period prescribed under sub-section (8), the company, its promoters and directors shall be liable to a penalty for each default of one thousand rupees for each day during which such default continues but not exceeding twenty-five lakh rupees.

[The abovementioned reply takes into account the alterations to be brought about by the Companies (Amendment) Bill, 2016].

CHAPTER IV

SHARE CAPITAL AND DEBENTURES

1. Are the conditions of issue of sweat equity shares different for start-up companies and other companies ?

For start-up companies:

A start-up company may issue sweat equity shares not exceeding fifty percent of its paid-up capital upto five years from the date of its incorporation or registration.

For other companies:

A company shall not issue sweat equity shares for more than fifteen percent of the existing paid-up equity share capital in a year or shares of the issue value of rupees five crores, whichever is higher. The issuance of sweat equity shares in the company shall not exceed twenty-five percent of the paid-up equity capital of the company at any time.

2. Whether the provisions of Chapter III of the Companies Act, 2013 and rule 18 of the Companies (Share Capital and Debentures) Rules, 2014 shall be applicable on the issue of rupee bonds by Indian companies exclusively to persons resident outside India in accordance with the applicable sectoral regulatory provisions ?

The Ministry of Corporate Affairs has consulted with the Reserve Bank of India and rolled out a clarification *vide* its Circular dated 3rd August, 2016. According to the said circular, the matter relating to issue of rupee denominated bonds to overseas investors is being regulated by RBI as part of ECB Policy framework. Hence, unless otherwise provided in the circular/ directions/ regulations issued by Reserve Bank of India, the provisions of Chapter III of the Act and rule 18 of Companies (Share Capital and Debentures) Rules, 2014 would not apply to issue of rupee denominated bonds made exclusively to persons resident outside India in accordance with applicable sectoral regulatory provisions as stated above.

3. Can a company issue shares at a discount other than the sweat equity shares ?

The recently inserted sub-section (2A) to section 53 through the Companies (Amendment) Bill, 2016 states that a company may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949. The said section has opened doors for the companies to issue shares at a discount other than sweat equity shares.

4. Section 55(2)(c) reads “where such shares are proposed to be redeemed out of the profits of the company, there shall, out of such profits, be transferred, a sum equal to the nominal amount of the shares to be redeemed, to a reserve, to be called the CRR Account, and the provisions of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the CRR Account were paid-up share capital of the company”.

What is the meaning of the quoted text in the above section ?

- (1) If redeemable preference shares are redeemed out of the profits of the company, Capital Redemption Reserve Account (CRR Account) has to be created as per provisions of section 55(2). This Account is to be preserved as if it were the capital of the company and not utilised for any purpose without following provisions applicable to reduction of capital.
- (2) The principle behind creating CRR Account is to protect the capital of the company in the event redemption of preference share capital is out of profits.
- (3) One exception is provided under section 55(4) of the Companies Act, 2013 where without following the process of reduction of capital the CRR Account can be applied in paying up unissued shares of the company to members as fully paid bonus shares. Hence, this exception is provided in the section itself. Save and except this exception, the provisions of reduction of share capital shall be applicable on the CRR Account if the same were to be applied for any other purpose.

5. Form SH-1, i.e., the prescribed format for share certificate, does not include memoranda of transfer. The memorandum of transfer was an integral part of the share certificate when the Companies Act, 1956 was effective.

In the absence of such memoranda in the prescribed format, can a company issue share certificates with said memoranda as additional information, or is the following of the format "as it is", strictly mandatory ?

The words in rule 5(2) of Companies (Share Capital and Debentures) Rules, 2014 read "every certificate of share or shares shall be in Form SH-1 or as near thereto as possible...".

Accordingly, the format of Form SH-1 is to be followed for the share certificate, but at the same time the company can provide additional information, viz., the memoranda of transfer but without deviating from the basic format prescribed.

6. Can a company specify in its Articles of Association that the authorised share capital of the company be altered through an ordinary resolution instead of special resolution ?

As per section 13 read with section 61 of the Companies Act, 2013, an ordinary resolution is required to be passed in respect of alteration in the provision relating to authorized share capital in the Memorandum of Association and as per section 14 of the Companies Act, 2013, a special resolution is required to be passed in respect of alteration in the provision relating to authorised share capital in the Articles of Association.

Articles can have more stringent clauses than those specified under the Companies Act, 2013 and these can be entrenched, but the Articles cannot have clauses that relax a provision in the Act. Thus, in case the capital clause is only in the memorandum of association of the company the articles can provide for its amendment by way of ordinary resolution in view of section 13 read with section 61. However, if the capital clause also appears in the Articles of Association in addition to the Memorandum, and alteration of authorised capital shall require alteration of Articles too then no such specification can be made in the Articles except by way of special resolution as per section 14 of the Act.

7. A company intends to convert its redeemable preference shares into equity share capital. Can it do so under the provisions of the Companies Act, 2013 ?

A company can convert its redeemable preference shares into equity shares if such conversion is already specified at the time of issue of such shares through its provisions and requisite approvals taken at that time. Otherwise, the company is required to get the consent of three-fourth majority of preference shareholders by means of a special resolution, as per section 48 read with section 55 of the Companies Act, 2013, before such conversion, and also required to comply with section 62 of the Act, and the company is further required to increase the amount of equity share capital in the authorised share capital before such conversion.

8. A company has been incorporated but the subscribers to the company have not paid subscription money. Whether it is necessary for the company to issue share certificates within two months with or without the receipt of share subscription money as per the provisions in the Companies Act, 2013 ?

As per section 56(4)(a) of the Companies Act, 2013, a company shall issue share certificates to the subscribers of Memorandum within 2 months from the date of incorporation. However, it is to be noted that this section applies to shares allotted and it would not be advisable to allot shares unless the share subscription money is received before issuing share certificates.

Therefore, share certificates should be issued only after the receipt of money.

It may be pertinent to note that the erstwhile section 11(1) of the Act provided for payment of subscription money before the commencement of business but that has been omitted by the Companies (Amendment) Act, 2015 w.e.f. 29th May, 2015.

Further, Form PAS-3 – for Return of Allotment seeks details about the amount paid on subscription and hence, it is necessary to receive the subscription money before allotment.

9. Examine the inclusions in the definition of 'Employee' for the purpose of issuance of Employee Stock Option as regards start-up companies.

For the purposes of section 62(1)(b) of the Companies, 2013, one has to

refer to the definition of "Employee" given under Explanation in rule 12(1) of the Companies (Share Capital & Debentures) Rules, 2014, which defines employee as :

- (a) a permanent employee of the company who has been working in India or outside India; or
- (b) a director of the company, whether a whole-time director or not but excluding an independent director; or
- (c) an employee as defined in clauses (a) or (b) of a subsidiary, in India or outside India, or of a holding company of the company

but does not include –

- (i) an employee who is a promoter or a person belonging to the promoter group; or
- (ii) a director who either himself or through his relative or through any body corporate, directly or indirectly, holds more than ten percent of the outstanding equity shares of the company.

As regards start-up companies, the conditions mentioned in sub-clause (i) and (ii) shall not apply upto five years from the date of its incorporation or registration.

10. Can a company issue bonus shares in the ratio of 1 : 1 ? Is there any limit on the amount to be used from the reserve for the said purpose ?

As per section 63(1) of the Companies Act, 2013, a company may issue fully paid-up bonus shares to its members, in any manner whatsoever, out of –

- (i) its free reserves;
- (ii) the securities premium account; or
- (iii) the capital redemption reserve account:

Provided that no issue of bonus shares shall be made by capitalizing reserves created by the revaluation of assets.

As per section 63(2), no company shall capitalize its profits or reserves for the purpose of issuing fully paid-up bonus shares under sub-section (1), unless it is authorized by its articles and has, on the recommendation of the Board, been authorized in the general meeting of the company.

Subject to meeting the above primary conditions, a company can issue bonus shares in 1 : 1 ratio if so decided upon by the shareholders on the recommendation of the Board.

11. State the companies which can issue secured debentures for a period beyond the standard ten years but not exceeding thirty years.

The following classes of companies may issue secured debentures for a period exceeding ten years but not exceeding thirty years :

- (i) Companies engaged in setting up of infrastructure projects;
- (ii) Infrastructure Finance Companies;
- (iii) 'Infrastructure Debt Fund Non-Banking Financial Companies' as defined in clause (b) of direction 3 of Infrastructure Debt Fund Non-Banking Financial Companies (Reserve Bank) Directions, 2011;
- (iv) Companies permitted by a Ministry or Department of the Central Government or by Reserve Bank of India or by the National Housing Bank or by any other statutory authority to issue debentures for a period exceeding ten years.

CHAPTER V

ACCEPTANCE OF DEPOSITS BY COMPANIES

1. Amounts received by private companies from their members, directors or their relatives were not treated as 'deposits' under section 58A of the Companies Act, 1956 and rules made thereunder. What shall be the status of the amounts received prior to 1st April, 2014 as regards treating them as deposits ?

MCA after consulting the issue with RBI has *vide* its General Circular No. 05/2015 dated 30th March, 2015 clarified that such amounts received by private companies prior to 1st April, 2014 shall not be treated as 'deposits' under the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014 subject to the condition that relevant private company shall disclose, in the notes to its financial statements for the financial year commencing on or after 1st April, 2014 the figure of such amounts and the accounting head in which such amounts have been shown in the financial statements. Any renewal or acceptance of fresh deposits on or after 1st April, 2014 shall, however, be in accordance with the provisions of the Companies Act, 2013 and rules made thereunder.

2. How does a company arrange for repayment of its deposits if the provisions of the Companies (Amendment) Bill, 2016 are accounted for ?

A company may arrange for the repayment of the deposits accepted by depositing, on or before the 30th day of April each year, such sum which shall not be less than twenty per cent of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account.

The clause of deposit insurance has been proposed to be done away with through the Companies (Amendment) Bill, 2016.

3. In respect of deposits accepted by a company before the commencement of this Act, and the amount of such deposit or part thereof or any interest due thereon remaining unpaid, what shall be the time limit within which such deposits need to be repaid ? Can such deposits be renewed also ?

The Companies (Amendment) Bill, 2016 proposes to alter the provisions pertaining to repayment of deposits accepted by a company before the commencement of the Companies Act, 2013. As per clause (b) of sub-section (1) of section 74, a company having accepted deposits before the commencement of this Act shall repay within three years from such commencement or on or before expiry of the period for which the deposits were accepted, whichever is earlier.

The Bill also proposes for the renewal of any such deposits to be done in accordance with the provisions of Chapter V and the rules made thereunder.

CHAPTER VI

REGISTRATION OF CHARGES

1. A company purchased a motor vehicle in the name of a director of the company. It is also the co-borrower of the loan taken for the said purpose. Does this transaction fall under the ambit of the provisions of section 77 of the Companies Act, 2013 ?

What difference would it make if the loan was taken only in the name of the director but the payment was made by the company ?

As the company is the co-borrower of the loan and it is making a charge on the vehicle, thus, section 77 of the Companies Act, 2013 shall apply on the company and it is required to file Form CHG-1 for the registration of the charge. Further, as the vehicle is registered in the name of director only, it will amount to an indirect loan to the director and provisions of the Act relating to grant of loans to directors shall apply.

In the case where the loan is taken by the director and the vehicle purchased on such loan is not in the name of the company but the company is still providing payment to settle the loan against vehicle on behalf of the director, it will also be considered as loan to the director to the extent of payments made by the company and section 185 and section 188 of the Companies Act, 2013 will apply.

However, if such company is a private company, the application of section 185 and section 188 will be subject to applicable exemptions provided *vide* MCA notification dated 5th June, 2015.

2. What are the forms to be filed for condonation of delay (in filing of forms relating to charges) by the Central Government ?

- (a) CHG-1 Where the due date of filing of form for creation/ modification of charge has expired, the company must first file this form for creation or modification of charge
- (b) CHG-4 Where the due date of filing of form for satisfaction has

expired, the company must first file this form for satisfaction of charge

- (c) CHG-8 Form for condonation of delay in registration, modification, satisfaction of charge to Central Government (power delegated to Regional Director)
- (d) INC-28 Filing the certified true copy of the order passed by Regional Director to the Registrar of Companies as per the provisions of Chapter VI of the Companies Act, 2013.

3. What are the attachments required with Form CHG-1 ?

The attachments required to be filed with Form CHG-1 are as follows :

- Instrument(s) of creation or modification of charge is a mandatory attachment in all cases.
- Instrument(s) evidencing acquisition of property which is/are already subject to charge by the company making such acquisitions. This attachment is mandatory in case if there is any acquisition of property which is already subjected to charge.
- Particulars of all joint charge holders. It is mandatory if number of charge holder is more than one.
- Instrument of creation or modification of charge is required to be attached with Form CHG-1.

The word 'Instrument' is not defined in the Companies Act, 2013. However, as per section 3(14) of the Indian Stamp Act, 1899, "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or record. It may include Hypothecation Deed and any other agreement received from the bank by which security interest is created.

4. The filing of Form CHG-4 was delayed by a company due to late receipt of NOC from the Bank. Is it necessary to file Form CHG-8 for condonation of delay in this case ?

It is necessary to file Form CHG-8 for condonation of delay if there is a delay in filing Form CHG-4 due to late receipt of NOC from the Bank.

5. Whether physical submission of petition to the Regional Director (power delegated through Central Government) is required in case of condonation of delay in filing the particulars of charge, modification or satisfaction of charge ?

No, the physical submission of petition to the Regional Director (power delegated through CG) is not required in case of condonation of delay in filing the particulars of charge, modification or satisfaction of charge.

Further, the physical application may be submitted to Regional Director for the speedy disposal of case and ease of processing.

6. According to sub-section (1) of section 82, a company shall give intimation to the Registrar about the payment or satisfaction in full of any charge registered within a period of thirty days from the date of such payment or satisfaction. Is there any recourse available to the company in case such period of 30 days elapses ?

Section 87 of the Companies Act, 2013 provides for condonation of delay in such cases.

The Companies (Amendment) Bill, 2016 intends to insert a proviso to the abovementioned section providing for the recourse in case the said period of 30 days elapses. The Registrar may, on an application by the company or the charge holder, allow such intimation of payment or satisfaction to be made within a period of three hundred days of such payment or satisfaction on payment of such additional fees as may be prescribed.

CHAPTER VII

MANAGEMENT AND ADMINISTRATION

1. Section 89 of the Companies Act, 2013 deals with declaration in respect of beneficial interest in any share. What does the term 'beneficial interest' signify ?

The term 'beneficial interest' is not defined under the Companies Act, 2013. However, the Companies (Amendment) Bill, 2016 proposes to insert sub-section (10) after existing sub-section (9) under section 89 to provide as follows :

'Beneficial interest' in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to –

- (i) exercise or cause to be exercised any or all of the rights attached to such share; or
- (ii) receive or participate in any dividend or other distribution in respect of such share.

2. Section 90 of the Companies Act, 2013 has been proposed a new meaning in the Amendment Bill of 2016. Who may be termed as a 'significant beneficial owner' ? What are the compliances to be made by a company as regards its significant beneficial owners ?

As per section 90 of the Companies Act, 2013 as proposed to be substituted by the Companies (Amendment) Bill, 2016, every individual, who is acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holds beneficial interests, of not less than twenty-five per cent or such other percentage as may be prescribed, in shares of a company or the right to exercise, or the actual exercising of significant influence or control as defined in clause (27) of section 2, over the company shall be referred to as 'significant beneficial owner'.

The compliances to be made by a company as regards its significant beneficial owners are as follows :

- (1) Maintenance of register of the interest declared by individuals and changes therein which shall include the name of individual, his date of birth, address, details of ownership in the company and such other details as may be prescribed.
- (2) The register so maintained shall be open to inspection by any member of the company on payment of such fees as may be prescribed.
- (3) Filing of return of significant beneficial owners of the company and changes therein with the Registrar in such form and manner as may be prescribed.
- (4) Give notice, in the prescribed manner, to any person (whether or not a member of the company) whom the company knows or has reasonable cause to believe –
 - (a) to be a significant beneficial owner of the company; or
 - (b) to be having knowledge of the identity of a significant beneficial owner or another person likely to have such knowledge; or
 - (c) to have been a significant beneficial owner of the company at any time during the three years immediately preceding the date on which the notice is issued,and who is not registered as a significant beneficial owner with the company as required under the provisions of the said section under the Act.
- (5) Apply to the Tribunal, where that person fails to give information required or where the information given is not satisfactory, within a period of fifteen days of the expiry of the period specified in the notice, for an order directing that the shares in question be subject to restrictions with regard to transfer of interest, suspension of all rights attached to the shares.

3. What are the changes suggested in the provisions pertaining to the placement of Annual Return as regards its accessibility to various stakeholders by the Companies (Amendment) Bill, 2016 ?

As per sub-section (3) of section 92 of the Companies Act, 2013 as may

be substituted by the Companies (Amendment) Bill, 2016, every company shall place a copy of the annual return on the website of the company, if any, and the web-link of such annual return shall be disclosed in the Board's Report. The compliance requiring an extract of the annual return forming part of the Board's Report has been done away with.

4. In case of listed companies, is it compulsory to file a Return with Registrar wherein the promoters' stake changes ?

The Companies (Amendment) Bill, 2016 proposes to omit section 93 of the Companies Act, 2013 which provides for the listed companies to file a Return with Registrar with respect to change in the number of shares held by promoters and top ten shareholders of such company. Thus, as and when the bill gets passed, the requirement under section 93 will not be applicable. Presently, it is mandatory in compliance of the provisions of section 93 of the Act.

5. Is it compulsory for all the companies to hold their annual general meetings at their registered offices or at place within the city, town or village in which the registered office of the company is situated ?

Yes, in terms of section 96(3) of the Companies Act, 2013. However, in view of the proposed first proviso to sub-section (2) to section 96 in the Companies (Amendment) Bill, 2016, annual general meeting of an unlisted company may be held at any place in India if consent is given in writing or by electronic mode by all the members in advance. Thus, the legal position for a listed company remains the same and no change shall be brought about due to the proposal in the Companies (Amendment) Bill, 2016.

6. The Board is empowered to call an extraordinary general meeting of the company whenever it deems fit. Can such a meeting be held at any place the Board may deem fit ? Also, can an extra-ordinary general meeting be conducted anywhere inside or outside India ?

Presently, as per Explanation to rule 18 of the Companies (Management and Administration) Rules, 2014 "for the purpose of this rule, it is hereby declared that extraordinary general meeting shall be held at a place within India". So, such meeting should take place at any place in India.

However, according to the proviso to sub-section (1) of section 100 as altered by the Companies (Amendment) Bill, 2016, the extraordinary general meeting of a company, other than that of the wholly owned

subsidiary of a company incorporated outside India, shall be held at a place within India only. Thus, a company, which is a wholly owned subsidiary company of a company incorporated outside India or of a body corporate outside India is permitted to have its EGM convened outside India. All other companies shall convene their EGM only at a place in India.

While the 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, any other general meetings may be held at any place within India.

Explanation to rule 18 of the Companies (Management and Administration) Rules, 2014, prescribes that the Extraordinary General Meeting should be held at a place within India. Thus, an Extraordinary General Meeting should be held only in India though not necessarily within the city, town or village in which the registered office of the company is situated.

However, clause 27 of the Companies (Amendment) Bill, 2016 seeks to amend sub-section (1) of section 100 of the Companies Act, 2013 to allow the wholly owned subsidiary of company incorporated outside India to hold its extra-ordinary general meeting outside India.

As per clause 27, in section 100(1) of the Companies Act, 2013, the following proviso shall be inserted, if and after the said Bill is enacted and enforced as law namely :-

“Provided that an extraordinary general meeting of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India.”

7. Section 101(1) of the Companies Act, 2013 allows general meetings to be called at a shorter notice than twenty-one days. In such a scenario, whether provisions of section 136 would also allow circulation of financial statements at a shorter notice if conditions under section 101 are fulfilled ?

According to the MCA General Circular 11/2015 dated 21st July, 2015, a company holding a general meeting after giving a shorter notice as provided under section 101 of the Act may also circulate financial statements (to be laid/considered in the same general meeting) at such shorter notice.

8. In terms of sub-section (1) to section 101, a general meeting of a company may be called by giving not less than clear twenty-one days' notice. What are the compliances to be made for calling a meeting at shorter notice ?

As per the proviso to the said section proposed to be substituted by the Companies (Amendment) Bill, 2016, a general meeting may be called after giving shorter notice than twenty-one clear days if consent, in writing or by electronic mode, is accorded thereto –

- (i) in the case of an annual general meeting, by not less than ninety-five per cent of the members entitled to vote thereat (*i.e.*, not the voting percentage; and
- (ii) in the case of any other general meeting, by members of the company –
 - (a) holding, if the company has a share capital, not less than ninety-five per cent of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or
 - (b) having, if the company has no share capital, not less than ninety-five per cent of the total voting power exercisable at that meeting.

9. A listed company is proposing to issue and offer share warrants to the Promoter group on preferential allotment basis. As per the provisions of Companies Act, 2013, the proposed item is required to be passed by way of special resolution. Whether shareholders belonging to 'Promoter Group' to whom share warrants shall be issued can vote in the special resolution ?

If no, can the promoter shareholders other than those to whom share warrants shall be offered can vote in the said special resolution ?

Since the matter at hand is a special business, as per section 102(1)(b) any information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon, must be annexed to the notice calling the meeting; it is suggested that the notice for the meeting must declare the information regarding the Promoter Group to whom the share warrants shall be issued.

In light of the provisions of section 106(2), a company shall not prohibit any member from exercising his voting rights on any ground other than those mentioned in section 106(1).

10. Can a private limited company hold a general meeting by giving notice of less than 21 days if the articles of the private company so provide ?

As per section 101(1) of the Companies Act, 2013, a company can call a general meeting by giving notice of twenty-one clear working days either in writing or through electronic mode. As per Notification No. G.S.R. 464(E) dated 5-6-2015, in case of private companies, section 101 shall apply unless otherwise specified in respective sections or the articles of association of the company provide otherwise. Thus, a private limited company can hold a general meeting by giving notice of less than 21 days if the articles of the private company so provide.

11. For an extra-ordinary general meeting held in a company should the minutes of the meeting be accorded serial number ?

As per the Secretarial Standard-2, serial number shall be given to each of the minutes of the extraordinary general meeting held in the company after the secretarial standards came into force from 1st July, 2015.

12. A private company has two directors who are also the only shareholders of the company. How should the company conduct its annual general meeting in case where both these shareholders of the company are outside India ?

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.

Therefore, in line with the provisions of the said section the annual general meeting of a company shall be necessarily 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. Thus, the AGM of the cannot be held outside India and shareholders must make it a point to be in India for the AGM.

13. Section 117 of the Act deals with the various resolutions that are required to be filed with the Registrar within 30 days of the passing of such resolution. What shall be the punishment leviable in case a

company fails to file the resolution or the agreement under section 117(1) before the expiry of the period specified under section 403 ?

As per sub-section (2) of section 117 of the Companies Act, 2013, if a company fails to file the resolution or the agreement under sub-section (1) before the expiry of the period specified under section 403 with additional fees, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default, including liquidator of the company, if any, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees. The limits mentioned hereinabove are those as modified by the Companies (Amendment) Bill, 2016.

CHAPTER VIII

DECLARATION AND PAYMENT OF DIVIDEND

1. When can a company declare interim dividend ? What are the profits which may be utilised for this purpose ?

Section 123(3) of the Companies Act, 2013 as proposed to be substituted by the Companies (Amendment) Bill, 2016 deals with the declaration of interim dividend by a company.

The Board of Directors of a company may declare interim dividend:

- (a) during any financial year; or
- (b) at any time during the period from closure of financial year till holding of the annual general meeting.

The said dividend may be paid out of:

- (a) the surplus in the profit and loss account; or
- (b) profits of the financial year for which such interim dividend is sought to be declared; or
- (c) profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend.

2. Can a company declare interim dividend in case it has incurred losses ?

Proviso to sub-section (3) of section 123 of the Companies Act, 2013 has been proposed to be revised by the Companies (Amendment) Bill, 2016 and the new proviso reads that, in case a company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during immediately preceding three financial years.

3. The definition of 'company' under the IEPF (Accounting, Audit, Transfer and refund) Rules, 2016 has been amended to include which type of companies ?

The definition of 'company' under the IEPF (Accounting, Audit, Transfer and refund) Rules, 2016 has been amended to include 'subsidiary bank' as defined in clause (k) of section 2 of State Bank of India (Subsidiary Bank) Act, 1959 (38 of 1959).

4. What do you mean by corporate action ? Why is it significant ?

Corporate action means any action taken by the company relating to transfer of shares and all the benefits accruing on such shares namely, bonus shares, split, consolidation, fraction shares etc., except right issue to the Authority. The company undertaking transfer to IEPF Authority shall convey through corporate action the following:

- (a) To the depository where the shareholders have their accounts for the transfer of such shares to the authority where the shares are already in demat form
- (b) To the depository after issue of duplicate share certificates, to convert the duplicate share certificates into demat form and transfer of such shares to the authority.

5. Where the shares are held in physical form, can the company issue duplicate share certificates in the name of shareholder and then get it transferred to IEPF or is it possible for the company to straight away issue the share certificates in the name of IEPF get it dematerialized and transferred to the Authority ?

Also, how can the company issue new duplicate share certificates without complying with the necessary formalities for issue of duplicate share certificates and without cancelling the original share certificate lying with the shareholders ?

A company has to follow the procedure laid down in rule 6(3)(d) of the IEPF Authority (Accounting, Audit, Transfer and Refund) Rules, 2016. It is not possible to straight away issue the share certificate in name of IEPF & get it dematerialized and transferred to the Authority.

However, as per Circular No. 07/2017 dated 5th June, 2017, it has been stated that since transfer of shares to IEPF under section 124(6) of the Companies Act, 2013 read with rule 6(3)(d) takes place on account of

operation of law, hence the procedure followed during transmission of shares may be followed and duplicate shares need not be issued in such cases.

6. As per first proviso of rule 6(1) of the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016 where the beneficial owner has encashed any dividend warrants during the last seven years, his or her shares are not liable to be transferred to the fund. In this case, if any shareholder encashes any dividend warrants after the expiry of said seven years, would his shares be liable to be transferred to IEPF or not ?

Explanation to section 124(6) provides that, in case any dividend is paid or claimed for any year during the said period of seven consecutive years, the shares shall not be transferred to Investor Education and Protection Fund.

The explanation clearly states that if the dividend is paid/claimed during the said period of seven consecutive years, the share shall not be transferred. Therefore, if any shareholder has encashed any dividend warrants after the expiry of said seven years; his shares would be liable to be transferred to IEPF.

7. Can a person whose shares, unclaimed dividend, etc. has been transferred to the Fund, claim the shares or apply for refund ?

Any person whose shares, unclaimed dividend, matured deposits, matured debentures, application money due for refund, or interest thereon, sale proceeds of fractional shares, redemption proceeds of preference shares etc., have been transferred to the Fund, may claim the shares or apply for refund, as the case may be, to the Authority by submitting an online application in Form IEPF-5 along with the requisite fees. A copy of the same duly signed by him shall be sent along with requisite documents to the concerned company at its registered office for verification of his claim. The same shall be forwarded along with a verification report to the Authority in the format specified by the Authority.

8. What shall be the time period within which the IEPF Authority is required to dispose-off the application received for refund ?

An application received for refund of any claim duly verified by the concerned company shall be disposed off by the Authority within sixty

days from the date of receipt of the verification report, complete in all respects and any delay beyond sixty days shall be recorded in writing specifying the reasons for the delay and the same shall be communicated to the claimant in writing or by electronic means.

9. In case of demand of claim by legal heirs or successors, what is the significance of transmission process ?

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

Where the request of transfer or transmission of shares is received after the transfer of shares by company to the Authority, the company shall verify all requisite documents required for registering transfer or transmission and shall issue letter to the claimant indicating his entitlement to the said security and furnish a copy of the same to the Authority while verifying the claim of such claimant.

10. How many claims can be filed by a single person ?

A claimant can file only one consolidated claim in respect of a company in a financial year.

11. In case of any dispute arising out or a lawsuit being initiated on account of inconsistency or disparity in the verification report, whom shall the liability rest with ?

In case of any dispute or lawsuit that may be initiated due to any incongruity or inconsistency or disparity in the verification report or otherwise, the company shall be liable under all circumstances whatsoever to indemnify the Authority and the Authority shall not be liable to indemnify the security holder or company for any liability arising out of any discrepancy in verification report submitted etc., leading to any litigation or complaint arising thereof.

12. A company declared an interim dividend on 1st November, 2016. What procedure the company has to follow in case the amount so declared is not fully paid or claimed by all the shareholders by the end of 30th November, 2016 ?

Section 124(1) states that when dividend has been declared by a company but has not been paid or claimed within thirty days from the date of the

declaration to any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the Unpaid Dividend Account.

13. What is the procedure to file details of unclaimed and unpaid amount ?

Form IEPF-2 is required to be filed by the company/corresponding New Bank which shall contain investor wise details of unclaimed and unpaid amounts in respect of dividends, debentures, deposits, etc. The details of unclaimed and unpaid amounts shall need to be provided as on the Annual General Meeting (AGM) date. This form is to be filed annually within 90 days from the date of AGM. The form can be downloaded from the IEPF portal of the Ministry (<http://www.iepf.gov.in/>).

CHAPTER IX

ACCOUNTS OF COMPANIES

1. The Companies (Accounting Standards) Amendment Rules, 2016 have altered the manner in which the accounts shall be prepared for the companies. To which accounting period shall such Amendment Rules be applicable ?

MCA vide its General Circular dated 27th April, 2016 has clarified that the amended Accounting Standards should be used for preparation of accounts for accounting periods commencing on or after the date of notification, *i.e.*, 30.03.2016.

2. The preparation of consolidated financial statements shall apart from the financial statements of the company itself, contain financial statements of which companies ?

Sub-section (3) to section 129 of the Companies Act, 2013 as proposed to be substituted by the Companies (Amendment) Bill, 2016 reads that, where a company has one or more subsidiaries or associate companies, it shall, in addition to financial statements provided under sub-section (2), prepare a consolidated financial statements of the company and of all the subsidiaries and associate companies in the same form and manner as that of its own and in accordance with applicable accounting standards, which shall also be laid before the annual general meeting of the company along with the laying of its own financial statements.

3. What is the legal inference on the repetition of disclosures in the Board's Report which have been once mentioned in the financial statements ?

The Companies (Amendment) Bill, 2016 aims to simplify the provisions relating to this aspect. According to the proviso to sub-section (3) of section 134, where disclosures referred to in section 134(3) of the Act have been included in the financial statements, such disclosures shall be referred to instead of being repeated in the Board's report.

4. Are all the members required to be present in the CSR committee meeting to form quorum ?

As per Secretarial Standard on Meetings of the Board of Directors (SS-1), the presence of all the members of any Committee constituted by the Board is necessary to form the quorum for meetings of such committee unless otherwise stipulated in the Act or any other law or the Articles or by the Board.

Regulations framed under any other law may contain provisions for the Quorum of a committee and such stipulations shall be followed.

Hence, it may be concluded that all the members are required to be present in the meeting of CSR Committee, unless the Board of Directors while constituting the committee has provided for a lesser quorum requirement for the Committee.

5. The requirement of a company to form a committee for implementing its Corporate Social Responsibility Policy is dependent on its financials. What are these qualifications ?

As worded in sub-section (1) of section 135, every company having –

- (a) net worth of rupees five hundred crore or more, or
- (b) turnover of rupees one thousand crore or more, or
- (c) a net profit of rupees five crore or more;

during the immediately preceding 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 words ‘any financial year’ which stood out in the Companies Act, 2013 would be substituted by the words ‘immediately preceding financial year’ by the proposed Companies (Amendment) Bill, 2016.

6. Is it compulsory for a company to appoint an independent director solely for the purpose of the provisions of section 135 even if it is not required to make any such appointment otherwise ?

According to the proviso proposed to be inserted in section 135(1) by the Companies (Amendment) Bill, 2016, where a company is not required to appoint an independent director under sub-section (4) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors. This means that the company is not required to appoint an independent director solely on account of compliance of the provisions of this section.

7. Section 136(1) requires every company having a subsidiary or subsidiaries to place on its website, if any, separate audited accounts in respect of each of its subsidiary. Can a company covered under this section file unaudited accounts of a foreign subsidiary if the audit of such foreign subsidiary is not a mandatory legal requirement in the country where such foreign subsidiary has been incorporated and such audit has not been conducted ?

Also, which format should be followed for the preparation of such accounts – Schedule III/Accounting Standards or the format as per country of incorporation of the foreign subsidiary ?

The Ministry in consultation with ICAI clarified *vide* its circular dated 21st July, 2015 that in case of a foreign subsidiary, which is not required to get its accounts audited as per legal requirements prevalent in the country of its incorporation and which does not get such accounts audited, the holding/parent Indian may place such unaudited accounts to comply with requirements of section 136(1) and 137(1) as applicable. These, however, need to be translated in English, if the original accounts are not in English.

Further, the format of accounts of foreign subsidiaries should be, as far as possible, in accordance with requirements under Companies Act, 2013. In case this is not possible, a statement indicating the reasons for deviation may be filed alongwith such accounts.

8. The Companies (Amendment) Bill, 2016 has proposed certain provisions for filing of financial statements of foreign subsidiaries which are not required to get their accounts audited. What are these provisions ?

Proviso to sub-section (1) to section 137 reads that, in case of a foreign subsidiary, which is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the requirements of the fourth proviso pertaining to the attachment of accounts of its subsidiary or subsidiaries which have been incorporated outside India and which have not established their place of business in India shall be met if the holding Indian listed company files such unaudited financial statement along with a declaration to this effect and where such financial statement is in a language other than English, along with a translated copy of the financial statement in English.'

CHAPTER X
AUDIT AND AUDITORS

1. Apart from the regular disclosures, which are the other matters to be disclosed in an Auditor's Report ?

The auditors shall also include their views and comments on the matters as to whether :

- (a) the company has disclosed the impact, if any, of pending litigations on its financial position in its financial statements;
- (b) the company has made provision, as required under any law or accounting standards, for material foreseeable losses, if any, on long term contracts including derivative contracts;
- (c) there has been any delay in transferring amounts, required to be transferred, to the Investor Education and Protection Fund by the company;
- (d) the company had provided requisite disclosures in its financial statements as to holdings as well as dealings in Specified Bank Notes during the period from 8th November, 2016 to 30th December, 2016 and if so, whether these are in accordance with the books of accounts maintained by the company.

2. What all documents must be obtained from a cost auditor before his appointment in a company ?

According to proviso to sub-rule (1) to rule 6 of the Companies (Cost Records and Audit) Rules, 2014, before his appointment, there shall be obtained:-

- Written consent of the cost auditor to such appointment, and
- a certificate from him or it, as provided in sub-rule (1A).

The certificate shall declare that:

- (a) the individual or the firm, as the case may be, is eligible for appointment and is not disqualified for appointment under the Act, the Cost and Works Accountants Act, 1959 and the rules or regulations made thereunder;
- (b) the individual or the firm, as the case may be, satisfies the criteria provided in section 141 of the Act, so far as may be applicable;
- (c) the proposed appointment is within the limits laid down by or under the authority of the Act; and
- (d) the list of proceedings against the cost auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

3. Can a cost auditor be removed from his office before the expiry of his term ?

A cost auditor appointed under the Companies (Cost Records and Audit) Rules, 2014 may be removed from his office before the expiry of his term, through a board resolution after giving a reasonable opportunity of being heard to the Cost Auditor and recording the reasons for such removal in writing.

CHAPTER XI

**APPOINTMENT AND
QUALIFICATIONS OF DIRECTORS**

1. The provisions regarding residence of one director in India have been proposed to be altered by the Amendment Bill, 2016. What new provisions are expected to come into force once the Bill is passed ?

The Amendment Bill, 2016 proposes to read section 149(3) of the Companies Act, 2013 as follows :

“Every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two days during the financial year:

Provided that in case of a newly incorporated company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated.”

2. The director of a company has already filed Form DIR – 11 post his resignation. What shall be the consequences facing the company if Form DIR – 12 is not filed within the stipulated time ?

Filing of Form DIR-11 and Form DIR-12 are separate responsibilities. While filing Form DIR-12 is the responsibility of the company, the onus of filing Form DIR-11 rests with the director of the company.

As per rule 15 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the Company shall within 30 days from the date of receipt of notice of resignation from a director, intimate such resignation to the Registrar in Form DIR-12. Further, Form DIR-12 can be filed with ROC until 300 days with additional fees as prescribed. However, after 300 days if the company wishes to file Form DIR-12 with the ROC then it shall have to first get the delay condoned by filing Form CG-1 with the MCA.

3. Persons other than the retiring directors intending to stand for directorships are required to deposit a sum of one lakh rupees while filing their candidature with the company. Private companies are exempt from the provisions of section 160 and for directorship in Nidhi companies; the said sum has been reduced to ten thousand rupees. Are there any other exceptions as well ?

The Companies (Amendment) Bill, 2016 intends to insert the following proviso to sub-section (1) of section 160:

“Provided that requirements of deposit of amount shall not apply in case of appointment of an independent director or a director recommended by the Nomination and Remuneration Committee, if any, constituted under sub-section (1) of section 178.”

Hence, with the insertion of this proviso, independent directors too shall be exempted from the condition of deposit of money.

4. A non-executive director of a private limited company holds expertise in a certain area. Can the said director render services as a consultant to the same company ? Can he render his services to a company in some other group as well ?

A non-executive director of a private limited company is eligible to act as a consultant of the private company in which he is a director. However, any such appointment shall be done in compliance of sections 184 and 188 of the Companies Act, 2013 and Rules framed thereunder. Unless the Articles of Association of the company prohibit appointment in group companies, he can also be appointed as consultant of any other company.

5. The limit has been prescribed as regards obtaining directorship in companies. Are there any exclusions ?

The Companies (Amendment) Bill, 2016 shall by adding another Explanation to section 165, exclude the directorship in dormant companies from being a part of the limit of 20 companies as regards obtaining directorships by a person.

6. Which companies are required to appoint Independent Directors ?

Appointment of Independent Director is mandatory in listed companies and certain specified companies [refer rule 4 of Companies (Appointment and Qualification of Directors) Rules, 2014]. That is public companies

having paid-up capital of Rs. 10 crores or more; or public companies having turnover of Rs. 100 crores or more; or the public companies, which have in aggregate, outstanding loans, debentures and deposits, exceeding Rs. 50 crores. Private companies are exempted from appointing any Independent Directors.

7. A company intends to appoint a director which shall be effective from a future date. Can the company pass a resolution in this regard beforehand and also file Form DIR-12 in advance for the same ?

The company may pass a resolution for the appointment of director which is effective from any future date. Form DIR-12 is to be filed within 30 days of the appointment. Hence, Form DIR-12 needs to be filed accordingly but the same must mention the date from which the appointment became effective.

8. Are the compliances required for appointment of an additional director same as those of appointment of a director appointed at a general meeting ?

While some of the compliances for appointment of an additional director and appointment of a director are same, there are certain differences too. The compliances similar for both additional director and director include :

- Entry in the Register of directors; and
- Filing of Form DIR-12.

The main difference in the compliances lies in the fact that while the Board is empowered to appoint an additional director, a director can only be appointed at general meeting. The term of holding the office is also different for both additional director and a director appointed at a general meeting.

9. A company intends to file Form DIR-10, i.e., application for removal of disqualification of directors. Is it required to file the financial statements before filing such form ?

Yes, the company is required to make good the default by doing necessary filings including filing of financial statements before filing Form DIR-10, i.e., application for removal of disqualification of directors.

10. Is it compulsory to take Form DIR-8 for every financial year as it is not mentioned in the law ?

Rule 14(1) of Companies (Appointment of Directors and Qualification) Rules, 2014 provides that Form DIR-8 is required to be filed by a director at the time before his appointment or re-appointment. The statutory auditors of the company may also ask for such a declaration on an yearly basis as there is a duty cast on the auditors under section 143(3)(g) of the Companies Act, 2013 to state in his/her audit report whether any of the directors have suffered any disqualification under section 164(2) of the Act.

As a good practice, Form DIR-8 may be submitted before the commencement of every financial year by the directors of a company. However, it is not mandatory to do so.

11. What is the amount of fees to be paid while filing an application for surrender of Director Identification Number under rule 11(f) of the Companies (Appointment and Qualification of Directors) Rules, 2014 of the Companies Act, 2013 ?

All persons irrespective of their directorships in OPCs and Small companies have to pay Rs. 1,000 as fees along with their application for surrendering their Director Identification Number.

12. A limited company has appointed two independent directors for a tenure of 2 years. According to section 149(10), an Independent Director shall be appointed for two consecutive terms wherein one term should not exceed 5 years.

The directors so appointed hereinabove as Independent Directors are due for re-appointment.

Can such independent directors be re-appointed for a period of 2 years again with ordinary resolution since the tenure does not exceed 5 years or is it necessary to pass a special resolution for their re-appointment ?

An independent director (ID) shall hold office for a term up to 5 years and shall be entitled to be reappointed for an additional term of a period up to 5 years. While the maximum tenure of an ID may be 10 consecutive years; as per section 149(11) of the Act, there is no bar on appointing an ID for a tenure less than 5 years as section 149(10) refers to a term "upto 5 consecutive years".

Therefore, the maximum term of appointment for an ID shall be a period of five years from the date of his appointment and he may be reappointed by passing a special resolution and providing a disclosure of such appointment in the Board's report for a further term not exceeding 5 years.

The Act permits only 2 consecutive terms to an ID [section 149(11)].

Hence, in the given case for persons appointed as ID for a term of 2 years, such term shall be counted as one term and then if they are appointed as ID for another 2 years, then this will be counted as a second and last of the two consecutive terms even though in aggregate the director would have been appointed only for 4 years. Such re-appointment would require a special resolution to be passed in terms of section 149(10).

13. Can a person be appointed as a director before obtaining Director Identification Number (DIN) ? If a person has obtained DIN on 29/03/2017, can he be appointed from 29/03/2016 ?

Section 152(3) reads that "No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number under section 154".

As per section 164(1)(h), a person shall not be eligible for appointment as a director of a company, if he has not complied with sub-section (3) of section 152.

In light of the provisions of section 152(3) read with section 164(1)(h), it may be noted that a person shall not be eligible to be appointed as a director unless he has been allotted a DIN. Hence, the said appointment is not possible.

14. A company has 10 directors. As per the provisions pertaining to retirement of directors, 2/3rd of them are eligible for retirement (2/3rd of 10 being 7). As per section 152(6)(c), of these, one third directors are liable for rotation.

Should it be checked whether number of 1/3rd directors is 3 or multiple of 3 always ? In the case mentioned hereinabove, neither the number of directors liable for rotation is 3 or multiple of 3. What recourse is available to the company ?

At the outset it may be informed that the total number of directors for the purpose of determining directors retiring by rotation shall not include

Independent Directors whether appointed under 2013 Act or any other law. However, directors appointed under section 151 of the Companies Act, 2013 would not be excluded while calculating directors retiring by rotation.

In so far as rotation of director under section 152 of Companies Act, 2013 is concerned it says that at least 2/3rd of the total number of directors of a public company shall be persons whose office is liable to retirement by rotation. Hence, for determining such directors the absolute number higher than 2/3rd is to be taken into account. Thus, 7 is the correct number in the example given assuming there are 3 Non-retiring directors (including whole-time directors)

Once the directors liable to retire by rotation have been determined then 1/3rd of such directors shall retire by rotation at each annual general meeting of the company after the first annual general meeting, provided Articles of Association does not provide for retirement by rotation of all directors at every annual general meeting. When the 1/3rd is computed, section 152(6)(c) provides that if the total number of directors liable to retire by rotation is neither three nor a multiple of three, then, the number nearest to one-third (not at least 1/3rd), shall retire from office. In the case above, 1/3rd of 7 is 2.33, and the number nearest to 2.33 is 2. Hence, 2 directors shall retire by rotation.

15. A company wants to appoint an employee as an Alternate Director for an existing Foreign Director.

1. Whether he will be termed as Whole-Time Director (WTD) as per the section 196 of the Companies Act, 2013 ? If yes, whether he should be appointed as WTD and designated as an Alternate Director ?

2. Whether his appointment as a Whole-Time Director shall be considered for total count of directors of the company ? For example, if the company has nine (9) directors, will the said appointment raise the total count to ten or will it remain nine only after him being designated as Alternate Director ?

3. Since the Alternate Director is an employee, there exists an employer-employee relationship. No additional remuneration is being drawn by him except salary. Is it valid ?

1. The law is silent on the compliances for appointment of an "employee" as an alternate director. However, the director appointed

as Alternate Director is nevertheless a “director” under section 2(34) of the Act. Further, whole-time director defined under section 2(94) “includes a director in the whole-time employment of the company”.

2. A combined reading of the above imply that compliances and conditions applicable including terms of remuneration and limits etc and required to be satisfied for appointment of a whole-time director shall need to be fulfilled for appointing an employee as an alternate director.
3. The appointment of an Alternate Director does not change the number of directors on the Board of a company. Hence, the total number of directors in this case shall remain nine (9) and not ten (10).
4. Also such an alternate director (even though whole-time director) will not be considered for purposes of determining compliance under section 203 of the Act, if applicable.
5. If no additional remuneration is paid to such alternate director it will be in order, however the remuneration paid to such person (now qualifying as whole-time director) will be subject to provisions applicable to payment of remuneration to whole-time directors.

16. Is it necessary for a company to obtain shareholders’ approval in the Annual General Meeting for the appointment of an Alternate Director ? If yes, can such Alternate Director be appointed for a term of one year ?

The appointment of an Alternate Director can be done by the Board of Directors of the company under section 161(2) if authorized by the Articles of the company, or by a resolution passed by the company in a general meeting.

The term of office of Alternate Director is dependent on the term of office of the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India. [Second proviso to section 161(2)]. However, the term can be shorter than that term, if so decided by the Board but not longer than the term of the director in whose place alternate director is appointed.

Further, if an employee is appointed as an alternate director and thus becomes a whole-time director, then all procedural compliances applicable for a whole-time director including shareholders’ approval, as applicable, need to be complied with by the company.

17. While filing Form DIR-12, for the appointment of director, under each section, against the term category, three options are listed – Independent, Promoter and Professional.

If a person being appointed in a private company is not a promoter or professional, the only option left with the company to select is Independent Director. Can the company do so ?

In a private company, appointment of independent director is not mandatory and consequently such category cannot be selected while filing Form DIR-12. The 'independent' category is only for Public companies. Further, 'Professional' means a person having expertise and specialized knowledge in the field in which the company operates.

Hence, in respect of a private company, if the person being appointed as director is not a promoter, then while filing Form DIR-12, the company should opt for professional category instead of independent director.

18. What is the amount of fees to be paid while filing an application for allotment of a Director Identification Number under section 153 of the Companies Act, 2013 ?

All persons irrespective of their directorships in OPCs and Small companies have to pay Rs. 500 as fees along with their application for allotment of a Director Identification Number.

CHAPTER XII

MEETINGS OF BOARD AND ITS POWERS

1. A director has not been attending the board meetings of the company. The company is of the opinion that the director must vacate the office held by him on the basis of the same. How should the Company Secretary act upon this issue ?

In terms of section 167(1)(b) of the Companies Act, 2013, the office of a director shall become vacant in case he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board.

The Company Secretary should check that the proper process as mentioned in section 173 of the Companies Act, 2013 has been followed in sending the board meeting notices. He/she should keep the attendance records/ minutes of the board meeting wherein such director's absence is recorded.

It may be desirable for the Company Secretary to bring this matter to the notice of the Board prior to the expiry of the period of 12 months so that if required the Board may take pre-emptive actions if any.

For the purpose of counting of Board Meetings held in the preceding twelve months, the period should commence from the date of the first Board Meeting held immediately after the meeting which the director concerned last attended.

SS-1 prescribes the requirement with respect to vacation of office which is only for attendance of a director in the Board Meeting and not for the manner of attending the Board Meeting. Therefore, Board Meeting attended by a director, whether physically or through Electronic Mode, shall be sufficient attendance.

A Board Resolution need not be passed to show that office of director has been vacated by a particular director. Vacation of office is automatic as soon as a director is found to have incurred disability.

As a matter of good governance, due intimation of such vacation should

be sent to such director forthwith and the Board may take note of such vacation at its next meeting. Compliances following vacation of office in terms of filing of forms need to be undertaken in time.

2. A private company was incorporated with two directors. These two directors are the only shareholders of the company. One of the directors met with an accident and died. Does the remaining alive director-cum-shareholder hold the right to appoint another director, even though the criteria of quorum of meeting remains unfulfilled ?

As per the provisions of section 174(2) of the Companies Act, 2013, in case the number of directors 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 of summoning a general meeting of the company and for no other purpose.

Thus, the remaining alive director can act as a quorum and pass resolution for appointment of another director or may call a general meeting.

3. Whether power to borrow money under section 179 can be delegated ? If yes, can such power be delegated on an unlimited basis ?

Yes, power to borrow money under section 179(3)(d) of the Companies Act, 2013 can be delegated by means of a Board resolution, to any committee of directors or Managing Director or Manager or any other principal officer as per first proviso to sub-section (3) of section 179 of the Companies Act, 2013.

However, the company, in the board resolution, specifies the limit of the amount to be borrowed on behalf of the company by the authorised person or committee, as and when the need arises, and also specifies the time limit for which the person or committee is authorised and his/its scope of operations. Thus, the authority cannot be delegated on an unlimited basis.

4. Can an interested director be counted as quorum ?

The provisions of section 184 explicitly provide that an interested director shall not participate in the meetings of the Board in case they are interested in the contract or arrangement or proposed contract or arrangement, and section 174(3) pertaining to quorum for the meeting of the Board further states that where at any time the number of interested directors (director within the meaning of sub-section (2) of section 184) exceeds or

is equal to two-thirds of the total strength of the Board of Directors, the number of directors who are not interested directors and present at the meeting, being not less than two, shall be the quorum during such time. Hence, the interested director cannot be counted in quorum.

No other provision in the Companies Act, 2013 explicitly specifies as to whether an interested director can be considered as quorum or not for the meeting. However, as per Para 3.2 of Secretarial Standard-1, a director shall not be reckoned for quorum in respect of an item in which he is interested and he shall not be present, whether physically or through Electronic Mode, during discussions and voting on such item. The same has also been stated under rule 15(2) of Companies (Meeting of Boards and its Powers) Rules, 2014.

Thus, the director cannot be counted for the purpose of quorum.

5. Is a director required to disclose his interest to the Board of Directors in Form MBP-1 with reference to holding directorship of foreign companies under section 184 of the Companies Act, 2013 ?

Section 184(1) of the Companies Act, 2013 read with rule 9(1) of the Companies (Meeting of Board and its Powers) Rules, 2014 states that every Director shall disclose his concern or interest in any company or companies or bodies corporate (including shareholding interest), by giving a notice in Form MBP-1.

Section 2(11) of the Companies Act, 2013 reads that a body corporate includes a company incorporated outside India.

Hence, in consonance with the said provisions it may be concluded that a director is required to disclose his interest as regards holding directorships or shareholding interest in foreign companies to the Board of Directors in their meeting.

6. Every director shall disclose his concern or interest by giving a notice in writing in Form MBP-1. Whether such disclosure of interest is required in respect of shares held in any company ? Can an interested director of a private company participate in such meeting where he is interested ?

As per sub-section (1) of the section 184 of the Companies Act, 2013, read with rule 9(1) of the Companies (Meetings of Board and its Powers) Rules, 2014, every director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the

disclosures already made, then at the first Board meeting held after such change, disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in Form MBP-1.

As per sub-section (2) of section 184 of the Companies Act, 2013, 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 with a body corporate in which such director or such director in association with any other director, holds more than 2% shareholding of that body corporate, or is a promoter, manager, CEO of that body corporate or with a firm or other entity in which, such director is a partner, owner or member, as the case may be, shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting.

However, after the MCA Exemption Notification dated 5th June, 2015, in case of private company, section 184(2) shall apply; with the exception that the interested director may participate in such meeting after disclosure of his interest.

Thus, from the above it may be concluded that disclosure in respect of shares of any amount shall be given in Form MBP-1 and in case of a contract or arrangement the director holding more than two percent of shareholding is required to give such disclosure. Further, only a director of a private company can participate in such meeting where he is interested after the disclosure of his interest. It may be pertinent to note the prescribed Form MBP-1 for disclosure in this regard has a column to disclose shareholding details.

It may be noted that exemption is only with respect to section 184 and not section 188, *i.e.*, in case of a related party transaction where the director is a related party then the director concerned will not be counted for quorum and shall not participate.

7. What conditions may be satisfied before a company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in whom any of the director of the company is interested as altered in the Companies Act, 2013 by the Companies (Amendment) Bill, 2016 ?

Sub-section (2) of section 185 pertaining to 'Loans to Directors' shall be

modified by the Companies (Amendment) Bill, 2016 and accordingly the conditions for advancing loan under this section will include that :

- (a) a special resolution is passed by the company in general meeting. The explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and
- (b) the loans are utilised by the borrowing company for its principal business activities.

8. Will sub-section (7) to section 186 be applicable for loans provided by Holding Company to its Wholly Owned Subsidiary Company ? Whether a Holding Company can give loans to its WOS at 'nil' rate of interest ?

Sub-section (7) to section 186 reads that "no loan shall be given under this section at a rate of interest lower than the prevailing yield of one year, three year, five year or ten year Government Security closest to the tenor of the loan".

The said sub-section does not provide for any exemption for loans by holding to subsidiary companies with respect to rate of interest chargeable for such loan(s).

Hence, even in case where the loan is given by a holding to its subsidiary, the interest shall be charged at the rates prescribed.

9. A holding company wants to give guarantee on behalf of its wholly owned subsidiary with respect to a loan taken by the latter. Can the holding company do so ?

As per clause (c) of the proviso to section 185(1) of the Companies Act, 2013, a holding company may give guarantee in respect of a loan made to its wholly owned subsidiary provided that such loans are utilized by the subsidiary company for its principal business activity.

10. Under section 372A of the Companies Act, 1956, wherein the effective yield (effective rate of return) on tax free bonds was greater than the yield on prevailing bank rate, the same was not considered as a violation of the Act. What is the view of MCA on the same with respect to section 186(7) of the Companies Act, 2013 ?

It has been clarified by MCA vide Circular No. 06/2013 dated 14.03.2013 that in cases where the effective yield (effective rate of return) on tax free bonds is greater than the prevailing yield of one year, three year, five year or ten year Government Security closest to the tenor of the loan, the same shall not be considered as a violation of section 186(7) of the Companies Act, 2013.

11. Are the provisions of section 186 applicable to the employees of the company ?

MCA vide its General Circular No. 04/2015 dated 10th March, 2015, has clarified that loans and/or advances made by the companies to their employees, other than the managing or whole-time directors (which is governed by section 185) are not governed by the requirements of section 186 of the Companies Act, 2013. Such clarification shall, however, be applicable if such loans/advances to employees are in accordance with the conditions of service applicable to employees and are also in accordance with the remuneration policy, in cases where such policy is required to be formulated.

12. A company has not obtained any loan from a Public Financial Institution but wants to give a loan to a person within the limit specified under section 186(2) of the Companies Act, 2013. Whether the consent of all directors present in board meeting is required in the said case ?

As per section 186(5) of the Companies Act, 2013, no loan or guarantee or security may be given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting. Hence, the consent of all the directors present in the Board meeting, sanctioning such loan, is required.

13. The second proviso to sub-section (1) of section 188 of the Companies Act, 2013 states that no member of the company shall vote on such resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party. Are there any exceptions ?

The Companies (Amendment) Bill, 2016 intends to insert a proviso which states that nothing contained in the second proviso shall apply to a company in which ninety per cent or more members, in number, are relatives of promoters or are related parties.

14. Whether it is necessary to pass Board Resolution if a transaction is transacted at arm's length basis with a related party ?

Section 188(1) enlists the various transactions which when undertaken with a related party shall require the consent of the Board of Directors by way of a resolution at a meeting of the Board. However, third proviso to sub-section (1) of section 188 states that nothing stated therein shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis.

Hence, it may be concluded that the passing of a Board resolution is not necessary in case of related party transactions occurring at arm's length basis. However, as a good practice the board may note and approve such a related party transaction. Further, there are additional compliances (beyond the Act) for listed companies, and the same must be complied with as applicable.

15. A public company intends to take loan from its directors (whole-time directors) and this transaction is not covered under section 188 of the Companies Act, 2013. But since a director is a related party, the acceptance of loan will be taken as related party transaction.

How much interest the company can pay to the director for the said loan ?

Where a company takes a loan from a director, the same falls under the purview of Acceptance of Deposits under section 73 of the Companies Act, 2013 read with relevant rules.

However, the Director from whom the money is received has to furnish a declaration that the amount given by him is not out of borrowed funds.

Though no rate of interest has been prescribed in the Act, a maximum cap has been set out in the Companies (Acceptance of deposits) Rules, 2014; *i.e.*, the maximum rate of interest prescribed by the RBI for acceptance of deposits by NBFCs. The same may be complied with in the said case.

16. As per the Sale of Goods Act, 1930, the definition of 'goods' includes 'shares'. Whether selling of shares to related party will fall under the purview of section 188 ?

Yes. In both situations, *viz.*, if a company is engaged in the business of buying and selling of shares and such other securities then the sale of shares and such other securities shall be covered under clause (a) of sub-section (1) of section 188 of Companies Act, 2013, and also in any other

case, the sale of shares held by a company in the normal course as investments shall be covered under section 188 as related party transactions. However, issue of shares of the company itself shall not be covered by section 188 nor will issue or sale of shares pursuant to an employee stock option scheme be covered as the Act provides specifically for compliances in that regard. The special provisions relating to employee stock option scheme and issue of shares will therefore override the general provisions of section 188.

17. Whether remuneration and unsecured loans to directors are covered under related party transactions as per section 188 ?

Remuneration and unsecured loans to directors are not covered under the related party transactions as per section 188 of the Companies Act, 2013. There are specific sections for both of them:

- Remuneration to directors (section 197 of the Act); and
- Unsecured loans to directors (section 185 of the Act).

CHAPTER XIII

**APPOINTMENT AND REMUNERATION OF
MANAGERIAL PERSONNEL**

1. A company is required to file a return with the Registrar for the appointment of certain managerial personnel. Who are they and which form is designated for the filing of such return ?

The return of appointment shall be filed within 60 days of the appointment of :

- Managing Director,
- Whole-Time Director; or
- Manager.

Form MR-1 shall be used for filing such return.

2. A private company has appointed a Managing Director. Can the company pay remuneration to such managing director without passing a special resolution ?

As per section 196(4) of the Companies Act, 2013, a managing director, whole-time director or manager shall be appointed and the terms and conditions of such appointment and remuneration payable have to be approved by the Board of Directors at a meeting which shall be subject to approval by a resolution at the next general meeting of the company and by the Central Government in case such appointment is at variance to the conditions specified in Schedule V of the Act. However, MCA Exemption Notification No. G.S.R. 464(E) dated 5th June, 2015 has exempted private companies from the said section.

Hence, in case of a private company, the terms of remuneration to a managing director need not be approved in a general meeting and remuneration can be paid without passing of special resolution.

3. Is there any age limit for appointment of a Managing Director in a public company ?

Part 1 of Schedule V of the Companies Act, 2013 states the minimum age for appointing a person as a Managing Director, Whole-time Director and Manager. The person must have completed the age of 21 years and not attained the age of 70 years. However, after attaining the age of 70 years, company may by a special resolution proceed with the appointment and no further approval by the Central Government will be required.

4. A private company is not mandatorily required to appoint a Managing Director. However, if it appoints a person to such designation, is it mandatory for the company to file Form MR-1 for Return of appointment of Key Managerial Personnel regarding the appointment of such Managing Director in the company ?

While section 196(4) of the Companies Act, 2013 states about the appointment of MD, WTD or Manager, the second proviso to the section reads that a return in the prescribed form shall be filed within sixty days of such appointment with the Registrar.

However, MCA Exemption Notification dated 5th June, 2015 exempts private companies from sub-sections (4) and (5) of section 196. Accordingly, it is not mandatory to file Form MR-1 for appointment of a Managing Director by any such company.

5. A private company proposes to appoint a foreigner as its Managing director. However, as per additional qualifications and explanation provided in Schedule V, it is mandatory for the proposed KMP to be a resident director. However, post exemptions given to private company, section 196(4) and (5) are not applicable.

Does this mean that the residency requirement has also been exempted ?

MCA vide its notification dated 5th June, 2015 exempted private companies from section 196(4) and (5). The applicability of Schedule V Part I which stipulates that a person to be appointed as a Managing Director should be a resident of India; is a stipulation consequential to the applicability of section 196(4) and hence is not applicable on private companies.

A private company can, therefore, appoint a foreigner as its Managing Director provided all other requirements are fulfilled for such appointment.

6. A private limited with paid-up share capital of Rs. 3 crore is a holding company of two private limited companies having paid-up share capital of Rs. 15 crore and Rs. 20 crore respectively.

As per rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the holding company is not required to appoint a Company Secretary since its paid-up capital is less than Rs. 5 crore. However, both its subsidiary companies are required to appoint Company Secretary and also file Form DIR-12 with ROC since their paid-up capital exceeds the limit under the said rule.

If a person is appointed as the Company Secretary of the holding company, can he also be appointed as a Company Secretary of subsidiary companies ? Also, whether Form DIR-12 can be filed in the name of single Company Secretary for both the subsidiaries ?

- (1) 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.
- (2) 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. Hence, the same person may be appointed as a Company Secretary in only one subsidiary company apart from its holding company.
- (3) The second subsidiary will need to appoint another person as whole-time Company Secretary.
- (4) Also, for appointment of Company Secretaries for different companies, separate Form DIR-12 shall be filed for each such appointment.

7. Section 197 of the Companies Act, 2013 talks about the overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits. However, the law does not promulgate the declaration about the same by any authority. Does the Companies (Amendment) Bill, 2016 provide for the same ?

Altering the said section extensively, the Companies (Amendment) Bill, 2016 intends to insert a sub-section (16) to section 197. The said sub-section reads that, "the auditor of the company shall, in his report under section 143, make a statement as to whether the remuneration paid by

the company to its directors is in accordance with the provisions of this section, whether remuneration paid to any director is in excess of the limit laid down under this section and give such other details as may be prescribed”.

CHAPTER XIV

**COMPROMISES, ARRANGEMENTS AND
AMALGAMATIONS**

1. Is it mandatory for a foreign company to obtain prior approval of the Reserve Bank of India prior to undertaking a merger with an Indian Company ?

Pursuant to rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, as amended *vide* amendment rules notified on 13th April, 2017, a foreign company incorporated outside India may merge with an Indian Company after obtaining prior approval of the RBI and after complying with the provisions of sections 230 to 232 of the Companies Act, 2013.

2. According to the recently enforced section 234, which companies fall under the purview of Chapter XV (Compromises, Amalgamations and Arrangements) of the Companies Act, 2013 ?

In the words of section 234, "the provisions of Chapter unless otherwise provided under any other law for the time being in force, shall apply *mutatis mutandis* to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government".

CHAPTER XV

REMOVAL OF NAMES OF COMPANIES FROM THE REGISTER OF COMPANIES

1. A company intends to file an application for removal of its name from the register of Companies. What are the documents to be attached with the application for Removal of names filed in Form STK-2 ?

The application in Form STK-2 shall be accompanied by –

- Indemnity bond duly notarised by every director in Form STK-3;
- A statement of accounts containing assets and liabilities of the company made up to a day, not more than 30 days before the date of application and certified by a Chartered Accountant;
- An affidavit in Form STK-4 by every director of the company;
- A copy of the special resolution duly certified by each of the directors of the company or consent of members holding 75% of the paid-up share capital as on the date of application; and
- A statement regarding pending litigations, if any, involving the company.

2. What are the various forms in which notice can be issued by Registrar for the removal of names of companies from the register of companies ?

The notice under section 248(1) of the Companies Act, 2013 is in Form STK-5 and under section 248(2) in Form STK-6. Such notices are :

- (i) Placed on the official website of the MCA on a separate link established on such website in this regard; and
- (ii) Published in the Official Gazette.

Another notice is published in English language in a leading English newspaper and at least once in vernacular language in a leading

vernacular language newspaper, both having wide circulation in the State in which the registered office of the company is situated. When the said notice is published under section 248(1), the prescribed form for the same is Form STK-5A, while for the purpose of section 248(2), the prescribed form remains the same, *i.e.*, Form STK-6.

3. Pursuant to section 248(1) of the Act, the Registrar on the satisfaction of certain conditions, may send a notice to the company stating his intention to remove the name of the company from the Register of Companies. Is there a draft format of such notice ?

The Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 have been amended to include Form STK-5A, *i.e.*, a standard Public Notice to the companies to be issued by the Registrar in pursuance of section 248(1) and (4) of the Act stating the reason for proposing removal of a company's name from the Register of Companies and requisitioning objections if any within a period of 30 days from the date of publication of the notice.

CHAPTER XVI

COMPANIES INCORPORATED OUTSIDE INDIA

1. The provisions of Corporate Social Responsibility are applicable to Indian companies bearing certain financial requisites. Will the enactment of Companies (Amendment) Bill, 2016 bring about a change in this scenario ?

Sub-section (2) to section 384 of the Companies Act, 2013 is intended to be altered by Companies (Amendment) Bill, 2016 with respect to the above-mentioned issue. The insertion of section 135 alongside section 92 shall *mutatis mutandis* make section 135 applicable on foreign companies as well.

CHAPTER XVII

**NATIONAL COMPANY LAW TRIBUNAL AND
APPELLATE TRIBUNAL**

1. What is the recourse available for documents which are available in language other than English while presenting before the National Company Law Tribunal ?

For documents in language other than English which are intended to be used in any proceeding before the Tribunal, the same shall be received by the Registry accompanied by a copy in English, which is agreed to by both the parties or certified to be a true translated copy by authorised representative engaged on behalf of parties in the case or by any other advocate or authorised representative.

Any appeal, petition or other proceeding shall not be set down for hearing until and unless all parties confirm that all the documents filed on which they intend to rely are in English or have been translated into English and required number of copies filed with the Tribunal.

2. An association appoints Mr. X to file an appeal with the NCLT on its behalf. What points must be kept in mind regarding the same ?

Where an appeal, application, petition or other proceeding is purported to be instituted by or on behalf of an association, the person or persons who sign(s) or verify(ies) the same shall produce along with such application, a true copy of the resolution of the association empowering such person(s) to do so, for verification by the Registry.

Furthermore, the Registrar may at any time call upon the party to produce such further materials as he deems fit for satisfying himself about due authorization.

3. What are the various Forms specifically related to NCLT for filing of applications, etc. ?

- NCLT. 1 Form for filing of petition or application or reference
- NCLT. 2 Form for filing of attachments to the application
- NCLT. 3 Form for filing of attachments to the application (in case of interlocutory application)
- NCLT. 4 To be used for general heading in all proceedings before the Tribunal and in all advertisements and notices
- NCLT. 5 Form for issue of notice by the Tribunal to the opposite party
- NCLT. 6 Form for filing of affidavit verifying the application
- NCLT. 7 Form for filing of affidavit verifying the evidence filed with the Tribunal on direction given by the Tribunal to either of the parties
- NCLT. 9 Form for filing application by a member for direction to the company for inspection of minute-book of general meeting
- NCLT. 1 Form for filing application under section 243(1)(b) of the Act for leave to any of the persons mentioned therein to be appointed or to act as the managing director or other director or manager of the company
- NCLT. 9 Form for filing application under section 245(1) read with 245(3) of the Act
- NCLT. 12 Form for filing of Memorandum of Appearance by the authorised representative, representing the respective parties to the proceedings
- NCLT. 13 Format for issuing Public notice by the Tribunal to all the members of the class on admission of an application filed under section 245(1)

4. Can an application filed before the Tribunal be disposed-of ex-parte ?

In case, if the applicant appears and the respondent does not appear on the date specified in the notice in Form NCLT.5, in terms of rule 49 of the NCLT Rules, 2016 the Tribunal, may adjourn the case or proceed forthwith ex-parte to dispose of the application.

5. Are the parties to a proceeding, suo motu allowed to file additional evidence ?

As per rule 40 of the NCLT Rules, 2016, the parties to the proceedings shall not be entitled to produce before the Bench additional evidence, either oral or documentary, which was in the possession or knowledge but was not produced before the Inspector, appointed by the Central Government for the purpose of investigating the affairs of the concerned company, during investigation under Chapter XIV of the Act. However, if the Bench requires any additional evidence or document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or if the Inspector so appointed for the said purpose has not given sufficient opportunity to the party to adduce evidence, the Bench, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be produced.

6. What action is accorded to the Bench on receipt of any additional evidence ?

In terms of rule 40(4) of the NCLT Rules, 2016, any and every additional evidence or document received by the Bench shall be made available by the Bench to the parties to the proceedings other than the party producing the evidence and they shall be afforded an opportunity to rebut the contents of the said additional evidence.

7. The concept of *amicus curiae* means "a person or group who is not a party to a lawsuit, but has a strong interest in the matter, will petition the court for permission to submit a brief in the action with the intent of influencing the court's decision". Is this concept applicable to the NCLT as well ?

The Tribunal may, at its discretion, permit any person or persons, including the professionals and professional bodies to render or to communicate views to the Tribunal as *amicus curiae* on any point or points or legal issues as the case may be as assigned to such *amicus curiae*. The Tribunal may permit *amicus curiae* to have access to the pleadings of the parties and the Tribunal shall enable the parties to submit timely observations on brief provided by the *amicus curiae*. The Tribunal shall be at liberty to direct either of the parties or both the parties to the proceedings involving a point on which the opinion of the *amicus curiae* has been sought, to bear such expenses or fee as may be ordered by the Tribunal.

8. Can we make combined petition for seeking permission to make application under sections 241 and 244 in case petitioner's shareholding is below 10 percent ?

The right to apply under section 241 of the Act is vested with the people mentioned under section 244 of the Companies Act, 2013. However, the proviso to section 244 reads that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

Hence, it may be concluded that to file an application under section 241, wherein the shareholding of the petitioner is less than ten percent, prior approval of the Tribunal is required to be obtained under section 244.

Therefore, a combined petition for seeking permission to make application under sections 241 and 244 may not be filed before the Tribunal.

9. Sec 244 provides for powers to NCLT to allow application under section 241 in case of holding below 10 percent. Can permission be granted for zero holding ?

Section 244(1) reads that the following members of a company shall have the right to apply under section 241, namely : –

- (a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;
- (b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members :

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

Hence, in light of the abovementioned proviso, it may be deciphered that the permission to apply may be granted to members in case of zero shareholding as well, in case an application is made to this effect.

10. Can old disputes of 2010 be appealed in NCLT ?

Section 434 of the Companies Act, 2013 provides as follows :

(1) On such date as may be notified by the Central Government in this behalf, –

- (a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 10E of the Companies Act, 1956 (1 of 1956), immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;
- (b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:

Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days; and

- (c) all proceedings under the Companies Act, 1956, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:

Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government.

Provided further that only such proceedings relating to cases other than winding-up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal:

Provided further that –

- (i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or
 - (ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts; shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959.
- (2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.

The section above clearly details the transfer of pending cases to NCLT from CLB.
