[A discussion on the amendments made in Business Law portion through Circulars/ Notifications/ Orders issued between 1st May, 2015 and 30th April, 2018]

(Relevant for students appearing in May 2019 examinations and onwards)
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A WORD ABOUT SUPPLEMENTARY

Laws and rules, in general, regulate the relationship between business and profession. In specific, an accounting student should have knowledge of the legal framework, which influences business transactions. The paper on Business Law, Ethics and Communication intends to make the students aware of legal background relating to business and company law. Besides, ethics form a core part of any profession and it is indeed imperative for the students of Chartered Accountancy to know the value of ethics in business. Further, a student also needs to develop good business communication skills and a sound understanding of related legal deeds and documents.

Part I of this paper comprises of Business Law and the Company Law covering various statues which influences business transactions on day to day basis and so form an important subject of the Chartered Accountancy Course. The level of knowledge prescribed for this subject at the Intermediate (IPC) level is ‘Working Knowledge’. Due to the dynamic nature of the subject, the students have to constantly update their knowledge regarding statutory developments.

The Board of Studies has prepared a “Supplementary Study Paper on Business Law, Ethics and Communication” which contains the relevant amendments in the subject pertaining to business law for the period 1st May 2015 to 30th April, 2018. Further, Chapter 6 – The companies At, 2013, has been fully revised as per amendments upto 30th April, 2018. Thus, the Module-2 (which is comprised of Chapter 6) of this paper is now to be read from this supplementary study paper. This supplementary gives the references of the page numbers of the relevant study material (July 2015 edition) for the convenience of the students so as to enable them to identify the additions/deletions/modifications in the Study Material. This publication is very important to the students to update themselves with respect to the amendments that have come in the subject and are applicable for the forthcoming examinations. Any further amendments relevant to a particular examination shall be communicated to the students through relevant Revisionary Test Paper (RTP).

Happy Reading and Best Wishes for the forthcoming examinations!
The Negotiable Instruments (Amendment) Act, 2015

The Negotiable Instruments (Amendment) Act, 2015 received the assent of the president on 26th December, 2015 and has been notified in the Official Gazette on 29th December, 2015 by the Ministry of Law and Justice.

This is an Act further to amend the Negotiable Instruments Act, 1881 and shall be deemed to have come into force on the 15th day of June, 2015.

The N.I. Act, 1881 defines promissory notes, cheques and specifies penalties for bouncing of cheques, and other violations. It does not however specify the jurisdiction of courts where cheque bouncing cases may be filed.

The Amendment Act, 2015 modifies the definition of a cheque in electronic form given in section 6, and clarifies the appropriate area of jurisdiction of courts by amendment in cognizance of offences in section 142 and through insertion of a new section 142A dealing with the transfer of pending cases related to the dishonour of cheques.

Key Highlights of the Negotiable Instruments (Amendment) Act, 2015:

1. Amendment in the definition of cheque given under section 6 of the N.I. Act, 1881

   (i) Explanation I, for clause (a) in the Principal Act, deals with the following definition-

   
   (a) “Cheque in the electronic form” - Under the Negotiable Instruments Act, 1881, this was defined as a cheque containing the exact mirror image of a paper cheque and generated, written and signed in a secure system using a digital signature (with /without biometric signature) and asymmetric crypto system.

   This above definition has been amended and substituted with the following namely-

   “Cheque in the electronic form” - means a cheque drawn in electronic form by using any computer resource, and signed in a secure system with a digital signature (with /without biometric signature) and asymmetric crypto system or electronic signature, as the case may be;

   (ii) After the Explanation II in the principal Act, the following explanation shall be inserted, namely-
“Explanation III—For the purposes of this section, the expressions "asymmetric crypto system", "computer resource", "digital signature", "electronic form" and "electronic signature" shall have the same meanings respectively assigned to them in the Information Technology Act, 2000.”

[Refer page 2.6 of the Study Material (July 2015 Editions)].

2. Amendment of section 142 (Cognizance of offences)- In the principal Act, section 142 shall be numbered as sub-section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely-

“(2) The offence under section 138, which deals with the dishonour of cheque, shall be inquired into and tried only by a court within whose local jurisdiction,—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account.

Explanation — For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.”

[Earlier Law: Section 142(2) is newly inserted Refer page 2.36 of the Study Material (July 2015 Edition)]

3. Insertion of new section 142A- Validation for transfer of pending cases - Section 142A is the new insertion in the Act. All cases of cheque bouncing which were pending in any court, before the Act came into force, will be transferred to a court with the appropriate jurisdiction.

"142A.(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or direction of any court, all cases transferred to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Act, as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-

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section (1) and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

This sub-section deals with respect to filing of subsequent complaints- The payee has filed a complaint against the drawer in a court with the appropriate jurisdiction, all subsequent complaints against that person regarding cheque bouncing will be filed in the same court. This will be irrespective of the mode of presentation of cheque.

(3) If, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times.

This sub-section deals with where more than one case filed by the same payee against the same drawer before different courts- If more than one case is filed by the same payee against the same drawer before different courts, the case will be transferred to the court with the appropriate jurisdiction before which the first case was filed.

4. Repeal and Savings-(1) The Negotiable Instruments (Amendment) Second Ordinance, 2015, which was promulgated in September 22, 2015, is here by repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the principal Act, as amended by this Act.
THE PAYMENT OF BONUS ACT, 1965

An Act further to amend the Payment of Bonus Act, 1965. The Act received the assent of the President on the 31st December, 2015, and published in the Official gazette on 1st January 2016 by Ministry of Law and Justice. It shall be deemed to have come into force on the 1st day of April, 2014.

Highlights to the Payment of Bonus (Amendment) Act, 2015

1. Amendment in Section 2(13) - Section 2(13) of the Payment of Bonus Act, 1965 (i.e., Principal Act) states the definition of “employee” who is eligible for bonus.

   As per the Principal Act, Employee means any person (other than an apprentice) employed –On a salary or wage not exceeding ` 10,000 per mensem in any industry, to do any skilled or unskilled, manual, supervisory, managerial, administrative, technical or clerical work, for hire or reward, whether the terms of employment be express /implied.

   As per the Payment of Bonus (Amendment) Act, 2015, the eligibility limit for payment of bonus has been enhanced from ` 10,000 to ` 21,000 per mensem.

   [Refer page 3.4 of the Study Material (July 2015 Edition)]

2. Amendment in Section 12 - Section 12 of the Payment of Bonus Act, 1965 deals with the calculation of bonus with respect to certain employees. According to the Principal Act, where the salary or wage of an employee exceeds ` 3,500 per mensem, the bonus payable to such employee under Section 10 or, as the case may be, under Section 11, shall be calculated as if his salary or wage were only ` 3,500 per mensem.

   This section have been incorporated by the Payment of Bonus (Amendment) Act, 2007 w.e.f. from 1.04.2006.

   As per the Payment of Bonus (Amendment) Act, 2015, calculation ceiling for the bonus has been raised. For the words “3,500 rupees” at both the places where they occur, the words “7,000 rupees or the minimum wage for the scheduled employment, as fixed by the appropriate Government, whichever is higher” shall respectively be substituted;
Further, **Explanation** have been inserted at the end of this section, namely:—

*Explanation* – For the purposes of this section, the expression "**scheduled employment**" shall have the same meaning as assigned to it in clause (g) of section 2 of the Minimum Wages Act, 1948.’

[Refer page 3.19 of the Study Material (July 2015 Edition)]

3. **Amendment in section 38** – Section 38 of the Payment of Bonus Act, 1965 deals with power to make rules. The Principal Act empowers the Central Government to make rules for the purpose of giving effect to the provisions of this Act. Since the said section does not provide for the previous publication of the rules.

As per the **Payment of Bonus (Amendment) Act, 2015**, an enabling provision providing for the previous publication for the purpose of inviting objections and suggestions in tune with the other legislations pertaining to welfare of labour have been inserted.

As of that, section 38 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely

"(1) The Central Government may, subject to the condition of previous publication, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

[Refer Page 3.28 of the Study material (July 2015 edition)]

The key amendments are:

1. in section 2, for clause (m), the following clause shall be substituted, namely:
   
   (m) "Tribunal" means the Industrial Tribunal referred to in section 7 D;

   [Earlier law: (1) “Tribunal” means the Employees’ Provident Funds Appellate Tribunal constituted under section 7D

   [Refer Page 4.19 of the Study material (July 2015 edition)]

2. for section 7D, the following section shall be substituted, namely:-

   "7D. The Industrial Tribunal constituted by the Central Government under sub-section (1) of section 7A of the Industrial Disputes Act, 1947 shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Tribunal for the purposes of this Act and the said Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act."

   [Earlier law: Employees’ Provident Fund Appellate Tribunal (Section 7D): The Central Government may, by notification in the Official Gazette, constitute one or more Appellate Tribunals to be known as the Employees’ Provident Funds Appellate Tribunal to exercise the powers and discharge the functions conferred on such Tribunal by this Act and every such Tribunal shall have jurisdiction in respect of establishments situated in such area as may be specified in the notification constituting the Tribunal.

   A Tribunal shall consist of one person only to be appointed by the Central Government.

   A person shall not be qualified for appointment as the Presiding Officer of a Tribunal (hereinafter referred to as the Presiding Officer), unless he is, or has been, or is qualified to be a Judge of a High Court; or a District Judge.

   [Refer Page 4.19 of the Study material (July 2015 edition)]
3. sections 7E, 7F, 7G and 7H shall be omitted

[Earlier Law:
The Study material contains only the citation of sections numbers 7E, 7F, 7G and 7H.
[Refer Page 4.19 of the Study material (July 2015 edition)]

4. For section 18A, the following section shall be substituted, namely:

"18A. The authorities referred to in section 7A and every inspector shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code."

[Earlier Law:
Presiding Officer and other officers to be public servants (Section 18A): The Presiding Officer of a Tribunal, its officers and other employees, the authorities referred to in Section 7-A and every inspector shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code.
[Refer Page 4.33 of the Study material (July 2015 edition)]
THE PAYMENT OF GRATUITY ACT, 1972

The Payment of Gratuity Act, 1972 applies to establishments employing 10 or more persons. The main purpose for enacting the Payment of Gratuity Act, 1972 is to provide social security to workman after retirement, whether retirement is a result of superannuation, or physical disablement or impairment of vital part of the body. Therefore, the Payment of Gratuity Act, 1972 is an important social security legislation to wage earning population in industries, factories and establishments.

Background for the amendments to the Payment of Gratuity Act, 1972

- The upper ceiling on gratuity amount under the Act was ₹ 10 Lakh. The provisions for Central Government employees under Central Civil Services (Pension) Rules, 1972 with regard to gratuity are also similar. Before implementation of 7th Central Pay Commission, the ceiling under CCS (Pension) Rules, 1972 was ₹ 10 Lakh. However, with implementation of 7th Central Pay Commission, in case of Government servants, the ceiling has been raised to ₹ 20 Lakhs.

- Therefore, considering the inflation and wage increase even in case of employees engaged in private sector, the Government decided that the entitlement of gratuity should also be revised in respect of employees who are covered under the Payment of Gratuity Act, 1972. Accordingly, the Government initiated the process for amendment to Payment of Gratuity Act, 1972 to increase the maximum limit of gratuity to such amount as may be notified by the Central Government from time to time. Currently the Government has issued the notification specifying the maximum limit to ₹ 20 Lakh.

- In addition, the Payment of Gratuity (Amendment) Act, 2018 also envisaged to amend the provisions relating to calculation of continuous service for the purpose of gratuity in case of female employees who are on maternity leave from 'twelve weeks' to 'such period as may be notified by the Central Government from time to time'. Currently, this period has also been notified as twenty six weeks.
Thus, the Ministry of Law and Justice has made the following amendments to the Payment of Gratuity Act, 1972 through the Payment of Gratuity (Amendment) Act, 2018 which received the assent of the President of India on 28th March, 2018 and was published in the Official Gazette on 29th March, 2018.

**Highlights to the Payment of Gratuity (Amendment) Act, 2018**

1. In section 2, for clause (k), the following clause shall be substituted, namely:—

   "(k) "notification" means a notification published in the Official Gazette and the expression "notified" shall be construed accordingly;"

   **[Earlier Law:**

   Include section 2(k) in the SM (the definition was earlier not included in the Study Material) on Page 5.4 of the Study material (July 2015 edition)]

2. In section 2A of the principal Act, in sub-section (2), in the Explanation, in clause (iv), for the words "twelve weeks", the words "such period as may be notified by the Central Government from time to time" shall be substituted.

   The Central Government has specified that the total period of maternity leave in case of a female employee shall not exceed 26 weeks. [Notification S.O. 1421(E) dated 29th March, 2018]

   **[Earlier Law:**

   ♦ in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

   [Refer Page 5.6 of the Study material (July 2015 edition)]

3. In section 4 of the principal Act, in sub-section (3), for the words "ten lakh rupees", the words "such amount as may be notified by the Central Government from time to time" shall be substituted.

   The Central Government has specified that the amount of gratuity payable to an employee shall not exceed 20 Lakh rupees. [Notification S.O. 1420 (E) dated 29th March, 2018]

   **[Earlier Law:**

   The Payment of Gratuity (Amendment) Act, 2010 has amended section 4(3) of the Payment of Gratuity Act, 1972 by which the maximum amount of gratuity payable to an employee shall not exceed rupees ten lakhs.

   [Refer Page 5.9 of the Study material (July 2015 edition)]
UNIT 1- PRELIMINARY

Learning Objectives

♦ To know about the extent and commencement of the Companies Act, 2013.
♦ Know about the application of the Act.
♦ Familiar with the definition clause given in the Act.
♦ Explain the Formation & Incorporation of company and the formation of not for profit organization.
♦ Identify the need for Memorandum and Articles of Association and changes incidental thereto.
♦ Know the effect of registration.
♦ Explain and identify the concepts related to registered office of company.
♦ Know how the Service of documents is effected
♦ Know about Authentication of documents, proceedings and contracts and Execution of bills of exchange, etc.

1.1 Introduction

The Companies Act, 2013 is an Act to consolidate and amend the law relating to companies. The legislation was necessitated to meet changes in the national and international economic environment and for expansion and growth of economy of our country.

The Companies Act, 2013 received the assent of the Hon’ble President of India on 29th August, 2013 and was notified in the Official Gazette on 30th August, 2013 for public information stating that different dates may be appointed for enforcement of different provisions of the Companies Act, 2013, through notifications.

Example: Section 1 came into force on 30th August, 2013; 98 sections came into force on 12th September, 2013; 143 sections were enforced from 1st April, 2014 and so on.
The Companies Act, 2013 is rule based legislation with 470 sections and seven schedules. The entire Act has been divided into 29 chapters. Each chapter has at least one set of Rules. The Companies Act, 2013 aims to improve corporate governance, simplify regulations and strengthen the interests of investors. Thus, the enactment making our corporate regulations more contemporary.

1.2 Short Title, Extent, Commencement and Application

This Section 1 of the Companies Act, 2013 deals with the title of the Act. According to which this Act may be called as the Companies Act, 2013.

Further, section deals with the extent to the applicability of the Act. It says that the Act shall extend to the whole of India.

This section also specifies the date of commencement of this Act. Accordingly, this section shall come into force at once and the remaining provisions of this Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and any reference in any provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

This Section furthermore states of the applicability of the Act. The provisions of this Act shall apply to-

(a) companies incorporated under this Act or under any previous company law*;

(b) insurance companies, except in so far as the said provisions are inconsistent with the provisions of the Insurance Act, 1938 or the Insurance Regulatory and Development Authority Act, 1999;

(c) banking companies, except in so far as the said provisions are inconsistent with the provisions of the Banking Regulation Act, 1949;

(d) companies engaged in the generation or supply of electricity, except in so far as the said provisions are inconsistent with the provisions of the Electricity Act, 2003;

(e) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act, and

(f) such body corporate, incorporated by any Act for the time being in force, as the Central Government may, by notification, specify in this behalf, subject to such exceptions, modifications or adaptation, as may be specified in the notification. Example: Food Corporation of India (FCI), National Highway Authority of India (NHAI) etc.

*For example: ABC Ltd. was incorporated on 1.1.1912 under the Indian Companies Act, 1882. So, the Companies Act, 2013 shall also be applicable on ABC Ltd.
1.3 Definitions

Section 2 of the Companies Act, 2013 is a definition section. It provides various terminologies used in the Act. Definitional Sections or Clauses, are known as ‘internal aids to construction’ and can be of immense help in interpreting or construing the enactment or any of its parts.

Also, according to clause 95 of section 2, words and expressions used and not defined in this Act but defined in the Securities Contracts (Regulation) Act, 1956 or the Securities and Exchange Board of India Act, 1992 or the Depositories Act, 1996 shall have the meanings respectively assigned to them in those Acts.

When a word or phrase is defined as having a particular meaning in the enactment, it is that meaning alone which must be given to it while interpreting a Section of the Act unless there be anything repugnant in the context.

Section 2 states that- In this Act, unless the context otherwise requires,—

(1) **Abridged prospectus** means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf;

(2) **Accounting standards** means the standards of accounting or any addendum thereto for companies or class of companies referred to in section 133;

(3) **Alter or Alteration** includes the making of additions, omissions and substitutions;

(4) **Appellate Tribunal** means the National Company Law Appellate Tribunal constituted under section 410;

(5) **Articles** means-

- the articles of association of a company as originally framed, or
- as altered from time to time, or
- applied in pursuance of any previous company law, or
- applied in pursuance of this Act;

(6) **Associate company**, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

**Explanation.**—For the purposes of this clause, “significant influence” means control of at least twenty per cent of total share capital, or of business decisions under an agreement;

As per the Companies (Specification of Definitions Details) Rules, 2014 term total Share Capital, for the purposes of this clause, means the aggregate of the –

(a) Paid-up equity share capital; and

(b) Convertible preference share capital;
Vide Circular dated 25/06/2014 it has been clarified that the shares held by a company in another company in a fiduciary capacity shall not be counted for the purpose of determining the relationship of associate company.

Students may please note that the definition of Associate company as defined under AS 23/ Ind AS 28 (Accounting for Investments in Associates in Consolidated Financial Statements/ Investment in Associates and Joint Ventures) is slightly different from the above definition as given in the Companies Act, 2013.

(7) **Auditing standards** means the standards of auditing or any addendum thereto for companies or class of companies referred to in sub-section (10) of section 143.

Section 143 of the Companies Act, 2013 deals with the Powers and Duties of Auditors and Auditing Standards. Sub-section (10) to section 143 provides that the Central Government may prescribe the standards of auditing or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under section 3 of the Chartered Accountants Act, 1949, in consultation with and after examination of the recommendations made by the National Financial Reporting Authority:

Provided that until any auditing standards are notified, any standard or standards of auditing specified by the Institute of Chartered Accountants of India shall be deemed to be the auditing standards.

(8) **Authorised capital or Nominal capital** means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company;

(9) **Banking company** means a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949;

(10) **Board of Directors or Board**, in relation to a company, means the collective body of the directors of the company;

(11) **Body corporate or Corporation** includes a company incorporated outside India, but does not include—

(i) a co-operative society registered under any law relating to co-operative societies; and

(ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf;

(12) **Book and Paper** and **Book or Paper** include books of account, deeds, vouchers, writings, documents, minutes and registers maintained on paper or in electronic form;

As per the Companies (Specification of definitions details) Rules, 2014, “e-Form” means a form in the electronic form as prescribed under the Act or the rules made thereunder and notified by the Central Government under the Act;

* Just for information of the students
(13) “Books of account” includes records maintained in respect of—

(i) all sums of money received and expended by a company and matters in relation to which the receipts and expenditure take place;

(ii) all sales and purchases of goods and services by the company;

(iii) the assets and liabilities of the company; and

(iv) the items of cost as may be prescribed under section 148 in the case of a company which belongs to any class of companies specified under that section.

Section 148 of the Companies Act, 2013 authorises Central Government to Specify Audit of Items of Cost in Respect of Certain Companies.

(14) **Branch office**, in relation to a company, means any establishment described as such by the company;

(15) **Called-up capital** means such part of the capital, which has been called for payment;

(16) **Charge** means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage;

(17) **Chartered Accountant** means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 who holds a valid certificate of practice under sub-section (1) of section 6 of that Act;

(18) **Chief Executive Officer (CEO)** means an officer of a company, who has been designated as such by it;

(19) **Chief Financial Officer (CFO)** means a person appointed as the Chief Financial Officer of a company;

These definitions of CEO & CFO should be read with section 2(51) and 203 which deals with the definition and appointment of Key Managerial Personnel (KMP) of the Companies Act, 2013.

(20) **Company** means a company incorporated under this Act or under any previous company law;

[Refer clause 67 of section 2 (Previous Company Law) along with the above definition]

(21) **Company limited by guarantee** means a company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up;

(22) **Company limited by shares** means a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them;

(23) **Company Liquidator** means a person appointed by the Tribunal as the Company Liquidator in accordance with the provisions of section 275 for the winding up of a company under this Act;
This definition is the modified definition given in line with the Insolvency and Bankruptcy Code, 2016. This is relevant for the provisions related to the winding up.

(24) **Company secretary** or **Secretary** means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a company secretary under this Act;

**Exemption:** This clause shall not apply to a section 8 (Formation of Companies with Charitable Objects, etc.) company as per the Notification dated 5th June, 2015.

The above mentioned exemption shall be applicable to a section 8 company which has not committed a default in filing its financial statements under section 137 of the Companies Act, 2013, or annual return under section 92 of the said Act with Registrar. [Vide amendment notification G.S.R. 584(E) dated 13th June, 2017.]

(25) **Company secretary in practice** means a company secretary who is deemed to be in practice under sub-section (2) of section 2 of the Company Secretaries Act, 1980;

(26) **Contributory** means a person liable to contribute towards the assets of the company in the event of its being wound up.

**Explanation**—For the purposes of this clause, it is hereby clarified that a person holding fully paid-up shares in a company shall be considered as a contributory but shall have no liabilities of a contributory under the Act whilst retaining rights of such a contributory;

(27) **Control** shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

It is an inclusive definition and relevant for the provisions relating to subsidiary and holding companies. This definition is also relevant for the definition of subsidiary given under section 2(87).

(28) **Cost accountant** means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 and who holds a valid certificate of practice under sub-section (1) of section 6 of that Act;

(29) **Court** means—

(i) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any district court or district courts subordinate to that High Court under sub-clause (ii);

(ii) the district court, in cases where the Central Government has, by notification, empowered any district court to exercise all or any of the jurisdictions conferred upon the High Court, within the scope of its jurisdiction in respect of a company whose registered office is situate in the district;
(iii) the **Court of Session** having jurisdiction to try any offence under this Act or under any previous company law;

(iv) the **Special Court** established under section 435;

(v) any **Metropolitan Magistrate** or a **Judicial Magistrate of the First Class** having jurisdiction to try any offence under this Act or under any previous company law;

(30) **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;

Provided that— (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 the Reserve Bank of India, issued by a company, shall not be treated as debenture;

(31) **Deposit** includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India;

(32) **Depository** means a depository as defined in section 2(1)(e) of the Depositories Act, 1996;

As per the Depositories Act, depository means a company formed and registered under the Companies Act, 1956 and which has been granted a certificate of registration under sub-section (1A) of section 12 of the SEBI Act, 1992.

(33) **Derivative** means the derivative as defined in section 2(ac) of the Securities Contracts (Regulation) Act, 1956;

According to section 2(ac) of the Securities Contracts (Regulation) Act, 1956, term derivative includes—

♦ a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;

♦ a contract which derives its value from prices, or index of prices, of underlying securities;

(34) **Director** means a director appointed to the Board of a company;

(35) **Dividend** includes any interim dividend;

(36) ‘**Document**’ includes summons, notice, requisition, order, declaration, form and register, whether issued, sent or kept in pursuance of this Act or under any other law for the time being in force or otherwise, maintained on paper or in electronic form;

(37) **Employees’ stock option** means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any,
which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price;

(38) **Expert** includes an engineer, a valuer, a Chartered Accountant, a Company Secretary, a Cost Accountant and any other person who has the power or authority to issue a certificate in pursuance of any law for the time being in force;

(39) **Financial institution** includes a scheduled bank [as given under section 2(80)], and any other financial institution defined or notified under the Reserve Bank of India Act, 1934;

(40) **Financial statement** in relation to a company, includes—

(i) a balance sheet as at the end of the financial year;
(ii) a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;
(iii) cash flow statement for the financial year;
(iv) a statement of changes in equity, if applicable; and
(v) any explanatory note annexed to, or forming part of, any document referred to in sub-clause (i) to sub-clause (iv):

Provided that the financial statement, with respect to One Person Company, small company and dormant company, may not include the cash flow statement;

**Exemption:** For private companies, the proviso to section 2(40) shall be read as follows:

“Provided that the financial statement, with respect to one person company, small company, dormant company and private company (if such private company is a start-up) may not include the cash flow statement;

Explanation. - For the purposes of this Act, the term „start-up“ or „start-up company“ means a private company incorporated under the Companies Act, 2013 or the Companies Act, 1956 and recognised as start-up in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry.”

The exceptions, modifications and adaptations shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 of the said Act or annual return under section 92 of the said Act with the Registrar.

**Note:** Students may note that ‘Profit and Loss Account’ may also be referred as ‘Statement of Profit and Loss’ under the Act at some places. **For example:** Schedule III.

(41) **Financial year**, in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following
year, in respect whereof financial statement of the company or body corporate is made up:¹

Provided that on an application made by a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Tribunal may, if it is satisfied, allow any period as its financial year, whether or not that period is a year:

Provided further that a company or body corporate, existing on the commencement of this Act, shall, within a period of two years from such commencement, align its financial year as per the provisions of this clause;

Example: If the incorporation date of company is 1st of September 2016, the first financial year shall be from 1st September 2016 to 31st March 2017. If the incorporation date is 1st January 2016 then the first financial year shall be from 1st January 2016 to 31st March, 2017.

(42) Foreign company means any company or body corporate incorporated outside India which,—

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) conducts any business activity in India in any other manner.

As per the Rule given in the Companies (Specification of Definitions Details) Rules, 2014, term “electronic mode”, means carrying out electronically based, whether main server is installed in India or not, including, but not limited to-

(i) Business to business and business to consumer transactions, data interchange and other digital supply transactions;

(ii) Offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;

(iii) Financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;

(iv) Online services such as telemarketing, telecommuting, telemedicine, education and information research; and

(v) All related data communication services, whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise;

¹ With respect to specified IFSC public company & specified IFSC Private company, a proviso has been inserted vide notification dated 4th January, 2017 stating that above stated company which is subsidiary of a foreign company, the financial year of the subsidiary may be same as the financial year of its holding company & approval of Tribunal shall not be required.
(43) **Free reserves** means such reserves which, as per the latest audited balance sheet of a company, are available for distribution as dividend:

Provided that—

(i) any amount representing unrealised gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise, or

(ii) any change in carrying amount of an asset or of a liability recognized in equity, including surplus in profit and loss account on measurement of the asset or the liability at fair value,

shall not be treated as free reserves;

(44) **Global Depository Receipt** means any instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts;

This definition is to be read with section 41 of the Companies Act, 2013 which provides for issue of global depository receipts.

(45) **Government company** means any company in which not less than 51% of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company;

**Example:** X is a company in which 50% of shareholding is held by Central Government. Here X is not a government company as there is no compliance of minimum holding of paid-up share capital i.e. at least 51% by the Central Government, or by any State Government or Governments.

(46) **Holding company** in relation to one or more other companies, means a company of which such companies are subsidiary companies

Explanation.—For the purposes of this clause, the expression "company" includes any body corporate.

For meaning of “subsidiary company” refer the definition given in section 2(87) of the Companies Act, 2013.

(47) **Independent director** means an independent director referred to in section 149(5);

(48) **Indian Depository Receipt** means any instrument in the form of a depository receipt created by a domestic depository in India and authorised by a company incorporated outside India making an issue of such depository receipts;

This section is to be read with section 390 which deals with the offer of Indian Depository Receipts.
(50) **Issued capital** means such capital as the company issues from time to time for subscription;

(51) **Key managerial personnel**, in relation to a company, means—
   (i) the Chief Executive Officer or the managing director or the manager;
   (ii) the company secretary;
   (iii) the whole-time director;
   (iv) the Chief Financial Officer;
   (v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
   (vi) such other officer as may be prescribed;
   **Note**: However, till now no other officer has been prescribed.

(52) **Listed company** means a company which has any of its securities listed on any recognised stock exchange;

(53) **Manager** means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not;

(54) **Managing director** means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

   **Explanation**—For the purposes of this clause, the power to do administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within the substantial powers of management;

(55) **Member**, in relation to a company, means—
   (i) the **subscriber to the memorandum** of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members even if the subscription money has not been paid to the company;
   (ii) **every other person who agrees in writing** to become a member of the company and whose name is entered in the register of members of the company;
(iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;

(56) Memorandum means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act;

(57) Net worth means the aggregate value of the paid-up share capital and all reserves created out of the profits, securities premium account and debit or credit balance of profit and loss account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation;

(58) Notification means a notification published in the Official Gazette and the expression “notify” shall be construed accordingly;

(59) Officer includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act;

(60) Officer who is in default, for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:—

(i) whole-time director (WTD);

(ii) key managerial personnel (KMP);

(iii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(iv) any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;

(v) any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;

(vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;

(vii) in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer;
Example: In a company, a default was committed with respect to the allotment of shares by the officers. In company there were no managing director, whole time director, a manager, secretary, a person charged by the Board with the responsibility of complying with the provisions of the Act, and neither any director/directors specified by the board. Therefore, in such situation, all the directors of the company may be treated as officers in default.

(61) **Official Liquidator** means an Official Liquidator appointed under sub-section (1) of section 359;

(62) **One Person Company** means a company which has only one person as a member;

(63) **Ordinary or special resolution** means an ordinary resolution, or as the case may be, special resolution referred to in section 114 (Ordinary and Special Resolution);

(64) **Paid-up share capital or share capital paid-up** means such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called;

(65) **Postal ballot** means voting by post or through any electronic mode;

This definition is related to section 110 to be read with Rule 22 of the *Companies (Management and Administration) Rules, 2014* specifying the procedure to be followed for conducting of business through postal ballot and provides the list of items of business which should be transacted only by means of voting through a postal ballot.

(66) **Prescribed** means prescribed by rules made under this Act;

(67) **Previous company law** means any of the laws specified below:—

(i) Acts relating to companies in force before the Indian Companies Act, 1866

(ii) the Indian Companies Act, 1866

(iii) the Indian Companies Act, 1882

(iv) the Indian Companies Act, 1913

(v) the Registration of Transferred Companies Ordinance, 1942

(vi) the Companies Act, 1956; and

(vii) any law corresponding to any of the aforesaid Acts or the Ordinances and in force—

(A) in the merged territories or in a Part B State (other than the State of Jammu and Kashmir), or any part thereof, before the extension thereto of the Indian Companies Act, 1913; or
(B) in the State of Jammu and Kashmir, or any part thereof, before the commencement of the Jammu and Kashmir (Extension of Laws) Act, 1956, in so far as banking, insurance and financial corporations are concerned, and before the commencement of the Central Laws (Extension to Jammu and Kashmir) Act, 1968, in so far as other corporations are concerned;

(viii) the Portuguese Commercial Code, in so far as it relates to sociedades anonimas; and

(ix) the Registration of Companies (Sikkim) Act, 1961

(68) Private company means a company having a minimum paid-up share capital as may be prescribed, and which by its articles,—

(i) restricts the right to transfer its shares;

(ii) except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that—

(A) persons who are in the employment of the company; and

(B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased,

shall not be included in the number of members; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company;

The requirement of having a minimum paid up share capital shall not apply to a section 8 company vide notification dated 5th June 2015.

The above-mentioned exemption shall be applicable to a section 8 company which has not committed a default in filing its financial statements under section 137 of the Companies Act, 2013, or annual return under section 92 of the said Act with Registrar. [Vide amendment notification G.S.R. 584(E) dated 13th June, 2017.]

*Since nothing has been prescribed so far. Thus, there is no minimum paid up share capital to form a private company.

(69) Promoter means a person—

(a) who has been named as such in a prospectus or is identified by the company in the annual return, or

2 Sub-clause (ix) of clause 67 is yet to be notified

3 Exemptions given to specified IFSC private company vide notification dated 4th January, 2017.
(b) who has **control over the affairs of the company**, directly or indirectly whether as a shareholder, director or otherwise; or

(c) in accordance with whose **advice, directions or instructions** the Board of Directors of the company is accustomed to act:

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity;

(70) **Prospectus** means any document described or issued as a prospectus and includes a red herring prospectus or shelf prospectus or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate;

(71) **Public company** means a company which—

(a) is not a private company; and

(b) has a minimum paid-up share capital as may be prescribed:

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles;

Example: A Pvt. Ltd. is wholly owned subsidiary of AB Ltd. A Pvt. Ltd. wanted to avail exemptions as provided to private companies. In this case since A Pvt. Ltd. is subsidiary of AB Ltd., which is a public company, therefore A Pvt. Ltd. will be deemed to be a public company and will be not allowed to avail exemptions provided to a private company.

The requirement of having a minimum paid up share capital shall not apply to a section 8 company vide notification dated 5th June 2015.

Since nothing has been prescribed so far. Thus, there is no minimum paid up share capital to form a public company.

(72) **Public financial institution** means—

(i) the **Life Insurance Corporation of India**, established under section 3 of the Life Insurance Corporation Act, 1956;

(ii) the **Infrastructure Development Finance Company Limited**, referred to in clause (vi) of sub-section (1) of section 4A of the Companies Act, 1956 so repealed under section 465 of this Act;

(iii) specified company referred to in the **Unit Trust of India** (Transfer of Undertaking and Repeal) Act, 2002;

(iv) **institutions notified by the Central Government** under sub-section (2) of section 4A of the Companies Act, 1956 so repealed under section 465 of this Act;

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such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India:

Provided that no institution shall be so notified unless—
(A) it has been established or constituted by or under any Central or State Act other than this Act or the previous law; or
(B) not less than fifty-one per cent of the paid-up share capital is held or controlled by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments;

(73) Recognised stock exchange means a recognised stock exchange as defined in section 2(f) of the Securities Contracts (Regulation) Act, 1956.

(74) Register of companies means the register of companies maintained by the Registrar on paper or in any electronic mode under this Act;

(75) Registrar means a Registrar, an Additional Registrar, a Joint Registrar, a Deputy Registrar or an Assistant Registrar, having the duty of registering companies and discharging various functions under this Act;

(76) Related party, with reference to a company, means—
(i) a director or his relative;
(ii) a key managerial personnel or his relative;
(iii) a firm, in which a director, manager or his relative is a partner;
(iv) a private company in which a director or manager or his relative is a member or director;
(v) a public company in which a director and manager is a director and holds along with his relatives, more than two per cent of its paid-up share capital;
(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act:

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

5(viii) any body corporate which is-
(A) a holding, subsidiary or an associate company of such company;
(B) a subsidiary of a holding company to which it is also a subsidiary; or

5 The above clause (viii) shall not apply with respect to section 188 to a Specified IFSC Public company vide Notification no. G. S.R. 08(E) dated 4th January, 2017
(C) an investing company or the venturer of the company;

Explanation.- For the purpose of this clause, “the investing company or the venturer of a company” means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.

Exemption - This Clause (viii) shall not apply with respect to section 188 to a private company vide Notification No. G.S.R. 464(E) dated 5th June, 2015.

(ix) such other person as may be prescribed;

As per Rule 3 given in the Companies (Specification of Definitions Details) Rules, 2014, for the purposes of sub-clause (ix) of clause (76) of section 2 of the Act, a director (other than an independent director) or key managerial personnel of the holding company or his relative with reference to a company, shall be deemed to be a related party.

Example : (1) XYZ Pvt. Ltd has two subsidiary companies, Y Pvt. Ltd and Z Pvt. Ltd. Here as per the section 2(76)(viii)(B), Y Pvt. Ltd and Z Pvt. Ltd. are related parties. However, as per the Notification No. G.S.R. 464(E) dated 5th June, 2015, clause (viii) shall not apply with respect to section 188 to a private company. Therefore Y Pvt. Ltd and Z Pvt. Ltd are not related parties for the purpose of section 188. However, if Y Pvt. Ltd and Z Pvt. Ltd. have common directors, then they will be deemed to be related parties because of section 2(76)(iv).

(2) Now suppose, XYZ Ltd. a public company, has two subsidiary companies, Y Pvt. Ltd and Z Pvt. Ltd. Here as per section 2(71), a private company which is a subsidiary of a public company will deemed to be a public company, so Y Pvt. Ltd and Z Pvt. Ltd will not be eligible to avail exemption under the Notification No. G.S.R. 464(E) dated 5th June, 2015. Therefore, as per section 2(76)(viii)(B), Y Pvt. Ltd and Z Pvt. Ltd are related parties. In addition XYZ Ltd. will also be related Party to Y Pvt. Ltd and Z Pvt. Ltd.

(77) Relative, with reference to any person, means anyone who is related to another, if—

(i) they are members of a Hindu Undivided Family;

(ii) they are husband and wife; or

(iii) one person is related to the other in such manner as may be prescribed;

Rule 4 given in the Companies (Specification of Definitions Details) Rules, 2014 provides of the List of Relatives in terms of Clause (77) of section 2. Accordingly, a person shall be deemed to be the relative of another, if he or she is related to another in the following manner, namely:-

(1) Father: Provided that the term “Father” includes step-father.

(2) Mother: Provided that the term “Mother” includes the step-mother.

(3) Son: Provided that the term “Son” includes the step-son.

(4) Son’s wife.
(5) Daughter.
(6) Daughter’s husband.
(7) Brother: Provided that the term “Brother” includes the step-brother;
(8) Sister: Provided that the term “Sister” includes the step-sister.

(78) 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.

(79) Schedule means a Schedule annexed to this Act;

(80) Scheduled bank means the scheduled bank as defined in section 2(e) of the Reserve Bank of India Act, 1934;

(81) Securities means the securities as defined in section 2(h) of the Securities Contracts (Regulation) Act, 1956.

(82) Securities and Exchange Board means the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992;

(83) Serious Fraud Investigation Office means the office referred to in section 211;

(84) Share means a share in the share capital of a company and includes stock;

(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 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:

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;

Example: P Ltd. is a company registered under the Companies Act, 2013 with paid up capital of ₹ 10 Lacs and turnover 2 crore rupees. According to section 2(85) a small company is a company other than a public company with the paid up of capital not exceeding fifty lakh rupees and turnover not exceeding two crore rupees. Since, P Ltd. is a public company though complying with other requirements, it cannot avail the status of a small company.

(86) Subscribed capital means such part of the capital which is for the time being subscribed by the members of a company;
(87) **Subsidiary company** or **Subsidiary**, in relation to any other company (that is to say the holding company), means a company in which the holding company—

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:

**Provided** that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

**Explanation**—For the purposes of this clause,—

(a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;

(b) the composition of a company’s Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;

(c) the expression “company” includes any body corporate;

(d) “layer” in relation to a holding company means its subsidiary or subsidiaries;

As per the **Companies (Specification of Definitions Details) Rules, 2014**, “**Total Share Capital**”, for the purposes of clause (87) of section 2, means the aggregate of the -

(a) paid-up equity share capital; and

(b) convertible preference share capital;

As per the notification dated 27th December 2013, Ministry clarified that the shares held by a company or power exercisable by it in another company in a fiduciary capacity shall not be counted for the purpose of determining the holding–subsidiary relationship in terms of the provision of section 2(87) of the Companies Act, 2013.

Students may please note that the definition of Associate company as defined under AS 21/ Ind AS 110 (Consolidated Financial Statement) is slightly different from the above definition as given in the Companies Act, 2013.

(88) **Sweat equity shares** means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called;

(89) **Total voting power**, in relation to any matter, means the total number of votes which may be cast in regard to that matter on a poll at a meeting of a company if all the members thereof or their proxies having a right to vote on that matter are present at the meeting and cast their votes;

(90) **Tribunal** means the National Company Law Tribunal constituted under section 408;
(91) **Turnover** means the gross amount of revenue recognised in the profit and loss account from the sale, supply, or distribution of goods or on account of services rendered, or both, by a company during a financial year;

(92) **Unlimited company** means a company not having any limit on the liability of its members;

(93) **Voting right** means the right of a member of a company to vote in any meeting of the company or by means of postal ballot;

(94) **Whole-time director (WTD)** includes a director in the whole-time employment of the company;

As per the *Companies (Specification of Definitions Details) Rules, 2014* “Executive Director” means a whole time director as defined in section 2(94) of the Act;

(94A) **Winding up** means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.

### 1.4 What is a Company?

Section 2(20) of the Companies Act, 2013 defines the term ‘company’: “Company means a company incorporated under this Act or under any previous company law”. The definition does not bring out clearly the meaning of a company. For a layman, the term “company” signifies a business organisation. But all business organisations cannot be technically called ‘companies’. There are distinctive features between different forms of organisations and the most striking feature in the company form of organisation vis-à-vis the other organisations is that it acquires a unique character of being a separate legal entity. In other words when a company is registered, it is clothed with a legal personality. It comes to have almost the same rights and powers as a human being. Its existence is distinct and separate from that of its members. Members may die or change, but the company goes on till it is wound up on the grounds specified by the Act. In other words, it means that it has perpetual succession. A company can own property, have banking account, raise loans, incur liabilities and enter into contracts. Even members can contract with company, acquire right against it or incur liability to it. For the debts of the company, only its creditors can sue it and not its members. Also in contrast to other forms of organization, the member of the company usually has a limited liability.

As the company is an artificial person, it can act only through some human agency, viz., directors. They control affairs of the company and act as its agency, but they are not the agents of the members of the company. A company has a common seal to authenticate its formal acts.
1.5 Corporate Veil Theory

(i) Corporate Veil: Corporate Veil refers to a legal concept whereby the company is identified separately from the members of the company.

The term Corporate Veil refers to the concept that members of a company are shielded from liability connected to the company’s actions. If the company incurs any debts or contravenes any laws, the corporate veil concept implies that members should not be liable for those errors. In other words, they enjoy corporate insulation.

Thus, the shareholders are protected from the acts of the company.

The Salomon Vs. Salomon and Co Ltd. laid down the foundation of the concept of corporate veil or independent corporate personality.

In Salomon vs. Salomon & Co. Ltd. the House of Lords laid down that a company is a person distinct and separate from its members. In this case one Salomon incorporated a company named “Salomon & Co. Ltd.”, with seven subscribers consisting of himself, his wife, four sons and one daughter. This company took over the personal business assets of Salomon for £ 38,782 and in turn, Salomon took 20,000 shares of £ 1 each, debentures worth £ 10,000 of the company with charge on the company’s assets and the balance in cash. His wife, daughter and four sons took up one £ 1 share each. Subsequently, the company went into liquidation due to general trade depression. The unsecured creditors to the tune of £ 7,000 contended that Salomon could not be treated as a secured creditor of the company, in respect of the debentures held by him, as he was the managing director of one-man company, which was not different from Salomon and the cloak of the company was a mere sham and fraud. It was held by Lord Mac Naughten:

“The Company is at law a different person altogether from the subscribers to the memorandum, and though it may be that after incorporation the business is precisely the same
as it was before and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the Act."

Thus, this case clearly established that company has its own existence and as a result, a shareholder cannot be held liable for the acts of the company even though he holds virtually the entire share capital. The whole law of corporation is in fact based on this theory of separate corporate entity.

Now, the question may arise whether this Veil of Corporate Personality can even be lifted or pierced.

Before going into this question, one should first try to understand the meaning of the phrase “lifting the veil”. It means looking behind the company as a legal person, i.e., disregarding the corporate entity and paying regard, instead, to the realities behind the legal facade. Where the Courts ignore the company and concern themselves directly with the members or managers, the corporate veil may be said to have been lifted. Only in appropriate circumstances, the Courts are willing to lift the corporate veil and that too, when questions of control are involved rather than merely a question of ownership.

(ii) Lifting of Corporate Veil: The following are the cases where company law disregards the principle of corporate personality or the principle that the company is a legal entity distinct and separate from its shareholders or members:

(1) To determine the character of the company i.e. to find out whether co-enemy or friend: In the law relating to trading with the enemy where the test of control is adopted. The leading case in this point is Daimler Co. Ltd. vs. Continental Tyre & Rubber Co., if the public interest is not likely to be in jeopardy, the Court may not be willing to crack the corporate shell. But it may rend the veil for ascertaining whether a company is an enemy company. It is true that, unlike a natural person, a company does not have mind or conscience; therefore, it cannot be a friend or foe. It may, however, be characterised as an enemy company, if its affairs are under the control of people of an enemy country. For this purpose, the Court may examine the character of the persons who are really at the helm of affairs of the company.

(2) To protect revenue/tax: In certain matters concerning the law of taxes, duties and stamps particularly where question of the controlling interest is in issue. [S. Berendsen Ltd. vs. Commissioner of Inland Revenue]

(i) Where corporate entity is used to evade or circumvent tax, the Court can disregard the corporate entity [Juggilal vs. Commissioner of Income Tax AIR (SC)].

(ii) In [Dinshaw Maneckjee Petit], it was held that the company was not a genuine company at all but merely the assessee himself disguised under the legal entity of a limited company. The assessee earned huge income by way of dividends and interest. So, he opened some companies and purchased their shares in exchange
of his income by way of dividend and interest. This income was transferred back to assessee by way of loan. The Court decided that the private companies were a sham and the corporate veil was lifted to decide the real owner of the income.

(3) **To avoid a legal obligation:** Where it was found that the sole purpose for the formation of the company was to use it as a device to reduce the amount to be paid by way of bonus to workmen, the Supreme Court upheld the piercing of the veil to look at the real transaction *(The Workmen Employed in Associated Rubber Industries Limited, Bhavnagar vs. The Associated Rubber Industries Ltd., Bhavnagar and another).*

**Workmen of Associated Rubber Industry Ltd., v. Associated Rubber Industry Ltd.:** The facts of the case are that “A Limited” purchased shares of “B Limited” by investing a sum of ₹ 4,50,000. The dividend in respect of these shares was shown in the profit and loss account of the company, year after year. It was taken into account for the purpose of calculating the bonus payable to workmen of the company. Sometime in 1968, the company transferred the shares of B Limited to C Limited a subsidiary, wholly owned by it. Thus, the dividend income did not find place in the Profit & Loss Account of A Ltd., with the result that the surplus available for the purpose for payment of bonus to the workmen got reduced.

Here, a company created a subsidiary and transferred to it, its investment holdings in a bid to reduce its liability to pay bonus to its workers. Thus, the Supreme Court brushed aside the separate existence of the subsidiary company. The new company so formed had no assets of its own except those transferred to it by the principal company, with no business or income of its own except receiving dividends from shares transferred to it by the principal company and serving no purpose except to reduce the gross profit of the principal company so as to reduce the amount paid as bonus to workmen.

(4) **Formation of subsidiaries to act as agents:** A company may sometimes be regarded as an agent or trustee of its members, or of another company, and may therefore be deemed to have lost its individuality in favour of its principal. Here, the principal will be held liable for the acts of that company.

In the case of *Merchandise Transport Limited vs. British Transport Commission* *(1982)*, a transport company wanted to obtain licences for its vehicles, but could not do so if applied in its own name. It, therefore, formed a subsidiary company, and the application for licence was made in the name of the subsidiary. The vehicles were to be transferred to the subsidiary company. Held, the parent and the subsidiary were one commercial unit and the application for licences was rejected.

(5) **Company formed for fraud/improper conduct or to defeat law:** Where the device of incorporation is adopted for some illegal or improper purpose, *e.g.*, to defeat or
circumvent law, to defraud creditors or to avoid legal obligations. [Gilford Motor Co. vs. Horne]

In the following instances this veil will be lifted:

1.6 Classes of Companies under the Act – Types of Companies

The growth of the economy and increase in the complexity of business operation in the corporate world has led to the emergence of different forms of corporate organizations. To regulate them, the
Companies Act, 2013 has broadly classified the companies into various classes. A company may be incorporated as a one-person company, private company or a public company, depending upon the number of members joining it. Again it may either be an unlimited company, or may be limited by shares or by guarantee or by both. On the basis of control, companies can be classified as associate company, holding company and subsidiary company. Some other forms of classification of companies are foreign company, government company, small company, dormant company, nidhi company and company formed for charitable objects.

Companies may be classified into various classes on the following basis:

1. On the basis of liability

(a) **Company limited by shares: Section 2(22)** of the Companies Act, 2013, defines that when the liability of the members of a company is limited by its memorandum of association to the amount (if any) unpaid on the shares held by them, it is known as a company limited by shares.

It thus implies that for meeting the debts of the company, the shareholder may be called upon to contribute only to the extent of the amount, which remains unpaid on his shareholdings. His separate property cannot be encompassed to meet the company’s debt.

It may be worthwhile to know that though a shareholder is a co-owner of the company, he is not a co-owner of the company’s assets. The ownership of the assets remains with the company, because of its nature - as a legal person. The extent of the rights and duties of a shareholder as co-owner is measured by his shareholdings.

(b) **Company limited by guarantee: Section 2(21)** of the Companies Act, 2013 defines it as the company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up.

Thus, the liability of the member of a guarantee company is limited upto a stipulated sum mentioned in the memorandum. Members cannot be called upon to contribute beyond that stipulated sum.

The **common features** between a ‘guarantee company’ and ‘the company having share capital’ are legal personality and limited liability. In the latter case, the member’s liability is limited by the amount remaining unpaid on the share, which each member holds. Both of them have to state in their memorandum that the members’ liability is limited.

However, the **point of distinction** between these two types of companies is that in the former case the members may be called upon to discharge their liability only after commencement of the winding up and only subject to certain conditions; but in the latter case, they may be called upon to do so at any time, either during the company’s life-time or during its winding up.

It is clear from the definition of the guarantee company that it does not raise its initial working funds from its members. Therefore, such a company may be useful only where no working
funds are needed or where these funds can be held from other sources like endowment, fees, charges, donations, etc.

In *Narendra Kumar Agarwal vs. Saroj Maloo*, the Supreme court has laid down that the right of a guarantee company to refuse to accept the transfer by a member of his interest in the company is on a different footing than that of a company limited by shares. The membership of a guarantee company may carry privileges much different from those of ordinary shareholders.

(c) **Unlimited company**: Section 2(92) of the Companies Act, 2013 defines unlimited company as a company not having any limit on the liability of its members. In such a company, the liability of a member ceases when he ceases to be a member.

The liability of each member extends to the whole amount of the company’s debts and liabilities but he will be entitled to claim contribution from other members. In case the company has share capital, the articles of association must state the amount of share capital and the amount of each share. So long as the company is a going concern the liability on the shares is the only liability which can be enforced by the company. The creditors can institute proceedings for winding up of the company for their claims. The official liquidator may call the members for their contribution towards the liabilities and debts of the company, which can be unlimited.

2. On the basis of members:

(a) **One person company**: The Companies Act, 2013 introduced a new class of companies which can be incorporated by a single person.

Section 2(62) of the Companies Act, 2013 defines one person company (OPC) as a company which has only one person as a member.

One person company has been introduced to encourage entrepreneurship.
and corporatization of business. OPC differs from sole proprietary concern in an aspect that OPC is a separate legal entity with a limited liability of the member whereas in the case of sole proprietary, the liability of owner is not restricted and it extends to the owner’s entire assets constituting of official and personal.

The procedural requirements of an OPC are simplified through exemptions provided under the Act in comparison to the other forms of companies.

According to section 3(1)(c) of the Companies Act, 2013, **OPC is a private limited company** with the minimum paid up share capital as may be prescribed and has at least one member.

**OPC (One Person Company) - significant points**

- Only one person as member.
- Minimum paid up capital – no limit prescribed.
- The memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber’s death or his incapacity to contract, become the member of the company.
- The other person whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be filed with Registrar of companies at the time of incorporation.
- Such other person may be given the right to withdraw his consent.
- The member of OPC may at any time change the name of such other person by giving notice to the company and the company shall intimate the same to the Registrar.
- Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.
- Only a natural person who is an Indian citizen and resident in India (person who has stayed in India for a period of not less than 182 days during the immediately preceding one calendar year)-
  - shall be eligible to incorporate a OPC;
  - shall be a nominee for the sole member of a OPC.
- No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company.
- No minor shall become member or nominee of the OPC or can hold share with beneficial interest.
- Such Company cannot be incorporated or converted into a company under section 8 of the Act. Though it may be converted to private or public companies in certain cases.
- Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of anybody corporate.
OPC cannot convert voluntarily into any kind of company unless two years have expired from the date of incorporation, except where the paid up share capital is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.

If One Person Company or any officer of such company contravenes the provisions, they shall be punishable with fine which may extend to ten thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.

Here the member can be the sole member and director.

(b) Private Company [Section 2(68)]: "Private company" means a company having a minimum paid-up share capital as may be prescribed, and which by its articles,—

(i) restricts the right to transfer its shares;

(ii) except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that—

(A) persons who are in the employment of the company; and

(B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased,

shall not be included in the number of members; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company;

Private company - significant points

- No minimum paid-up capital requirement.
- Minimum number of members – 2 (except if private company is an OPC, where it will be 1).
♦ Maximum number of members – 200, excluding present employee-cum-members and erstwhile employee-cum-members.
♦ Right to transfer shares restricted.
♦ Prohibition on invitation to subscribe to securities of the company.
♦ Small company is a private company.
♦ OPC can be formed only as a private company.

**Small Company:** Small company given under the section 2(85) of the Companies Act, 2013 which 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 two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

**Exceptions:** This section shall not 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.

**Small Company –significant points**

♦ A private company
♦ Paid up capital – not more than ₹ 50 lakhs
   Or
   Turnover – not more than ₹ 2 crores.
♦ Should not be – Section 8 company
   – Holding or a Subsidiary company

(c) **Public company [Section 2(71)]:** Public company means a company which—

♦ is not a private company; and
♦ has a minimum paid-up share capital as may be prescribed:

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles;

The requirement of having a minimum paid up share capital shall not apply to a section 8
company vide notification dated 5th June 2015.

Since nothing has been prescribed so far. Thus, there is no minimum paid up share capital to form a public company.

**Public company - significant points**

- Is not a private company (Articles do not have the restricting clauses).
- Shares freely transferable.
- No minimum paid up capital requirement.
- Minimum number of members – 7.
- Maximum numbers of members – No limit.
- Subsidiary of a public company is deemed to be a public company.

According to section 3(1)(a), a company may be formed for any lawful purpose by seven or more persons, where the company to be formed is to be a public company.

3. **On the basis of control:**

(a) **Holding and subsidiary companies:** ‘Holding and subsidiary’ companies are relative terms.

**Holding company** is defined under Section 2(46).

Whereas section 2(87) defines “subsidiary company”. [See the definitions as given in the earlier pages]

**Example 1:** A will be subsidiary of B, if B controls the composition of the Board of Directors of A, i.e., if B can, without the consent or approval of any other person, appoint or remove a majority of directors of A.

**Example 2:** A will be subsidiary of B, if B holds more than 50% of the share capital of A.

**Example 3:** B is a subsidiary of A and C is a subsidiary of B. In such a case, C will be the subsidiary of A. In the like manner, if D is a subsidiary of C, D will be subsidiary of B as well as of A and so on.

**Status of private company, which is subsidiary to public company:** In view of Section 2(71) of the Companies Act, 2013 a Private company, which is subsidiary of a public company shall be deemed to be public company for the purpose of this Act, even where such subsidiary company continues to be a private company in its articles.

(b) **Associate company [Section 2(6)]:** in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

[See the definitions as given in the earlier pages]
4. On the basis of access to capital:

(a) **Listed company:** As per the definition given in the section 2(52) of the Companies Act, 2013, it is a company which has any of its securities listed on any recognised stock exchange. Whereas the word securities as per the section 2(81) of the Companies Act, 2013 has been assigned the same meaning as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956.

(b) **Unlisted company:** means company other than listed company.

5. Other companies:

(a) **Government company [Section 2(45)]:** Government Company means any company in which not less than 51% of the paid-up share capital is held by—

(i) the Central Government, or

(ii) by any State Government or Governments, or

(iii) partly by the Central Government and partly by one or more State Governments, and the section includes a company which is a subsidiary company of such a Government company.

(b) **Foreign Company [Section 2(42)]:** It means any company or body corporate incorporated outside India which—

(i) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(ii) conducts any business activity in India in any other manner

(c) **Formation of companies with charitable objects etc. (Section 8 company):** Section 8 of the Companies Act, 2013 deals with the formation of companies which are formed to
promote the charitable objects of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment etc.

Such company intends to apply its profit in

- promoting its objects and
- prohibiting the payment of any dividend to its members.

Examples of section 8 companies are FICCI, ASSOCHAM, National Sports Club of India, CII etc.

**Power of Central government to issue the license**

(i) Section 8 allows the Central Government to register such person or association of persons as a company with limited liability without the addition of words 'Limited' or 'Private limited' to its name, by issuing licence on such conditions as it deems fit.

(ii) The registrar shall on application register such person or association of persons as a company under this section.

(iii) On registration the company shall enjoy same privileges and obligations as of a limited company.

**Revocation of license:** The Central Government may by order revoke the licence of the company where the company contravenes any of the requirements or the conditions of this sections subject to which a licence is issued or where the affairs of the company are conducted fraudulently, or violative of the objects of the company or prejudicial to public interest, and on revocation the Registrar shall put 'Limited' or 'Private Limited' against the company's name in the register. But before such revocation, the Central Government must give it a written notice of its intention to revoke the licence and opportunity to be heard in the matter.

**Order of the Central Government:** Where a licence is revoked there the Central Government may, in the public interest order that the company registered under this section should be amalgamated with another company registered under this section having similar objects, to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order, or the company be wound up.

**Penalty/punishment in contravention:** If a company makes any default in complying with any of the requirements laid down in this section, the company shall, be punishable with fine varying from ten lakh rupees to one crore rupees and the directors and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine varying from twenty-five thousand rupees to twenty-five lakh rupees, or with both and where it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447 which deals with Fraud.

**Section 8 Company- Significant points**

- Formed for the promotion of commerce, art, science, religion, charity, protection
environment, sports, etc.

♦ Requirement of minimum share capital does not apply.
♦ Uses its profits for the promotion of the objective for which formed.
♦ Does not declare dividend to members.
♦ Operates under a special licence from Central Government.
♦ Need not use the word Ltd./ Pvt. Ltd. in its name and adopt a more suitable name such as club, chambers of commerce etc.
♦ Licence revoked if conditions contravened.
♦ On revocation, Central Government may direct it to
  ➢ Converts its status and change its name
  ➢ Wind – up
  ➢ Amalgamate with another company having similar object.
♦ Can call its general meeting by giving a clear 14 days notice instead of 21 days.
♦ Requirement of minimum number of directors, independent directors etc. does not apply.
♦ Need not constitute Nomination and Remuneration Committee and Shareholders Relationship Committee.
♦ A partnership firm can be a member of Section 8 company.

(d) Dormant company (Section 455): Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant
accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

“Inactive company” means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years.

“Significant accounting transaction” means any transaction other than—

(i) payment of fees by a company to the Registrar;
(ii) payments made by it to fulfil the requirements of this Act or any other law;
(iii) allotment of shares to fulfil the requirements of this Act; and
(iv) payments for maintenance of its office and records.

(e) Nidhi Companies: Company which has been incorporated as a nidhi with the object of cultivating the habit of thrift (cost cutting) and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies. [Section 406 of the Companies Act, 2013]

(f) Public Financial Institutions (PFI): By virtue of Section 2(72) of the Companies Act, 2013, the following institutions are to be regarded as public financial institutions:

(i) the Life Insurance Corporation of India, established under the Life Insurance Corporation Act, 1956;
(ii) the Infrastructure Development Finance Company Limited,
(iii) specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002;
(iv) institutions notified by the Central Government under section 4A(2) of the Companies Act, 1956 so repealed under section 465 of this Act;
(v) such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India:
Conditions for an institution to be notified as PFI: No institution shall be so notified unless—

(A) it has been established or constituted by or under any Central or State Act other than this Act or the previous law; or

(B) not less than fifty-one per cent of the paid-up share capital is held or controlled by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments.

Incorporation of Company and Matters Incidental thereto

1.7 Introduction to Incorporation of Companies

A company is a separate legal entity with perpetual succession for lawful purpose. Development of this concept is equally significant in economic terms as invention of steam engine is for the industrial revolution.

Persons who initiate promotion of a company are known as promoters. All persons who take steps for the registration of a company e.g., those associated with the preparation of a prospectus or in drawing up the Memorandum of Association of the company and assisting in its registration are regarded as promoters. It should, however, be noted that persons acting only in a professional capacity e.g., the solicitor, banker, accountant etc. are not regarded as promoters.

The Companies Act, 2013 defines the term “Promoter” under section 2(69) which means a person—

(a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or

(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

However, a person who is acting merely in a professional, shall not be regarded as promoter, e.g., the solicitor, banker, accountant etc. are not regarded as promoters.

### 1.8 Formation of Company

Companies are broadly of below types:

- **Private Limited Company (with “Private Limited” or “Pvt. Ltd.” as its suffix)**
- **Public Limited Company (with “Limited” or “Ltd.” as its suffix)**
- **One Person Company (with “OPC” as its suffix): Pvt Co.**
- **Limited by shares/guarantee or Unlimited Co.**

The companies so formed could be with limited liability (by shares or guarantee) or with unlimited liability.6&7

**Note**: For Government Companies, suffix “Pvt. Ltd / Ltd.” not required *(Notification dated 5th June 2015)*. This exception shall be applicable to a government company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar *[Notification dated 13th June 2017]*.

**Section 3** of the Companies Act, 2013 deals with the basic requirement with respect to the constitution of the company. In the case of a public company with or without limited liability any 7 or more persons can form a company for any lawful purpose by subscribing their names to memorandum and complying with the requirements of this Act in respect of registration. In exactly the same way, 2 or more persons can form a private company and one person where company to be formed is one person company.

However, that one person need to specify the name of one nominee in the Memorandum of Association (MOA) who would take his place in case of his death or his incapacity to contract. The nominee could be changed as per the process and this will not attract process for alteration of the Memorandum of Association.

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6 Provided that a Specified IFSC public company shall be formed only as a company limited by shares.

7 Provided that a Specified IFSC private company shall be formed only as a company limited by shares.
Persons who form the company are known as promoters. It is they who conceive the idea of forming the company. They take all necessary steps for its registration.

**Members severally liable in certain cases [Section 3A]**

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.

**I. One person company (OPC)**

Law with respect to formation of OPC provides that—

- The memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber’s death or his incapacity to contract, become the member of the company.
- The other person whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be filed with Registrar of companies at the time of incorporation.
- Such other person may be given the right to withdraw his consent.
- The member of OPC may at any time change the name of such other person by giving notice to the company and the company shall intimate the same to the Registrar.
- Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.
Only a natural person who is an Indian citizen and resident in India (person who has stayed in India for a period of not less than 182 days during the immediately preceding one calendar year)-

- shall be eligible to incorporate a OPC;
- shall be a nominee for the sole member of a OPC.

A natural person shall not be a member of more than a OPC at any point of time and the said person shall not be a nominee of more than a OPC.

Where a natural person being member in OPC becomes member in another such company by virtue of his being a nominee in that OPC, such person shall meet the eligibility criteria (as given in point above) within a period of 182 days.

No minor shall become member or nominee of the OPC or can hold share with beneficial interest.

Such Company cannot be incorporated or converted into a company under section 8 of the Act. Though it may be converted to private or public companies in certain cases. The procedure of conversion is given in the rules 6 & 7 of the Chapter II.

Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of anybody corporate.

OPC cannot convert voluntarily into any kind of company unless two years have expired from the date of incorporation, except where the paid up share capital is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.

II. Formation of companies with charitable objects, etc. [Section 8]
1. **Object of formation of Section 8 Company**: Section 8 of the Companies Act, 2013 deals with the formation of companies which are formed to promote the charitable objects of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment etc. Such company intends to apply its profit in promoting its objects and prohibiting the payment of any dividend to its members.

2. **Power of Central government to issue the license**: This section allows the Central Government to register such person or association of persons as a company with limited liability without the addition of words ‘Limited’ or ‘Private limited’ to its name, by issuing licence on such conditions as it deems fit. The registrar shall on application register such person or association of persons as a company under this section.

   ‘Where it is proved to the satisfaction of the Central Government that a limited company registered under this Act or under any previous company law has been formed with any of the objects and with the restrictions and prohibitions it may, by licence, allow the company to be registered under section subject 8 to such conditions as the Central Government deems fit and to change its name by omitting the word —Limited, or as the case may be, the words —Private Limited from its name and thereupon the Registrar shall, on application, in the prescribed form, register such company under this section and all the provisions of this section shall apply to that company’.

3. **Privileges of limited Company**: On registration the company shall enjoy same privileges and obligations as of a limited company.

4. **A firm may be a member** of the company registered under section 8.

5. **Alteration of Memorandum and Articles**: A company registered under this section shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government.  

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8 The power of Central Government to register a Section 8 company has been delegated to ROC [S.O. 1353(E), dated 21st May, 2014]. Under the said notification, the Central Government has delegated to the Registrar of Companies, the power and functions vested in it under the said section of the said Act, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers and functions under the said sections, if in its opinion, such a course of action is necessary in the public interest.

9 Power of Central Government has been delegated to ROC [S.O. 1353(E), dated 21st May, 2014].

10 Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]

11 Power has been delegated to ROC, except for alteration of memorandum in case of conversion into another kind of company [S.O. 1353(E), dated 21st May, 2014.]
6. **Conversion into any other kind of Company** : A company registered under this section may convert itself into company of any other kind only after complying with such conditions as may be prescribed.

A company registered under section 8 which intends to convert itself into a company of any other kind shall pass a special resolution at a general meeting for approving such conversion.

7. **Revocation of license**

(i) The Central Government may by order revoke the licence of the company where the company contravenes any of the requirements or the conditions of this sections subject to which a licence is issued or where the affairs of the company are conducted fraudulently, or violative of the objects of the company or prejudicial to public interest, and on revocation the Registrar shall put ‘Limited’ or ‘Private Limited’ against the company’s name in the register. But before such revocation, the Central Government must give it a written notice of its intention to revoke the licence and opportunity to be heard in the matter.

(ii) Where a licence is revoked, the Central Government may, by order, if it is satisfied that it is essential in the public interest, direct that the company be wound up under this Act or amalgamated with another company registered under this section.

However, no such order shall be made unless the company is given a reasonable opportunity of being heard.

(iii) Where a licence is revoked and where the Central Government is satisfied that it is essential in the public interest that the company registered under this section should be amalgamated with another company registered under this section and having similar objects, then, notwithstanding anything to the contrary contained in this Act, the Central Government may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.

(iv) If on the winding up or dissolution of a company registered under this section, there remains, after the satisfaction of its debts and liabilities, any asset, they may be transferred to another company registered under this section and having similar objects, subject to such conditions as the Tribunal may impose, or may be sold and

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12 Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]
proceeds thereof credited to the Insolvency and Bankruptcy Fund formed under section 224 of the Insolvency and Bankruptcy Code, 2016.

(v) A company registered under this section shall amalgamate only with another company registered under this section and having similar objects.

(vi) Thus, on revocation, Central Government may direct it to—

8. **Penalty/ punishment in contravention:** If a company makes any default in complying with any of the requirements laid down in this section, the company shall, be punishable with fine varying from ten lakh rupees to one crore rupees and the directors and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine varying from twenty-five thousand rupees to twenty-five lakh rupees, or with both.

And where it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447.

9. **Exceptions :**

(i) Can call its general meeting by giving a clear 14 days notice instead of 21 days.

(ii) Requirement of minimum number of directors, independent directors etc. does not apply.

(iii) Need not constitute Nomination and Remuneration Committee and Shareholders Relationship Committee.
1.9 Memorandum of Association – MOA [Section 4]

As per section 2(56)—memorandum means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act;

It is the base document for the formation of the company and along with the Articles of Association (AOA) is regarded as the Constitution of the Company.

The MOA and AOA, similar to other company agreements and resolutions is subject to the Companies Act, 2013 (Section 6) and the law of the land and therefore all its contents need to be in compliance of the Companies Act 2013 and other applicable legislations.

Section 4 of the Companies Act, 2013 seeks to provide for the requirements with respect to memorandum of a company.

<table>
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<th>Formation</th>
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<th>Type of Co.</th>
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<td>• To promote Charitable objects</td>
<td>• To promote its objectives • No payment of dividends out of profits</td>
<td>• Limited Liability • Without the addition of words &quot;Ltd.&quot; or &quot;Pvt Ltd.&quot;</td>
<td>• The CG can grant such status • However, CG has delegated the power to grant licence to ROC</td>
<td>• CG may revoke licence • If conditions of section 8 are contravened, or • affairs of the company are conducted fraudulently, or prejudicial to public interest</td>
<td>• Co. has to use words &quot;Ltd.&quot; or &quot;Pvt Ltd.&quot;</td>
</tr>
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</table>
I. Object of registering a memorandum of association:

♦ It contains the object for which the company is formed and therefore identifies the possible scope of its operations beyond which its actions cannot go.

♦ It enables shareholders, creditors and all those who deal with company to know what its powers are and what activities it can engage in.

♦ A memorandum is a public document under Section 399 of the Companies Act, 2013. Consequently, every person entering into a contract with the company is presumed to have the knowledge of the conditions contained therein.

♦ The shareholders must know the purposes for which his money can be used by the company and what risks he is taking in making the investment.

A company cannot depart from the provisions contained in the memorandum however imperative may be the necessity for the departure. It cannot enter into a contract or engage in any trade or business, which is beyond the power confessed on it by the memorandum. If it does so, it would be ultra vires the company and void.

II. The memorandum of a company shall state—

(a) the name of the company with the last word “Limited” in the case of a public limited company, or the last words “Private Limited” in the case of a private limited company. Exception: This clause is not applicable on the companies formed under section 8 of the Act.

(b) the State in which the registered office of the company is to be situated;

(c) the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof;

If any company has changed its activities which are not reflected in its name, it shall change its name in line with its activities within a period of six months from the change of activities after complying with all the provisions as applicable to change of name.

III. Liability / Capital Clause:

(a) This clause covers details on the liability of members of the company, whether limited or unlimited, and also state—

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13 In case of Specified IFSC Public Company and IFSC Private Company, name shall have the suffix, “International Financial Service company” or “IFSC” as a part of its name.

14 Specified IFSC Public Company & IFSC Private company shall state its objects to do financial services activities as permitted under the Special Economic Zones Act, 2005 read with SEZ Rules, 2006 and any matter considered necessary in furtherance thereof in accordance with license to operate, from International Financial Services Centre located in an approved multi services Special Economic Zone, granted by the Reserve Bank of India or the Securities and Exchange Board of India or the Insurance Regulatory and Development Authority of India.
◆ in the case of a company limited by shares, that the liability of its members is limited to the amount unpaid, if any, on the shares held by them; and

◆ in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute—
   ➢ to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and
   ➢ to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves;

(b) in the case of a company having a share capital—

♦ the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share; and

♦ the number of shares each subscriber to the memorandum intends to take, indicated opposite his name;

(c) The clause, in the case of One Person Company, covers the name of the person who, in the event of death of the subscriber, shall become the member of the company.

IV. Name Clause

Applying for the name of the company: The name stated in the memorandum shall not—

(a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or

(b) be such that its use by the company—
   ➢ will constitute an offence under any law for the time being in force; or
   ➢ is undesirable in the opinion of the Central Government15.

As per the Notification S.O. 1353(E), dated 9th of July, 2014 : In exercise of powers conferred by Section 458 of the Companies Act, 2013 the Central Government has delegated to the ROC the power & functions vested in it under the this section[i.e. section 4(2)] of the said Act, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under the said sections, if in its opinion, such course of action is necessary in the public interest.

15 Power of Central Government has been delegated to ROC [S.O. 1353(E), dated 21st May, 2014].
(c) **Undesirable Names:** A company shall not be registered with a name which contains—

(i) any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; or

(ii) such word or expression, as may be prescribed, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

**Clarification:** Vide General Circular No. 02/2014, dated 11.02.2014 a clarification was issued on the use of word ‘National’ in the names of Companies or LLP. According to which no company should be allowed to be registered with the word ‘National’ as part of its title unless it is a government company & the Central/State Government has a stake in it.

Similarly, the word ‘Bank’ may be allowed in the name of an entity only when such entity produces a ‘No Objection Certificate’ or ‘Exchange’ should be allowed in the name of a company only where ‘No Objection Certificate’ from SEBI in this regard is produced by the Promoters.

(d) **Reservation of name:**

**Applying for name:** A person may make an application, in such form and manner and accompanied by such fee, as may be prescribed, to the Registrar for the reservation of a name set out in the application as—

(i) the name of the proposed company; or

(ii) the name to which the company proposes to change its name.

**Reserving the name:** Upon receipt of an application under sub-section (4), 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:

Provided that in case of an application for reservation of name or for change of its name by an existing company, the Registrar may reserve the name for a period of sixty days from the date of approval.

**Cancelling name:** Where after reservation of name, it is found that name was applied by furnishing wrong or incorrect information, then—
(i) if the company has not been incorporated, the reserved name shall be cancelled and the person who has made the application shall be liable to a penalty which may extend to one lakh rupees;

(ii) if the company has been incorporated, the Registrar may, after giving the company an opportunity of being heard—

1. either direct the company to change its name within a period of 3 months, after passing an ordinary resolution;

2. take action for striking off the name of the company from the register of companies; or

3. make a petition for winding up of the company.

Circular: As per the General Circular No.29/2014, dated 11th of July, 2014, Government directed that while allotting names to Companies/Limited Liability Partnerships, the Registrar of Companies concerned should exercise due care to ensure that the names are not in contravention of the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950. It is necessary that Registrars are fully familiar with the provisions of the said Act.

Note: Rule 8–Undesirable Names of the Companies (Incorporation) Rules, 2014, determines whether a proposed name is identical with another or other rules which may be kept in mind while dealing with the Name clause of the MOA.

V. Domicile Clause

The name of federal state is mentioned where the registered office is to be situated.

VI. Objects Clause

Covers the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

Doctrine of Ultra Vires

In the case of a company whatever is not stated in the memorandum as the objects or powers is prohibited by the doctrine of ultra vires. As a result, an act which is ultra vires is void, and does not bind the company. Neither the company nor the contracting party can sue on it. The company cannot make it valid, even if every member assents to it.

The general rule is that an act which is ultra vires the company is incapable of ratification. An act which is intra vires the company but outside the authority of the directors may be ratified by the company in proper form [Rajendra Nath Dutta v. Shilendra Nath Mukherjee, (1982) 52 Com Cases 293 (Cal.)].
The rule is meant to protect shareholders and the creditors of the company. If the act is ultra vires (beyond the powers of) the directors only, the shareholders can ratify it. If it is ultra vires the articles of association, the company can alter its articles in the proper way. The doctrine of ultra vires was first enunciated by the House of Lords in a classic case, Ashbury Railway Carriage and Iron Co. Ltd. v. Riche, (1878) L.R. 7 H.L. 653.

The memorandum of the company in the said case defined its objects thus: “The objects for which the company is established are to make and sell, or lend or hire, railway plants to carry on the business of mechanical engineers and general contractors……..”.

The company entered into a contract with M/s. Riche, a firm of railway contractors to finance the construction of a railway line in Belgium. On subsequent repudiation of this contract by the company on the ground of its being ultra vires, Riche brought a case for damages on the ground of breach of contract, as according to him the words “general contractors” in the objects clause gave power to the company to enter into such a contract and, therefore, it was within the powers of the company. More so because the contract was ratified by a majority of shareholders.

The House of Lords held that the contract was ultra vires the company and, therefore, null and void. The term “general contractor” was interpreted to indicate as the making generally of such contracts as are connected with the business of mechanical engineers. The Court held that if every shareholder of the company had been in the room and had said, “That is a contract which we desire to make, which we authorise the directors to make”, still it would be ultra vires. The shareholders cannot ratify such a contract, as the contract was ultra vires the objects clause, which by Act of Parliament, they were prohibited from doing.

However, the disadvantages of this doctrine outweigh its main advantage, namely to provide protection to the shareholders and creditors. Although it may be useful to members in restraining the activities of the directors, it is only a nuisance in so far as it prevents the company from changing its activities in a direction which is agreed by all. Again, the purpose of doctrine of ultravires has been defeated as now the object clause can be easily altered, by passing just a special resolution of the shareholders.

VII. Subscription Clause

According to section 7(1)(a) there shall be filed with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the memorandum and articles of the company duly signed by all the subscribers to the memorandum in such manner as may be prescribed in Rule 13 of the Companies (Incorporation) Rules, 2014.

VIII. Forms and schedule related to Memorandum:

The memorandum of a company shall be in respective forms specified in Tables A, B, C, D
and E in Schedule I as may be applicable to such company.

The MOA and AOA shall be in respective forms as provided in Schedule I to the Companies Act, 2013:

| TABLE –A   | •MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES |
| TABLE –B   | •MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND NOT HAVING A SHARE CAPITAL |
| TABLE –C   | •MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND HAVING A SHARE CAPITAL |
| TABLE –D   | •MEMORANDUM OF ASSOCIATION OF AN UNLIMITED COMPANY AND NOT HAVING SHARE CAPITAL |
| TABLE –E   | •MEMORANDUM OF ASSOCIATION OF AN UNLIMITED COMPANY AND HAVING SHARE CAPITAL |
| TABLE –F   | •ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY SHARES |
| TABLE –G   | •ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND HAVING A SHARE CAPITAL |
| TABLE –H   | •ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND NOT HAVING SHARE CAPITAL |
| TABLE –I   | •ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY AND HAVING A SHARE CAPITAL |
| TABLE –J   | •ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY AND NOT HAVING SHARE CAPITAL |

IX. Any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, shall not give any person a right to participate in the divisible profits of the company otherwise than as a member. If the contrary is done, it shall be void.

1.10 Articles of Association–AOA [Section 5]

As per Section 2(5)—articles means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or
Section 5 of the Companies Act, 2013 seeks to provide the contents and model of articles of association. The section lays the following law—

(1) **Contains regulations**: The articles of a company shall contain the regulations for management of the company.

(2) **Inclusion of matters**: The articles shall also contain such matters, as are prescribed under the rules. However, a company may also include such additional matters in its articles as may be considered necessary for its management.

(3) **Entrenchment**

**Contain provisions for entrenchment**: The articles may contain provisions for entrenchment (to protect something) to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with.

**Manner of inclusion of the entrenchment provision**: The provisions for entrenchment shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.

**Notice to the registrar of the entrenchment provision**: Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed.

**Example**: If PQR Company subscribes by investing in XYZ, a Private Ltd. company in 10% terms, tomorrow if XYZ private limited approaches any Bank for a loan, the bank officials would read the Articles & would ask to get the consent of PQR Company. Now, if there is no entrenchment provision, then ‘XYZ’ may, after passing a special resolution remove the minority right and can borrow beyond the limit.

In order to control it, the entrenchment provisions are usually compelled by the minority to make the majority responsible and the minority in these provisions can get incorporated a clause saying that borrowing beyond a particular limit or issuances of shares is to be done only after the requisite consent of minority has been obtained.

(4) **Forms of articles**: 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.

(5) **Model articles**: A company may adopt all or any of the regulations contained in the model articles applicable to such company.

(6) **Company registered after the commencement of this Act**: In case of any company, which is registered after the commencement of this Act, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model
articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.

(7) **Section not apply on company registered under any previous company law:** Nothing in this section shall apply to the articles of a company registered under any previous company law, unless amended under this Act.

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### Doctrine of Indoor Management

According to this doctrine, persons dealing with the company need not inquire whether internal proceedings relating to the contract are followed correctly, once they are satisfied that the transaction is in accordance with the memorandum and articles of association.

Stakeholders need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to take it for granted that the company had gone through all these proceedings in a regular manner.

The doctrine helps protect external members from the company and states that the people are entitled to presume that internal proceedings are as per documents submitted with the Registrar of Companies.

The doctrine of indoor management evolved around 150 years ago in the context of the doctrine of constructive notice. The role of doctrine of indoor management is opposed to the role of doctrine of constructive notice. Whereas the doctrine of constructive notice protects a company against outsiders, the doctrine of indoor management protects outsiders against the actions of a company. This doctrine also is a possible safeguard against the possibility of abusing the doctrine of constructive notice.

#### Basis for Doctrine of Indoor Management

1. What happens internal to a company is not a matter of public knowledge. An outsider can only presume the intentions of a company, but not know the information he/she is not privy to.
2. If not for the doctrine, the company could escape creditors by denying the authority of officials to act on its behalf.

#### Exceptions to Doctrine of Indoor Management (Applicability of doctrine of constructive notice)

**Knowledge of irregularity:** In case this ‘outsider’ has actual knowledge of irregularity within the company, the benefit under the rule of indoor management would no longer be available. In fact, he/she may well be considered part of the irregularity.

**Negligence:** If, with a minimum of effort, the irregularities within a company could be discovered, the benefit of the rule of indoor management would not apply. The protection of the rule is also not available where the circumstances company does not make proper inquiry.

**Forgery:** The rule does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. A company can never be held bound for forgeries committed by its officers.
1.11 Act to Override Memorandum, Articles, etc. [Section 6]

According to section 6 of the Act,

‘Save as otherwise expressly provided in this Act—

(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of Directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and

(b) any provision contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be.’

In simple words, the provisions of this Act shall have overriding effect on provisions contained in memorandum or articles or in an agreement or in resolution passed by the company in the general meeting or by its board of directors, whether they are registered, executed or passed before or after the commencement of this Act.

Any provision contained in any of the above mentioned document, shall be void, to the extent to which it is inconsistent to the provisions of this Act.

Incorporation by fraudulent action: According to section 7(6), without prejudice to the provisions of section 7(5) where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration under clause (b) of sub-section (1) shall each be liable for action under section 447.

1.12 Incorporation of Company [Section 7]

I. INCORPORATION OF COMPANY: Section 7 of the Companies Act, 2013 provides for the procedure to be followed for incorporation of a company.
(1) **Filing of the documents and information with the registrar:** For the registration of the company following documents and information are required to be filed with the registrar within whose jurisdiction the registered office of the company is proposed to be situated—

- the memorandum and articles of the company duly **signed by all the subscribers** to the memorandum.
- a **declaration by person who is engaged in the formation of the company** (an advocate, a chartered accountant, cost accountant or company secretary in practice), **and by a person named in the articles** (director, manager or secretary of the company), that all the requirements of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with.
- an **affidavit from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles** stating that—
  - he is not convicted of any offence in connection with the promotion, formation or management of any company, or
  - he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the last five years,
and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief;

♦ the address for correspondence till its registered office is established;

♦ the particulars (names, including surnames or family names, residential address, nationality) of every subscriber to the memorandum along with proof of identity, and in the case of a subscriber being a body corporate, such particulars as may be prescribed.

♦ the particulars (names, including surnames or family names, the Director Identification Number, residential address, nationality) of the persons mentioned in the articles as the subscribers to the Memorandum and such other particulars including proof of identity as may be prescribed; and

♦ the particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed.

Particulars provided in this provision shall be of the individual subscriber and not of the professional engaged in the incorporation of the company [The Companies (Incorporation) Rules, 2014].

(2) Issue of certificate of incorporation on registration: The Registrar on the basis of documents and information filed, shall register all the documents and information in the register and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act.

(3) Allotment of Corporate Identity Number (CIN): On and from the date mentioned in the certificate of incorporation, the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.

(4) Maintenance of copies of all documents and information: The company shall maintain and preserve at its registered office copies of all documents and information as originally filed, till its dissolution under this Act.

(5) Furnishing of false or incorrect information or suppression of material fact at the time of incorporation (i.e. during incorporation process): If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action for fraud under section 447.

(6) Company already incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact (i.e. post Incorporation): where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or
made for incorporating such company, or by any fraudulent action, the promoters, the persons
named as the first directors of the company and the persons making declaration under this
section shall each be liable for action for fraud under section 447.

(7) Order of the Tribunal: Where a company has been got incorporated by furnishing false
or incorrect information or representation or by suppressing any material fact or information in
any of the documents or declaration filed or made for incorporating such company or by any
fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the
situation so warrants—

(a) pass such orders, as it may think fit, for regulation of the management of the company
including changes, if any, in its memorandum and articles, in public interest or in the
interest of the company and its members and creditors; or

(b) direct that liability of the members shall be unlimited; or

(c) direct removal of the name of the company from the register of companies; or

(d) pass an order for the winding up of the company; or

(e) pass such other orders as it may deem fit:

Provided that before making any order,—

♦ the company shall be given a reasonable opportunity of being heard in the matter; and

♦ the Tribunal shall take into consideration the transactions entered into
by the company, including the obligations, if any, contracted or payment of any
liability.

Simplified Proforma for Incorporating Company Electronically (SPiCe)

The Ministry of Corporate Affairs has taken various initiatives for ease of business. In a step
towards easy setting up of business, MCA has simplified the process of filing of forms for
incorporation of a company through Simplified Proforma for incorporating company
electronically.

II. EFFECT OF REGISTRATION: Section 9 of the Companies Act, 2013 provides for the effect
of registration of a company.

According to section 9, from the date of incorporation (mentioned in the certificate of
incorporation), the subscribers to the memorandum and all other persons, who may from time
to time become members of the company, shall be a body corporate by the name contained in
the memorandum. Such a registered company shall be capable of exercising all the functions
of an incorporated company under this Act and having perpetual succession with power to
acquire, hold and dispose of property, both movable and immovable, tangible and intangible,

16 “Tribunal” means the National Company Law Tribunal (NCLT) constituted under section 408 of the
Companies Act, 2013. The NCLT is a quasi-judicial body in India that adjudicates issues relating to
companies in India. The NCLT was established under the Companies Act, 2013 and was constituted on 1st
June, 2013.
to contract and to sue and be sued, by the said name.

From the date of incorporation mentioned in the certificate, the company becomes a legal person separate from the incorporators; and there comes into existence a binding contract between the company and its members as evidenced by the Memorandum and Articles of Association [Hari Nagar Sugar Mills Ltd. vs. S.S. Jhunjhunwala]. It has perpetual existence until it is dissolved by liquidation or struck out of the register. A shareholder who buys shares, does not buy any interest in the property of the company but in certain cases a writ petition will be maintainable by a company or its shareholders.

A legal personality emerges from the moment of registration of a company and from that moment the persons subscribing to the Memorandum of Association and other persons joining as members are regarded as a body corporate or a corporation in aggregate and the legal person begins to function as an entity. A company on registration acquires a separate existence and the law recognises it as a legal person separate and distinct from its members [State Trading Corporation of India vs. Commercial Tax Officer].

It may be noted that under the provisions of the Act, a company may purchase shares of another company and thus become a controlling company. However, merely because a company purchases all shares of another company it will not serve as a means of putting an end to the corporate character of another company and each company is a separate juristic entity [Spencer & Co. Ltd. Madras vs. CWT Madras].

As has been stated above, the law recognizes such a company as a juristic person separate and distinct from its members. The mere fact that the entire share capital has been contributed by the Central Government and all its shares are held by the President of India and other officers of the Central Government does not make any difference in the position of registered company and it does not make a company an agent either of the President or the Central Government [Heavy Electrical Union vs. State of Bihar].

1.13 Effect of Memorandum and Articles [Section 10]

(1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles.

(2) All monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

1.14 Registered office of company [Section 12]

A company is considered to be a separate legal entity from the members. Once a company gets incorporated, it is required to maintain a registered office. This is a physical office where the corporation will receive service of legal documents from ROC or in case of a lawsuit, etc.. This address cannot be a P.O. box but must be a physical location where someone is present,
to receive service of legal documents during normal business hours. It could be different from a Head Office or Corporate office.

Section 12 of the Companies Act, 2013 seeks to provide for the registered office of the companies for the communication and serving of necessary documents, notices letters etc. The domicile and the nationality of a company is determined by the place of its registered officer. This is also important for determining the jurisdiction of the court.

(1) **Registered office:** From the 15th day of its incorporation and at all times thereafter a company shall have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it.\(^{17}\)

(2) **Verification of registered office:** The company shall furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation.\(^{18}\)

(3) **Labeling of company:** Every company shall—

- paint or affix its name, and the address of its registered office, and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in legible letters, and if the characters employed are not those of the language/s in general use in that locality, then also in the characters of that language/s.
- have its name engraved in legible characters on its seal, if any;
- get its name, address of its registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications; and
- have its name printed on hundies, promissory notes, bills of exchange and such other documents as may be prescribed:

(4) **Name change by the company:** Where a company has changed its name/s during the last two years, it shall paint or affix or print, along with its name, the former name or names so changed during the last two years.

(5) **In case of OPC:** The words “One Person Company” shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

(6) **Notice of change to registrar:** Notice of every change of the situation of the registered office, verified in the manner prescribed, after the date of incorporation of the company, shall be given to the Registrar within 15 days of the change, who shall record the same.\(^{19}\)

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\(^{17}\) With the respected specified IFSC public & IFSC private companies, they shall have its registered office at the IFSC located in the approved multiservice SEZ set up under the SEZ Act, 2005 read with SEZ Rules, 2006.

\(^{18}\) In case of specified IFSC public & IFSC private company word “thirty days” will be read as “sixty days”.

\(^{19}\) In the case of specified IFSC public & IFSC private companies for the word “15 days” read as “60 days.”
(7) Change by passing of special resolution: The registered office of the company shall be changed only by passing of special resolution by a company—

- in the case of an existing company, outside the local limits of any city, town or village where such office is situated at the commencement of this Act or where it may be situated later by virtue of a special resolution passed by the company; and

- in the case of any other company, outside the local limits of any city, town or village where such office is first situated or where it may be situated later by virtue of a special resolution passed by the company.20

(8) Change of registered office outside the jurisdiction of registrar: Where a company changes the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State, there such change is to confirmed by the Regional Director on an application made by the company.

(9) Communication and filing of confirmation: The confirmation of change of registered office from jurisdiction of one registrar to another registrar within the same state, shall be—

- communicated within 30 days from the date of receipt of application by the Regional Director to the company, and

- the company shall file the confirmation with the Registrar within a period of 60 days of the date of confirmation who shall register the same, and

- certify the registration within a period of thirty days from the date of filing of such confirmation.

(10) Certificate, a conclusive evidence of compliance of requirements of this Act: The certificate shall be conclusive evidence that all the requirements of this Act with respect to change of registered office have been complied with and the change shall take effect from the date of the certificate.

(11) In case of default: If any default is made in complying with the requirements of this section, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every day during which the default continues but not exceeding one lakh rupees.

1.15 Alteration of memorandum [Section 13 & 15]

As per Section 2(3)—alter or —alteration includes the making of additions, omissions and substitutions.

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20 In case of specified IFSC public & IFSC private company registered office of the specified IFSC public & specified IFSC private company shall not change from one place to another with in the International Financial Services Centre, except on the authority of a resolution passed by the board of directors. Provided that the specified IFSC public company and specified IFSC private company shall not change the place of its registered office to any other place outside the International Financial Service Centre.
I. **Procedure of alteration of memorandum:** Section 13 of the Companies Act, 2013 provides the provisions that deals with the alteration of the memorandum. The provision says that—

(1) **Alteration by special resolution:** Company may alter the provisions of its memorandum with the approval of the members by a special resolution.

(2) **Name change of the company:** Any change in the name of a company shall be effected only with the approval of the Central Government in writing:

However, no such approval shall be necessary where the change in the name of the company is only the deletion therefrom, or addition thereto, of the word “Private”, on the conversion of any one class of companies to another class in accordance with the provisions of the Act.

According to the **Companies (Incorporation) Rules, 2014:**

The change of name shall not be allowed to a company which has not filed annual returns or financial statements due for filing with the Registrar or which has failed to pay or repay matured deposits or debentures or interest thereon: Provided that the change of name shall be allowed upon filing necessary documents or payment or repayment of matured deposits or debentures or interest thereon as the case may be.

(3) **Entry in register of companies:** On any change in the name of a company, the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name and the change in the name shall be complete and effective only on the issue of such a certificate.

(4) **Change in the registered office:** The alteration of the memorandum relating to the place of the registered office from one State to another shall not have any effect unless it is approved by the Central Government on an application in such form and manner as may be prescribed.

(5) **Dispose of the application of change of place of the registered office:** The Central Government shall dispose of the application of change of place of the registered office within a period of 60 days.

Before passing of order, Central Government may satisfy itself that-
- the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company, or

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21 Notification S.O. 1353(E), dated 21st May, 2014. In exercise of powers conferred by Section 458 of the Companies Act, 2013 the Central Government hereby delegates to the ROC the power & functions vested in it under this section [i.e. section 13(2)] of the said Act, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under the said sections, if in its opinion, such course of action is necessary in the public interest.

22 Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]

23 Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]
the sufficient provision has been made by the company either for the due discharge of all its debts and obligations, or
adequate security has been provided for such discharge.

(6) Filing with Registrar: A company shall, in relation to any alteration of its memorandum, file with the Registrar—
the special resolution passed by the company under sub-section (1);
the approval of the Central Government under sub-section (2), if the alteration involves any change in the name of the company.

(7) Filing of the certified copy of the order with the registrar of the states: Where an alteration of the memorandum results in the transfer of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States within such time and in such manner as may be prescribed, who shall register the same.

(8) Issue of fresh certificate of incorporation: The Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration.

(9) Change in the object of the company: A company, which has raised money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution through postal ballot is passed by the company and—
the details, in respect of such resolution shall also be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;
the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.

(10) Registrar to certify the registration on the alteration of the objects: The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of 30 days from the date of filing of the special resolution.

(11) Alteration to be registered: No alteration made under this section shall have any effect until it has been registered in accordance with the provisions of this section.

(12) Only member have a right to participate in the divisible profits of the company: Any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, intending to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.

II. Alteration noted in every copy: Every alteration made in the memorandum or articles of a company shall be noted in every copy of the memorandum or articles, as the case may be. If a
company makes any default in complying with the stated provisions, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every copy of the memorandum or articles issued without such alteration. [Section 15]

Provision of Section 13 are summarised below:

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<th>MOA clause</th>
<th>Members’ resolution</th>
<th>External approvals</th>
<th>Outcome</th>
<th>Applicability</th>
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<tr>
<td>Name Clause</td>
<td>Special resolution</td>
<td>Approval of Central Government and subject to Section 16</td>
<td>New incorporation certificate issued by ROC</td>
<td>Not applicable where only word “Private” is added or deleted on company class conversion</td>
</tr>
<tr>
<td>Domicile Clause</td>
<td>Special resolution</td>
<td>Approval of Central Government required only when registered office is changed from one state to another</td>
<td>The Central Government shall dispose of the application under sub-section (4) within a period of sixty days and before passing its order may satisfy itself that the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company or that the sufficient provision has been made by the company either for the due discharge of all its debts and obligations or that adequate security has been provided for such discharge.</td>
<td></td>
</tr>
<tr>
<td>Objects Clause</td>
<td>Special resolution</td>
<td>-</td>
<td>A company, which has raised money from public through prospectus and still has any unutilised</td>
<td></td>
</tr>
</tbody>
</table>
amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution is passed by the company and—
(i) the details, as may be prescribed, in respect of such resolution shall also be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;
(ii) the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.

| Liability /Capital Clause | Special resolution | Any alteration of the memorandum, in the case of a company limited by guarantee and not having a share |
capital, purporting to
give any person a right
to participate in the
divisible profits of the
compact otherwise
than as a member,
shall be void.

1.16 Rectification of Name of Company [Section 16]

According to Section 16

(1) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which, —

(a) in the opinion of the Central Government, is identical with or too nearly resembles the name by which a company in existence had been previously registered, whether under this Act or any previous company law, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of three months from the issue of such direction, after adopting an ordinary resolution for the purpose;

(b) on an application by a registered proprietor of a trade mark that the name is identical with or too nearly resembles to a registered trade mark of such proprietor under the Trade Marks Act, 1999, made to the Central Government within 3 years of incorporation or registration or change of name of the company, whether under this Act or any previous company law, in the opinion of the Central Government, is identical with or too nearly resembles to an existing trade mark, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of 6 months from the issue of such direction, after adopting an ordinary resolution for the purpose.

(2) Where a company changes its name or obtains a new name under sub-section (1), it shall within a period of 15 days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

(3) If a company makes default in complying with any direction given under sub-section (1), the company shall be punishable with fine of one thousand rupees for every day during which the default continues and every officer who is in default shall be punishable with fine which shall not be less than five thousand rupees but which may extend to one lakh rupees.

The above statutory provision can be summarized as below:

24 Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]
25 Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]
26 Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]
27 Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]
(1) **Central government to issue direction:** The Central Government is empowered to give direction to the company to rectify its name (Where the name is identical with or too nearly resembles the name by which a company in existence had been previously registered, or the name is identical with or too nearly resembling to a registered trade mark) within a period of 3 months or 6 months, as the case may be, from the issue of such direction by passing an ordinary resolution.

(2) **Notice of change to the registrar:** Where a company changes its name or obtains a new name, it shall within a period of 15 days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

(3) **Default in compliance with the direction:** If a company makes default in complying with any direction—

<table>
<thead>
<tr>
<th>Liable person</th>
<th>Penalty/punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Company</td>
<td>Fine of 1,000 rupees for every day during which the default continues</td>
</tr>
<tr>
<td>Every Officer who is in default</td>
<td>Fine varying from 5,000 rupees to 1 lakh rupees.</td>
</tr>
</tbody>
</table>

### 1.17 Alteration of articles [Section 14 & 15]

1. Section 14 of the Companies Act, 2013, vests companies with power to alter or add to its articles. A company cannot divest itself of these powers [Andrews vs. Gas Meter Co. [1897] 1 Ch. 161]. Matters as to which the memorandum is silent can be dealt with by the alteration of article. Section 14 of the Companies Act, 2013 vests companies with power to alter or add to its articles. The law with respect to alteration of articles is as follows:

(1) **Alteration by special resolution:** Subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution alter its articles.

(2) **Alteration to include conversion of companies:** Alteration of articles include alterations having the effect of conversion of—

   (a) a private company into a public company; or

   (b) a public company into a private company:

Even where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, then such company shall, as from the date of such alteration, cease to be a private company:

However, any such alteration having the effect of conversion of a public company into a private company, then such conversion shall not take effect except with the approval of the Tribunal and make such order as it may deem fit.
(3) **Filing of alteration with the registrar:** Every alteration of the articles and a copy of the order of the Tribunal approving the alteration, shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.

(4) **Any alteration made shall be valid:** Any alteration of the articles registered as above shall, subject to the provisions of this Act, be valid as if it were originally contained in the articles.

II. **Alteration noted in every copy:** Every alteration made in articles of a company shall be noted in every copy of the articles, as the case may be. If a company makes any default in complying with the stated provisions, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every copy of the articles issued without such alteration. [Section 15]

### 1.18 Copies of memorandum, articles, etc., to be given to Members [Section 17]

According to section 17 every company on being so requested by a member, shall send copies of the following documents within seven days of the request on the payment of fees—

(a) the memorandum;

(b) the articles; and

(c) every agreement and every resolution referred in section 117 (Resolutions and agreements to be filed), if and in so far as they have not been embodied in the memorandum or articles.

In case of default, the company and every officer who is in default shall be liable for each default, to a penalty of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

### 1.19 Conversion of companies already Registered [Section 18]

According to Section 18 of the Companies Act, 2013, a company may convert itself in some other class of company by altering its memorandum and articles of association. Following is the law with respect to the conversion of the companies already registered.

1. **By alteration of memorandum and articles:** A company of any class registered under this Act may convert itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of this Chapter.

2. **File an application to the Registrar:** Wherever such conversion of companies is required to be done, the company shall file an application to the Registrar, who shall after satisfying himself that the provisions applicable for registration of companies have been complied with, close the former registration of the company.
3. **Issue a certificate of incorporation:** After registering the required documents, issue a certificate of incorporation in the same manner as its first registration.

4. **No effect on the debts, liabilities etc. incurred before conversion:** The registration of a company under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done.

### 1.20 Subsidiary company not to hold shares in its Holding Company [Section 19]

As per Section 19

(1) No company shall, either by itself or through its nominees, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void:

Provided that nothing in this sub-section shall apply to a case—

(a) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or

(b) where the subsidiary company holds such shares as a trustee; or

(c) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company:

However, the subsidiary company referred to in the preceding proviso shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee, as referred to in clause (a) or clause (b) of the said proviso.

(2) The reference in this section to the shares of a holding company which is a company limited by guarantee or an unlimited company, not having a share capital, shall be construed as a reference to the interest of its members, whatever be the form of interest.

**Example:** RPIP Ltd. has invested 51% in the shares of SSP Pvt. Ltd. on 31 March 2017. SSP Pvt. Ltd. have been holding 2% equity of RPIP Ltd since 2011. SSP Pvt. Ltd. cannot increase its equity beyond that 2% on or after 31 March 2017. However, it could continue to hold or reduce its initial 2% stake.

### 1.21 Service of documents [Section 20]

Section 20 of the Companies Act, 2013, provides the mode in which documents may be served on the company, on the members and also on the registrars.
Law with respect to the service of documents is as follows—

(1) **Serving of document to company:** A document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by-

- registered post, or
- speed post, or
- courier service, or
- leaving it at its registered office, or
- means of such electronic or other mode as may be prescribed:

However, where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.

(2) **Serving of document to registrar or member:** Save as provided in this Act or the rules made thereunder for filing of documents with the Registrar in electronic mode, a document may be served on Registrar or any member by sending it to him by—

- Post, or
- registered post, or
- speed post, or
- courier, or
- by delivering at his office or address, or
- by such electronic or other mode as may be prescribed:

However, a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

**Explanation**—For the purposes of this section, the term “courier” means a person or agency which delivers the document and provides proof of its delivery.

**Exemption**—Section 20 (2) shall apply to a **Nidhi Company**, subject to the modification that in the case of a Nidhi, the document may be served only on members who hold shares of more than ` 1,000 in face value or more than 1%, of the total paid-up share capital of the Nidhis whichever is less.

For other shareholders, document may be served by a public notice in newspaper circulated in the district where the Registered Office of the Nidhi is situated; and publication of the same on the notice board of the Nidhi. [*Notification dated 5th June, 2015.*]
As per the *Companies (Incorporation) Rules, 2014*,

1. The term, **“electronic transmission”** means a communication that creates a record that is capable of retention, retrieval (recovery) and review, and which may thereafter be rendered into clearly legible tangible form. It may be made by—
   - facsimile(duplicate) telecommunication or electronic mail, which the company or the officer has provided from time to time for sending communications,
   - posting of an electronic message board or network that the company or the officer has designated for such communications, or
   - other means of electronic communication, in respect of which the company or the officer has put in place reasonable systems to verify that the sender is the person contending to send the transmission.

2. In case of delivery by post, such service shall be deemed to have been effected—
   (i) in the case of a notice of a meeting, at the expiration of 48 hours after the letter containing the same is posted; and
   (ii) in any other case, at the time at which the letter would be delivered in the ordinary course of post.

### 1.22 Authentication of documents, Proceedings and Contracts

[Section 21]

As per section 21 of the Companies Act, 2013, a document or proceeding requiring authentication by a company or contracts made by or on behalf of a company may be signed by—

(i) any key managerial personnel, or

(ii) an officer or employee of the company duly authorised by the Board in this behalf.  

28 In the case of specified IFSC public company and IFSC private company, for the word “An officer” read as “An officer or any other person”.

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1.23 Execution of Bills of Exchange, etc. [Section 22]

(1) A bill of exchange, hundi or promissory note shall be deemed to have been made, accepted, drawn or endorsed on behalf of a company if made, accepted, drawn, or endorsed in the name of, or on behalf of or on account of, the company by any person acting under its authority, express or implied.

(2) A company may, by writing under its common seal, if any, authorise any person, either generally or in respect of any specified matters, as its attorney to execute other deeds on its behalf in any place either in or outside India.

However, in case a company does not have a common seal, the above authorisation shall be made by 2 directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary.

(3) A deed signed by such an attorney on behalf of the company and under his seal shall bind the company.

As per Sec.2(51) — Key managerial personnel, in relation to a company, means—
(i) the CEO or the MD or the manager;
(ii) the company secretary;
(iii) the whole-time director;
(iv) the CFO;
(v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
(vi) such other officer as may be prescribed;
*It can be observed from above that a company may or may not have a common seal. If company decides to have a common seal then it has to affix the same for specified matters, execution of deeds on behalf of the company.

**Key Points**

- A company can be defined as an “artificial person”, invisible, intangible, created by or under law, with a distinct legal personality and perpetual succession. It is not affected by the death, insanity, or insolvency of an individual member.
- The memorandum of association is the document that sets up the company and the articles of association set out how the company is run, governed and owned.
- Once an association becomes incorporated it acquires a new legal status – it becomes a legal entity in its own right, separate from the individual members.
- A company of any class may convert itself as a company of other class by alteration of its MOA and AOA.
### UNIT 2 – PROSPECTUS AND ALLOTMENT OF SECURITIES

**Learning Objectives**
- Explain the procedure for issue of prospectus and other related concepts
- Know the criminal and civil liability for mis-statements in prospectus and punishment for fraudulently inducing persons to invest money
- Know Punishment for personation for acquisition, etc., of securities
- Comprehend the powers of SEBI
- Know about the allotment of securities by company
- Understand the concept of global depository receipt

### 2.0 INTRODUCTION

This unit constitutes chapter III of the Act consisting of sections 23 to 42 dealing with the prospectus and allotment of securities. The Act provides the manner in which securities can be issued by both public and private company. This chapter relating to issue of securities is covered under two headings Part I relates to issue of public offer and Part II relates to issue of securities through private placement.

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2.1 Introduction

One of the advantages of floating a company is raising of capital. Capital could be raised from public at large or from a defined group or inner circle (pre-known select group of persons). The former is called the ‘Public offer’ and the latter is called ‘Private Placement’. Capital acquisition is inflow of funds for the issuer and needs advertisement which should be in accordance with the relevant legal provisions so that any investor is not defrauded or be-fooled. On successful closure of the application process, securities are allotted to investors which could be then listed on an appropriate segment of a recognised stock exchange.

The provisions related to raising of capital such as issue of prospectus, allotment of shares etc. and other matters incidental thereto are contained in Chapter III of the Companies Act, 2013, which is divided into two parts:

Part I – Public Offer of the chapter comprise sections 23 to 41, and
Part II – Private Placement comprises section 42.

2.2 Public offer and Private Placement

As per Section 23 (1) A public company may issue securities—

(a) to public through prospectus (herein referred to as “public offer”) by complying with the provisions of this Part; or
(b) through private placement by complying with the provisions of Part II of this Chapter; or
(c) through a rights issue or a bonus issue in accordance with the provisions of this Act and
   in case of a listed company or a company which intends to get its securities listed also with
   the provisions of the Securities and Exchange Board of India Act, 1992 and the rules and
   regulations made thereunder.

As per Section 23(2), a private company may issue securities—
(a) by way of rights issue or bonus issue in accordance with the provisions of this Act; or
(b) through private placement by complying with the provisions of Part II of this Chapter.

Explanation —For the purposes of this Chapter, “public offer” includes initial public offer (IPO)
or further public offer (FPO) of securities to the public by a company, or an offer for sale of
securities (OFS) to the public by an existing shareholder, through issue of a prospectus.

As per Section 2 (81) —securities means the securities as defined in clause (h) of section 2 of
the Securities Contracts (Regulation) Act, 1956

“Securities" include—
(i) Shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities
   of a like nature in or of any incorporated company or other body corporate;
(ia) derivative;
(ib) units or any other instruments issued by any collective investment scheme to the investors
   in such schemes;
(ic) security receipt as defined in clause (2g) under section 2 of the Securitisation and
(id) units or any other such instrument issued to the investors under any mutual fund scheme.
   Securities however, shall not include any unit linked insurance policy or scrips or any such
   instrument or unit, by whatever name called, which provides a combined benefit risk on
   the life of the persons and investment by such persons and issued by an insurer referred
   to in clause (9) of section 2 of the Insurance Act, 1938.
(ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer
   being a special purpose distinct entity which possesses any debt or receivable, including
   mortgage debt, assigned to such entity, and acknowledging beneficial interest of such
   investor in such debt or receivable, including mortgage debt, as the case may be;
(ii) Government securities;
(iia) such other instruments as may be declared by the Central Government to be securities; and
(iii) rights or interests in securities;

Right and bonus issue - Right and bonus issue of securities by a private company shall be
governed by the section 62 under the chapter IV (Share capital and debentures) of this Act, whereas such issue by a public company shall be governed by section 23, and in the case of a listed company it shall also be governed by SEBI Act and its Regulation.

The provisions of Section 23 are tabulated below:

<table>
<thead>
<tr>
<th></th>
<th>Public Company</th>
<th>Private Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Offer (including IPO, FPO or OFS)</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Private Placement</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Rights issue / Bonus Issue</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Compliance with SEBI rules and regulations</td>
<td>Yes, for listed company or company proposed to be listed</td>
<td>No</td>
</tr>
</tbody>
</table>

**Example:** The Board of Directors of M/s R Investments Ltd. have allotted shares to the investors of the company without issuing a prospectus with the Registrar of Companies, Mumbai. Here in the given case according to Section 23 of the Companies Act, 2013, a public company can issue securities to the public only by issuing a prospectus. Section 26 (1) lays down the matters required to be disclosed and included in a prospectus and requires the registration of the prospectus with the Registrar before its issue. So, the company has violated with the above provisions of the Act and hence the allotment made is void. The company will have to refund the entire moneys received and will also be punishable under section 26 (9) of the Act.

**2.3 Power of Securities and Exchange Board to Regulate issue and Transfer of Securities, etc.**

As per the **Explanation to section 24** of this Act, it is hereby declared that all powers relating to all other matters relating to prospectus, return of allotment, redemption of preference shares and any other matter specifically provided in this Act, shall be exercised by the Central Government, the Tribunal or the Registrar, as the case may be.

**Section 24** lays down power of Securities and Exchange Board (SEBI) to regulate issue and transfer of securities, etc.
(1) As per Section 24(1) The provisions contained in this Chapter, Chapter IV which deals with the share capital and debentures, and in section 127 which deals with the punishment for failure to distribute dividends, shall,

(a) in so far as they relate to —

(i) issue and transfer of securities; and

(ii) non-payment of dividend,

by listed companies or those companies which intend to get their securities listed on any recognised stock exchange in India, except as provided under this Act, be administered by the Securities and Exchange Board by making regulations in this behalf;

(b) in any other case, be administered by the Central Government.

(2) The Securities and Exchange Board shall, in respect of matters specified in subsection (1) and the matters delegated to it under proviso to sub-section (1) of section 458, exercise the powers conferred upon it under sub-sections (1), (2A), (3) and (4) of section 11, sections 11A, 11B and 11D of the Securities and Exchange Board of India Act, 1992.
2.4 Prospectus

As per the definition given in Section 2(70) of the Companies Act, 2013, prospectus means any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of body corporate.

(I) Matters to be stated in prospectus

According to Section 26 (1), every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed.

The matter contained in the prospectus can be classified under three headings

(a) Firstly, under the general information, the prospectus shall contained the following information, namely —

   (i) names and addresses of the registered office of the company, company secretary, Chief Financial Officer, auditors, legal advisers, bankers, trustees, if any, underwriters and such other persons as may be prescribed;
(ii) dates of the opening and closing of the issue, and declaration about the issue of allotment letters and refunds within the prescribed time;

(iii) a statement by the Board of Directors about the separate bank account where all monies received out of the issue are to be transferred and disclosure of details of all monies including utilised and unutilised monies out of the previous issue in the prescribed manner;

(iv) details about underwriting of the issue;

(v) consent of the directors, auditors, bankers to the issue, expert's opinion, if any, and of such other persons, as may be prescribed;

(vi) the authority for the issue and the details of the resolution passed therefor;

(vii) procedure and time schedule for allotment and issue of securities;

(viii) capital structure of the company in the prescribed manner;

(ix) main objects of public offer, terms of the present issue and such other particulars as may be prescribed;

(x) main objects and present business of the company and its location, schedule of implementation of the project;

(xi) particulars relating to—
  (A) management perception of risk factors specific to the project;
  (B) gestation period of the project;
  (C) extent of progress made in the project;
  (D) deadlines for completion of the project; and
  (E) any litigation or legal action pending or taken by a Government Department or a statutory body during the last five years immediately preceding the year of the issue of prospectus against the promoter of the company;

(xii) minimum subscription, amount payable by way of premium, issue of shares otherwise than on cash;

(xiii) details of directors including their appointments and remuneration, and such particulars of the nature and extent of their interests in the company as may be prescribed; and

(xiv) disclosures in such manner as may be prescribed about sources of promoter's contribution;

(b) Secondly, under the Financial informations, Prospectus set out the following reports for the purposes of the financial information, namely:
(i) reports by the auditors of the company with respect to its profits and losses and assets and liabilities and such other matters as may be prescribed;

(ii) reports relating to profits and losses for each of the five financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries and in such manner as may be prescribed:

Provided that in case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out in such manner as may be prescribed, the reports relating to profits and losses for each of the financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries;

(iii) reports made in the prescribed manner by the auditors upon the profits and losses of the business of the company for each of the five financial years immediately preceding issue and assets and liabilities of its business on the last date to which the accounts of the business were made up, being a date not more than one hundred and eighty days before the issue of the prospectus:

Provided that in case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out in the prescribed manner, the reports made by the auditors upon the profits and losses of the business of the company for all financial years from the date of its incorporation, and assets and liabilities of its business on the last date before the issue of prospectus; and

(iv) reports about the business or transaction to which the proceeds of the securities are to be applied directly or indirectly;

(c) **Thirdly, under the statutory information**, prospectus shall make a declaration about the compliance of the provisions of this Act and a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules and regulations made thereunder; and

(d) state such other matters and set out such other reports, as may be prescribed.

**(2) Exceptions:** Nothing in sub-section (1) shall apply—

(a) to the issue to existing members or debenture-holders of a company, of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant has a right to renounce the shares or not under sub-clause (ii) of clause (a) of sub-section (1) of section 62 in favour of any other person; or
(b) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange.

(3) **Application of sub-section (1) to prospectus or to an application related to formation of a company:** Subject to sub-section (2), the provisions of sub-section (1) shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently. The date indicated in the prospectus shall be deemed to be the date of its publication.

(4) **Prospectus to be issued after registration and compliance with other formalities:** No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless on or before the date of its publication, there has been delivered to the Registrar for registration, a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his duly authorised attorney.

(5) **Exclusion of expert statement:** A prospectus issued under sub-section (1) shall not include a statement purporting to be made by an expert unless the expert is a person who is not, and has not been, engaged or interested in the formation or promotion or management, of the company and has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for registration and a statement to that effect shall be included in the prospectus.

(6) **Mention compliances of the formalities:** Every prospectus issued under sub-section (1) shall, on the face of it—

(a) state that a copy has been delivered for registration to the Registrar as required under sub-section (4); and

(b) specify any documents required by this section to be attached to the copy so delivered or refer to statements included in the prospectus which specify these documents.

(7) **Compliance of requirements of this sections before registration:** The Registrar shall not register a prospectus unless the requirements of this section with respect to its registration are complied with and the prospectus is accompanied by the consent in writing of all the persons named in the prospectus.

(8) **Period for the issue of prospectus:** No prospectus shall be valid if it is issued more than ninety days after the date on which a copy thereof is delivered to the Registrar under sub-section (4).

(9) **Punishment in case of contravention:** If a prospectus is issued in contravention of the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees and
every person who is knowingly a party to the issue of such prospectus shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both.

The major minimum contents of a prospectus or deemed prospectus are underlined in the sub-section (1) of Section 26 above. In addition to these there are substantial disclosure requirements which are prescribed under Companies (Prospectus and Allotment of Securities) Rules, 2014.

These requirements are not applicable:

- to the issue to existing members or debenture-holders of a company
- to the issue in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange

Other significant requirements as prescribed by Section 26:

- Prospectus to be registered with the ROC within ninety days before issue and this fact should be stated in the prospectus. The Registrar shall not register a prospectus unless the requirements of this section with respect to its registration are complied with and the prospectus is accompanied by the consent in writing of all the persons named in the prospectus.
- Expert’s opinion could only be included if supported by his consent for such inclusion and that consent is not withdrawn before delivering the prospectus to ROC for registration. As per Section 2(38) —expert includes an engineer, a valuer, a Chartered Accountant, a Company Secretary, a Cost Accountant and any other person who has the power or authority to issue a certificate in pursuance of any law for the time being in force;

Sub-section (9) of Section 26 (as explained above) contains penal provisions.
(II) Public offer of securities to be in dematerialised form

(1) Section 29(1) states that every company making public offer; and Such other class or classes of public companies as may be prescribed under the Rule 9 of the Companies (Prospectus and Allotment of Securities) Rules, 2014, shall issue the securities only in dematerialised form by complying with the provisions of the Depositories Act, 1996 and the regulations made thereunder.

(2) Any company, other than a company mentioned in sub-section (1), may convert its securities into dematerialised form or issue its securities in physical form in accordance with the provisions of this Act or in dematerialised form in accordance with the provisions of the Depositories Act, 1996 and the regulations made thereunder.

Securities could be held in physical or dematerialised form. However public offer of securities has to be mandatorily in demat form in accordance with the Depositories Act, 1996. Demat ensures fool proof control over issue, sale, purchase, pledge, extinguishment of securities lending transparency and credibility to the entire process and securities markets.

According to Rule 9 of Companies (Prospectus and Allotment of Securities) Rules, 2014 (Dematerialisation of securities)

The promoters of every public company making a public offer of any convertible securities may hold such securities only in dematerialised form:

Provided that the entire holding of convertible securities of the company by the promoters held in physical form up to the date of the initial public offer shall be converted into dematerialised form before such offer is made and thereafter such promoter shareholding shall be held in dematerialized form only.

(III) Shelf Prospectus, Red Herring Prospectus and Abridged Prospectus

Section 31 and Section 32 deals with important provision related to Shelf Prospectus and Red-herring Prospectus respectively. These twin provisions play a significant role in facilitating commercial and logistical consideration involved in the funds raising cycle.

Imagine a situation where the issuer company issues debentures frequently and has to file a prospectus every time it issues a new series of debenture. In this case, concept of shelf prospectus comes into play. Literally, it means prospectus with a given shelf life. Any number of issues could be made during the tenure of the shelf prospectus. The only caveat is to supplement the shelf prospectus by an “information memorandum” containing key updates or changes.

Likewise, developments in financial markets allow innovative methods of raising funds making the most of favourable market conditions. Timing the issue and Book building of issue are facilitated by the concept of red herring prospectus whereby the price per security and number of securities are left open to be decided post closure of the issue.
**Shelf prospectus** – The expression “shelf prospectus” means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus.

(1) **Filing of shelf prospectus with the registrar:** According to section 31, any class or classes of companies, as the Securities and Exchange Board may provide by regulations in this behalf, may file a shelf prospectus with the Registrar at the stage-

(i) of the first offer of securities included therein which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under that prospectus, and

(ii) in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required.

(2) **Filing of information memorandum with the shelf prospectus:** A company filing a shelf prospectus shall be required to file an information memorandum containing all material facts relating to new charges created, changes in the financial position of the company as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer of securities and such other changes as may be prescribed, with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus:

Provided that where a company or any other person has received applications for the allotment of securities along with advance payments of subscription before the making of any such change, the company or other person shall intimate the changes to such applicants and if they express a desire to withdraw their application, the company or other person shall refund all the monies received as subscription within fifteen days thereof.

(3) **Memorandum together with the shelf prospectus shall be deemed to be a prospectus:** Where an information memorandum is filed, every time an offer of securities is made under sub-section (2), such memorandum together with the shelf prospectus shall be deemed to be a prospectus.

**Red herring prospectus**— The expression “red herring prospectus” means a prospectus which does not include complete particulars of the quantum or price of the securities included therein.

Section 32 deals with the issue of red herring prospectus by a company. Accordingly law states that-

(i) **Issue a red herring prospectus prior to the issue of a prospectus:** A company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus.
(ii) **Filing with the registrar**: A company proposing to issue a red herring prospectus shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer.

(iii) **Same obligation**: A red herring prospectus shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus.

(iv) **Filing of red herring prospectus with registrar and SEBI upon closing of offer**: Upon the closing of the offer of securities under this section, the prospectus stating therein the total capital raised, whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board.

**Abridged prospectus** means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf. [Refer Para No. 2.7 of this Unit]

(IV) **Document containing offer of securities for sale to be deemed prospectus**

Section 25 of the Act states the law related to the document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company.

**Offer for sale of securities (OFS)- Meaning**

OFS as it commonly called are commonly used by many companies to dilute promoters’ holdings or to provide exit route to venture capitalist.

It is different from IPO or FPO in the sense that under OFS securities are offloaded by earlier allotees through the issuer company instead of directly by the issuer company. In OFS there is no change in the Balance Sheet of the company as no new capital comes into picture.

(1) **Documents which deemed to be a prospectus**: As per Section 25(1), where a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company; and all enactments and rules of law as to the contents of prospectus and as to liability in respect of mis-statements, in and omissions from, prospectus, or otherwise relating to prospectus, shall apply with the modifications specified in subsections (3) and (4) and shall have effect accordingly, as if the securities had been offered to the public for subscription and as if persons accepting the offer in respect of any securities were subscribers for those securities, but without prejudice to the liability, if any, of the persons by whom the offer is made.
in respect of mis-statements contained in the document or otherwise in respect thereof.

(2) **Securities offered for sale to the public**: For the purposes of this Act, it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, securities was made with a view to the securities being offered for sale to the public if it is shown—

(a) that an offer of the securities or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or

(b) that at the date when the offer was made, the whole consideration to be received by the company in respect of the securities had not been received by it.

(3) **Effect of section 26**: Section 26 as applied by section 25 shall have effect as if —

(i) it required a prospectus to state in addition to the matters required by that section to be stated in a prospectus—

(a) the net amount of the consideration received or to be received by the company in respect of the securities to which the offer relates; and

(b) the time and place at which the contract where under the said securities have been or are to be allotted may be inspected;

(ii) the persons making the offer were persons named in a prospectus as directors of a company.

(4) **Person making an offer is a company or a firm**: Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document referred to in sub-section (1) is signed on behalf of the company or firm by two directors of the company or by not less than one-half of the partners in the firm, as the case may be.

Section 25 regards document for offer of sale of securities as a deemed prospectus (unless contrary proved) if:

- an offer of the securities or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or

- at the date when the offer was made, the whole consideration to be received by the company in respect of the securities had not been received by it.

Accordingly, all applicable provisions relating to prospectus viz., mis-statement, contents, civil, criminal liability etc. are applicable to the said deemed prospectus. There is no dilution of liability for the persons making the offer which is in addition to liability of the company whose securities are offered for sale. Additionally, below to be disclosed as well in the deemed prospectus:
the net amount of the consideration received or to be received by the company in respect of the securities to which the offer relates; and

- the time and place at which the contract where under the said securities have been or are to be allotted may be inspected;

The purpose is to protect gullible investors in all possible manners.

(V) **Offer of sale of shares by certain members of company**

Sections 28 of the Act deals with the Offer for sale of securities by certain members of company.

1. Where certain members of a company propose, in consultation with the Board to offer, in accordance with the provisions of any law for the time being in force, whole or part of their holding of shares to the public, they may do so in accordance with such procedure as may be prescribed.

2. Any document by which the offer of sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company and all laws and rules made thereunder as to the contents of the prospectus and as to liability in respect of mis-statements in and omission from prospectus or otherwise relating to prospectus shall apply as if this is a prospectus issued by the company.

3. The members, whether individuals or bodies corporate or both, whose shares are proposed to be offered to the public, shall collectively authorise the company, whose shares are offered for sale to the public, to take all actions in respect of offer of sale for and on their behalf and they shall reimburse the company all expenses incurred by it on this matter.

(VI) **Variation in terms of contract or objects in prospectus [Section 27]**

Section 27 deals with Variation in terms of contract or objects in prospectus. Once funds are raised through a given prospectus, the principles of “doctrine of ultra vires” (*mutatis mutandis*) comes into play i.e., the company has to use the funds strictly in accordance with the prospectus. Deviations are required to be pre-approved by the investors and recall option to be given to dissenting investors. Deviation regarding use of issue proceeds for buying, trading or otherwise dealing in equity shares of any other listed company is not permitted.

Accordingly, the section states that-

1. **Variation on approval in general meeting by passing of SR:** A company shall not, at any time, vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued, except subject to the approval of, or except subject to an authority given by the company in general meeting by way of special resolution:

   Provided that the details, as may be prescribed, of the notice in respect of such resolution to shareholders, shall also be published in the newspapers (one in English
and one in vernacular language) in the city where the registered office of the company is situated indicating clearly the justification for such variation:

Provided further that such company shall not use any amount raised by it through prospectus for buying, trading or otherwise dealing in equity shares of any other listed company.

(2) Exit offer to dissenting shareholders: The dissenting shareholders being those shareholders who have not agreed to the proposal to vary the terms of contracts or objects referred to in the prospectus, shall be given an exit offer by promoters or controlling shareholders at such exit price, and in such manner and conditions as may be specified by the Securities and Exchange Board by making regulations in this behalf.

2.5 Securities to be dealt with in stock exchanges

(1) Filing of an application with recognised stock exchange: In accordance to Section 40(1) every company making public offer shall, before making such offer, make an application to one or more recognised stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges.

(2) Prospectus to state name of stock exchange: Where a prospectus states that an application has been made, such prospectus shall also state the name or names of the stock exchange in which the securities shall be dealt with.

(3) To maintain separate bank account: All monies received on application from the public for subscription to the securities shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—

(a) for adjustment against allotment of securities where the securities have been permitted to be dealt with in the stock exchange or stock exchanges specified in the prospectus; or

(b) for the repayment of monies within the time specified by the Securities and Exchange Board, received from applicants in pursuance of the prospectus, where the company is for any other reason unable to allot securities.

(4) Condition purporting to waive compliance shall be void: Any condition purporting to require or bind any applicant for securities to waive compliance with any of the requirements of this section shall be void.

(5) In case of default: If a default is made in complying with the provisions of this section, both the company and the officer of the company shall be liable.
Payment of commission: A company may pay commission to any person in connection with the subscription to its securities, whether absolute or conditional, subject to such conditions as given in Rule 13 of the *Companies (Prospectus and Allotment of Securities) Rules, 2014*. 

**Conditions for the payment of commission:**

(a) the payment of such commission shall be **authorized in the company’s articles of association**;

(b) the commission may be **paid out of proceeds of the issue or the profit** of the company or both;

(c) **Rate of commission:** Following is the rate of commission to be paid to the person:

<table>
<thead>
<tr>
<th>in case of shares</th>
<th>in case of debentures</th>
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<tbody>
<tr>
<td>□ shall not exceed 5% of the price at which the shares are issued, or</td>
<td>□ shall not exceed 2.5% of the price at which the debentures are issued, or</td>
</tr>
<tr>
<td>□ a rate authorised by the articles,</td>
<td>□ as specified in the company’s articles,</td>
</tr>
<tr>
<td>□ whichever is less</td>
<td>□ whichever is less</td>
</tr>
</tbody>
</table>

(d) **Disclosure of the particulars:** the prospectus of the company shall disclose the following particulars -

(i) the name of the underwriters;

(ii) the rate and amount of the commission payable to the underwriter; and
(iii) the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.

(e) **No commission to be paid:** there shall not be paid commission to any underwriter on securities which are not offered to the public for subscription;

(f) **Copy of payment of commission to be delivered to registrar:** a copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

**Example:** A public limited company which went in for Public issue of shares had applied for listing of shares in three recognised Stock Exchanges and out of it only two had given permission for listing. Can the company proceed for allotment of shares?

**Answer:** Every company making a public offer shall, before making such offer, make an application to one or more recognised stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges. [Section 40 (1)]

Where a prospectus states that an application has been made, such prospectus shall also state the name or names of the stock exchange in which the securities shall be dealt with. [Section 40 (2)]

From the above it is clear that not only the company has to apply for listing of the securities at a recognized stock exchange but also obtain permission thereof before making the public offer.

Hence, under the Companies Act, 2013 by making the offer of shares before getting the approval from the stock exchanges, it has violated the provisions of section 40.

**Example:** The Board of Directors of a company decide to pay 5% of issue price as underwriting commission to the underwriters. On the other hand the Articles of Association of the company permit only 3% commission. The Board of Directors further decide to pay the commission out of the proceeds of the share capital. Are the decisions taken by the Board of Directors valid under the Companies Act, 2013?

**Answer:** Under the **Companies (Prospectus and Allotment of Securities) Rules, 2014** the rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent (5%) of the price at which the shares are issued or a rate authorised by the articles, whichever is less.

The same rules allow the commission to be paid out of proceeds of the issue or the profit of the company or both. Therefore, the decision of the Board of Directors to pay 5% commission to the underwriters is invalid while the decision to pay out of the proceeds of the share issue is valid.

### 2.6 Advertisement of prospectus [SECTION 30]

As per Section 30 where an advertisement of any prospectus of a company is published in any manner, the following shall be specified in the advertisement:

(i) the contents of its memorandum as regards the objects, the liability of members and the amount of share capital of the company, and
(ii) the names of the signatories to the memorandum and the number of shares subscribed for by them, and
(iii) its capital structure.

2.7 Issue of application forms for securities

Section 33 deals with “abridged” prospectus means short or edited prospectus in the prescribed manner which accompanies the application form for securities.

Most of you must have seen the physical application form for application of securities with fine prints and wondered who cares to read those fine prints. You are right to the extent that High Net worth Individual (HNI) investors or institutional investor go minutely through the official full prospectus. However, to plug any information gaps for the small investors the provisions for abridged prospectus are made in the Act irrespective of the fact that these are not paid due attention.

Abridged Prospectus - Issue of application forms for securities

(1) According to Section 33(1), no form of application for the purchase of any of the securities of a company shall be issued unless such form is accompanied by an abridged prospectus:

Exception: Provided that nothing in sub-section (1) shall apply if it is shown that the form of application was issued—

(a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to such securities; or

(b) in relation to securities which were not offered to the public.

(2) A copy of the prospectus shall, on a request being made by any person before the closing of the subscription list and the offer, be furnished to him.

(3) If a company makes any default in complying with the provisions of this section, it shall be liable to a penalty of fifty thousand rupees for each default.

2.8 Allotment of securities by company

“Allotment” means the appropriation out of previously un-appropriated capital of a company, of a certain number of shares to a person. Till such allotment, the shares do not exist as such. It is on allotment that the shares come into existence.

According to Section 39(1) no allotment of any securities of a company offered to the public for subscription shall be made unless the amount stated in the prospectus as the minimum amount has been subscribed and the sums payable on application for the amount so stated have been paid to and received by the company by cheque or other instrument.

(2) The amount payable on application on every security shall not be less than five per cent. of the nominal amount of the security or such other percentage or amount, as may be specified
by the Securities and Exchange Board by making regulations in this behalf.

(3) If the stated minimum amount has not been subscribed and the sum payable on application is not received within a period of thirty days from the date of issue of the prospectus, or such other period as may be specified by the Securities and Exchange Board, the amount received under sub-section (1) shall be returned within such time and manner as may be prescribed.

(4) Whenever a company having a share capital makes any allotment of securities, it shall file with the Registrar a return of allotment in such manner as may be prescribed.

(5) In case of any default under sub-section (3) or sub-section (4), the company and its officer who is in default shall be liable to a penalty, for each default, of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

<table>
<thead>
<tr>
<th>Allotment of securities</th>
<th>Minimum amount subscribed, and application money have been paid and received by the company</th>
<th>application money shall not be less than 5% or such other percentage or amount as specified by SEBI</th>
</tr>
</thead>
</table>

<table>
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<tr>
<th>Minimum amount not subscribed and application money not received</th>
<th>Such other period as specified by SEBI</th>
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<th>amount received shall be returned within 15 days from the closure of issue</th>
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<th>Where company makes an allotment of securities</th>
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<th>shall file a return of allotment with the registrar</th>
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<th>In case of default</th>
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<tr>
<td>Company shall pay penalty of Rs.1000 for each day during which such default continues, or 1 lac which ever is less</td>
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Once securities are issued and subscribed for, these needs to be allotted in tune with the conditions as given below:

- Minimum subscription to be received within 30 days of issue of prospectus. In case minimum subscription is not received, the issue is regarded as failed. To take care of such eventuality, the merchant bankers in case of public offer resort to underwriting, suitable pricing, bringing in anchor investors etc. among other things. In case failed issue, the entire issue proceeds need to be refunded along with applicable interest.

- Application money > 5% of the nominal amount.

- Return of allotment needs to be filed with the ROC

**Example:** After receiving 80% of the minimum subscription as stated in the prospectus, a company allotted 100 equity shares in favour of ‘X’. The company deposited the said amount in the bank but withdrew 50% of the amount, before finalisation of the allotment, for the purchase of certain assets. X refuses to accept the allotment of shares on the ground that the allotment is violative of the provisions of the Companies Act, 2013.

**Answer:** The company has received 80% of the minimum subscription as stated in the prospectus. Hence, the allotment is in contravention of section 39(1) of the Companies Act, 2013 which prohibits a company from making any allotment of securities until it has received the amount of minimum subscription stated in the prospectus. Under section 39 (3), it is required to refund the money received (i.e. 80% of the minimum subscription) to the applicants. It has no other option available.

Therefore, in the present case, X is within his rights refuses to accept the allotment of shares which has been illegally made by the company.

### 2.9 Mis-statements in prospectus

In common parlance, mis-statement is the act of stating something that is false or not accurate. It could either be by commission or by omission or by both.

Mis-statement of prospectus is a serious offence which attracts section 34 and / or section 35.

Liabilities can be classified under two headings:

<table>
<thead>
<tr>
<th>Civil Liability</th>
<th>Criminal Liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Loss or damage is an essential condition</td>
<td>• Mens rea (guilty mind) is an essential condition</td>
</tr>
<tr>
<td>• Civil Procedure Code, 1908 applicable</td>
<td>• Criminal Procedure Code, 1973 applicable</td>
</tr>
<tr>
<td>• Offence against the counterparty</td>
<td>• Offence is regarded committed against the state</td>
</tr>
</tbody>
</table>
Criminal liability for mis-statements in prospectus [Section 34]

Where a prospectus, issued, circulated or distributed under this Chapter, includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorises the issue of such prospectus shall be liable under section 447:

Provided that nothing in this section shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

Civil liability for mis-statements in prospectus [Section 35]

(1) Liabilities of persons: According to Section 35(1), where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person who—

(a) is a director of the company at the time of the issue of the prospectus;
(b) has authorised himself to be named and is named in the prospectus as a director of the company, or has agreed to become such director, either immediately or after an interval of time;
(c) is a promoter of the company;
(d) has authorised the issue of the prospectus; and
(e) is an expert referred to in sub-section (5) of section 26,

shall, without prejudice to any punishment to which any person may be liable under section 36, be liable to pay compensation to every person who has sustained such loss or damage.

(2) Exceptions: No person shall be liable if he proves—

(a) that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
(b) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.
(c) that, as regards every misleading statement purported to be made by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the report or valuation; and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe, that the person making the statement was competent to make it and that the said person had given the consent required by sub-section (5) of section 26 to the issue of the prospectus and had not
withdrawn that consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder.

(3) **Liability on defraud:** Where it is proved that a prospectus has been issued with intent to defraud the applicants for the securities of a company or any other person or for any fraudulent purpose, every person referred to in subsection (1) shall be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus.

**Example:** A company issued a prospectus. All the statements contained therein were literally true. It also stated that the company had paid dividends for a number of years, but did not disclose the fact that the dividends were not paid out of trading profits, but out of capital profits. An allottee of shares wants to avoid the contract on the ground that the prospectus was false in material particulars.

**Answer:** The non disclosure of the fact that dividends were paid out of capital profits is a concealment of material fact as a company is normally required to distribute dividend only from trading or revenue profits and under exceptional circumstances can do so out of capital profits. Hence, a material misrepresentation has been made. Hence, in the given case the allottee can avoid the contract of allotment of shares.

**Example:** An allottee of shares in a Company brought action against a Director in respect of false statements in prospectus. The director contended that the statements were prepared by the promoters and he has relied on them and so director is not liable.

**Answer:** Yes, the Director shall be held liable for the false statements in the prospectus under sections 34 and 35 of the Companies Act, 2013. Section 34 imposes a criminal punishment on every person who authorises the issue of such prospectus, and section 35 more particularly includes a director of the company in the imposition of liability for such mis statements. Therefore, in the present case the director cannot hide behind the excuse that he had relied on the promoters for making correct statements in the prospectus.
2.10 Punishment for fraudulently inducing persons to invest money
[Section 36]

Any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into, or to offer to enter into—

(a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting securities; or

(b) any agreement, the purpose or the pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities; or

(c) any agreement for, or with a view to obtaining credit facilities from any bank or financial institution,

shall be liable for action under section 447.

2.11 Action by affected persons [Section 37]

A suit may be filed or any other action may be taken under section 34 or section 35 or section 36 by any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the prospectus.

Class Actions – Gift of Companies Act, 2013

Class action suit is for a group of people filing a suit against a defendant who has caused common harm to the entire group or class. This is not like a common litigation method where one defendant files a case against another defendant while both the parties are available in court. In the case of class action suit, the class or the group of people filing the case need not be present in the court and can be represented by one petitioner. The benefit of these type of suits is that if several people have been injured by one defendant, each one of the injured people need not file a case separately but all of the people can file one single case together against the defendant.

The need for these types of suits was first felt in the context of securities market during the time of Satyam Scam, where a large group of people were cheated regarding their hard earned money invested in Stock Market. During that time, it was felt that it was not at all viable regarding cost effectiveness for a small stakeholder to file a case independently against the defendant. Millions of cheated investors during that time formed a large group and filed the case against the company, but since there was no available legal remedy or law which can actually support this type of litigation of a group filing charges, it became tough for those investors to take a recourse or gain advantage in the Indian Judicial System by this method. Class action suits in India were so far filed under the guise of public interest litigations. Courts were free to dismiss these. These shareholders ran pillar to post right from the National Consumer Disputes
Redressal Commission up to the extent of Supreme Court and had their claims rejected.

**Example:** M applies for share on the basis of a prospectus which contains mis-statement. The shares are allotted to him, who afterwards transfers them to N. Can N bring an action for a rescission on the ground of mis-statement under section 37 of the Companies Act, 2013?

**Answer:** No, N cannot bring an action for rescission of the contract to buy shares from M on the ground of mis-statement as under section 37 of the Companies Act, 2013. A suit may be filed or any other action may be taken under section 34 or section 35 or section 36 only by any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the prospectus.

### 2.12 Punishment for Personation for Acquisition, etc., of Securities

**[Section 38]**

(1) According to section 38 where any person who—

(a) makes or abets making of an application in a fictitious name to a company for acquiring, or subscribing for, its securities; or

(b) makes or abets making of multiple applications to a company in different names or in different combinations of his name or surname for acquiring or subscribing for its securities; or

(c) otherwise induces directly or indirectly a company to allot, or register any transfer of, securities to him, or to any other person in a fictitious name,-shall be liable for action under section 447.

(2) The provisions of sub-section (1) shall be prominently reproduced in every prospectus issued by a company and in every form of application for securities.

(3) Where a person has been convicted under this section, the Court may also order disgorgement of gain, if any, made by, and seizure and disposal of the securities in possession of, such person.

(4) The amount received through disgorgement or disposal of securities under sub-section (3) shall be credited to the Investor Education and Protection Fund.

### 2.13 Punishment for Fraud

**Meaning of fraud:** “Fraud” in relation to affairs of a company or any body corporate, includes-

- any act,
- omission,
- concealment of any fact, or
 abuse of position
committed by any person, or any other person with the connivance in any manner, with intent
to deceive, to gain undue advantage from, or to injure the interests of, the company or its
shareholders or its creditors or any other person, whether or not there is any wrongful gain or
wrongful loss;
“Wrongful gain” means the gain by unlawful means of property to which the person gaining is
not legally entitled;
“Wrongful loss” means the loss by unlawful means of property to which the person losing is
legally entitled.
According to section 447 of the Act, any person who is found to be guilty of fraud, shall be
punishable with imprisonment for a term which shall not be less than six months but which may
extend to ten years and shall also be liable to fine which shall not be less than the amount
involved in the fraud, but which may extend to three times the amount involved in the fraud:
Provided that where the fraud in question involves public interest, the term of imprisonment shall
not be less than three years.

2.14 Global depository receipt (GDR) [Section 41]
GDRs are issued to broad-base the investor pool and to take advantage of the international
investment appetite. Securities are offered to a depository which in turn issue Depository
Receipts to international investors. These receipts are traded on international stock exchanges.
As per Section 41, a company may, after passing a special resolution in its general meeting,
issue depository receipts in any foreign country in such manner, and subject to such conditions,
as may be prescribed.
The Companies (Issue of Global Depository Receipts) Rules, 2014 and Depository Receipts
Scheme, 2014 prescribes the necessary conditions on this regard.
The Companies (Issue of Global Depository Receipts) Rules, 2014, lays the conditions and the
manner in which a company may issue depository receipts in a foreign country.
Eligibility to issue depository receipts. - A company may issue depository receipts provided
it is eligible to do so in terms of the Scheme and relevant provisions of the Foreign Exchange
Management Rules and Regulations.
“Scheme” means the Foreign Currency Convertible Bonds and Ordinary Shares (Through
Depository Receipt Mechanism) Scheme, 1993 or any modification or re-enactment thereof.
Conditions for issue of depository receipts.–
(1) Passing of resolution: The Board of Directors of the company intending to issue
depository receipts shall pass a resolution authorising the company to do so.
(2) **Approval of shareholders:** The Company shall take prior approval of its shareholders by a special resolution to be passed at a general meeting:

(3) **Depository receipts shall be issued by an overseas depository bank:** The depository receipts shall be issued by an overseas depository bank appointed by the company and the underlying shares shall be kept in the custody of a domestic custodian bank.

(4) **Compliance with all the provisions, schemes, regulations etc:** The Company shall ensure that all the applicable provisions of the Scheme and the rules or regulations or guidelines issued by the Reserve Bank of India are complied with before and after the issue of depository receipts.

(5) **Compliance report to be placed at the meeting:** The company shall appoint a merchant banker or a practising chartered accountant or a practising cost accountant or a practising company secretary to oversee all the compliances relating to issue of depository receipts and the compliance report taken from such merchant banker or practising chartered accountant or practising company secretary, as the case may be, shall be placed at the meeting of the Board of Directors of the company or of the committee of the Board of directors authorised by the Board in this regard to be held immediately after closure of all formalities of the issue of depository receipts:

Provided that the committee of the Board of directors referred to above shall have at least one independent director in case the company is required to have independent directors.

**Manner for issue of depository receipts—**

(1) The depository receipts can be issued by way of public offering or private placement or in any other manner prevalent abroad and may be listed or traded in an overseas listing or trading platform.

(2) The depository receipts may be issued against issue of new shares or may be sponsored against shares held by shareholders of the company in accordance with such conditions as the Central Government or Reserve Bank of India may prescribe or specify from time to time.

(3) The underlying shares shall be allotted in the name of the overseas as depository bank and against such shares, the depository receipts shall be issued by the overseas depository bank abroad.

**Proceeds of issue** - The proceeds of issues of depository receipts shall either be remitted to a bank account in India or deposited in an Indian bank operating abroad or any foreign bank (which is a Scheduled Bank under the Reserve Bank of India Act, 1934) having operations in India with an agreement that the foreign bank having operations in India shall take responsibility for furnishing all the information which may be required and in the event of a sponsored issue of Depository Receipts, the proceeds of the sale shall be credited to the respective bank account of the shareholders.
Right to vote to the holder of depository receipts-

(1) A holder of depository receipts may become a member of the company and shall be entitled to vote as such only on conversion of the depository receipts into underlying shares after following the procedure provided in the Scheme and the provisions of this Act.

(2) Until the conversion of depository receipts, the overseas depository shall be entitled to vote on behalf of the holders of depository receipts in accordance with the provisions of the agreement entered into between the depository, holders of depository receipts and the company in this regard.

Non applicability of certain provisions of the Act –

(1) The provisions of the Act and any rules related to public issue of shares or debentures shall not apply to issue of depository receipts abroad.

(2) The offer document, if prepared for the issue of depository receipts, shall not be treated as a prospectus or an offer document within the meaning of this Act and all the provisions as applicable to a prospectus or an offer document shall not apply to a depository receipts offer document.

(3) Notwithstanding anything contained under section 88 (Register of members etc.) of the Act, until the redemption of depository receipts, the name of the overseas depository bank shall be entered in the Register of Members of the company.

For example: Many Indian companies have their GDRs and ADRs (American Depository Receipts) listed on international stock exchanges like Infosys, HDFC Bank, RIL, ICICI Bank, L&T, etc.

2.15 Private Placement – Offer or Invitation for Subscription of Securities on Private Placement [Section 42]

“Private placement” means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies below conditions. Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions of this Act, and the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 shall be required to be complied with if a company makes an offer or accepts monies in contravention of this section, the company, its promoters and directors shall be liable for a penalty which may extend to the amount involved in the offer or invitation or two crore rupees, whichever is higher, and the company shall also refund all monies to subscribers within a period of thirty days of the order imposing the penalty.

1 In case of Nidhis, section 42 except sub-section (1), explanation (II) to sub-section (2), (4), (6), (8), (9) and (10) shall not apply. Vide Notification dated 5th June, 2015
Requirements of offer or invitation for subscription of securities on private placement: [Section 42]

(1) **Issue of private placement offer letter**: According to Section 42(1), a company may, make private placement through issue of a private placement offer letter.

(2) **Offer/invitation to number of persons**: The offer of securities or invitation to subscribe securities, shall be made to such number of persons not exceeding fifty or such higher number as may be prescribed, in a financial year and on such conditions (including the form and manner of private placement) as may be prescribed.

As per the Rule 14 sub-rule (2) of the *Companies (Prospectus and Allotment of Securities) Rules, 2014*, limit on membership i.e., the higher number, have been prescribed. According to it, offer of securities or invitation to subscribe securities shall be made to not more than two hundred persons in the aggregate in a financial year.

However Qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option as per provisions of section 62 (1)(b), are excluded from the limits.

“Qualified institutional buyer” means the qualified institutional buyer as defined in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 as amended from time to time.

**Offer/ invitation made to more than the prescribed number of persons**: If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of this Chapter.

(3) **No issue of fresh offer/ invitation**: No fresh offer or invitation under this section shall be made unless the allotments with respect to any offer or invitation made earlier-

   (i) have been completed, or
   (ii) that offer or invitation has been withdrawn, or
   (iii) abandoned by the company.

(4) **Offer / invitation treated as public offer**: Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions of this Act, and the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 shall be required to be complied with.

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2 This provision shall not apply on specified IFSC Public and IFSC Private company. (Notification dated 4th January, 2017)
(5) **Payment of amount:** All monies payable towards subscription of securities under this section shall be paid through cheque or demand draft or other banking channels but not by cash.

(6) **Time for allotment of securities:** A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities.³

**Default in allotment of securities:** Where the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent. per annum from the expiry of the sixtieth day:

**Separate Bank Account:** Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—

(a) for adjustment against allotment of securities; or

(b) for the repayment of monies where the company is unable to allot securities.

(7) **Offers made to the persons whose name is recorded:** All offers covered under this section shall be made only to such persons whose names are recorded by the company prior to the invitation to subscribe, and that such persons shall receive the offer by name, and that a complete record of such offers shall be kept by the company in such manner as may be prescribed and complete information about such offer shall be filed with the Registrar within a period of thirty days of circulation of relevant private placement offer letter.

(8) **No publication required:** No company offering securities under this section shall release any public advertisements or utilise any media, marketing or distribution channels or agents to inform the public at large about such an offer.

(9) **Filing with the registrar:** Whenever a company makes any allotment of securities under this section, it shall file with the Registrar a return of allotment in such manner as may be prescribed, including the complete list of all security-holders, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed.

(10) **In contravention of the section:** If a company makes an offer or accepts monies in contravention of this section-

³ In the given provision, in case of specified IFSC public and IFSC Private company for the word “60 days” it shall be “90 days”.

⁴ This provision [Section 42(7)] shall not apply to specified IFSC public and IFSC private company.

*(Notification dated 4th July, 2017)*
**Persons liable** | **Penalty**
---|---
Company, Promoters and Directors | • May extend to the amount involved in the offer or invitation, or
• Two crore rupees, whichever is higher

Company | • Shall also refund all monies to subscribers within a period of thirty days of the order imposing the penalty.

**Procedure of allotment of securities through Private placement**

- Issue of private placement letter
- Payment of money towards subscription
- Allotment of securities within 60 days from receipt of application money
- Transfer amount in separate bank account
- Return of allotment filed with registrar with complete list of security holders
- In case of contravention, Company, promoters and directors shall be liable for penalty

**Procedure in case of failure of allotment of securities through Private placement**

1. Company fails in allotment of securities within 60 days from receipt of application money
2. Company shall repay application money within 15 days from the date of expiry of 60 days
3. Company then also fails to repay the application money within the aforesaid period
4. Company shall be liable to repay application money + Interest @12% p.a from expiry of 60th day
As per Rule 14(2) of the Companies (Prospectus and Allotment of Securities) Rules, 2014, certain restrictions has been put on the companies to make a private placement of its securities. A company shall not make a private placement of its securities, unless-

(a) **Previous approval of shareholder:** The proposed offer of securities or invitation to subscribe securities has been previously approved by the shareholders of the company, by a Special Resolution, for each of the Offers or Invitations.

Provided that in the explanatory statement annexed to the notice for the general meeting the basis or justification for the price (including premium, if any) at which the offer or invitation is being made shall be disclosed.

Whereas in case of offer or invitation for non-convertible debentures it shall be sufficient if the company passes previous special resolution only once in a year for all the offers or invitation for such debentures during the year.

Provided also that in case of an offer or invitation for non-convertible debentures referred to in the second proviso, made within a period of six months from the date of commencement of these rules, the special resolution referred to in the second proviso may be passed within the said period of six months from the date of commencement of these rules.

(b) **Offer/ invitation to the number of persons:** Such offer or invitation shall be made to not more than two hundred persons in the aggregate in a financial year.

Provided that any offer or invitation made to qualified institutional buyers, or to employees of the company under a scheme of employees stock option as per provisions of clause (b) of sub-section (1) of section 62 shall not be considered while calculating the limit of two hundred persons.

**Explanation.**– For the purposes of this sub-rule, it is hereby clarified that -

(i) the restrictions under sub-clause (b) would be reckoned individually for each kind of security that is equity share, preference share or debenture;

(ii) the requirement of provisions of sub-section (3) of section 42 shall apply in respect of offer or invitation of each kind of security and no offer or invitation of another kind of security shall be made unless allotments with respect to offer or invitation made earlier in respect of any other kind of security is completed;

(c) **Dependence on the value of offer/invitation:** The value of such offer or invitation per person shall be with an investment size of not less than twenty thousand rupees of face value of the securities.

(d) **Company to maintain record of bank account:** The payment to be made for subscription to securities shall be made from the bank account of the person subscribing to such securities and the company shall keep the record of the bank account from where such payments for subscription have been received.
Non-applicability of Section 42 to Nidhi Companies: Section 42 except sub-section (1), Explanation. (II) to sub-section (2), sub-sections (4), (6), (8), (9) and (10) shall not apply to a Nidhi company as per the notification dated 5th June 2015.

Example: ABC Company is offering 1000 shares of `10 each to a shareholder on private placement basis. Whether the offer made by the ABC is in order?

Answer: As per the section 42 read with the Rule 14(2) of the Companies (Prospectus and Allotment of Securities) Rules, 2014, the value of private placement offer or invitation person shall be with an investment size of not less than `20,000 of face value of securities, irrespective of the fact that the actual allotment amount (including share premium) may be much higher than the said limit. Here in the given case the face value of securities offered is less than `20,000. Here the offer made by ABC is not acceptable as a private placement under section 42.

Key Points

- Securities could be offered to public at large (public offer) or through private placement subject to the type of issuer company
- Prospectus, deemed prospectus, abridged prospectus, red-herring prospectus, shelf prospectus, information memorandum need to comply with the minimum information requirements as prescribed in the Act and the Rules
- Fraudulent Omission or commission in the issue documents attract civil as well as criminal liability. Similarly, fraudulent inducement for subscription or impersonation for securities application is also punishable offence
- SEBI has power to deal with matters related to listed or proposed to be listed securities. Central Government (MCA, Regional Director, ROC) has power to deal with matters related to unlisted securities
- Issue of securities (shares, debentures or hybrid securities) through public offer to be made only in demat form
- Existing holders of securities could offload their stake through required compliances for an OFS
- Provision related to timelines, pre-requisites for allotment and listing wherever applicable needs to strictly adhered to avoid any penal provision
- Private placements have somewhat diluted disclosure requirements as public exposure is not there
UNIT 3 – SHARE AND SHARE CAPITAL

Learning Objectives
The share capital is the lifeblood for running the affairs of the company. Sometimes after the issue of capital a company may either alter or reduce the share capital depending upon the exigencies of the situation. For desired share capital, a company may also raise a debenture which have to be registered as a charge. In this unit the following headings are covered:

♦ Know the Kinds of share capital
♦ Explain the basic requirements for issue of share certificates, Voting rights & Variation of shareholders' rights
♦ Explain calls on unpaid shares
♦ Know about application of securities premium
♦ Identify prohibition on issue at discount, Sweat Equity shares & Issue and redemption of Preference Shares
♦ Know about the Transfer and transmission of securities, refusal and appeal thereof
♦ Identify Authorised, subscribed and paid up capital
♦ Explain the concept related to the alteration of share capital and notice to Registrar thereof
♦ Know about the concept related to Further issue of share capital, Issue of bonus shares, Reduction of share capital, buy back of shares and restrictions thereon
♦ Know about Issue of debentures, Capital Redemption Reserve, Debenture Redemption Reserve & Nomination provisions
♦ Identify the Punishments and penalties for various offences including impersonation.
♦ Understand the meaning of deposits
♦ Know the requirements and restrictions for accepting deposit from members
♦ Know the punishment for contravention of the provisions related to acceptance of deposits by companies
♦ Understand meaning of charge, Notice of Charge
♦ Know what steps are to be followed for registration of Charge and satisfaction of charge
♦ Know the penal provisions in case of default
3.1. Introduction

Shares and debentures are financial instruments for raising funds for the company. Under the Companies Act, 2013, these are jointly referred to as “Securities”.

Generally, shares depict ownership interest in a company with entrepreneurial risks and rewards whereas debentures depict lender’s interest in the company with limited risks and returns.

Both these financial instruments are presented on the liabilities side of the issuer company and on the assets side of the investor or lender respectively.

Legal provisions related to these instruments are covered in Chapter IV of the Companies Act, 2013 (comprising sections 43 to 72) and the Companies (Share Capital & Debentures) Rules, 2014 as amended from time to time along with endorsement in the company formation documents or approved by suitable company forum, wherever necessary.

3.2 Share Capital-Types [Section 43]¹ & ²

Section 2(84) of the Companies Act, 2013 defines share as a share in the share capital of a company and includes stock.

Kinds of share capital

<table>
<thead>
<tr>
<th>Equity share capital</th>
<th>Preference share capital</th>
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<td>with voting rights</td>
<td>carries preferential right</td>
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<tr>
<td>with differential rights as to dividend, voting or otherwise</td>
<td>w.r.t payment of dividend and repayment of capital at time of winding up</td>
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¹ Exemption: In case of Private Company- Section 43 shall not apply where memorandum or articles of association of the private company so provides. - Notification dated 5th June, 2015.

The above mentioned exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar. Notification dated 13th June, 2017.

² In case of Specified IFSC Public Company - Section 43 Shall not apply to a Specified IFSC public company, where memorandum of association or articles of association of such company provides for it. - Notification Date 4th January, 2017
Broadly, there are two kinds of share capital of a company limited by shares:

♦ Equity share capital
♦ Preference share capital.

The Act defines preference share capital as instruments which have preferential right to dividend payment (absolute/fixed or ad-valorem / %) and preferential repayment during winding up of the company. These shareholders could also participate in equity pool post the preferential entitlements.

Shares which are not preference shares are termed as equity shares.

Equity shares are further classified as plain vanilla (same voting rights) or Differential equity shares (with differences w.r.t. dividend or voting rights or otherwise)

In Indian listed companies, there are two companies which have issued differential voting rights shares (DVRs):

♦ Tata Motors
♦ Future Retail

Empirically, aforesaid DVRs (no voting rights) are traded at lower valuations vis-à-vis their counterparts with voting rights, other things being equal.

Extract of the Act:

*According to section 43, the share capital of a company limited by shares shall be of two kinds, namely:—

(a) equity share capital—
(i) with voting rights; or
(ii) with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed; and

(b) preference share capital:

Provided that nothing contained in this Act shall affect the rights of the preference shareholders who are entitled to participate in the proceeds of winding up before the commencement of this Act.

Explanation.—For the purposes of this section,—

(i) "equity share capital", with reference to any company limited by shares, means all share capital which is not preference share capital;

(ii) "preference share capital", with reference to any company limited by shares, means that part of the issued share capital of the company which carries or would carry a preferential right with respect to—
(a) payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and

(b) repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up, whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company;

(iii) capital shall be deemed to be preference capital, notwithstanding that it is entitled to either or both of the following rights, namely:—

(a) that in respect of dividends, in addition to the preferential rights to the amounts specified in sub-clause (a) of clause (ii), it has a right to participate, whether fully or to a limited extent, with capital not entitled to the preferential right aforesaid;

(b) that in respect of capital, in addition to the preferential right to the repayment, on a winding up, of the amounts specified in sub-clause (b) of clause (ii), it has a right to participate, whether fully or to a limited extent, with capital not entitled to that preferential right in any surplus which may remain after the entire capital has been repaid."

Rule 4 of the *Companies (Share capital and Debenture) Rules, 2014* states about equity shares with differential rights.

**Conditions for the issue of equity shares with differential rights:** No company limited by shares shall issue equity shares with differential rights as to dividend, voting or otherwise, unless it complies with the following conditions, namely:

(a) the articles of association of the company authorizes the issue of shares with differential rights;

(b) the issue of shares is authorized by an ordinary resolution passed at a general meeting of the shareholders:

Provided that where the equity shares of a company are listed on a recognized stock exchange, the issue of such shares shall be approved by the shareholders through postal ballot;

(c) the shares with differential rights shall not exceed twenty-six percent of the total post-issue paid up equity share capital including equity shares with differential rights issued at any point of time;

(d) the company having consistent track record of distributable profits for the last three years;

(e) the company has not defaulted in filing financial statements and annual returns for three financial years immediately preceding the financial year in which it is decided to issue such shares;

(f) the company has no subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend;
(g) the company has not defaulted in payment of the dividend on preference shares or repayment of any term loan from a public financial institution or State level financial institution or scheduled Bank that has become repayable or interest payable thereon or dues with respect to statutory payments relating to its employees to any authority or default in crediting the amount in Investor Education and Protection Fund to the Central Government;

Provided that a company may issue equity shares with differential rights upon expiry of five years from the end of the financial Year in which such default was made good.

(h) the company has not been penalized by Court or Tribunal during the last three years of any offence under the Reserve Bank of India Act, 1934, the Securities and Exchange Board of India Act, 1992, the Securities Contracts Regulation Act, 1956, the Foreign Exchange Management Act, 1999 or any other special Act, under which such companies being regulated by sectoral regulators.

Restriction on conversion of equity share capital with voting rights into equity share capital carrying differential voting rights: Further Rule 4(3) specifies that the company shall not convert its existing equity share capital with voting rights into equity share capital carrying differential voting rights and vice-versa.

Rights to the holders of the equity shares with differential rights: Rule 4(5) states that the holders of the equity shares with differential rights shall enjoy all other rights such as bonus shares, rights shares etc., which the holders of equity shares are entitled to, subject to the differential rights with which such shares have been issued.

Particulars of shares to be maintained in the register of members: Rule 4(6) Where a company issues equity shares with differential rights, the Register of Members maintained under section 88 shall contain all the relevant particulars of the shares so issued along with details of the shareholders.

### 3.3 Basic requirements [Section 45 and 46]

**Extract of the Act:**

Section 45: Every share in a company having a share capital shall be distinguished by its distinctive number:

Provided that nothing in this section shall apply to a share held by a person whose name is entered as holder of beneficial interest in such share in the records of a depository.

Section 46: (1) A certificate, issued under the common seal, if any, of the company or signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary, specifying the shares held by any person, shall be prima facie evidence of the title of the person to such shares.

(2) A duplicate certificate of shares may be issued, if such certificate —

(a) is proved to have been lost or destroyed; or
(b) has been defaced, mutilated or torn and is surrendered to the company.

(3) Notwithstanding anything contained in the articles of a company, the manner of issue of a certificate of shares or the duplicate thereof, the form of such certificate, the particulars to be entered in the register of members and other matters shall be such as may be prescribed.

(4) Where a share is held in depository form, the record of the depository is the prima facie evidence of the interest of the beneficial owner.

(5) If a company with intent to defraud issues a duplicate certificate of shares, the company shall be punishable with fine which shall not be less than five times the face value of the shares involved in the issue of the duplicate certificate but which may extend to ten times the face value of such shares or rupees ten crores whichever is higher and every officer of the company who is in default shall be liable for action under section 447.”

Physical entitlement to a particular portion of share capital is prima facie evidenced by way of a share certificate which has to be

♦ Distinctively numbered; &

♦ To be issued under common seal of the company or signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary.

In case required, duplicate could be issued post necessary compliances and investigations.

The aforesaid requirements are not there in case of dematerialised shares or shares held in electronic form with any depository. In that case records of the depository will be treated as prima facie evidence of the right involved.

**Demat**—Now-a-days most of the listed shares are held in electronic format. Even banks and financial institutions now insist for demat of securities for charge creation to facility corroboration with central registry for loans and mortgages. Physical securities are mostly limited to private limited companies and closely held companies.

At present, there are two depositories in India: NSDL and CDSL with various depository participants (DPs) linked to them. Dematerialised securities are held by investors in their respective accounts with the DP. The DP keeps a track of transfer, transmission, charge creation etc. There are necessary enabling legal enactments to facilitate all these procedures.

An intelligent reader would observe that the share certificate issues by a company could be in a way compared to currency notes issued by the Central Bank. Therefore, strict penal provisions are there against fraudulent activities. In such cases, the wrong-doer company is punishable with monetary penalty of five to ten times of the face value of shares involved or rupees Ten Crores whichever is higher.

Besides, every officer in default is liable to imprisonment ranging from six months to ten years alongwith monetary penalty of three times the fraud [Section 447]

**Example:** ‘A’ commits forgery and thereby obtains a certificate of transfer of shares from a company and transfers the shares to ‘B’ for value acting in good faith. Company refuses to
transfer the shares to ‘B’. In this case company is right to refuse to do the transfer of the shares in the name of the transferee B without any liability as a forged transfer is a nullity in law and does not give the transferee concerned any title to the shares. Whereas A incurs a criminal liability under the Indian Penal Code punishable both by imprisonment and also being liable to compensate both the Company and B for losses suffered by them.

3.4 Rights and variation of rights [Section 47 & 48]

3Voting Rights [Section 47]

Section 47 governs the voting rights of members. Accordingly section provides:

(i) **Voting right of member holding equity share capital:** Subject to the provisions of section 43, sub-section (2) of section 50 and sub-section (1) of section 188-

(a) every member of a company limited by shares and holding equity share capital therein, shall have a right to vote on every resolution placed before the company; and

**(b) his voting right on a poll shall be in proportion to his share in the paid-up equity share capital of the company.

**Exemption to Nidhi company**- clause (b) of Sub-section (1) of Section 47 shall apply, subject to the modification that no member shall exercise voting rights on poll in excess of five per cent, of total voting rights of equity shareholders. (Notification dated 5th June, 2015.)

(ii) **Voting right of member holding preference share capital:** Every member of a company limited by shares who is holding any preference share capital shall, in respect of such capital, have—

- a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares, and
- any resolution for the winding up of the company, or

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3 In case of Specified IFSC Public Company – Section 47 shall not apply to a Specified IFSC public company, where memorandum of association or articles of association of such company provides for it. - Notification Date 4th January, 2017.
for the repayment or reduction of its equity or preference share capital and his voting right on a poll shall be in proportion to his share in the paid-up preference share capital of the company.

(iii) **Proportion of voting rights** : The proportion of the voting rights of equity shareholders to the voting rights of the preference shareholders shall be in the same proportion as the paid-up capital in respect of the equity shares bears to the paid-up capital in respect of the preference shares.

Where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, there such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.

On analysis of above provision, in case of equity shares other than equity shares with differential voting rights, each shareholder is entitled to vote on any resolution placed before the company i.e., in the annual general meeting (AGM) or Extra-ordinary general meeting (EGM) of the members of the company. The voting right shall be proportionate to the paid up capital of the class of shares involved.

In a meeting of preference shareholders, preference voting rights are proportionate to one’s preference share investment to total nominal preference share capital in the company.

For other shareholder’s meeting, preference shareholder could vote only on the below resolutions placed before the members where the resolution in question:

♦ directly affects the rights as preference shareholder
♦ involves the winding up of the company
♦ involves repayment or reduction of equity or preference share capital.

In aforesaid cases voting rights to be computed on the basis of joint proportion of equity and preference share capital.

In a nutshell, voting rights for securities are not based on the principles of adult / universal franchise i.e. one person one vote but these are based on the class of shares and on the monetary value of investments at face value.

Private company could be more innovative in terms of voting rights if permitted by their Memorandum of Association or Article of Association.

Exemption to Private Company- In case of private company - Section 47 shall not apply where memorandum or articles of association of the private company so provides. (Notification dated 5th June, 2015).

The above mentioned exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar. (Notification dated 13th June, 2017)
Variations of shareholders' rights [Section 48]

Where share capital of a company is divided into different classes of shares, it may sometimes be necessary for it to amend the rights attached to one or more classes of shares. The Companies Act states the following laws on the variations of shareholders' right:

(1) Variation in rights of shareholders with consent: Where a share capital of the company is divided into different classes of shares, the rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class,—

(a) if provision with respect to such variation is contained in the memorandum or articles of the company; or

(b) in the absence of any such provision in the memorandum or articles, if such variation is not prohibited by the terms of issue of the shares of that class:

Provided that if variation by one class of shareholders affects the rights of any other class of shareholders, the consent of three-fourths of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.

(2) No consent for variation: Where the holders of not less than ten per cent of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation, they may apply to the Tribunal to have the variation cancelled, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Tribunal:

Provided that an application under this section shall be made within twenty-one days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(3) Binding decision of tribunal: The decision of the Tribunal on any application under sub-section (2) shall be binding on the shareholders.

(4) Filing copy of order with the Registrar: The Company shall, within thirty days of the date of the order of the Tribunal, file a copy thereof with the Registrar.

(5) Default in compliance with the provision: Where any default is made in complying with the provisions of this section, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.
3.5 Calls and incidental matters [Section 49 to Section 51]

Calls are made by the company on security holders to pay the amount called up in respect of partly paid up securities.

As per Section 49, these calls have to uniformly made and there should be no differentiation for a given class of security holders.

Explanation.—For the purposes of this section, shares of the same nominal value on which different amounts have been paid-up shall not be deemed to fall under the same class (i.e. the provision is not applicable in case where different amounts are paid for a same class for security.)

As per Section 50, a company may, if so authorised by its articles, accept from any member, the whole or a part of the amount remaining unpaid on any shares held by him, even if no part of that amount has been called up (i.e. if authorised by the articles, a company can keep advance subscription or call money received in advance.)

However, there would be no voting right on that advance amount till the amount is duly called for and adjusted.

The company could pay proportionate dividends in proportion to amount paid on each share, if authorised by the articles [Section 51].

In other words, advance payment will never lead to increased voting rights but delayed payment of call money could be the reason of decreased voting rights.

Example: “Moonstar Ltd” is authorised by its articles to accept the whole or any part of the amount of remaining unpaid calls from any member although no part of that amount has been called up. ‘A’, a shareholder of the Moonstar Ltd., deposits in advance the remaining amount due on his shares without any calls made by “Moonstar Ltd.”. In the given case Mr. A, has deposited in advance the remaining amount due on his shares without any calls made by ‘Moonstar Ltd’. So, ‘Moonstar Ltd’ was authorized to accept the unpaid calls by its articles. Hence, this is a valid transaction.

3.6 Issue of shares at premium or discount [Section 52 to Section 55]

When a security of a given face value is issued at price higher than its face value, the issue is called as issue at premium and the differential amount as premium.

Where the issue price is lower to the face value, the issue is regarded at discount and the differential known as discount.

There could be several reason for issue at premium or discount. Predominant among these are:

♦ To capture the play of market forces between the issuer and investor at the time of issue;
♦ To give effect to the fair value of underlying business or rights linked to the securities;
To minimise payment of stamp duty / ROC fee during incorporation of the company which is based on the authorised capital of the company

There are precautionary provisions covered in section 52 and 53 for both these scenarios (premium or discount) respectively to safeguard the issuer company and its stakeholders.

**Application of premiums received on issue of shares [Section 52]**

Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the premium received on those shares shall be transferred to a securities premium account and the provisions of this Act relating to reduction of share capital (which are very stringent) of a company shall, except as provided in this section, apply as if the securities premium account were the paid-up share capital of the company.

**Application of securities premium account :** The securities premium account may be applied by the company—

(a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;

(b) in writing off the preliminary expenses of the company;

(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;

(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or

(e) for the purchase of its own shares or other securities under section 68.

**Who may apply the securities premium account :** The securities premium account may be applied by such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133,—

(a) in paying up unissued equity shares of the company to be issued to members of the company as fully paid bonus shares; or

(b) in writing off the expenses of or the commission paid or discount allowed on any issue of equity shares of the company; or

(c) for the purchase of its own shares or other securities under section 68.

**Prohibition on issue of shares at discount [Section 53]**

A company cannot issue shares in disregard of Section 53 of the Companies Act, 2013.

1. According to section 53, a company shall not issue shares at a discount, except in the case of an issue of sweat equity shares given under section 54 of the Companies Act, 2013. [Sub section (1)]

2. Any share issued by a company at a discount shall be void. [Sub section (2)]
3. Notwithstanding anything contained in sub-sections (1) and (2), a company may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949.

4. Where a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees and every officer who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

It is clear for the reading of section 52 and 53 that these restrictions are only on issue of shares, it could be equity or preference but not on any debt related products like bonds or debentures whose pricing is more governed by YTM (yield to maturity) considerations.

**Issue of Sweat equity shares [Section 54]**

Sweat equity is issued to keep the employees of a company motivated by making them partner in growth of the company.

As per **Section 2(88)—sweat equity shares** means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called;

As per **Section 2(37)—employees' stock option** means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price;

Section 54 of the Companies Act, 2013 provides the conditions where a company may issue sweat equity shares of a class of shares already issued.

**Conditions:** A company may issue sweat equity shares of a class of shares already issued, if the following conditions are fulfilled, namely—

(a) the issue is **authorised by a special resolution** passed by the company;

(b) the **resolution specifies** the number of shares, the current market price, consideration, if any, and the class or classes of directors or employees to whom such equity shares are to be issued;

(c) **not less than one year has**, at the date of such issue, **elapsed** since the date on which

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*In case of Specified IFSC Public Company - Clause (c) of Sub-section (1) of section 54 shall not apply.*

*Notification Date 4th January, 2017*
the company had commenced business; and

(d) where the equity shares of the company are listed on a recognised stock exchange, the sweat equity shares are issued in accordance with the regulations made by the Securities and Exchange Board in this behalf and if they are not so listed, the sweat equity shares are issued in accordance with such rules as prescribed under Rule 8 of the Companies (Share and Debentures) Rules, 2014.

The rights, limitations, restrictions and provisions as are for the time being applicable to equity shares shall be applicable to the sweat equity shares issued under this section and the holders of such shares shall rank pari passu with other equity shareholders.

As per the Rule 8 of the Companies (Share and Debentures) Rules, 2014,

A company other than a listed company, which is not required to comply with the Securities and Exchange Board of India Regulations on sweat equity, shall not issue sweat equity shares to its directors or employees at a discount or for consideration other than cash, for their providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called, unless the issue is authorised by a special resolution passed by the company in general meeting.

“Employee” means-(a) a permanent employee of the company who has been working in India or outside India, for at least last one year; or

(b) a director of the company, whether a whole time director or not; or

(c) an employee or a director as defined in sub-clauses (a) or (b) above of a subsidiary, in India or outside India, or of a holding company of the company;

Whereas the expression ‘Value additions’ means actual or anticipated economic benefits derived or to be derived by the company from an expert or a professional for providing know-how or making available rights in the nature of intellectual property rights, by such person to whom sweat equity is being issued for which the consideration is not paid or included in the normal remuneration payable under the contract of employment, in the case of an employee.

Example: 250 Equity shares offered by the company at a discount of 50% on current market price, subject to the condition that the vesting will happen on completion of minimum one year in service or achieving a particular milestone and the right being exercisable by the employee/s during a fixed duration post vesting.

In case of Specified IFSC Private Company - Clause (c) of sub section (1) of section 54 shall not apply.
- Notification Date 4th January, 2017

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Preference shares - Issue and redemption [Section 55]

According to Section 55:

- **Company to issue redeemable preference shares**: No company limited by shares shall issue any preference shares which are irredeemable;

  **Period for redeem of preference shares**: A company limited by shares may, if so authorised by its articles, issue preference shares which are liable to be redeemed within a period not exceeding twenty years from the date of their issue subject to such conditions as prescribed under Rule 9 of the Companies (Share Capital and Debentures) Rules, 2014.

  **Exceptions**: A company may issue preference shares for a period exceeding twenty years (but not exceeding thirty years) for infrastructure projects (specified in schedule VI), subject to the redemption of 10% of shares beginning 21st year at the option of such preferential shareholders;
♦ **Shares to be redeemed out of the profits only:** No such shares shall be redeemed except out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption;

♦ **Redeemed shares to be fully paid:** no such shares shall be redeemed unless they are fully paid;

♦ **Proposed shares to be redeemed shall be transferred to the CRR account:** 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 Capital Redemption Reserve (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 Capital Redemption Reserve Account were paid-up share capital of the company; and

♦ **Class of companies whose financial statement complies with Accounting standards:**
In case of such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133, the premium, if any, payable on redemption shall be provided for out of the profits of the company, before the shares are redeemed: Provided also that premium, if any, payable on redemption of any preference shares issued on or before the commencement of this Act by any such company shall be provided for out of the profits of the company or out of the company’s securities premium account, before such shares are redeemed.

In a case not meeting above criteria, the premium, if any, payable on redemption shall be provided for out of the profits of the company or out of the company’s securities premium account, before such shares are redeemed.

♦ **In case of unredeemed preference shares:** Where a company is not in a position to redeem any preference shares or to pay dividend, if any, on such shares in accordance with the terms of issue (such shares hereinafter referred to as unredeemed preference shares), it may—
  ➢ with the consent of the holders of three-fourths in value of such preference shares, and
  ➢ with the approval of the Tribunal on a petition made by it in this behalf,
issue further redeemable preference shares equal to the amount due, including the dividend thereon, in respect of the unredeemed preference shares, and on the issue of such further redeemable preference shares, the unredeemed preference shares shall be deemed to have been redeemed:

Provided that the Tribunal shall, while giving approval under this sub-section, order the redemption forthwith of preference shares held by such persons who have not consented to the issue of further redeemable preference shares.
For the removal of doubts, it is hereby declared that the issue of further redeemable preference shares or the redemption of preference shares under this section shall not be deemed to be an increase or, as the case may be, a reduction, in the share capital of the company.

- **Paying of un-issued shares to members**: The capital redemption reserve account may, be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

### 3.7 Transfer and Transmission of Securities and The Allied Provisions [Section 56 to Section 59]

**Section 44** states that the shares or debentures or other interest of any member in a company shall be movable property transferable in the manner provided by the articles of the company.

Section 56 of the Companies Act, 2013 deals with the transfer and transmission of securities or interest of a member in the company.

**Requirement for registering the transfer of securities [Section 56(1)]:** According to the law, a company shall not register a transfer of securities of the company, or the interest of a member in the company in the case of a company having no share capital, unless a proper instrument of transfer, in such form as may be prescribed, duly stamped, dated and executed by or on behalf of the transferor and the transferee (except where the transfer is between persons both of whose names are entered as holders of beneficial interest in the records of a depository), specifying the name, address and occupation, if any, of the transferee, has been delivered to the company by the transferor or the transferee within a period of 60 days from the date of execution, along with the certificate relating to the securities, or if no such certificate is in existence, along with the letter of allotment of securities.

**Instrument of transfer lost/ not delivered [First proviso to section 56(1)]:** Where the instrument of transfer has been lost or the instrument of transfer has not been delivered within the prescribed period, the company may register the transfer on such terms as to indemnity as the Board may think fit.

5 In case of Government company -

It is further provided that the provisions of this sub-section [i.e section 56(1)], in so far as it requires a proper instrument of transfer, to be duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee, shall not apply with respect to bonds issued by a Government company, provided that an intimation by the transferee specifying his name, address and occupation, if any, has been delivered to the company along with the certificate relating to the bond; and if no such certificate is in existence, along with the letter of allotment of the bond:

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5 Notification dated 5th June, 2015.
Provided also that the provisions of this sub-section shall not apply to a Government Company in respect of securities held by nominees of the Government.

**Power of company to register:** Power of company to register shall not be effected by above provision (given under sub- section 1) on receipt of an intimation of transmission of any right to securities by operation of law from any person to whom such right has been transmitted.

**Transmission of securities on an application of transferor alone:** Where an application is made by the transferor alone and relates to partly paid shares, the transfer shall not be registered, unless the company gives the notice of the application, in such manner as may be prescribed, to the transferee and the transferee gives no objection to the transfer within two weeks from the receipt of notice.

**Company delivering the certificate:** Every company shall, unless prohibited by any provision of law or any order of Court, Tribunal or other authority, deliver the certificates of all securities allotted, transferred or transmitted—

<table>
<thead>
<tr>
<th>Different conditions</th>
<th>Period of the delivering the certificates</th>
</tr>
</thead>
<tbody>
<tr>
<td>In the case of subscribers to the memorandum;</td>
<td>Within 2 months from the date of incorporation</td>
</tr>
<tr>
<td>In the case of any allotment of any of its shares</td>
<td>Within a period of two months from the date of allotment</td>
</tr>
<tr>
<td>In the case of a transfer or transmission of securities</td>
<td>Within a period of one month from the date of receipt by the company of the instrument of transfer or the intimation of transmission</td>
</tr>
<tr>
<td>In the case of any allotment of debenture</td>
<td>Within a period of six months from the date of allotment</td>
</tr>
</tbody>
</table>

Provided that where the securities are dealt with in a depository, the company shall intimate the details of allotment of securities to depository immediately on allotment of such securities.  

**Transfer of security of the deceased:** The transfer of any security or other interest of a

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6 (In case of Specified IFSC Public Company - after the proviso, the following proviso shall be inserted, namely:- “Provided further that a Specified IFSC public company shall deliver the certificates of all securities to subscribers after incorporation, allotment, transfer or transmission within a period of sixty days.” - Notification Dated 4th January, 2017

In case of Specified IFSC Private Company - after the proviso, the following proviso shall be inserted, namely:- “Provided further that a Specified IFSC private company shall deliver the certificates of all securities to subscribers after incorporation, allotment, transfer or transmission within a period of sixty days.” - Notification Dated 4th January, 2017)
deceased person in a company made by his legal representative shall, even if the legal representative is not a holder thereof, be valid as if he had been the holder at the time of the execution of the instrument of transfer.

**Default in compliance of the provisions:** Where any default is made in complying with the provisions of sub-sections (1) to (5), the company shall be punishable with fine varying from 25,000 rupees to 5 lakh rupees and every officer of the company who is in default shall be punishable with fine with the minimum of 10 thousand rupees extending to 1 one lakh rupees.

**Liability of depository:** Where any depository or depository participant, with an intention to defraud a person, has transferred shares, it shall be liable under section 447 of the Companies Act, 2013 with the liability mentioned under the Depositories Act, 1996.

**Punishment for personation of shareholder [Section 57]**

If any person deceitfully personates as—

♦ an owner of any security or interest in a company, or
♦ of any share warrant or coupon issued in pursuance of this Act, and
♦ thereby obtains or attempts to obtain any such security or interest or any such share warrant or coupon, or
♦ receives or attempts to receive any money due to any such owner,

Such person shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

**Refusal of registration and appeal against refusal [Section 58]**

Section 58 of the Companies Act, 2013, deals with process of the company to be followed by on refusal to register the transfer of securities.

(i) If a private company limited by shares refuses, to register the transfer of, or the transmission of the right to any securities or interest of a member in the company, then the company shall send notice of the refusal to the transferor and the transferee or to the person giving intimation of such transmission, within a period of thirty days from the date on which the instrument of transfer, or the intimation of such transmission, was delivered to the company.

The securities or other interest of any member in a public company are freely transferable, subject to the contract/arrangement.

(ii) The transferee may appeal to the Tribunal against the refusal within a period of thirty days from the date of receipt of the notice or in case no notice has been sent by the company, within a period of sixty days from the date on which the instrument of transfer or the intimation of transmission, was delivered to the company.

(iii) If a public company without sufficient cause refuses to register the transfer of securities within a period of thirty days from the date on which the instrument of transfer or the
intimation of transmission, is delivered to the company, the transferee may, within a period of sixty days of such refusal or where no intimation has been received from the company, within ninety days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.

(iv) The Tribunal, while dealing with an appeal may, after hearing the parties, either dismiss the appeal, or by order—

(a) direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within a period of ten days of the receipt of the order; or

(b) direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved.

(v) If a person contravenes the order of the Tribunal he shall be punishable with imprisonment for a term not less than one year but may extend to three years and with fine not less than one lakh rupees which may extend to five lakh rupees.

Rectification of register of member [Section 59]

Section 59 of the Companies Act, 2013 provides the procedure for the rectification of register of members after the transfer of securities. The provision states that—

(i) Remedy to the aggrieved for not carrying the changes in the register of members: If the name of any person is, without sufficient cause, entered in the register of members of a company, or after having been entered in the register, is, omitted there from, or if a default is made, or unnecessary delay takes place in entering in the register, the fact of any person having become or ceased to be a member, the person aggrieved, or any member of the company, or the company may appeal in such form as may be prescribed, to the Tribunal, or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register.

(ii) Order of the Tribunal: The Tribunal may, after hearing the parties to the appeal by order, either dismiss the appeal or direct that the transfer or transmission shall be registered by the company within a period of ten days of the receipt of the order, or direct rectification of the records of the depository or the register and in the latter case, direct the company to pay damages, if any, sustained by the party aggrieved.

(iii) The provisions of this section shall not restrict the right of a holder of securities, to transfer such securities and any person acquiring such securities shall be entitled to voting rights unless the voting rights have been suspended by an order of the Tribunal.

(iv) Where the transfer of securities is in contravention of any of the provisions of the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992 or this Act or any other law for the time being in force, there the Tribunal may, on an application made by the depository, company, depository participant, the holder of the securities or the Securities and Exchange Board, direct any company or a depository to set right the contravention and rectify its register or records concerned.
(v) **Default in complying with the order**: If any default is made in complying with the order of the Tribunal under this section, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

### 3.8 Publication of Authorised, Subscribed and Paid-Up Capital

**[Section 60]**

According to section 2(8) “authorised capital” or “nominal capital” means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company.

Section 2(64) defines “paid-up share capital” or “share capital paid-up” means such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called;

Whereas section 2(86) “subscribed capital” means such part of the capital which is for the time being subscribed by the members of a company;

Where any notice, advertisement or other official publication, or any business letter, bill head or letter paper of a company-

contains a statement of the amount of the authorised capital of the company,

such notice, advertisement or other official publication, or such letter, bill head or letter paper shall also contain a statement, in an equally prominent position and in equally conspicuous characters, of the amount of the capital which has been subscribed and the amount paid-up.

**In default**: If any default is made in complying with the above requirements, the company shall be liable to pay a penalty of ten thousand rupees and every officer of the company who is in default shall be liable to pay a penalty of five thousand rupees, for each default.

### 3.9 Alteration in share capital [Sections 61-68]

Section 2(8) defines **authorised capital or nominal capital** means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company. Whereas Section 2(15) states that **called-up capital** means such part of the capital, which has been called for payment.
According to section 61 of the Companies Act, 2013, a limited company having a share capital may alter its capital part of the memorandum.

(1) According to the provision, a limited company having a share capital may, if so authorised by its articles, alter its memorandum in its general meeting to—

(a) **increase its authorised share capital** by such amount as it thinks expedient;

(b) **consolidate and divide** all or any of its share capital into shares of a larger amount than its existing shares, however no consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner.

Provided that no consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner;

(c) **convert all or any of its fully paid-up shares into stock**, and reconvert that stock into fully paid-up shares of any denomination;

(d) **sub-divide its shares**, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived.
(e) **cancel shares** which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) The cancellation of shares shall not be deemed to be a reduction of share capital.

A company shall within 30 days of the shares having been consolidated, converted, sub-divided, redeemed, or cancelled or the stock having been reconverted, notice should be given to the Registrar in the prescribed form along with an altered memorandum [Section 64 of the Companies Act, 2013].

**Further issue of share capital – Rights Issue; Preferential Allotment [Section 62]**

A rights issue involves pre-emptive subscription rights to buy additional securities in a company offered to the company’s existing security holders. It is a non-dilutive pro rata way to raise capital.

**Example:** 1:8 rights issue means an existing investor can buy one extra share for every eight shares already held by him/her. Usually the price at which the new shares are issued by way of rights issue is less than the prevailing market price of the stock to encourage subscription.

A public company may issue securities through a rights issue or a bonus issue in accordance with the provisions of this Act and in case of a listed company or a company which intends to get its securities listed also with the provisions of the Securities and Exchange Board of India Act, 1992 and the rules and regulations made thereunder as per section 23(1)(c) of the Companies Act, 2013.

A private company may issue securities by way of rights issue or bonus issue in accordance with the provisions of this Act as per the section 23(2)(a).

As per the section 62 of the Companies Act, 2013-

(1) where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered—

(a) to persons who, at the date of the offer, are holders of equity shares of the company in proportion, to the paid-up share capital on those shares by sending a letter of offer subject to the following conditions, namely:—

(i) the offer shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days and not exceeding thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;

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7 In case of Nidhi company - Section 62 shall not apply - Notification dated 5th June, 2015.

8 Provided that notwithstanding anything contained in sub-clause (i), in case of a Specified IFSC public company, the periods lesser than those specified in the said sub-clause shall apply if ninety per cent. of the members have given their consent in writing or in electronic mode." - Notification Date 4th January, 2017
In case of private company- wherever ninety percent of the members of a private company have given their consent in writing or in electronic mode, the periods lesser than those specified in the above said sub-clause or sub-section (2), shall apply.

(ii) unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person; and the notice referred to in clause (i) shall contain a statement of this right;

(iii) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the Board of Directors may dispose of them in such manner which is not dis-advantageous to the shareholders and the company;

(b) to employees under a scheme of employees’ stock option, subject to 9 & 10 [special resolution] passed by company and subject to the conditions as may be prescribed; or

(c) to any persons, if it is authorised by a special resolution, whether or not those persons include the persons referred to in clause (a) or clause (b), either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer, subject to the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed.

This clause authorises company to issue shares to persons other than its existing shareholders and to employees under ESOP. However, the process to issue those shares is provided under section 42 of the Act (Private placement).

(2) The notice referred to in sub-clause (i) of clause (a) of sub-section (1) shall be dispatched through registered post or speed post or through electronic mode or courier or any other mode having proof of delivery to all the existing shareholders at least three days before the opening of the issue.

Exemption to a private company: Provided that notwithstanding anything contained in this sub-clause and sub-section (2) of this section, in case ninety per cent. of the members of a private company have given their consent in writing or in electronic mode, the periods lesser than those specified in the said sub-clause or sub-section shall apply.

(3) Exception: This section shall not apply to the increase of the subscribed capital of a company caused by the exercise of an option attached to the debentures issued or loan raised by the company to convert such debentures or loans into shares in the company.

Provided that the terms of issue of such debentures or loan containing such an option have been approved before the issue of such debentures or the raising of loan by a special resolution passed by the company in general meeting.

9 In case of private company - In clause (b) of Sub-section (1) of Section 62 for the words "special resolution", the words "ordinary resolution" shall be substituted. - Notification dated 5th June, 2015.

10 In case of Specified IFSC Public Company - Clause (b) of Sub-section (1) of section 62 for the words "special resolution" read as "ordinary resolution". - Notification Date 4th January, 2017.
(4) **Conversion of debentures/loan into shares**: Where any debentures have been issued, or loan has been obtained from any Government by a company, and if that Government considers it necessary in the public interest, it may, by order, direct that such debentures or loans or any part thereof shall be converted into shares in the company on such terms and conditions as appear to the Government to be reasonable in the circumstances of the case even if terms of the issue of such debentures or the raising of such loans do not include a term for providing for an option for such conversion.

(5) **Term of conversion not acceptable to the company**: Where the terms and conditions of such conversion are not acceptable to the company, it may, within 60 days from the date of communication of such order, appeal to the Tribunal which shall after hearing the company and the Government pass such order as it deems fit.

(6) **Points to be taken into consideration for the term of conversion**: In determining the terms and conditions of conversion, the Government shall have due regard to the financial position of the company, the terms of issue of debentures or loans, as the case may be, the rate of interest payable on such debentures or loans and such other matters as it may consider necessary.

(7) **When memorandum of company stand altered and increases authorized share capital**: Where the Government has, by an order directed that any debenture or loan or any part thereof shall be converted into shares in a company and where no appeal has been preferred to the Tribunal or where such appeal has been dismissed, then the memorandum of company shall, by such order having the effect of increasing the authorised share capital of the company, stand altered and the authorised share capital of such company shall stand increased by an amount equal to the amount of the value of shares which such debentures or loans or part thereof has been converted into.

**Example**: A listed company at Bombay Stock Exchange, intends to offer its new shares to non-members. All the existing members of the company were against the same pointing on the validity of the same. Here in the given case, section 62 (1) (a) (iii), (b) and (c) further shares in a company limited by shares may be issued to non-members under certain circumstances. In compliance with the provision, offer of new shares to non-members is valid.

**Issue of bonus shares [Section 63]**

Bonus shares are shares issued proportionately by a company to its current shareholders as fully paid shares free of any cost to them.

**Example**: 1:3 bonus issue means an existing shareholder will get one extra free share for every three shares already held by him/her.

This section 63 of the Companies Act, 2013 deals with the condition and the manner of issue of fully paid-up bonus shares by a company to its members.

(1) Section 63 says that 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 capitalising reserves created by the revaluation of assets.

(2) No company shall capitalise its profits or reserves for the purpose of issuing fully paid-up bonus shares unless—
(a) it is authorised by its articles;
(b) it has on the recommendation of the Board, been authorised in the general meeting of the company;
(c) it has not defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it;
(d) it has not defaulted in respect of the payment of statutory dues of the employees, such as, contribution to provident fund, gratuity and bonus;
(e) the partly paid-up shares, if any outstanding on the date of allotment, are made fully paid-up;
(f) it complies with such conditions as may be prescribed*. 

(3) The bonus shares shall not be issued in lieu of dividend.
It can only be done if the articles of the company contain provisions in regard thereto. It means that profits which otherwise are available for distribution among the members, are not divided among them in cash, but the shareholders are allotted further shares (bonus shares). Capital profits, shares premium and capital redemption reserve account can also be used for the purpose of issuing fully paid bonus shares.

**Note:** According to the proviso to Section 123(5) of the Companies Act, 2013, it is permissible for a company to capitalise its profits or reserves for the purpose of issuing fully paid up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company.

*The company which has once announced the decision of its Board recommending a bonus issue, shall not subsequently withdraw the same [Rule 14 of the Companies (Share capital and debenture) Rules, 2014]*

**Notice to be given to Registrar for Alteration of Share Capital [Section 64]**
Where–
♦ a company alters its share capital in any manner specified in section 61 (1),
♦ an order made by the Government under section 62(4) read with 62(6) has the effect of increasing authorised capital of a company; or
• a company redeems any redeemable preference shares,

the company shall file a notice in the prescribed form with the Registrar within a period of thirty
days of such alteration or increase or redemption, as the case may be, along with an altered
memorandum.

In default: If a company and any officer of the company who is in default contravenes the
provisions of sub-section (1), it or he shall be punishable with fine which may extend to one
thousand rupees for each day during which such default continues, or five lakh rupees,
whichever is less.

Unlimited Company to Provide for Reserve Share Capital on Conversion into Limited
Company [Section 65]

An unlimited company having a share capital may, by a resolution for registration as a limited
company under this Act, do either or both of the following things, namely—

(a) increase the nominal amount of its share capital by increasing the nominal amount of
each of its shares, subject to the condition that no part of the increased capital shall be capable
of being called up except in the event and for the purposes of the company being wound up;

(b) provide that a specified portion of its uncalled share capital shall not be capable of
being called up except in the event and for the purposes of the company being wound up.

Reduction of share capital [Section 66]

Accumulated business losses, assets of reduced or doubtful value or having paid up capital in
excess of wants of the company could lead to the need of reducing share capital.

Section 66 deals with the reduction of share capital.

(1) Reduction of share capital by special resolution: Subject to confirmation by the
Tribunal on an application by the company, a company limited by shares or limited by guarantee
and having a share capital may, by a special resolution, reduce the share capital in any manner
and in particular, may—

(a) extinguish or reduce the liability on any of its shares in respect of the share capital not
paid-up; or

(b) either with or without extinguishing or reducing liability on any of its shares,—

(i) cancel any paid-up share capital which is lost or is unrepresented by available assets;
or

(ii) pay off any paid-up share capital which is in excess of the wants of the company,
alter its memorandum by reducing the amount of its share capital and of its shares
accordingly:

No reduction shall be made: Section further Provides that no such reduction shall be
made if the company is in arrears in the repayment of any deposits accepted by it, either
before or after the commencement of this Act, or the interest payable thereon.
(2) **Issue of Notice from the Tribunal**: The Tribunal shall give notice of every application made to it under sub-section (1) to the Central Government, Registrar and to the Securities and Exchange Board, in the case of listed companies, and the creditors of the company and shall take into consideration the representations, if any, made to it by that Government, Registrar, the Securities and Exchange Board and the creditors within a period of three months from the date of receipt of the notice:

Provided that where no representation has been received from the Central Government, Registrar, the Securities and Exchange Board or the creditors within the said period, it shall be presumed that they have no objection to the reduction.

(3) **Order of tribunal**: The Tribunal may, if it is satisfied that the debt or claim of every creditor of the company has been discharged or determined or has been secured or his consent is obtained, make an order confirming the reduction of share capital on such terms and conditions as it deems fit:

Provided that no application for reduction of share capital shall be sanctioned by the Tribunal unless the accounting treatment, proposed by the company for such reduction is in conformity with the accounting standards specified in section 133 or any other provision of this Act and a certificate to that effect by the company’s auditor has been filed with the Tribunal.

(4) **Publishing of order of confirmation of tribunal**: The order of confirmation of the reduction of share capital by the Tribunal under sub-section (3) shall be published by the company in such manner as the Tribunal may direct.

(5) **Delivery of certified copy of order to the registrar**: The company shall deliver a certified copy of the order of the Tribunal under subsection (3) and of a minute approved by the Tribunal showing—

(a) the amount of share capital;
(b) the number of shares into which it is to be divided;
(c) the amount of each share; and
(d) the amount, if any, at the date of registration deemed to be paid-up on each share, to the Registrar within thirty days of the receipt of the copy of the order, who shall register the same and issue a certificate to that effect.

(6) Nothing in this section shall apply to buy-back of its own securities by a company under section 68.

(7) **No liability of member**: A member of the company, past or present, shall not be liable to any call or contribution in respect of any share held by him exceeding the amount of difference, if any, between the amount paid on the share, or reduced amount, if any, which

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11\&* The powers of Central Government has been delegated to Regional Directors. Notification dated 6th September, 2017.
is to be deemed to have been paid thereon, as the case may be, and the amount of the share as fixed by the order of reduction.

(8) **In case where creditor is entitled to object**: Where the name of any creditor entitled to object to the reduction of share capital under this section is, by reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his debt or claim, not entered on the list of creditors, and after such reduction, the company commits a default, within the meaning of section 6 of the Insolvency and Bankruptcy Code, 2016, in respect of the amount of his debt or claim—

(a) every person, who was a member of the company on the date of the registration of the order for reduction by the Registrar, shall be liable to contribute to the payment of that debt or claim, an amount not exceeding the amount which he would have been liable to contribute if the company had commenced winding up on the day immediately before the said date; and

(b) if the company is wound up, the Tribunal may, on the application of any such creditor and proof of his ignorance as aforesaid, if it thinks fit, settle a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding up.

(9) Nothing in sub-section (8) shall affect the rights of the contributories among themselves.

(10) **Liability of officer**: If any officer of the company—

(a) knowingly conceals the name of any creditor entitled to object to the reduction;

(b) knowingly misrepresents the nature or amount of the debt or claim of any creditor; or

(c) abets or is privy to any such concealment or misrepresentation as aforesaid, he shall be liable under section 447.

(11) **In case of failure to publish the order of confirmation of the reduction of shares**: If a company fails to comply with the provisions of sub-section (4), it shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees.
Restriction on purchase by company or giving of loans by it for purchase of its shares [Section 67]

A fundamental principle of Company Law was that a Company cannot buy its own shares. This is laid by Section 67 of the Companies Act, 2013.

Section 67(1) lays down that no company limited by shares or by guarantee and having a share capital shall have power to buy its own shares unless the consequent reduction of share capital is effected under the provisions of this Act.

(2) No public company shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase or subscription made or to be made, by any person of or for any shares in the company or in its holding company.

(3) Exceptions: There are, however, certain exceptions where the company may provide the financial assistance, namely:

(a) the lending of money by a banking company in the ordinary course of its business;

(b) the provision is made by a company for lending of money in accordance with any scheme approved by company through special resolution with such requirements as may be prescribed, for the purchase of, or subscription for, fully paid up shares in the company or its holding company, if the purchase of, or the subscription for, the shares held by trustees for the benefit of the employees or such shares held by the employee of the company;

(c) the giving of loans by a company to persons in the employment of the company other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of six months with a view to enabling them to purchase or subscribe for fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership:

12 & 13 In case of private companies - Section 67 shall not apply to a private company-

(a) in whose share capital no other body corporate has invested any money;

(b) if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice its paid up share capital or fifty crore rupees, whichever is lower; and

(c) such a company is not in default in repayment of such borrowings subsisting at the time of making transactions under this section. - Notification dated 5th June, 2015.

14 In case of Nidhi company - Sub-section (1) of Section 67 shall not apply, when shares are purchased by the company from a member on his ceasing to be a depositor or borrower and it shall not be considered as reduction of capital under section 66 of the Companies Act, 2013. - Notification dated 5th June, 2015.
However, disclosures in respect of voting rights not exercised directly by the employees in respect of shares to which the scheme relates shall be made in the Board’s report in such manner as may be prescribed. [Section 67].

(4) nothing in Section 67 shall affect the right of a company to redeem any preference shares issued under this Act or under any previous Companies law.

(5) If a company contravenes the provisions of this section, it shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees.

BUY BACK OF SECURITIES [Sections 68-70]

Buy back is the re-acquisition by a company of its own securities. It is a way of returning money to its investors.

Example: Tata Consultancy Services (TCS), announced India’s biggest buyback offer till date. The software major plans to buy back up to 5.61 crore equity shares at ₹2,850 per share. The buyback is being made through the tender offer route, which means the existing shareholders can tender their shares through the stock exchange. The buyback offer price of ₹2,850 represents a 13.7% premium to ₹2,506.50, the closing price on February 20 when the announcement was made.

Section 68 to Section 70 contains provisions for buy back of securities by the issuer company.

Power of company to purchase its own securities [Section 68]

Section 68 of the Companies Act, 2013 provides the power of a company to purchase its own securities subject to certain conditions.

(1) Sources of funds for buy-back of shares: A company can purchase its own shares or other specified securities. The purchase should be out of:

(i) its free reserves; or
(ii) the securities premium account; or
(iii) the proceeds of the issue of any shares or other specified securities.

However, buy-back of any kind of shares or other specified securities cannot be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities [Section 68(1)].

“Specified securities” includes employees’ stock option or other securities as may be notified by the Central Government from time to time.

(2) Conditions for buy-back: The company shall not purchase its own shares or other specified securities unless:

(a) the buy-back is authorised by its articles;
(b) a special resolution authorising the buy-back is passed in general meeting of the company; (except where— (i) the buy-back is, ten per cent. or less of the total paid-up equity capital and free reserves of the company; and (ii) such buy-back has been authorised by the Board by means of a resolution passed at its meeting;

(c) the buy-back is 25% or less of the aggregate of paid-up capital and free reserves of the company;

Provided that the buy-back of equity shares in any financial year shall not exceed 25% of its total paid up equity capital in that financial year.

(d) the ratio of the aggregate debts( secured and unsecured) owed by the company after buy back is not more than twice the paid up capital and its free reserves;

Provided that the Central Government may prescribe a higher ratio of the debt to capital and free reserves for a class or classes of companies;

The expression “free reserves” for the purposes of this section, includes securities premium account.

(e) all the shares or other specified securities for buy-back are fully paid-up;

(f) the buy-back of the shares or other specified securities listed on any recognised stock exchange is in accordance with the regulations made by SEBI in this behalf;

(g) the buy-back in respect of shares or other specified securities other than those specified in Clause (f) is in accordance with rules as may be prescribed. [Sections 68(2)]

Provided that no offer of buy-back, shall be made within a period of one year from the date of the closure of the preceding offer of buy-back, if any.

(3) Procedure before buy-back : The notice of the meeting at which special resolution is proposed to be passed shall be accompanied by an explanatory statement stating -

(a) a full and complete disclosure of all the material facts;

(b) the necessity for the buy-back;

(c) the class of shares or securities intended to be purchased under the buy back;

(d) the amount to be invested under the buy-back; and

(e) the time limit for completion of buy-back.[Sections 68(3)]

(4) Time limit for completion of buy-back: Every buy-back shall be completed within twelve months from the date of passing the special resolution or a resolution passed by the Board at general meeting authorising the buy-back.[Sections 68(4)]

(5) Buy-Back from Whom? : The buy-back under Sub-section (1) may be—

(a) from the existing share holders or security holders on a proportionate basis; or

(b) from the open market; or
(c) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity. [Sections 68(5)]

(6) **Declaration of Solvency**: Where a company has passed a special resolution under clause (b) of Sub-section (2) or the Board has passed a resolution under the first proviso to clause (b) of Sub Section (2) to buy-back its own shares or other securities under this section, it shall, before making such buy-back, file with the Registrar and the Securities and Exchange Board of India a declaration of solvency in the form as may be prescribed and verified by an affidavit to the effect that the Board has made a full inquiry into the affairs of the company as a result of which they have formed an opinion that it is capable of meeting its liabilities and will not be rendered insolvent within a period of one year of the date of declaration adopted by the Board, and signed by at least two directors of the company, one of whom shall be the managing director, if any;

Provided that no declaration of solvency shall be filed with the Securities and Exchange Board of India by a company whose shares are not listed on any recognised stock exchange. [Sections 68(6)]

(7) **Extinguishment of Securities**: Where a company buys-back its own securities or other specified securities, it shall extinguish and physically destroy the shares or securities so bought-back within seven days of the last date of completion of buy-back. [Sections 68(7)]

(8) **Cooling Period**: Where a company completes a buy-back of its shares or other specified securities under this section, it shall not make further issue of same kind of shares (including allotment of further shares under clause (a) of Sub-section (1) of Section 62 or other specified securities within a period of six months except by way of bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares. [Sections 68(8)]

(9) **Register of Buy Back**: Where a company buys-back its shares or other specified securities under this section, it shall maintain a register of the shares or securities so bought, the consideration paid for the shares or securities bought-back, the date of cancellation of shares or securities, the date of extinguishing and physically destroying the shares or securities and such other particulars as may be prescribed. [Sections 68(9)]

(10) **Filing of Buy-back Return**: A company shall, after completion of the buy-back under this section, file with the Registrar and the Securities and Exchange Board of India, a return containing such particulars relating to the buy-back within thirty days of such completion, as may be prescribed:

Provided that no return shall be filed with the Securities and Exchange Board of India by a company whose shares are not listed on any recognised stock exchange. [Sections 68(10)]

(11) **Penalty for Default**: If a company makes default in complying with the provisions of this section or any regulations made by SEBI under clause (f) of Sub-section (2), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees and every officer of the company who is in default shall be punishable with
imprisonment for a term which may extend to three years or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both. [Sections 68(11)]

Transfer of certain sums to Capital Redemption Reserve account [Section 69]

Where a company purchases its own shares out of free reserves or securities premium account, then a sum equal to the nominal value of the share so purchased shall be transferred to the capital redemption reserve account and details of such transfer shall be disclosed in the balance sheet.

The capital redemption reserve account may be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

Prohibition for buy-back in certain circumstances [Section 70]

This section of the Companies Act, 2013 prohibits the company for buy back in the certain circumstances.

(1) The provision says that no company shall directly or indirectly purchase its own shares or other specified securities-

(a) through any subsidiary company including its own subsidiary companies; or

(b) through any investment company or group of investment companies; or

(c) if a default, is made by the company, in repayment of deposits or interest payment thereon, redemption of debentures or prefer-ence shares or payment of dividend to any shareholder or repayment of any term loan or interest payable thereon to any finan-cial institutions or banking company;

But where the default is remedied and a period of three years has lapsed after such default ceased to subsist, there such buy-back is not prohibited.

(2) No company shall directly or indirectly purchase its own shares or other specified securities in case such company has not complied with provisions of Sections 92 (Annual Report), 123 (Declaration of dividend), 127 (Punishment for failure to distribute dividends), and section 129 (Financial Statements).

DEBENTURES [Sections 71]

As per Section 2(30), 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.

Provided that—(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 the Reserve Bank of India, issued by a company, shall not be treated as debenture;
Section 71 of the Companies Act, 2013 provides the manner in which a company may issue debentures. According to the provision—

(1) **Issue of debentures with an option to convert**: A company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption.

Provided that the issue of debentures with an option to convert such debentures into shares, wholly or partly, shall be approved by a special resolution passed at a general meeting.

(2) **No company shall issue any debentures carrying any voting rights.**

(3) **Issue of secured debentures**: Secured debentures may be issued by a company subject to such terms and conditions as may be prescribed in Rule 18 of the *Companies (Share Capital and Debentures) Rules, 2014*.

(4) **Creation of debenture redemption reserve (DRR) account**: Where debentures are issued by a company under this section, the company shall create a **debenture redemption reserve account** out of the profits of the company available for payment of dividend and the amount credited to such account shall not be utilised by the company except for the redemption of debentures.

(5) **Limitation on the issue of prospectus/ offer / invitation to the public**: No company shall issue a prospectus or make an offer or invitation to the public or to its members exceeding five hundred for the subscription of its debentures, unless the company has, before such issue or offer, appointed one or more debenture trustees and the conditions governing the appointment of such trustees shall be such as may be prescribed.

(6) **Debenture trustee to protect the interest of debenture holders**: A debenture trustee shall take steps to protect the interests of the debenture-holders and redress their grievances in accordance with such rules as may be prescribed.
(7) Liability of debenture trustee: Any provision contained in a trust deed for securing the issue of debentures, or in any contract with the debenture-holders secured by a trust deed, shall be void in so far as it would have the effect of exempting a trustee thereof from, or indemnifying him against, any liability for breach of trust, where he fails to show the degree of care and due diligence required of him as a trustee, having regard to the provisions of the trust deed conferring on him any power, authority or discretion:

Provided that the liability of the debenture trustee shall be subject to such exemptions as may be agreed upon by a majority of debenture-holders holding not less than three-fourths in value of the total debentures at a meeting held for the purpose.

(8) To pay interest and redeem the debentures: A company shall pay interest and redeem the debentures in accordance with the terms and conditions of their issue.

(9) Filing of petition before the Tribunal by the debenture trustee: Where at any time the debenture trustee comes to a conclusion that the assets of the company are insufficient or are likely to become insufficient to discharge the principal amount as and when it becomes due, the debenture trustee may file a petition before the Tribunal and the Tribunal may, after hearing the company and any other person interested in the matter, by order, impose such restrictions on the incurring of any further liabilities by the company as the Tribunal may consider necessary in the interests of the debenture-holders.

(10) On failure to redeem the debentures/ to pay interest on the debentures: Where a company fails to redeem the debentures on the date of their maturity or fails to pay interest on the debentures when it is due, the Tribunal may, on the application of any or all of the debenture-holders, or debenture trustee and, after hearing the parties concerned, direct, by order, the company to redeem the debentures forthwith on payment of principal and interest due thereon.

(11) Default in compliance of order of the Tribunal: If any default is made in complying with the order of the Tribunal under this section, every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than two lakh rupees but which may extend to five lakh rupees, or with both.

(12) Specific performance of the contract: A contract with the company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

(13) Procedure to be prescribed by the Central Government: The Central Government may prescribe the procedure, for securing the issue of debentures, the form of debenture trust deed, the procedure for the debenture-holders to inspect the trust deed and to obtain copies thereof, quantum of debenture redemption reserve required to be created and such other matters.

### 3.10 Power to nominate [Section 72]

Nomination is a facility whereby a holder of any financial asset (bank a/c, FD, securities etc.) could nominate the name of person who would be entitled to that financial asset in case of his or her death. Generally, such nomination overrides any will. It is a very logical thing to do to avoid legal, procedural tangles related to transmission at a later stage for the near and dear ones.
As per Section 72 of the Companies Act, 2013—

(1) every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.

(2) Where the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.

(3) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

(4) Where the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority.

Key Points

♦ There are broadly two kinds of long term capital to run a business viz., owners’ capital and lender’s capital. Working capital is the short term capital which is excess of current assets over current liabilities
♦ Each type of capital is denominated by different securities with applicable rights which could be varied by following due course of law
♦ Most of the requirements to be in accordance with the AOA or MOA or with the decisions of the members’ body which are subject to the requirements of the Companies Act.
♦ There are mandated provisions related to premium and discount at the time of issue or redemption
♦ ESOP (Employee Stock Option Plan) is governed by Sec. 54 on Sweat equity
♦ Transmission is different from transfer of securities since the former is effected by law
♦ Power to alter share capital is envisaged under Sec. 61
♦ Companies could issue right shares in accordance with Sec. 62
♦ Bonus shares could be issued in accordance with sec. 63
♦ A company is restricted to purchase or give loans for purchase of its shares (other than under buy back provisions)
♦ Capital Redemtion Reserve A/c is created to meet the funds requirements for redemption of preference shares and to earmark funds for future use in the prescribed manner.
♦ Debenture Redemption Reserve A/c is created to ring fence funds requirement for redemption of Debentures
3.11 Introduction

Deposits from the public are an important mode of finance in the corporate sector. It is accordingly necessary to control the companies inviting deposits from the public in order to safeguard the general and wider interest of the public at large.

3.12 Meaning of deposit, depositor and Eligible Company

According to the definition given under section 2(31) of the Companies Act, 2013, the term ‘deposit’ includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include such categories of amount as may be prescribed in consultation with the RBI.

Types of deposits

- Secured deposits
- Unsecured deposits

According to the Companies (Acceptance of Deposits) Rules, 2014, following categories of amount may not be considered as deposit—

(i) Any amount received from the Central Government or a state Government, or from any other source whose repayment is guaranteed by the Central Government or a State Government, or any amount received from a local authority, or any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature

(ii) Any amount received from foreign Governments, foreign international banks, multilateral financial institutions etc. subject to the provisions of Foreign Exchange Management Act, 1999

(iii) any amount received as a loan or facility from any banking company.

(iv) Any amount received as a loan or financial assistance from Public Financial Institutions

(v) any amount received against issue of commercial paper or any other instruments issued in accordance with the guidelines or notification issued by the Reserve Bank of India;

(vi) any amount received by a company from any other company;
(vii) any amount received and held pursuant to an offer made in accordance with the provisions of the Act towards subscription to any securities (including share application money or advance towards allotment of securities, pending allotment), so long as such amount is appropriated only against the amount due on allotment of the securities applied for;

Explanation: 1. If the securities for which application money or advance for such securities was received cannot be allotted within 60 days from the date of receipt of the application money or advance for such securities and such application money or advance is not refunded to the subscribers within 15 days from the date of completion of 60 days, such amount shall be treated as a deposit under these rules.

Provided that unless otherwise required under the Companies Act, 1956 or the Securities and Exchange Board of India Act, 1992 or rules or regulations made thereunder to allot any share, stock, bond, or debenture within a specified period, if a company receives any amount by way of subscriptions to any shares, stock, bonds or debentures before the 1st April, 2014 and disclosed in the balance sheet for the financial year ending on or before the 31st March, 2014 against which the allotment is pending on the 31st March, 2015, the company shall, by the 1st June 2015, either return such amounts to the persons from whom these were received or allot shares, stock, bonds or debentures or comply with these rules.

2. Any adjustment of the amount for any other purpose shall not be treated as refund.

(viii) any amount received from a person who, at the time of the receipt of the amount, was a director of the company or a relative of the director of the Private company.

Provided that the director of the company or relative of the director of the private company, as the case may be, from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the Board's report;

(ix) any amount raised by the issue of bonds or debentures secured by a first charge or a charge ranking pari passu with the first charge on any assets referred to in Schedule III of the Act excluding intangible assets of the company or bonds or debentures compulsorily convertible into shares of the company within 10 years.

Provided that if such bonds or debentures are secured by the charge of any assets referred to in Schedule III of the Act, excluding intangible assets, the amount of such bonds or debentures shall not exceed the market value of such assets as assessed by a registered valuer;

(ixia) any amount raised by issue of non-convertible debenture not constituting a charge on the assets of the company and listed on a recognised stock exchange as per applicable regulations made by Securities and Exchange Board of India.

(x) any amount received from an employee of the company not exceeding his annual salary under a contract of employment with the company in the nature of non-interest bearing security deposit;
(xi) any non-interest bearing amount received or held in trust
(xii) any amount received in the course of, or for the purposes of, the business of the company—

(a) as an advance for the supply of goods or provision of services accounted for in any manner whatsoever provided that such advance is appropriated against supply of goods or provision of services within a period of three hundred and sixty five days from the date of acceptance of such advance:

Provided that in case of any advance which is subject matter of any legal proceedings before any court of law, the said time limit of three hundred and sixty five days shall not apply:

(b) as advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against such property in accordance with the terms of agreement or arrangement;

(c) as security deposit for the performance of the contract for supply of goods or provision of services;

(d) as advance received under long term projects for supply of capital goods except those covered under item (b) above:

(e) as an advance towards consideration for providing future services in the form of a warranty or maintenance contract as per written agreement or arrangement, if the period for providing such services does not exceed the period prevalent as per common business practice or five years, from the date of acceptance of such service whichever is less;

(f) as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;

(g) as an advance for subscription towards publication, whether in print or in electronic to be adjusted against receipt of such publications;

Provided that if the amount received under items (a), (b) and (d) above becomes refundable (with or without interest) due to the reasons that the company accepting the money does not have necessary permission or approval, wherever required, to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules

Explanation.- For the purposes of this sub-clause the amount shall be deemed to be deposits on the expiry of fifteen days from the date they become due for refund.

(xiii) any amount brought in by the promoters of the company by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank

(xiv) any amount accepted by a Nidhi company in accordance with the section 406 of the Act.
(xv) any amount received by way of subscription in respect of a chit under the Chit Fund Act, 1982

(xvi) any amount received by the company under any collective investment scheme in compliance with regulations framed by the Securities and Exchange Board of India

(xvii) an amount of twenty five lakh rupees or more received by a start-up company, by way of a convertible note (convertible into equity shares or repayable within a period not exceeding five years from the date of issue) in a single tranche, from a person.

Explanation—For the purposes of this sub-clause,—

1. “Start-up company” means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with notification number G.S.R. 180(E) dated 17th February, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry;

2. “Convertible note” means an instrument evidencing receipt of money initially as a debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of the start-up company upon occurrence of specified events and as per the other terms and conditions agreed to and indicated in the instrument.

(xviii) any amount received by a company from Alternate Investment Funds, Domestic Venture Capital Funds, Infrastructure Investment Trusts and Mutual Funds registered with the Securities and Exchange Board of India in accordance with regulations made by it.

Meaning of Depositor

‘Depositor’ means,

(i) any member of the company who has made a deposit with the company in accordance with the provisions of sub-section (2) of section 73 of the Act, or

(ii) any person who has made a deposit with a public company in accordance with the provisions of section 76 of the Act.

Meaning of Eligible Company

“Eligible company” means a public company as referred to in sub-section (1) of section 76, having a net worth of not less than one hundred crore rupees or a turnover of not less than five hundred crore rupees and which has obtained the prior consent of the company in general meeting by means of a special resolution and also filed the said resolution with the Registrar of Companies before making any invitation to the Public for acceptance of deposits:

However, an eligible company, which is accepting deposits within the limits specified under clause (c) of sub-section (1) of section 180, may accept deposits by means of an ordinary resolution.
3.13 Prohibition on acceptance of deposits from public [Section 73]

According to section 73 of the Companies Act, 2013,

(1) **Restriction on acceptance of deposits from public:** On and from commencement of this Act, no company shall invite, accept or renew deposits under this Act from the public except in a manner provided under this Chapter of the Act.

   **Exception:** This sub-section with respect to the acceptance or renewal of deposit from public shall not apply to the following company:

   (i) banking company,
   (ii) non-banking financial company as defined in the Reserve Bank of India Act, 1934,
   (iii) a housing finance company registered with the National Housing Bank established under the National Housing Bank Act, 1987, and
   (iv) and such other company as the Central Government may specify, after consultation with the Reserve Bank of India.

(2) **When company may accept deposit from its members:** A company may, subject to the passing of a resolution in general meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to the fulfilment of the following conditions, namely—

   (a) issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of

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depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in such form and in such manner as may be prescribed;

(b) filing a copy of the circular along with such statement with the Registrar within 30 days before the date of issue of the circular;

(c) depositing such sum which shall not be less than fifteen per cent. of the amount of its deposits maturing during a financial year and the financial year next following, and kept in a scheduled bank in a separate bank account to be called as deposit repayment reserve account;

(d) providing such deposit insurance in such manner and to such extent as may be prescribed;

(e) certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits; and

(f) providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company.

Where a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as “unsecured deposits” and shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits.

**Exception 15:**

In case of private company - Clause (a) to (e) of Sub-section 2 of Section 73 shall not apply to private Companies.

(A) which accepts from its members monies not exceeding one hundred per cent. of aggregate of the paid up share capital, free reserves and securities premium account; or

(B) which is a start-up, for five years from the date of its incorporation; or

(C) which fulfils all of the following conditions, namely:-

(a) which is not an associate or a subsidiary company of any other company;

(b) if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and

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15 In case of Specified IFSC Public Company - Clauses (a) to (e) of subsection (2) of section 73 Shall not apply to a Specified IFSC public company which accepts from its members, monies not exceeding 100% of aggregate of the paid up share capital and free reserves, and such company shall file the details of monies so accepted to the Registrar in such manner as may be specified.
(c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section:

Provided that the company referred to in clauses (A), (B) or (C) shall file the details of monies accepted to the Registrar in such manner as may be specified.

(3) Repayment of deposit: Every deposit accepted by a company shall be repaid with interest in accordance with the terms and conditions of the agreement.

(4) Failure on the repayment of deposit: Where a company fails to repay the deposit or part thereof or any interest thereon, the depositor concerned may apply to the Tribunal for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non-payment and for such other orders as the Tribunal may deem fit.

(5) Application of the amount of deposit repayment reserve account: The deposit repayment reserve account shall not be used by the company for any purpose other than repayment of deposits.

According to the **Companies (Acceptance of Deposits) Rules, 2014**: 

**Rule 3-Terms and Conditions of Acceptance of Deposits by Companies**

(1) On and from the commencement of these rules,—

(a) no company referred to in sub-section (2) of section 73 and no eligible company shall accept or renew any deposit, whether secured or unsecured, which is repayable on demand or upon receiving a notice within a period of less than six months or more than thirty-six months from the date of acceptance or renewal of such deposit:

Provided that a company may, for the purpose of meeting any of its short-term requirements of funds, accept or renew such deposits for repayment earlier than six months from the date of deposit or renewal, as the case may be, subject to the condition that—

(i) such deposits shall not exceed ten per cent. of the aggregate of the Paid-up share capital, free Reserves and securities premium account of the company, and

(ii) such deposits are repayable not earlier than three months from the date of such deposits or renewal thereof.

(2) Where depositors so desire, deposits may be accepted in joint names not exceeding three, with or without any of the clauses, namely, “Jointly”, “Either or Survivor”, “First named or Survivor”, “Anyone or Survivor”.

(3) No company referred to in sub-section (2) of section 73 shall accept or renew any deposit from its members, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits exceeds thirty five per cent of the aggregate of the Paid-up share capital, free Reserves and securities premium account of the company.
Provided that a Specified IFSC Public company and a private company may accept from its members monies not exceeding one hundred per cent. of aggregate of the paid up share capital, free reserves and securities premium account and such company shall file the details of monies so accepted to the Registrar in Form DPT-3.

Explanation.- For the purpose of this rule, a Specified IFSC Public company means an unlisted public company which is licensed to operate by the Reserve Bank of India or the Securities and Exchange Board of India or the Insurance Regulatory and Development Authority of India from the International Financial Services Centre located in an approved multi services Special Economic Zone set-up under the Special Economic Zones Act 2005 read with the Special Economic Zones Rules, 2006:

Provided further that the maximum limit in respect of deposits to be accepted from members shall not apply to following classes of private companies, namely:-

(i) a private company which is a start-up, for five years from the date of its incorporation;

(ii) a private company which fulfils all of the following conditions, namely:-

(a) which is not an associate or a subsidiary company of any other company;

(b) the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is less ; and

(c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under section 73:

Provided also that all the companies accepting deposits shall file the details of monies so accepted to the Registrar in Form DPT-3.

(4) No eligible company shall accept or renew—

(a) any deposit from its members, if the amount of such deposit together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits from members exceeds ten per cent. of the aggregate of the Paid-up share capital, free Reserves and securities premium account of the company;

(b) any other deposit, if the amount of such deposit together with the amount of such other deposits, other than the deposit referred to in clause (a), outstanding on the date of acceptance or renewal exceeds twenty-five per cent. of aggregate of the Paid-up share capital, free Reserves and securities premium account of the company.

(5) No Government company eligible to accept deposits under section 76 shall accept or renew any deposit, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal exceeds thirty five per cent. of the aggregate of its Paid-up share capital, free Reserves and securities premium account of the company.
(6) No company referred to in sub-section (2) of section 73 or any eligible company shall invite or accept or renew any deposit in any form, carrying a rate of interest or pay brokerage thereon at a rate exceeding the maximum rate of interest or brokerage prescribed by the Reserve Bank of India for acceptance of deposits by non-banking financial companies.

Explanation: For the purposes of this sub-rule, it is hereby clarified that the person who is authorised, in writing, by a company to solicit deposits on its behalf and through whom deposits are actually procured shall only be entitled to the brokerage and payment of brokerage to any other person for procuring deposits shall be deemed to be in violation of these rules.

(7) The company shall not reserve to itself either directly or indirectly a right to alter, to the prejudice or disadvantage of the depositor, any of the terms and conditions of the deposit, deposit trust deed and deposit insurance contract after circular or circular in the form of advertisement is issued and deposits are accepted.

(8) (a) Every eligible company shall obtain, at least once in a year, credit rating for deposits accepted by it and a copy of the rating shall be sent to the Registrar of Companies alongwith the return of deposits in Form DPT-3.

(b) The credit rating referred to in clause (a) shall not be below the minimum investment grade rating or other specified credit rating for fixed deposits, from any one of the approved credit rating agencies as specified for Non-Banking Financial Companies in the Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 1998, issued by the Reserve Bank of India, as amended from time to time.

Rule 6: Creation of security

(1) For the purposes of providing security, every company referred to in sub-section (2) of section 73 and every eligible company inviting secured deposits shall provide for security by way of a charge on its assets as referred to in Schedule III of the Act excluding intangible assets of the company for the due repayment of the amount of deposit and interest thereon for an amount which shall not be less than the amount remaining unsecured by the deposit insurance:

Provided that in the case of deposits which are secured by the charge on the assets referred to in Schedule III of the Act excluding intangible assets, the amount of such deposits and the interest payable thereon shall not exceed the market value of such assets as assessed by a registered valuer.

Explanation. I—For the purposes of this sub-rule it is clarified that the company shall ensure that the total value of the security either by way of deposit insurance or by way of charge or by both on company’s assets shall not be less than the amount of deposits accepted and the interest payable thereon.
Explanation. II—For the purposes of proviso to sub-clause (ix) of clause (c) of sub-rule (1) of rule 2 and this sub-rule, it is hereby clarified that pending notification of sub-section (1) of section 247 of the Act and finalisation of qualifications and experience of valuers, valuation of stocks, shares, debentures, securities etc. shall be conducted by an independent merchant banker who is registered with the Securities and Exchange Board of India or an independent chartered accountant in practice having a minimum experience of ten years.

(2) The security (not being in the nature of a pledge) for deposits as specified in sub-rule (1) shall be created in favour of a trustee for the depositors on:

(a) specific movable property of the company, or

(b) specific immovable property of the company wherever situated, or any interest therein.

Rule 7- Appointment of Trustee for Depositors

(1) No company referred to in sub-section (2) of section 73 or any eligible company shall issue a circular or advertisement inviting secured deposits unless the company has appointed one or more trustees for depositors for creating security for the deposits:

Provided that a written consent shall be obtained from the trustee for depositors before their appointment and a statement shall appear in the circular or circular in the form of advertisement with reasonable prominence to the effect that the trustees for depositors have given their consent to the company to be so appointed.

(2) The company shall execute a deposit trust deed in Form DPT-2 at least seven days before issuing the circular or circular in the form of advertisement.

(3) No person including a company that is in the business of providing trusteeship services shall be appointed as a trustee for the depositors, if the proposed trustee—

(a) is a director, key managerial personnel or any other officer or an employee of the company or of its holding, subsidiary or associate company or a depositor in the company;

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

(c) has any material pecuniary relationship with the company;

(d) has entered into any guarantee arrangement in respect of principal debts secured by the deposits or interest thereon;

(e) is related to any person specified in clause (a) above.

(4) No trustee for depositors shall be removed from office after the issue of circular or advertisement and before the expiry of his term except with the consent of all the directors present at a meeting of the board.
Provided that in case the company is required to have independent directors, at least one independent director shall be present in such meeting of the Board.

Rule 14- Register of Deposits

(1) Every company accepting deposits shall maintain at its registered office one or more separate registers for deposits accepted or renewed, in which there shall be entered separately in the case of each depositor the following particulars, namely:

(a) name, address and PAN of the depositor/s;
(b) particulars of guardian, in case of a minor;
(c) particulars of the nominee;
(d) deposit receipt number;
(e) date and the amount of each deposit;
(f) duration of the deposit and the date on which each deposit is repayable;
(g) rate of interest or such deposits to be payable to the depositor;
(h) due date for payment of interest;
(i) mandate and instructions for payment of interest and for non-deduction of tax at source, if any;
(j) date or dates on which the payment of interest shall be made;
(k) details of deposit insurance including extent of deposit insurance;
(l) particulars of security or charge created for repayment of deposits;
(m) any other relevant particulars;

(2) The entries specified in sub-rule (1) shall be made within seven days from the date of issuance of the receipt duly authenticated by a director or secretary of the company or by any other officer authorised by the Board for this purpose.

(3) The register referred to in sub-rule (1) shall be preserved in good order for a period of not less than eight years from the financial year in which the latest entry is made in the register.

Rule 16- Return of deposits to be filed with the Registrar

Every company to which these rules apply, shall on or before the 30th day of June, of every year, file with the Registrar, a return in Form DPT-3 along with the fee as provided in Companies (Registration Offices and Fees) Rules, 2014 and furnish the information contained therein as on the 31st day of March of that year duly audited by the auditor of the company.

Rule 16A- Disclosures in the financial statement

(1) Every company, other than a private company, shall disclose in its financial statement, by way of notes, about the money received from the director.
(2) Every private company shall disclose in its financial statement, by way of notes, about the money received from the directors, or relatives of directors.

**Rule 17- Penal rate of interest**

Every company shall pay a penal rate of interest of 18% p.a. for the overdue period in case of deposits, whether secured or unsecured, matured and claimed but remaining unpaid.

**Rule 19- Applicability of section 73 and 74 to eligible companies**

Pursuant to provisions of sub-section (2) of section 76 of the Act, the provisions of sections 73 and 74 shall, mutatis mutandis, apply to acceptance of deposits from public by eligible companies.

**Explanation**- For the purposes of this rule, it is hereby clarified that in case of a company which had accepted or invited public deposits under the relevant provisions of the Companies Act, 1956 and rules made under that Act (here in after known as “Earlier Deposits”) and has been repaying such deposits and interest thereon in accordance with such provisions, the provisions of clause (b) of sub-section (1) of section 74 of the Act shall be deemed to have been complied with if the company complies with requirements under the Act and these rules and continues to repay such deposits and interest due thereon on due dates for the remaining period of such deposit in accordance with the terms and conditions and period of such Earlier Deposits and in compliance with the requirements under the Act and these rules;

Provided further that the fresh deposits by every eligible company shall have to be in accordance with the provisions of Chapter V of the Act and these rules.

**Rule 21- Punishment for contravention**

If any company referred to in sub-section (2) of section 73 or any eligible company inviting deposits or any other person contravenes any provision of these rules for which no punishment is provided in the Act, the company and every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first day during which the contravention continues.

### 3.14 Repayment of deposits, etc, accepted before commencement of this Act [Section 74]

According to section 74 of the Companies Act, 2013,

(i) Where in respect of any deposit accepted by a company before the commencement of this Act, the amount of such deposit or part thereof or any interest due thereon remains unpaid on such commencement or becomes due at any time thereafter, the company shall—

   (a) file, within a period of 3 months from such commencement or from the date on which such payments, are due, with the Registrar a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable
thereon along with the arrangements made for such repayment, notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and

(b) repay within one year from such commencement or from the date on which such payments are due, whichever is earlier.

(ii) The Tribunal may on an application made by the company, after considering the financial condition of the company, the amount of deposit or part thereof and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.

(iii) If a company fails to repay the deposit or part thereof or any interest thereon within the time specified in sub-section (1) or such further time as may be allowed by the Tribunal under sub-section (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees but which may extend to ten crore rupees and every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years or with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees, or with both.

### 3.15 Damages for Fraud [Section 75]

(1) Where a company fails to repay the deposit or part thereof or any interest thereon referred to in section 74 within the time specified in sub-section (1) of that section or such further time as may be allowed by the Tribunal under sub-section (2) of that section, and it is proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall, without prejudice to the provisions contained in sub-section (3) of that section and liability under section 447, be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by the depositors.

(2) Any suit, proceedings or other action may be taken by any person, group of persons or any association of persons who had incurred any loss as a result of the failure of the company to repay the deposits or part thereof or any interest thereon.

### 3.16 Acceptance of deposits from public by certain companies [Section 76]

According to section 76 of the Companies Act, 2013–

(1) a public company, having such net worth of not less than one hundred crore rupees or turnover of not less than five hundred crore rupees, may accept deposits from persons
other than its members subject to compliance with the requirements provided in subsection (2) of section 73 and subject to such rules as the Central Government may, in consultation with the Reserve Bank of India, prescribe:

Provided that such a company shall be required to obtain the rating (including its networth, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency for informing the public the rating given to the company at the time of invitation of deposits from the public which ensures adequate safety and the rating shall be obtained for every year during the tenure of deposits:

Provided further that every company accepting secured deposits from the public shall within thirty days of such acceptance, create a charge on its assets of an amount not less than the amount of deposits accepted in favour of the deposit holders in accordance with such rules as may be prescribed.

(2) The provisions of this Chapter shall, mutatis mutandis, apply to the acceptance of deposits from public under this section.

### 3.17 Punishment for Contravention of Section 73 or Section 76

[Section 76A]

Where a company accepts or invites or allows or causes any other person to accept or invite on its behalf any deposit in contravention of the manner or the conditions prescribed under section 73 or section 76 or rules made thereunder or if a company fails to repay the deposit or part thereof or any interest due thereon within the time specified under section 73 or section 76 or rules made thereunder or such further time as may be allowed by the Tribunal under section 73,—

(a) the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees or twice the amount of deposit accepted by the company, whichever is lower but which may extend to ten crore rupees; and

(b) every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years and with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees:

Provided that if it is proved that the officer of the company who is in default, has contravened such provisions knowingly or wilfully with the intention to deceive the company or its shareholders or depositors or creditors or tax authorities, he shall be liable for action under section 447.
KEY POINTS

♦ Deposit includes any receipt of money by way of deposit or loan or in any other form by a company but does not include such categories of amount prescribed in consultation with RBI.

♦ Section 73 prohibits a company to invite, accept or renew deposits from public. This prohibition however shall not apply in case of
  * banking company
  * non-banking financial company
  * such other company as the Central Government may specify.

♦ If a company fails to repay the deposit or part thereof or any interest thereon, the depositor concerned may apply to the Tribunal for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non-payment and for such other orders as the Tribunal may deem fit.

♦ The deposit repayment reserve account shall not be used by the company for any purpose other than repayment of deposits.

♦ The company accepting deposits shall maintain at its registered office one or more registers for deposits accepted or renewed.

♦ The Return of Deposits shall be filed in Form DPT-3 with the Registrar.

♦ There are stringent penal provisions (Sec. 75 and 76 A) to safeguard the interest of the depositors.
3.18 Introduction to Registration of Charges

According to section 2(16) of the Companies Act, 2013 “charge” has been defined as an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

Thus, Charge is:

♦ an interest or lien
♦ created on the property or assets
♦ of a company or any of its undertakings or both
♦ as security and includes a mortgage.

On reading the above definition, the first question that arises in the minds of the reader is that why creating a charge is a necessity for companies.

The answer to this lies in the setup of raising capital by the companies. Generally, companies depend on share capital and borrowed capital for funding their projects. When the company raises money through borrowings, they may issue debentures or by obtaining loans from banks/financial institutions. These banks/financial institutions need a surety regarding the repayment of their funds. Thus, they create a mortgage or hypothecation on the assets of the company for safe and secured lending of the funds. This creation of right on the assets and properties of the borrower companies, is known as a charge on assets.

Once charge is registered and filed, it becomes an information in public domain as to how much company has borrowed against its assets and from whom.
The law with respect to the registration of charges are dealt in sections 77 to 87 of the
Companies Act, 2013.

3.19 Duty to Register Charges, etc. [section 77]

Charge Created

Within 30 days

Register Charge

If not register in 30 days

Register with additional fees [Condonation]

If not register in 300 days

Seek extension from CG [Rectification in Register of Charges]

Omission to file with the Registrar the particulars of Charge

Omission to register Charge within time

Omission or Mis-Statement /modification wrt memorandum of satisfactory

Any other grounds – just & equitable
Section 77 of the Act deals with duty to register charges. According to the section:

1. **Duty of the company to register charges**: It shall be duty of the company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise and situated in or outside India, to register the particulars of the charge signed by the company and the charge holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the registrar within 30 days of creation.

2. **Registration by the registrar**: The Registrar may, on an application by the company, allow such registration to be made within a period of three hundred days of such creation on payment of such additional fees as may be prescribed.

Provided further that if registration is not made within a period of three hundred days of such creation, the company shall seek extension of time in accordance with section 87.

Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

In terms of Rule 3 of the **Companies (Registration of Charges), Rules 2014**, Verification of instrument evidencing creation or modification of Charge [Sub rule 4 of Rule 3]: A copy of every instrument evidencing any creation or modification of charge and required to be filed with the Registrar in pursuance of section 77, 78 or 79 shall be verified as follows-

- (a) where the instrument or deed relates solely to the property situated outside India, the copy shall be verified by a certificate issued either under the seal, if any, of the company, or under the hand of any director or company secretary of the company or an authorised officer of the charge holder or under the hand of some person other than the company who is interested in the mortgage or charge;

- (b) where the instrument or deed relates, whether wholly or partly, to the property situated in India, the copy shall be verified by a certificate issued under the hand of any director or company secretary of the company or an authorised officer of the charge holder.

3. **Condonation of delay by Registrar**

- (a) The Registrar may, on being satisfied that the company had sufficient cause for not filing the particulars and instrument of charge, if any, within a period of 30 days of the date of creation of the charge, allow the registration of the same after thirty days but within a period of 300 days of the date of such creation of charge or modification of charge on payment of additional fee.

- (b) The application for delay shall be made and supported by a declaration from the company signed by its secretary or director that such belated filing shall not adversely affect rights of any other intervening creditors of the company [Rule 4 of the Companies (Registration of Charges) Rules, 2014].
(4) **Issue of certificate of registration by registrar:** Where a charge is registered with the Registrar, a certificate of registration of such charge shall be issued in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge is created.

(5) **No charge to be taken into account by the liquidator/creditor:** No charge created by a company shall be taken into account by the liquidator appointed under this Act or the Insolvency and Bankruptcy Code, 2016, as the case may be or any other creditor, unless –

(i) it is duly registered under sub-section (1), and

(ii) a certificate of registration of such charge is given by the Registrar under sub-section (2).

However, not registering charge shall not impact/negate any contract or obligation for the repayment of the money secured by a charge. Further, it may be noted that failure to register charge shall not absolve company’s liability in respect of any offence under this Chapter.

### 3.20 Application for Registration of Charge [section 78]

As per section 78 of the Companies Act, 2013, where a company fails to register the charge within the period 30 days, the person in whose favour the charge is created may apply to the Registrar for registration of the charge along with the instrument created for the charge, within such time and in such form and manner as may be prescribed and the Registrar may, on such application, within a period of 14 days after giving notice to the company, unless the company itself registers the charge or shows sufficient cause why such charge should not be registered, allow such registration on payment of such fees, as may be prescribed.

[For details students may refer Rule 3 of the *Companies (Registration of Charges) Rules, 2014*].

Provided that where registration is effected on application of the person in whose favour the charge is created, that person shall be entitled to recover from the company the amount of any fees or additional fees paid by him to the Registrar for the purpose of registration of charge.

### 3.21 Section 77 to Apply in Certain Matters [section 79]

**Modification of charge:** The term ‘modification’ includes variation of any of the terms of the agreement including variation of rate of interest which may be by mutual agreement or by operation of law. Even if the rights of a charge holder are assigned to a third party, it will be regarded as a modification.

The provisions applicable to the registration of a charge under section 77 shall apply to modification of the charge. Some examples of modification are as under:

1. where the charge is modified by varying any terms and conditions of the existing charge by agreement;
2. where the modification is in pursuance of an agreement for enhancing or decreasing the limits;
3. where the modification is by ceding a *pari passu* charge;
4. change in rate of interest (other than bank rate);
5. change in repayment schedule of loan; (this is not applicable in working loans which are repayable on demand) and
6. partial release of the charge on a particular asset or property.

Section 79 of the Companies Act, 2013, says that section 77 relating to registration of charges shall, so far as may be, apply to—

(a) a company acquiring any property subject to a charge within the meaning of that section;

or

(b) any modification in the terms or conditions or the extent or operation of any charge registered under that section.

As per *Rule 6 of the Companies (Registration of Charges) Rules, 2014*, where the particulars of modification of charge is registered under section 79, the Registrar shall issue a certificate of modification of charge. The certificate issued by the Registrar shall be conclusive evidence that the requirements of Chapter VI of the Act and the rules made thereunder as to registration of creation or modification of charge, as the case may be, have been complied with.

### 3.22 Date of Notice of Charge [section 80]

According to section 80 of the Companies Act, 2013, where any charge on any property or assets of a company or any of its undertakings is registered under section 77, any person acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be deemed to have notice of the charge from the date of such registration.
3.23 Register of Charges to be kept by Registrar [Section 81]

Section 81 of the Companies Act, 2013 deals with maintenance of the register of charges by the registrar. According to it, the Registrar shall, in respect of every company, keep a register containing particulars of the charges registered under this Chapter in such form and in such manner as may be prescribed.

Such a register, shall be open to inspection by any person on payment of such fees as may be prescribed for each inspection.

The particulars of charges maintained on the Ministry of Corporate Affairs portal (www.mca.gov.in/MCA21) shall be deemed to be the register of charges for the purposes of section 81 of the Act. [Rule 7 of the Companies (Registration of Charges) Rules, 2014]

3.24 Company's Register of Charges [section 85]

1. **Company's register of charges:** According to section 85 of the Companies Act, 2013, every company shall keep at its registered office a register of charges in such form and in such manner as may be prescribed, which shall include therein all charges and floating charges affecting any property or assets of the company or any of its undertakings, indicating in each case such particulars as may be prescribed.

   Section provides that a copy of the instrument creating the charge shall also be kept at the registered office of the company along with the register of charges.

2. **Inspection of the register of charges and instrument of charges:** The register of charges and instrument of charges, shall be open for inspection during business hours—
   (a) by any member or creditor without any payment of fees; or
   (b) by any other person on payment of such fees as may be prescribed,

   -subject to such reasonable restrictions as the company may, by its articles, impose.

As per Rule 10 of the Companies (Registration of Charges) Rules, 2014:

**Company's Register of Charges**

(1) Every company shall keep at its registered office a register of charges in Form No. CHG.7 and enter therein particulars of all the charges registered with the Registrar on any of the property, assets or undertaking of the company and the particulars of any property acquired subject to a charge as well as particulars of any modification of a charge and satisfaction of charge.

(2) The entries in the register of charges maintained by the company shall be made forthwith after the creation, modification or satisfaction of charge, as the case may be.

(3) Entries in the register shall be authenticated by a director or the secretary of the company or any other person authorised by the Board for the purpose.
(4) The register of charges shall be preserved permanently and the instrument creating a charge or modification thereon shall be preserved for a period of 8 years from the date of satisfaction of charge by the company.

3.25 Company to Report Satisfaction of Charge [section 82]

1. Company to intimate the registrar on the satisfaction of charge: According to section 82 of the Companies Act, 2013, a company shall give intimation to the Registrar in the prescribed form [Form CHG 1], of the payment or satisfaction in full of any charge registered under this Chapter within a period of 30 days from the date of such payment or satisfaction and the provisions of section 77(1) shall, as far as may be, apply to an intimation given under this section.\(^\text{16}\)

    ![Diagram]

2. Notice to the holder of charge by the registrar: The Registrar shall, on receipt of intimation, cause a notice to be sent to the holder of the charge calling upon him to show cause within such time not exceeding 14 days, as may be specified in such notice, as to why payment or satisfaction in full should not be recorded as intimated to the Registrar, and if no cause is shown, by such holder of the charge, the Registrar shall order that a memorandum of satisfaction shall be entered in the register of charges kept by him under section 81 and shall inform the company that he has done so.

    However, no notice shall be required to be sent, in case the intimation to the Registrar in this regard is in the specified form and signed by the holder of charge.

3. If any cause is shown, the Registrar shall record a note to that effect in the register of charges and shall inform the company.

4. No effect of this section on the powers of the Registrar: Nothing in this section shall be deemed to affect the powers of the Registrar to make an entry in the register of charges under section 83 or otherwise than on receipt of an intimation from the company.

\(^{16}\) Provided that in case of a Specified IFSC public company, the Registrar may, on an application by the company, allow such registration to be made within a period of three hundred days of such creation on payment of such additional fees as may be prescribed.

Provided that in case of a Specified IFSC private company, the Registrar may, on an application by the company, allow such registration to be made within a period of three hundred days of such creation on payment of such additional fees as may be prescribed.
3.26 Power of Registrar to Make Entries of Satisfaction and Release in Absence of Intimation from Company [section 83]

Section 83 of the Companies Act, 2013 provides powers to the registrar to make entries with respect to the satisfaction and release of charges where no intimation has been received by him from the company.

(i) The Registrar may, on evidence being given to his satisfaction with respect to any registered charge,—

(a) that the debt for which the charge was given has been paid or satisfied in whole or in part; or

(b) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking,

- enter in the register of charges a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be, despite the fact that no intimation has been received by him from the company.

(ii) The Registrar shall inform the affected parties within thirty days of making the entry in the register of charges kept under section 81(1).

According to the Companies (Registration of Charges) Rules, 2014 with respect to the satisfaction of charge-

(1) A company shall within a period of thirty days from the date of the payment or satisfaction in full of any charge registered, give intimation of the same to the Registrar along with the fee.

(2) Where the Registrar enters a memorandum of satisfaction of charge in full in pursuance of section 82 or 83, he shall issue a certificate of registration of satisfaction of charge.

3.27 Intimation of Appointment of Receiver or Manager [section 84]

Section 84 of the Companies Act, 2013 provides that if any person obtains an order for the appointment of a receiver of, or of a person to manage, the property, subject to a charge, of a company or if any person appoints such receiver or person under any power contained in any instrument, he shall, within a period of 30 days from the date of the passing of the order or of the making of the appointment, give notice of such appointment to the company and the Registrar along with a copy of the order or instrument and the Registrar shall, on payment of the prescribed fees, register particulars of the receiver, person or instrument in the register of charges.

Any person appointed above shall, on ceasing to hold such appointment, give to the company and the Registrar a notice to that effect and the Registrar shall register such notice.
3.28 Punishment for Contravention [section 86]

According to section 86 of the Companies Act, 2013, if any company contravenes any provision relating to the registration of charges contained under chapter VI of the Act, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to ten lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

3.29 Rectification by Central Government in Register of Charges

[Section 87]

I. Rectification by Central Government in register of charges: Section 87 of the Companies Act, 2013 empowers the *Central Government to make rectification in register of charges. According to the provision—

(1) The Central Government on being satisfied that—

(i) (a) the omission to file with the Registrar the particulars of any charge created by a company or any charge subject to which any property has been acquired by a company or any modification of such charge; or

(b) the omission to register any charge within the time required under this Chapter or the omission to give intimation to the Registrar of the payment or the satisfaction of a charge, within the time required under this Chapter; or

(c) the omission or mis-statement of any particular with respect to any such charge or modification or with respect to any memorandum of satisfaction or other entry made in pursuance of section 82 or section 83, - was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors or shareholders of the company; or

(ii) on any other grounds, it is just and equitable to grant relief,

-it may on the application of the company or any person interested and on such terms and conditions as it may seem to the *Central Government just and expedient, direct that the time for the filing of the particulars or for the registration of the charge or for the giving of intimation of payment or satisfaction shall be extended or, as the case may require, that the omission or mis-statement shall be rectified.
(2) Where the Central Government extends the time for the registration of a charge, the order shall not prejudice any rights acquired in respect of the property concerned before the charge is actually registered.

II. Condonation of delay and rectification of register of charges. According to Rule 12 of the Companies (Registration of Charges) Rules, 2014:

(1) Where the instrument creating or modifying a charge is not filed within a period of 300 hundred days from the date of its creation (including acquisition of a property subject to a charge) or modification and where the satisfaction of the charge is not filed within 30 days from the date on which such payment of satisfaction, the Registrar shall not register the same unless the delay is condoned by the Central Government.

(2) The application for condonation of delay and for such other matters covered in sub-clause (a), (b) and (c) of clause (i) of sub-section (1) of section 87 of the Act shall be filed with the Central Government along with the fee.

(3) The order passed by the Central Government under section 87(1) of the Act shall be required to be filed with the Registrar along with the fee as per the conditions stipulated in the said order.

KEY POINTS
◆ “Charge” has been defined as an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.
◆ A charge created by a company is required to be registered with registrar within 30 days of its creation.
◆ Condonation of delay by Registrar: The Registrar may on application by the Company may allow registration of charge within 300 days of creation or modification of charge on payment of additional fee.
◆ If Company fails to register the charge even within this period of 300 days it may seek extension of time from the Central Government in accordance with section 87.
◆ The company shall give intimation to Registrar of payment or satisfaction in full of any charge within a period of 30 days from the date of such payment or satisfaction.
◆ On receipt of such intimation, the registrar issues a notice to the holder calling a show cause within such time not exceeding 14 days as to why payment or satisfaction in full should not be regarded as intimated to the Registrar.

In case, the company fails to send intimation of satisfaction of charge to the Registrar, the registrar may enter in the register of charges memorandum of satisfaction on receipt of evidence to his satisfaction.

Where Registrar enters a memorandum of satisfaction of charge in full, he shall issue a certificate of registration of satisfaction of charge.

Company’s register of Charges

Every company shall keep at its registered office a register of charges which shall include therein all charges and floating charges affecting any property or assets of the company or any of its undertakings. It will be updated after the creation, modification or satisfaction of charge.

This register shall be preserved permanently and the instrument creating a charge or modification thereon shall be preserved for a period of 8 years from the date of satisfaction of charge by the company.

The register of charges and instrument of charges shall be kept open for inspection during business hours by members, creditors or any other person subject to reasonable restriction as the company by its articles impose.

Rectification by Central Government in register of Charges/Condonation of delay

(i) The Central Government on being satisfied that—

- the omission to file with the Registrar the particulars of any charge created by a company or any charge.
- the omission to register any charge within the time required or the omission to give intimation to the Registrar of the payment or the satisfaction of a charge, within the time prescribed as per Act.
- the omission or mis-statement of any particular with respect to any such charge or modification or with respect to any memorandum of satisfaction or other entry made in pursuance of section 82 or section 83 was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors or shareholders of the company; or,

(ii) on any other grounds, it is just and equitable to grant relief.
UNIT- 4 : MEETINGS & PROCEEDINGS

Learning Objectives
The management and administration of a company constitutes an integral and important portion in the Companies Act, 2013. It gives an opportunity to the shareholders to know about the state of affairs of the company and also deliberate on various issues. This part of chapter deals with the maintenance of the Registers and preparation of the annual returns. There are different kinds of meetings that have to be convened upon by the company and statutory requirements have to be complied while calling, convening and conducting of the meetings.

At the end of this Chapter, you will be able to:

♦ State the meaning, need and importance of management & administration of company.
♦ Learn about the Maintenance of registers and other documentation required to be kept by a Company.
♦ Know about meeting for conduct of the business.
♦ Explain the requirements for convening of a valid meeting.

4.0 INTRODUCTION
A company is an artificial legal entity distinct from its members, thus, the affairs of the company are practically done by the Board of Directors. The Board of Directors in carrying out the day-to-day affairs of the company has to perform the role within their limited powers and the powers, which are granted to them. Certain powers can be exercised by the board of their own and some with the consent of the company at the general meeting. The shareholders as owners of the company ratify the actions of the board at the meetings of the company. The meetings of the shareholders serve as the focal point for the shareholders to converge and give their decisions on the actions taken by the directors.
To begin with, let us understand the structure of this Chapter of Companies Act, 2013 which deals with the provisions related to Management & Administration of Company. It runs from Section 88 to 122 and is divided under the following headings –

Thus, to initiate, it is imperative that we streamline the understanding of this unit so as to link it with the essential concepts along with their procedures which can be found in the respective rules, i.e. Companies (Management & Administration) Rules, 2014.

This Unit applies to all the companies, public and private and has special provisions applicable to One Person Company, which are detailed out in section 122 of the Act and is discussed later in the Unit.

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4.1 Registers

The provisions relating to maintaining the various registers as per the Companies Act, 2013 are contained in Sections 88 – 91. Along with these provisions, the Companies (Management & Administration) Rules, 2014 are also applicable to the maintenance of registers by a Company. Relevant provisions related to maintenance of register is as follows:

**SECTION 88 – REGISTER OF MEMBERS, ETC.**

Section 88(1) of the Companies Act, 2013 seeks to provide that every company shall keep and maintain the register of members, register of debenture-holders and register of any other security holders.

- **Maintenance of Register of members:** Section 88(1)(a) requires a register of members to be maintained and that the holding of each class of equity and preference shares by each member residing in or outside India will have to be shown separately in the register of members. The form and manner in which these registers are to be maintained, is contained in Rule 3 of the Companies (Management & Administration) Rules, 2014; whereas Rule 5 provides for the maintenance of the register of members.

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◆ **Time period for entries in register:** As per Rule 5, entries have to be made in the Register within 7 days of the date of approval by the Board or Committee thereof by approving the allotment or transfer as the case may be.

◆ **Place where register shall be maintained:** Rule 5 also states that the registers shall be maintained at the registered office of the company unless a special resolution is passed in a general meeting authorising the keeping of the register at any other place within the city, town or village in which the registered office is situated or any other place in India in which more than 1/10th of the total members entered in the register of members reside.

◆ **Other informations also to be referred in register:** Any order passed by the authority attaching the shares or relating to dividends is also required to be referred in the register of members. Hypothecation and pledge of shares is also required to be entered in the register of members as per Rule 5(7) and 5(8).

◆ **Particular in register:** Rule 3 prescribes that every company limited by shares, shall, from the date of its registration, maintain a register of its members in Form MGT – 1. In case of a company not limited by shares, the register shall contain the following particulars, in respect of each member—
  - Name of the member, address (registered office address in case the member is a body corporate); email address; Permanent Account Number or Corporate Identity Number (‘CIN’); Nationality; in case member is a minor – name of his guardian and the date of birth of the member, name and address of the nominee;
  - Date of becoming the member;
  - Date of cessation;
  - Amount of guarantee, if any;
  - Any other interest, if any; and
  - Instructions, if any, given by the member with regard to sending of notices, etc.

◆ **Maintenance of register of debenture holders:** Section 88(1)(b) of the Act refers to the form and manner of maintenance of Register of debenture-holders, which corresponds to Rule 4 which states that every company which issues or allots debentures or any other security shall maintain a separate register for debenture holder or security holder in Form–MGT–2.

◆ **Updation of rewards of members:** Rule 5 also states that the changes relating to the status of the member should be effectively captured and updated accordingly in the relevant register. If any change occurs in the status of a member or debenture-holder or any other security holder whether due to death or insolvency or change of name or due to transfer to Investor Education Protection Fund or due to any other reason, entries shall be made in the respective registers.
**Index of names:** Section 88(2) mentions that every register maintained under section 88(1) shall include an index of names included therein. The relevant rule here is, *Rule 6 of the Companies (Management & Administration) Rules, 2014* which state that the maintenance of index is not necessary where the number of members is less than 50. It also states that the company shall make the necessary entries in the index simultaneously with the entry for allotment or transfer of any security in such Register.

**Register index of beneficial owner to be maintained of a depository:** Section 88(3) is basically an enabling provision, which sets out that the register and index of beneficial owners maintained by a depository under section 11 of the Depositories Act, 1996, shall be deemed to be the corresponding register and index for the purposes of this Act.

To understand the term ‘depository’ here, let us go back to the times when shares used to be held in physical form by the shareholders and the evidence that a particular person was a shareholder in a particular company in which he/she had invested, could be proved only by the fact that the said person had the share certificates of the company. With the advent of time, the companies dematerialised their shares by converting them into electronic form and thus, now-a-days if you wish to invest in the shares of a company, you can do so by opening a Demat account and so the shares get transferred to you. In this situation, you are the beneficial owner of the shares of the company in which you have invested. The physical shares are still issued by the Company and transferred to intermediary institutions (like NSDL and CDSL in India) who store and secure the shares for the company and the investor maintains an account for their securities. These intermediaries are known as Depository, who work like a bank. So practically, the company issues the shares to you when you invest in the securities of the issuing company, but what you get is the electronic copy of the share certificate. The physical share certificate is handled by the Depository, although you are the beneficial owner of the securities. Whenever any transfer of shares take place, the Depository’s function is to transfer the ownership of shares from one investor’s account to another investor account.

**Foreign Register – Section 88(4) read with Rule 7:**

**Maintenance of foreign register:** The most important part of section 88 is its sub-clause (4) since it deals with Foreign Register. Section 88(4) read with Rule 7 entitles a company to maintain a foreign register of members, debenture-holders or other security holders or beneficial owners, showing the holding of persons residing outside India.

**Compliances:** The compliances with respect to maintenance of foreign register are as follows–

- A company which has share capital or which has issued debentures or any other security may, if so authorised by its articles, keep in any country outside India, a part of the register of members or as the case may be, of debenture holders or of any other security holders or of beneficial owners, resident in that country.

- The company shall, within 30 days from the date of the opening of any foreign register, file with the Registrar of Companies (‘RoC’) notice of the situation of the office in the
prescribed from Form No. MGT – 3 along with the fee where such register is kept; and in the event of any change in the situation of such office or of its discontinuance, shall, within 30 days from the date of such change or discontinuance, as the case may be, file notice with the RoC of such change or discontinuance.

- A foreign register shall be deemed to be part of the company's register ("principal register") of members or of debenture-holders or of any other security holders or beneficial owners, as the case may be.

- The foreign register shall be maintained in the same format as the principal register.

- A foreign register shall be open to inspection and may be closed, and extracts may be taken therefrom and copies thereof may be required, in the same manner, as is applicable to the principal register, except that the advertisement before closing the register shall be inserted in at least two newspapers circulating in the place wherein the foreign register is kept.

- If a foreign register is kept by a company in any country outside India, the decision of the appropriate competent authority in regard to the rectification of the register shall be binding.

- Entries in the foreign register maintained under section 88(4) shall be made after the Board of Directors or its duly constituted committee approved the allotment or transfer of shares, debentures or any other securities, as the case may be.

The company shall –

- Transmit to its registered office in India, a copy of every entry in any foreign register within 15 days after the entry is made; and

- Keep at such office a duplicate register for all the purposes of this Act, be deemed to part of the principal register.

- Subject to the provisions of section 88 and the rules made thereunder, with respect to duplicate registers, the shares or as the case may be, debentures or any other security, registered in any other security, registered in any foreign register shall be distinguished from the shares or as the case may be, debentures or any other security, registered in the principal register and in every other foreign register; and no transaction with respect to any shares or as the case may be, debentures or any security, registered, be registered in any other register.

Every such duplicate register shall, for the purposes of this Act, be deemed to be a part of the principal register.

Subject to the provisions of section 88 and the rules made thereunder, with respect to duplicate registers, the shares or as the case may be, debentures or any other security, registered in any foreign register shall be distinguished from the shares or as the case may be, debentures or any other security, registered in the principal register and in every other foreign register; and no transaction with respect to any
shares or as the case may be, debentures or any other security, registered in a foreign
register shall, during the continuance of that registration, be registered, be registered
in any other register.

- The company may discontinue the keeping of any foreign register, and thereupon all
entries in that register shall be transferred to some other foreign register kept by the
company outside India or to the principal register.

- **Penalty on failure to maintain register:** Section 88 deals with the penalty for
contravention of the provisions of section 88, *i.e.* failure to maintain registers in accordance
with the provisions of Section 88(1) and 88(2) of the Act. It states that the company and
every officer of the company who is in default shall be punishable with fine which shall not
be less than ₹ 50,000 but which may extend to ₹ 3,00,000 and where the failure is a
continuing one, with a further fine which may extend to ₹ 1,000 per day.

- **Nature of offence:** The offence under this section is a compoundable offence under
section 441 of the Act.

- **Details of Nominations in the register:** It is important to note here that Form MGT – 1
and MGT – 2 require details of nomination as referred to in section 72 of the Act, read with
*[Rule 19 of the Companies (Share Capital and Debentures) Rules, 2014]* to be entered in
the Register of members and register of debenture-holders or other security holders as the
case may be.

**Example 1**

*Mr. Zoey purchased the shares of Luxy Hairstyles Private Limited, at market price, in the name
of his daughter, Mila, who is 4 years old. Mr. Joe, the Director of the Company, has approached
you to advise him on the updation of said change in the register of members, since Mila, being
a minor is incompetent to contract in her capacity.*

**Answer:** Since, the minors are not competent to enter into any contract, thus their names cannot
be entered in the register of members. Therefore, Mr. Joe is advised that while filing MGT – 1
and MGT – 2, the names of the minor can only be entered only if the details of the guardian are
present. Thus, Zoey’s name shall appear in the register of members of Luxy Hairstyles Private
Limited since Mila is a minor.

**Example 2**

*Mrs. And Mr. Taneja, recently got married and jointly purchased the shares of New Hopes India
Private Limited on 14th August 2016. Mr. Taneja intimated the company that only the name of
his wife should appear in the records of the company, for the shares purchased by them.*
secretary of the company is not sure whether this is possible, given that the shares are held in the names of both the persons.

**Answer:** Joint holders of shares may request the company to enter their names on the register in a certain order, or execute transfers to have their holding split, with the result that part of the holding is entered showing the name of one holder and part showing the name of another. However, the condition of Mr. Taneja that only the name of his wife should appear in the register as a member cannot be catered to, although the names can be entered in the order such that the name of his wife appears first. The reason for this is that the articles of most companies provide that, in the case of exclusion of the other joint holders, and for this purpose, seniority shall be determined by the order in which the names stand in the register of members.

**SECTION 89 – DECLARATION IN RESPECT OF BENEFICIAL INTEREST IN ANY SHARE**

- This section seeks to provide that a declaration is to be given to the company by any person who is a member but not holding the beneficial interest in such shares.
- Further the person holding beneficial interest shall declare the nature of his interest and other particulars on those shares to the company.
- Any changes in the beneficial interest is also to be declared.
The section also provides that the company shall make note of all the above incidents, as and when they occur and intimate the same to RoC within the time and manner as prescribed in Rule 9 of the Companies (Management & Administration) Rules, 2014.

Rule 9 prescribes the procedure to be followed in case of declaration in respect of beneficial interest in any shares –

- A person whose name is entered in the register of members of a company as the holder of shares in that company but who does not hold the beneficial interest such share, shall file with the company, a declaration to that effect in Form MGT – 4, within 30 days from the date on which his name is entered in the register of members of such company. Any change in the beneficial interest of the same shall be intimated to the company within 30 days in Form MGT – 4.

- Every person holding and exempted from furnishing declaration or acquiring a beneficial interest in shares of a company not registered in his name, shall file with the company, a declaration disclosing such interest in Form MGT – 5, within 30 days after acquiring such beneficial interest in the shares of the company.

- Where any declaration is received by the company under section 89, the company shall make note of such declaration in the register of members and shall file, within a period of 30 days from the date of receipt of declaration by it, a return in Form MGT – 6 with the RoC in respect of such declaration with the required fee.

- Provided that nothing contained in this rule shall apply in relation to a trust which is created, to set up a Mutual Fund or Venture Capital Fund or such other fund as may be approved by the Securities and Exchange Board of India.

Where any declaration under this section is made to a company, the company shall make a note of such declaration in the register concerned and shall file, within thirty days from the date of receipt of declaration by it, a return in the prescribed form with the Registrar in respect of such declaration with such fees or additional fees as may be prescribed. within the time specified under section 403 [Section 89(6)].

No right in relation to any share in respect of which a declaration is required to be made under this section but not made by the beneficial owner, shall be enforceable by him or by any person claiming through him.

Nothing in this section shall be deemed to prejudice the obligation of a company to pay dividend to its members under this Act and the said obligation shall, on such payment, stand discharged.

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1 In case of an unlisted public company and private company which is licensed to operate from the IFSC, in section 89(6) for the word “30 days” read as “60 days”.
Penalty for default under section 89(5) & 89(7) –

Two kinds of penal provisions are included under section 89 –

♦ Related to persons required to make a declaration: Section 89(5) applies to those who are required to make a declaration, but fail to do so. The penalty for their failure, without any reasonable explanation, is fine which extends up to ₹ 50,000 and additionally ₹ 1,000 per day during which the failure continues.

♦ Related to company: Section 89(7) refers to the company which fails to comply with the provisions of section 89, makes punishable the company and every defaulting officer with a fine which shall not be less than ₹ 500 but which may go up to ₹ 1,000 with further fine of ₹ 1,000 per day during which the failure continues.

Exemption to Government Company- In case of Government company - Section 89 shall not apply - Notification dated 5th June, 2015.

The above mentioned exemption shall be applicable to a government company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar - Notification dated 13th June, 2017.

Example

Ms. Emma gifted the shares purchased by her of the Company Bio-Optics Limited, to her sister Cathy. Emma had purchased these shares on the occasion of her birthday in February 2017. However, neither Emma nor Cathy were aware that they had to intimate about the transaction of transfer of such shares as a gift, to the company. Discuss the same in light of the provisions of section 89 of the Act.

Answer: The provisions of the section 89 of the Act, dealing with declaration of beneficial interest in shares by a person to the company does not apply in a civil suit where the title of the shares is in a dispute. Khajamiya Miransaheb Mujahid v. Peerapasha Miransaheb Mujahid (1987) (Kar.). Where the shares are gifted away, they become the property of the donee. Hence, the provisions relating to declaration of beneficial interest are not applicable.

SECTION 90–INVESTIGATION OF BENEFICIAL OWNERSHIP OF SHARES IN CERTAIN CASES

The section simply enables the Central Government to appoint one or more competent persons to investigate and report as to the beneficial ownership with regard to any share or class of shares. This section is to be read with section 216, as if such investigation were investigation ordered under that section.

Exemption to Government Company- In case of Government company - Section 90 shall not apply - Notification dated 5th June, 2015.

The above mentioned exemption shall be applicable to a government company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar - Notification dated 13th June, 2017.
SECTION 91 – POWER TO CLOSE REGISTER OF MEMBERS OR DEBENTURE-HOLDERS OR OTHER SECURITY HOLDERS

♦ The said section is divided into two parts – sub-section (1) deals with the time limits for which the register of members is allowed to be closed and sub-section (2) mentions the penalty for contravention of the provisions of sub-section (1).

♦ The section seeks to provide that a company may close the register of members, debenture-holders and other security holders by giving minimum 7 days' notice or such lesser period as specified by Securities Exchange Board of India ('SEBI').

♦ Section 91(1) further states that the registers may be closed for any period not exceeding 30 days at any one time and for an aggregate period of 45 days in one year.

♦ Section 91(2) sets out that if the registers is closed without giving the notice as prescribed in sub-section (1), or after giving a shorter notice than that so provided, or for a continuous period or an aggregate period in excess of the limits specified in that sub-section, the company and every officer of the company who is in default shall be liable to a penalty of ₹ 5,000 per day subject to a maximum of ₹ 1,00,000 during which the register is kept closed. However, the offence is a compoundable offence under section 441 of the Companies Act, 2013.

♦ It is important to note here that the private companies have been exempted from issuing public notice in newspapers, provided it issues 7 days' notice to its members before effecting closure of the registers.

♦ Rule 10 of the Companies (Management & Administration) Rules, 2014 lists down the procedure to be followed for closing the register of members/ debenture-holders/ other security holders –

  ➢ A company closing the register of members or the register of debenture holders or the register of other security holders shall give at least seven days previous notice and in such manner, as may be specified by Securities and Exchange Board of India, if such company is a listed company or intends to get its securities listed, by advertisement at least once in a vernacular newspaper in the principal vernacular language of the district and having a wide circulation in the place where the registered office of the company is situated, and at least once in English language in an English newspaper circulating in that district and having wide circulation in the place where the registered office of the company is situated and publish the notice on the website as may be notified by the Central Government and on the website, if any, of the Company. [Sub rule (1)]

  ➢ The provisions contained in sub-rule (1) shall not be applicable to a private company provided that the notice has been served on all members of the private company not less than seven days prior to closure of the register of members or debenture holders or other security holders.
4.2 Annual Return [Section 92-94]

The provisions of preparation and filing of annual return of a company are contained in section 92 of the Companies Act, 2013.

The section is particularly important from the compliance point of view, since this is an annual compliance and essentially captures all the important events that have taken place in the company during the financial year. Every company is required to file with the RoC, the annual return as prescribed in section 92, in Form MGT – 8 as per Rule 11(1) of the Companies (Management & Administration) Rules, 2014.

The particulars contained in an annual return, to be filed by every company are as follows–

1. Its registered office, principal business activities, particulars of its holding, subsidiary and associate companies.
2. Its shares, debentures and other securities and shareholding pattern
3. Its indebtedness
4. Its members and debenture-holders along with the changes therein since the close of the previous financial year
5. Its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year.
6. Meetings of members or a class thereof, Board and its various committees along with attendance details.
7. Remuneration of directors and key managerial personnel
8. Penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment.
10. Details in respect of shares held by or on behalf of the Foreign Institutional Investors including their names, addresses, countries of incorporation, registration and percentage of shareholding held by them.

* The afore-mentioned annual return has to be signed by a director of the company and the company secretary; and in case, there is no company secretary, by a company secretary
in practice. However, in relation to One Person Company and small company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.

♦ Sub section 2 of section 92 read with Rule 11(2) of the Companies (Management & Administration) Rules, 2014, provides that the annual return, filed by a listed company or a company having paid-up share capital of 10 crore or more; or a turnover of 50 crore or more, shall be certified by a Company Secretary in practice and the certificate shall be in Form MGT – 8. It must state that the annual return discloses the facts correctly and adequately and that the company has complied with all the provisions of the Act.

♦ The extract of annual return shall be attached with the Board’s Report in Form MGT – 9, as per section 92(3) read with rule 12(1).

♦ A copy of annual return shall be file with the RoC within 60 days from the date on which the Annual General Meeting (‘AGM’) is held or where no annual general meeting is held in any year within 60 days from the date on which the annual general meeting should have been held, along with the reasons for not holding the AGM within the time specified under section 403.

**In case of Private Company - Clause(g) of Sub-Section (1) of Section 92 shall apply to private companies namely:-

“(g) "aggregate amount of remuneration drawn by directors;". - Notification Dated 13th June, 2017”

Signing of annual return and certification in case of listed companies

♦ Section 92(2) provides for certification of the annual return by a company secretary in practice.

♦ As per Rule 11 of the Companies (Management & Administration) Rules, 2014, every company shall prepare its annual return in Form MGT – 7 and in respect of the specified listed companies as mentioned above, the annual return shall be certified in by a company secretary in practice and the certificate will be in Form MGT – 8.

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2 In case of Private Company - proviso to sub-section (1) of Section 92 for the proviso the following proviso shall be substituted, namely:-

"Provided that in relation to One Person Company, small company and private company (if such private company is a start-up), the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company."

The above exceptions/ modifications/ adaptations shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with Registrar. Notification Dated 13th June, 2017

3 In case of Specified IFSC Public Company and Specified IFSC Private Company - Sub-section (3) of section 92 shall not apply. - Notification Date 4th January, 2017

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In this context, a company secretary in practice who signs the annual return cannot certify the same. Although there is no specific provision prohibiting this, it will not be a proper compliance for the same professional to sign as well as certify the document.4

**Penalty for contravention—**

- **Section 92(5) of the Act** specifies that if the company defaults in filing the annual return within the time as specified in this section, the company shall be punishable with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 5,00,000 or imprisonment up to 6 months or with both.
- If a company secretary in practice, certifies the annual return otherwise than in accordance with this section and the rules made thereunder, he shall be punishable with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 5,00,000.
- **Rule 14 of the Companies (Management & Administration) Rules, 2014** relates to inspection of annual returns; whereas Rule 15 deals with the preservation of annual return. As per Rule 15(3), copies of annual return along with the copy of certificates and the documents required to be annexed thereto shall be preserved for a period of 8 years from the date of filing of the annual return.

**Example**

*Big Fox Private Limited called it’s Annual General Meeting on 30th September, 2016 for laying down the financial statement for approval of its shareholders’ for the financial year ended 31st March 2016. However, due to want of quorum, the meeting could not take place and was cancelled. The company has not file the annual financial statements, or the annual return for the year ending March 2016, with the RoC till date. The director is of the view that since the annual general meeting did not take place, the period of 60 days for filing of annual return is not applicable and thus, there is no contravention of section 92. Discuss.*

**Answer:** The director is incorrect in holding that there no contravention of the provisions of the Companies Act, 2013. Section 92 states that every company has to file an annual return with the RoC in Form MGT – 7 within 60 days of date on which annual general meeting was held or the date when it must have been held. In the above case, the annual general meeting of Big Fox Private Limited should have been held by 30th September 2016, but it did not take place. Thus, the company has contravened the provisions of section 92 of the Companies Act, 2013 and shall be liable for a penalty as specified in Section 92(5) of the Act.

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4 Page 1599 of Ramaiya’s Chapter VII- Management & Administration
SECTION 93 – RETURN TO BE FILED WITH REGISTRAR IN CASE PROMOTERS’ STAKE CHANGES

According to the section every listed company is mandated to file with the RoC a return in the form prescribed in Rule 13 and Form MGT – 10 of Companies (Management & Administration) Rules, 2014, with respect to any changes in the number of shares held by the promoters and the top 10 shareholders within 15 days of such change.

Rule 13 mentions that every listed company shall file in Form MGT -10 a return with respect to changes relating to either increase or decrease of 2 percent or more in the shareholding position of promoters and top 10 shareholders of the company in each case.

SECTION 94 – PLACE OF KEEPING AND INSPECTION OF REGISTERS, RETURNS, ETC.

Extract of Section 94(1)

“The registers required to be kept and maintained by a company under section 88 and copies of the annual return filed under section 92 shall be kept at the registered office of the company:

Provided that such registers or copies of return may also be kept at any other place in India in which more than one-tenth of the total number of members entered in the register of members reside, if approved by a special resolution passed at a general meeting of the company and the Registrar has been given a copy of the proposed special resolution in advance:

Provided further that the period for which the registers, returns and records are required to be kept shall be such as may be prescribed.”

♦ The section further provides that the registers and indices shall be open to inspection by any member, debenture-holder, other security holder or beneficial owner, during business hours, except when they are closed under the provisions of section 88, without payment of any fees and any other person on payment of such fees as prescribed in Rule 14(1).

♦ As per Rule 14(1), the registers and indices shall be open for inspection during business hours, at such reasonable time on every working day as the board may decide upon payment of fees as may be specified in the articles of association of the company, but which may not exceed 50 for each inspection. Also, a reasonable time shall be not less than 2 hours on every working day for which the inspection shall be open by the company.
According to Section 94(3) read with Rule 14(2), any member, debenture-holder or security holder or beneficial owner can take the extracts during any business without payment of any fee or can also get copies thereof with payment of fee not exceeding ` 10 for each page. Such copies or entries or return shall be supplied within 7 days of deposit of fee.

Preservation of register of members etc. and annual return–

- **Preservation of register of members:** Rule 15 of the Companies (Management & Administration) Rules, 2014 states that the register of members along with the index shall be preserved permanently and shall be kept in the custody of company preservation of register of members secretary of the company or any other person authorised by the Board for such purpose; and

- **Preservation of register of debenture holders/ other security holders:** The register of debenture-holder or any other security holder along with the index shall be preserved for a period of 8 years from the date preservative of register of debenture holding other security holder of redemption of debentures or securities as the case may be.

- **Copies of documents filled with ROC to be preserved:** Copies of all annual returns prepared under section 92 and copies of all certificates and documents required to be annexed thereto shall be preserved for a period of 8 years from the date of filing with the RoC.

- **Preservation of foreign register:** shall be preserved permanently, unless it is discontinued and all the entries are transferred to any other foreign register or to the principal register. Foreign register of debenture-holder or any other security holder shall be preserved for a period of 8 years from the date of redemption of debenture or securities.

- **Copy of proposed Special Resolution filed with ROC:** A copy of the proposed special resolution in advance to be filed with the RoC as required in accordance with first proviso of section 94(1), shall be filed with the Registrar, at least one day before the date of general meeting of the company in Form MGT – 14.

Penalty for refusing the inspection or making any extract or copy required –

- If any inspection or the making of any extract or copy required under this section is refused, the company and every officer of the company who is in default, shall be liable for each such default, to a penalty of ` 1,000 for every day subject to a maximum of ` 1,00,000 during which the refusal or default continues.

- The Central Government may also, by order, direct an immediate inspection of the document, or direct that the extract required shall forthwith be allowed to be taken by the person requiring it. [Section 94(5)]
SECTION 95 – REGISTERS, ETC. TO BE EVIDENCE

The section simply seeks to provide that the registers, indices and copies of annual return shall be prima facie evidence of any matter directed or authorised to be inserted therein by or under this Act.

4.3 Pre-requisites of a Meeting

Before we move on to our next concept of types of meetings and the procedure to convene them, as per the Companies Act, 2013, let us take a turn and swot the terms which are important to know for convening the meeting.

Let us discuss each of these concepts one-by-one in the following sections. But first, it’s important to know the very basics of the meeting, so that it helps us in the better understanding of these terms as well. So, first of all, the most common term that are going to be used while discussing the following terms is, ‘General Meeting’. Now, it is very important to note here that the term general meeting is used to describe a meeting of members of shareholders, as per the provisions of the Act; whereas there exist other types of meetings as well, viz. Board Meetings, i.e. meetings of the board of directors and class meetings, i.e. meetings of special class of persons, like, creditors, preference shareholders, etc. The pre-requisites of the meetings that we are going to discuss below are, in general applicable to all kinds of meetings, although the time limits may differ and there might be a specific mention of a certain type of meeting in that section.

Also, this part is divided into three chunks, i.e. how to properly ‘call’ a meeting; how to properly ‘convene’ a meeting and how to make sure that the post-meeting formalities and compliances
are completed as per the legal provisions of the law. So, let’s check with the provisions in
details–

5SECTION 101: NOTICE OF A MEETING

Section 101 of the Companies Act, 2013 states the length of notice for calling a meeting. It
states that in order to properly call a general meeting the notice should be sent at least 21 clear
days before the meeting, to all the members, legal representative of any deceased member
or the assignee of insolvent members, the auditors and directors, in writing or electronic mode
or other prescribed mode.

Mode of sending the notice:

As per Rule 18 of the Companies (Management & Administration) Rules, 2014, sending of
notices through electronic mode has been statutorily recognized by the Act.

◆ The said rule mentions that a notice may be sent through e-mail as a–
  ➢ Text; or
  ➢ As an attachment to e-mail; or
  ➢ As a notification providing electronic link; or
  ➢ Uniform Resource Locator for accessing such notice.

◆ The e-mail shall be addressed to the person entitled to receive such e-mail as per the
  records of the company as provided by the depository. Also, the company shall provide an
  advance opportunity at least once in a financial year, to the member to register his e-mail
  address and the changes therein and such request may be made by only those members
  who have not got their email id recorded or to update a fresh email id and not from the
  members whose email ids are already registered.

◆ The notice shall be placed simultaneously on the website of the Company, if any, and on
  the website as may be notified by Central Government.

Length of serving the notice – 21 clear days:

Note that, the section mentions that the notice shall be sent 21 clear days’ before the date of
meeting. It’s quite obvious to question as to what the term ‘clear days’ means. 21 clear days

5 In case of Specified IFSC Public Company - Section 101 shall apply in case of a Specified IFSC public
company, unless otherwise specified in the articles of the company. Notification Dated 4th January, 2017
6 In case of section 8 company, in clause (1) of Sub-section (1) of Section 101 for the words “21 days”,
the words “14 days” shall be substituted. Notification dated 5th June, 2015.
The above mentioned exception shall be applicable to a section 8 company which has not committed a
default in filing of its financial statements under section 137 or annual return under section 92 with the
mean that the date on which notice is served and the date of meeting are excluded for sending the notice. A company cannot curtail by its articles of association the requirement of 21 clear days.

**Who is entitled to receive the notice of the general meeting? [Section 101(3)]**

The notice of every meeting of the company shall be given to—

(a) every member of the company, legal representative of any deceased member or the assignee of an insolvent member;

(b) the auditor or auditors of the company; and

(c) every director of the company.

**Example**

Mr. Abeer filed a complaint against the company, Elixir Private Limited since it did not serve the notice to him for attending the annual general meeting. The company, in turn, provided the proof that they had sent the notice, by way of an email to Mr. Abeer, inviting him to attend the annual general meeting of the company. Abeer alleges that he never received the email. State whether the company is liable as guilty for contravening the provisions of section 101 of the Companies Act, 2013 read with rules.

**Answer:** As per Rule 18(3) of the Companies (Management & Administration) Rules, 2014, the company’s obligation shall be satisfied when it transmits the e-mail and the company shall not be held responsible for a failure in transmission beyond its control. Also, if the member entitled to receive the notice fails to provide or update relevant e-mail address to the company, or to the
depository participant as the case may be, the company shall not be in default for not delivering notice via e-mail.

Meetings held at shorter notice—

Generally, general meetings need to be called by giving at least a notice of 21 clear days.

However, a general meeting may be called after giving shorter notice than that specified in this sub-section if consent, in writing or by electronic mode, is accorded thereto—

(i) in the case of an annual general meeting, by not less than ninety-five per cent. of the members entitled to vote thereat; and

(ii) in the case of any other general meeting, by members of the company—

(a) holding, if the company has a share capital, majority in number of members entitled to vote and who represent not less than ninety-five per cent. of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or

(b) having, if the company has no share capital, not less than ninety-five per cent. of the total voting power exercisable at that meeting:

Provided further that where any member of a company is entitled to vote only on some resolution or resolutions to be moved at a meeting and not on the others, those members shall be taken into account for the purposes of this sub section in respect of the former resolution or resolutions and not in respect of the latter.

Contents of the Notice – Section 101(2):

A valid notice must state the day, date, hour of the meeting and place of the meeting and shall contain a statement of business to be transacted in that meeting. It must be issued on the authority of the Board of Directors under the name of an authorised official.

Omission to send notice – Section 101(4):

Section 101(4) states that any accidental omission to give notice to, or non-receipt of such notice to any member or other person who is entitled to such notice for any meeting shall not invalidate the proceedings of the meeting.

This essentially means, that the omission must not be designed or deliberate. Failure to send notice to a member, under a belief that it will not reach him at the address mentioned in the register of members is deliberate and not accidental, even if the belief is based on a mistaken impression.

The onus is on the company to prove that the omission was not deliberate.

Applicability of section 101 to Private companies— Section 101 shall apply, unless otherwise specified in respective sections or the articles of the company provide otherwise. Notification dated 5th June, 2015.

This exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the Act, with the Registrar. Notification dated 13th June 2017.
Explanatory Statement to be annexed to notice (Section 102)\textsuperscript{7}

Section 102 of the Companies Act, 2013 mentions that where any special business is to be transacted at the company's general meeting, then an 'Explanatory Statement' should be annexed to the notice calling such general meeting, which must specify,

(a) the nature of concern or interest, financial or otherwise, if any, in respect of each items of—
   (i) every director and the manager, if any;
   (ii) every other key managerial personnel; and
   (iii) relatives of the persons mentioned in sub-clauses (i) and (ii);
(b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

For the purposes of understanding what special business means, let us understand the types of businesses that are transacted at the general meetings. Companies Act, 2013 sets out the two types of businesses transacted in general meetings, which are –

- Ordinary business; and
- Special business.

Ordinary business are the following business which are transacted at the annual general meeting of the company—

\begin{itemize}
  \item Consideration of financial statement and the reports of the Board of Directors and auditors
  \item Declaration of any dividend
  \item Appointment of Directors in place of those retiring
  \item Appointment of, and fixing of the remuneration of the auditors
\end{itemize}

\textsuperscript{7} In case of Specified IFSC Public Company - Section 102 shall apply in case of a Specified IFSC public company, unless otherwise specified in the articles of the company. Notification Date 4th January, 2017

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In simple words, at the annual general, all the other businesses except the ones stated above are special business. At extra-ordinary general meeting, every business transacted is a special business.

Proviso to section 102(2) sets out that where an item of special business which is to be transacted at a meeting of the company relates to or affects any other company, then the extent of shareholding interest in that other company of every promoter, director, manager, and of every key managerial personnel of the first mentioned company shall, if the extent of such shareholding is not less than 2% of the paid-up share capital of that company, shall also be set out in the statement.

In case any item of business refers to any document which is to be considered at the meeting, then the time and place where such document can be inspected should also be specified in the explanatory statement.

An important clause in section 102 of the Act states that in case of non-disclosure or insufficient disclosure in any statement made by promoter, director, manager or other key managerial personnel which results into any benefit for themselves or their relatives, then the same profit derived shall have to be compensated by him.

Extract of Sub section (4) of Section 102

"Where as a result of the non-disclosure or insufficient disclosure in any statement referred to in sub-section (1), being made by a promoter, director, manager, if any, or other key managerial personnel, any benefit which accrues to such promoter, director, manager or other key managerial personnel or their relatives, either directly or indirectly, the promoter, director, manager or other key managerial personnel, as the case may be, shall hold such benefit in trust for the company, and shall, without prejudice to any other action being taken against him under this Act or under any other law for the time being in force, be liable to compensate the company to the extent of the benefit received by him."

Penalty for contravention of the provisions of this section–

If any default is made in complying with the provisions of this section, then every promoter, director, manager, or other key managerial personnel who is in default shall be punishable with fine which may extend to ₹ 50,000 or 5 times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is more.

Applicability of section 101 to Private companies- Section 102 shall apply unless otherwise specified in respective sections or the articles of the company provide otherwise. Notification dated 5th June, 2015.

This exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar. Notification dated 13th June 2017.
The said section of the Companies Act, 2013 states that unless the articles of the company provide for a larger number, the quorum for the meeting shall be as follows—

Public Company -

- If number of members is not more than 1000, quorum shall be 5 members personally present
- If the number of members is more than 1000 but upto 5000, then the quorum shall be 15 members personally present
- If the number of members exceed 5000, then quorum shall be 30 members personally present.

Private Company -

- Quorum - 2 members personally present

The term ‘members personally present’ as mentioned above refers to the members entitled to vote in respect of the items of business on the agenda of the meeting.

Adjourned Meeting due to want of Quorum—

If the quorum is not present within half-an-hour from the time appointed for holding a meeting of the company—

(a) the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine; or

(b) the meeting, if called by requisitionists under section 100, shall stand cancelled.

Provided that in case of an adjourned meeting or of a change of day, time or place of meeting under clause (a), the company shall give not less than three days notice to the members either individually or by publishing an advertisement in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated.

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8 In case of Specified IFSC Public Company - Section 103 shall apply in case of a Specified IFSC public company, unless otherwise specified in the articles of the company. Notification Date 4th January, 2017.
Where quorum is not present in the adjourned meeting also within half an hour, then the members present shall form the quorum.

**Applicability of section 103 to Private companies**- Section 103 shall apply to a private company unless otherwise specified in respective sections or the articles of the company provide otherwise. *Notification dated 5th June, 2015.*

This exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar. *Notification dated 13th June 2017.*

**Example 1**

There are 54 members of Dicey Private Limited. The company held its annual general meeting on 1st July 2017 at 2.00 p.m. and 28 members were present till 2.45 p.m. The Chairman of the meeting proceeded to initiate the meeting and passed the resolutions as discussed in the meeting. Comment whether the meeting took place as per the provisions of Companies Act, 2013.

**Answer:** As per the provisions of Section 103 of the Companies Act, 2013, the quorum for a Private Limited Company shall be two members personally present. Thus, the quorum for the annual general meeting of Dicey Private Limited was complied with and the company is not in contravention with any of the provisions of the Companies Act, 2013.

**Example 2**

Abbey Limited has 2300 members and the annual general meeting of the company is due to be held on 23rd February 2017 at 10.30 a.m. On the day of the meeting, 18 members were personally present by 11.00 a.m. and the Chairman proceeded to initiate the chronicles of the meeting. There were 5 special businesses to be discussed at the said meeting and by 2.30 p.m. Agenda 1 to 3 had been discussed and appropriate resolutions were passed. However, due to some emergency, 4 of the members had to leave around 3 p.m. The Chairman granted them the permission and proceeded to discuss Agenda 4 & 5 and accordingly passed resolution as per the consent of the remaining members. Comment whether the meeting is a properly convened meeting as per the provisions of section 103 of the Companies Act, 2013.

**Answer:** In the above case, while the appropriate quorum was present at the time when the meeting started as per section 103 of the Companies Act, 2013, the quorum was not present at the time of deciding Agenda 4 & 5. It has been held that where at the time of transacting business, the number of members is less than the quorum fixed for the meeting, the business cannot be transacted and shall be a nullity.
CHAIRMAN OF MEETING [SECTION 104]\(^9\)

**Election of chairman by members:** Section 104 of the Companies Act, 2013 seeks to provide that unless the articles of association of the Company otherwise provide, the members, personally present, shall elect among themselves to be the Chairman by show of hands.

**Demand of poll:** The section further provides that if a poll is demanded on the election of the Chairman, the Chairman elected by show of hands shall continue to be the Chairman of the meeting until some other person is elected as Chairman as a result of poll, and such other elected person shall be the Chairman for rest of the meeting.

**Powers of chairman:** A very basic thing that comes to anyone’s mind when hearing the word, Chairman, is, are we talking about the Chairman of the Company? Or is he just a Chairman of the meeting? Yes, that’s right. Section 104 talks about the Chairman of the meeting, the one who manages the meetings and ensures that the required decorum of the meeting is maintained at all times, till the meeting is concluded and post that, executes the minutes of the meeting. The Chairman has *prima facie* authority to decide all questions which arise at a meeting and which require decision at the time.in order to fulfil his duty properly, he must observe strict impartiality, even though he must be personally strongly opposed to any matter.

**Right to cast casting vote:** The Chairman has a casting vote in Board Meetings and general meetings, if specifically empowered by the articles of the Company. A casting vote means that in event of the equality of vote on a particular business being transacted at the meeting, the Chairman of the meeting shall have a right to cast a second vote. If there is no provision in the articles for a casting vote, an ordinary resolution on which there is equality of votes is deemed to be dropped.

**Exemption to Private Company:** In case of private company - Section 104 shall apply, unless otherwise specified in the articles of the company. - *Notification dated 5th June, 2015.*

This exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the Act, with the Registrar. *Notification dated 13th June 2017.*

### 4.4 Proxies [Section 105]\(^10\)

The section provides following laws related to proxy:

- Section 105 of the Companies Act, 2013 deals with the provisions of proxy for meetings. Sub-section (1) provides that any member of a company who is entitled to attend and vote

\(^9\) In case of Specified IFSC Public Company - Section 104 shall apply in case of a Specified IFSC public company, unless otherwise specified in the articles of the company. *Notification Date 4th January, 2017.*

\(^10\) In case of Specified IFSC Public Company - Section 105 shall apply in case of a Specified IFSC public company, unless otherwise specified in the articles of the company. *Notification Date 4th January, 2017.*
at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf.

However, a proxy shall not have the right to speak at such meeting and shall not be entitled to vote except on a poll.

Applicability of the sub-section(1) - Unless the articles of a company otherwise provide, this sub-section shall not apply to a company not having a share capital. CG may also prescribe a class or classes of companies whose members shall not be entitled to appoint another person as a proxy.

♦ A person appointed as proxy shall act on behalf of such member or number of members not exceeding fifty and holding in aggregate not more than 10 per cent of the total share capital of the company carrying voting rights. However, a member who is holding more than 10 per cent of the total share capital of the Company carrying voting rights, may appoint a single person as a proxy and such person shall not act as a proxy for any other person or shareholder.

♦ As per Rule 19(3) of the Companies (Management & Administration) Rules, 2014, the appointment of proxy shall be in the Form MGT – 11.

♦ As a compliance requirement, every notice calling a meeting of a company shall state a statement with reasonable prominence that ‘a member who is entitled to attend and vote at the meeting, is entitled to appoint a proxy, or where that is allowed, one or more proxies, and that the proxy need not be a member of the company’.

♦ Section 105(4) of the Act provides that a proxy received 48 hours before the meeting will be valid even if the articles provide for a longer period.

♦ Rule 20 of the Companies (Management & Administration) Rules, 2014 is applicable to listed companies. The proviso to Rule 20(3)(vii) states that a member who has cast his vote will not be entitled to vote at the annual general meeting as once a vote is cast the member will not be entitled to change it subsequently. Hence a member who has cast his vote through electronic voting cannot be permitted to appoint a proxy although the member may personally attend the meeting.

♦ Section 105(8) provides for inspection of proxies during the meeting and 24 hours before the meeting before its commencement, and the inspection is to be given only during business hours. At least 3 days' notice in writing is required to be given to the company for conducting the inspection.

♦ Penalty for default–
  ➢ Failure to state in notice of meeting that a member is entitled to appoint proxy who need not be a member every officer of the company who is in default shall be punishable with fine which may extend to ₹ 5,000.
For the purpose of any meeting, issuing invitation at company’s expense to appoint named person as proxy, every officer of the company knowingly issuing such invitation or wilfully authorising or permitting its issue shall be punishable with fine which may extend to ₹ 1,00,000 as per section 105(5).

For refusing the inspection to members at any time during the business hours, the company and every officer who is in default, shall be punishable with fine upto ₹ 10,000 and where the contravention is a continuing one, with a further fine upto ₹ 1,000 per day of default.

Offences under this section are compoundable under section 441 of the Act.

Rule 19 of the Companies (Management & Administration) Rules, 2014 provides as under—

- Restriction on the maximum number of members (50) and shareholding (10 percent) that a proxy holder can represent.
- Only a member can be a proxy holder in a company registered under section 8 of the Companies Act, 2013.

Exemption to Private Company- In case of private company - Section 105 shall apply, unless otherwise specified in respective sections or the articles of the company provide otherwise. Notification dated 5th June, 2015.

This exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the Act, with the Registrar. Notification dated 13th June 2017.

### 4.5 Voting [Section 106-109]

Ever pondered as to why is voting important in the meetings? The meeting takes places with an agenda or say, the decisions to be taken by the company’s members which are crucial for the working of the company. So the meeting takes place to discuss and decide upon the topics which are important – thus this decision requires consensus of the members attending the meeting. This consensus is reached through voting. As per the Companies Act, 2013, the voting in a meeting can take place in the following ways—

- Voting by show of hands – (section 107);
- Voting by electronic means – (section 108);
- Voting by demand of poll – (section 109);
- Voting by Postal Ballot – (section 110).
The right to vote is a personal right of a shareholder and he may use it if he likes it. He may split its vote for and against the resolution. The Act also prescribes the restriction on voting rights under section 106 so as to enable that the shareholders or members who are liable to pay upon calls of the shares are restricted to vote on important decisions at the meetings, if the articles of the company provide so. Let us discuss each of these provisions in detail.

RESTRICTION ON VOTING RIGHTS [SECTION – 106]\(^\text{11}\)

The section overrules the whole of the Companies Act, 2013 and provides that the articles of association of a company may provide that no member shall exercise any voting right in respect of any share registered in his name on which any amount is due from him on calls or any other sums payable to the company, or in regard to which the company has exercised the right of lien. [Sub section (1)]

Section – 106 (2) also suggests that a company shall not prohibit any member from exercising his voting rights on any other ground except the grounds mentioned in (1).

On a poll taken at a meeting of a company, a member entitled to more than one vote, or his proxy, where allowed, or other person entitled to vote for him, as the case may be, need not, if he votes, use all his votes or cast in the same way all the votes he uses. [Sub section (3)]

Also, such member can’t sign a requisition for an extraordinary general meeting.

\(^{11}\) In case of Specified IFSC Public Company - Section 106 shall apply in case of a Specified IFSC public company, unless otherwise specified in the articles of the company. Notification Date 4th January, 2017.
Exemption to Private Company- In case of private company - Section 106 shall apply, unless otherwise specified in respective sections or the articles of the company provide otherwise. 

(Notification dated 5th June, 2015).

This exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the Act, with the Registrar. Notification dated 13th June 2017.

Example 1

Where the articles of the company do not contain any provision restricting the exercise of voting right of member, a member cannot be prevented from voting, even though, calls or other sum payable by him have not been paid or the company has exercised any right of lien over his shares. But, where the articles contain any such provision, and the shares forfeited for non-payment of calls have been re-allotted, the new allottee being liable for the balance remained unpaid on the shares will not be entitled to vote so long as any calls presently payable on the shares remain unpaid.

Example 2

What happens in case of voting by joint shareholders? Suppose that Mr. & Mrs. Iyer are joint shareholders of Goal Private Limited and they hold 500 shares of the company. Regarding a particular special business being transacted at the extra-ordinary general meeting of the company, Mr. Iyer is in the favour of the decision, whereas Mrs. Iyer is against the resolution. Decide how should the vote be casted in case of this situation?

Join shareholders must concur in voting unless the articles provide to the contrary.

The voting in case of joint shareholders is done in the order of seniority, which is determined on the basis of the order in which their names appear in the register of members/ shareholders. The joint-holders have a right to instruct the company as to the order in which their names are to appear in the register.

Example 3

Consider a situation where directors are also the shareholders of the company.

Directors, who are also the shareholders of the company, stand in a fiduciary relationship with the company in their capacity as directors. However, a director should vote as a common shareholder would vote in a general meeting, and need not be influenced by the fact of his being a director.
VOTING BY SHOW OF HANDS [Section 107]\(^{12}\)

- The general meaning set out by this section of the Companies Act, 2013 is that unless the voting is demanded by way of poll or by electronic means, the voting should be by way of show of hands in the first instance.
- Also, section 106(2) states that the declaration by the Chairman of the meeting in the minutes books shall be the conclusive evidence that the resolution is passed.

Extract of the Act,

“(1) At any general meeting, a resolution put to the vote of the meeting shall, unless a poll is demanded under section 109 or the voting is carried out electronically, be decided on a show of hands.

(2) A declaration by the Chairman of the meeting of the passing of a resolution or otherwise by show of hands under sub-section (1) and an entry to that effect in the books containing the minutes of the meeting of the company shall be conclusive evidence of the fact of passing of such resolution or otherwise.”

Exemption to Private Company- In case of private company - Section 107 shall apply, unless otherwise specified in respective sections or the articles of the company provide otherwise. - Notification dated 5th June, 2015.

This exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the Act, with the Registrar. Notification dated 13th June 2017.

Example

Can an insolvent shareholder vote at the meeting by show of hands?

Yes. Notwithstanding that he has no longer any beneficial interest in the shares and the dividends are payable only to his trustee in bankruptcy, an insolvent shareholder so long as he remains in the register of the company as a member, is entitled to exercise his votes which are attributed to his status as member.

VOTING THROUGH ELECTRONIC MEANS [Section 108]

This is a new mode of voting in meetings which has been introduced in the Companies Act, 2013 and provides that a member in the prescribed class of companies may exercise his right to vote by electronic means.

*Rule 20 of the Companies (Management & Administration) Rules, 2014* provides a detailed procedure for electronic voting, which states as follows –

“Voting through electronic means” shall apply in respect of the general meetings for which

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\(^{12}\) In case of Specified IFSC Public Company - Section 107 shall apply in case of a Specified IFSC public company, unless otherwise specified in the articles of the company. Notification Date 4th January, 2017.
notices are issued on or after the date of commencement of this rule.

Companies providing its members to exercise right to vote by electronic means: Every company which has listed its equity shares on a recognised stock exchange and every company having not less than one thousand members shall provide to its members facility to exercise their right to vote on resolutions proposed to be considered at a general meeting by electronic means:

Provided that a Nidhi, or an enterprise or institutional investor referred to in Chapter XB or Chapter XC of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 is not required to provide the facility to vote by electronic means:

Explanation: For the purpose of this sub-rule, “Nidhi” means a company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from and lending to, its members only, for their mutual benefit, and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies.”

Exercise of right by a member: A member may exercise his right to vote through voting by electronic means on resolutions and the company shall pass such resolutions in accordance with the provisions of this rule.

Procedure: A company which provides the facility to its members to exercise voting by electronic means shall comply with the following procedure, namely:

(i) Notice of meeting: The notice of the meeting shall be sent to all the members, directors and auditors of the company either-
   (a) by registered post or speed post; or
   (b) through electronic means, namely, registered e-mail ID of the recipient; or
   (c) by courier service;

(ii) Notice to be hosted on website: the notice shall also be placed on the website, if any, of the company and of the agency forthwith after it is sent to the members;

(iii) Notice containing the particular: the notice of the meeting shall clearly state -
   (a) that the company is providing facility for voting by electronic means and the business may be transacted through such voting;
   (b) that the facility for voting, either through electronic voting system or ballot or polling paper shall also be made available at the meeting and members attending the meeting who have not already cast their vote by remote e-voting shall be able to exercise their right at the meeting;
   (c) that the members who have cast their vote by remote voting prior to the meeting may also attend the meeting but shall not been titled to cast their vote again;
(iv) the notice shall:

(a) indicate the process and manner for voting by electronic means;

(b) indicate the time schedule including the time period during which the votes may be cast by remote e-voting;

(c) provide the details about the login ID;

(d) specify the process and manner for generating or receiving the password and for casting of vote in a secure manner.

(v) Publication of notice: the company shall cause a public notice by way of an advertisement to be published, immediately on completion of dispatch of notices for the meeting under clause (i) of sub-rule (4) but at least twenty-one days before the date of general meeting, at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having country-wide circulation, and specifying in the said advertisement, inter alia, the following matters, namely:-

(a) statement that the business may be transacted through voting by electronic means;

(b) the date and time of commencement of remote e-voting;

(c) the date and time of end of remote e-voting;

(d) cut-off date;

(e) the manner in which persons who have acquired shares and become members of the company after the dispatch of notice may obtain the login ID and password;

(f) the statement that-

(A) remote e-voting shall not be allowed beyond the said date and time;

(B) the manner in which the company shall provide for voting by members present at the meeting; and

(C) a member may participate in the general meeting even after exercising his right to vote through remote e-voting but shall not be allowed to vote again in the meeting; and

(D) a person whose name is recorded in the register of members or in the register of beneficial owners maintained by the depositories as on the cut-off date only shall be entitled to avail the facility of remote e-voting as well as voting in the general meeting;

(g) website address of the company, if any, and of the agency where notice of the meeting is displayed; and
(h) name, designation, address, email id and phone number of the person responsible to address the grievances connected with facility for voting by electronic means:

Provided that the public notice shall be placed on the website of the company, if any, and of the agency;

(vi) **Time for opening of e-voting:** the facility for remote e-voting shall remain open for not less than three days and shall close at 5.00 p.m. on the date preceding the date of the general meeting;

(vii) **Option for remote e-voting:** during the period when facility for remote e-voting is provided, the members of the company, holding shares either in physical form or in dematerialized form, as on the cut-off date, may opt for remote e-voting:

Provided that once the vote on a resolution is cast by the member, he shall not be allowed to change it subsequently or cast the vote again:

Provided further that a member may participate in the general meeting even after exercising his right to vote through remote e-voting but shall not be allowed to vote again;

(viii) **at the end of the remote e-voting period, the facility shall forthwith be blocked :**

Provided that if a company opts to provide the same electronic voting system as used during remote e-voting during the general meeting, the said facility shall be in operation till all the resolutions are considered and voted upon in the meeting and may be used for voting only by the members attending the meeting and who have not exercised their right to vote through remote e-voting.

(ix) **Appointment of scrutinizer:** The Board of Directors shall appoint one or more scrutinizer, who may be Chartered Accountant in practice, Cost Accountant in practice, or Company Secretary in practice or an Advocate, or any other person who is not in employment of the company and is a person of repute who, in the opinion of the Board can scrutinize the voting and remote e-voting process in a fair and transparent manner:

Provided that the scrutinizer so appointed may take assistance of a person who is not in employment of the company and who is well-versed with the electronic voting system;

(x) **Function of scrutinizer:** the scrutinizer shall be willing to be appointed and be available for the purpose of ascertaining the requisite majority;

(xi) **Role of Chairman:** The Chairman shall, at the general meeting, at the end of discussion on the resolutions on which voting is to be held, allow voting, as provided in clauses (a) to (h) of sub-rule (1) of rule 21, as applicable, with the assistance of scrutinizer, by use of ballot or polling paper or by using an electronic voting system for all those members who are present at the general meeting but have not cast their votes by availing the remote e-voting facility.

(xii) **Counting of votes :** The scrutinizer shall, immediately after the conclusion of voting at the general meeting, first count the votes cast at the meeting, thereafter unblock the votes cast through remote e-voting in the presence of at least two witnesses not in the employment
of the company and make, not later than three days of conclusion of the meeting, a consolidated scrutinizer’s report of the total votes cast in favour or against, if any, to the Chairman or a person authorized by him in writing who shall countersign the same:

Provided that the Chairman or a person authorized by him in writing shall declare the result of the voting forthwith;

**Explanation:** It is hereby clarified that the manner in which members have cast their votes, that is, affirming or negating the resolution, shall remain secret and not available to the Chairman, Scrutiniser or any other person till the votes are cast in the meeting.

**(xiii) Access to details :** For the purpose of ensuring that members who have cast their votes through remote e-voting do not vote again at the general meeting, the scrutiniser shall have access, after the closure of period for remote e-voting and before the start of general meeting, to details relating to members, such as their names, folios, number of shares held and such other information that the scrutiniser may require, who have cast votes through remote e-voting but not the manner in which they have cast their votes:

**(xiv) Maintenance of Register:** The scrutiniser shall maintain a register either manually or electronically to record the assent or dissent received, mentioning the particulars of name, address, folio number or client ID of the members, number of shares held by them, nominal value of such shares and whether the shares have differential voting rights;

**(xv) Safe Custody of register:** The register and all other papers relating to voting by electronic means shall remain in the safe custody of the scrutiniser until the Chairman considers, approves and signs the minutes and thereafter, the scrutiniser shall hand over the register and other related papers to the company.

**(xvi) Result on websites:** The results declared along with the report of the scrutiniser shall be placed on the website of the company, if any, and on the website of the agency immediately after the result is declared by the Chairman:

Provided that in case of companies whose equity shares are listed on a recognised stock exchange, the company shall, simultaneously, forward the results to the concerned stock exchange or exchanges where its equity shares are listed and such stock exchange or exchanges shall place the results on its or their website.

**(xvii) Passing of date of resolution:** Subject to receipt of requisite number of votes, the resolution shall be deemed to be passed on the date of the relevant general meeting.

**Explanation:** For the purposes of this clause, the requisite number of votes shall be the votes required to pass the resolution as the ‘ordinary resolution’ or the ‘special resolution’, as the case may be, under section 114 of the Act.

**(xviii) Resolution not to be withdrawn:** a resolution proposed to be considered through voting by electronic means shall not be withdrawn.

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DEMAND FOR POLL [Section 109]\(^{13}\)

The section discusses four things –

- Who can demand poll at the meeting;
- What should be the time for taking the poll;
- Appointment of Scrutinizer for poll; and
- Manner of taking poll and result thereof.

Section 109 provides that before or on declaration of result of the voting on any resolution by a show of hands, the Chairman of the meeting on his own, or on demand made by the 'specified' members order for a poll.

**Members who can demand for poll –**

- In case of a company having a share capital, by the members present in person or proxy, where allowed, and having not less than 1/10th of the total voting power or holding shares on which an aggregate sum of not less than ₹ 5,00,000 or such higher amount has been prescribed has been paid – up.

- In the case of any other company, by any member or members present in person or by proxy, where allowed, and having not less than 1/10th of the total voting power.

The section further provides that the demand for poll may be withdrawn by the persons who made the demand, at any time.

A poll demanded for adjournment of the meeting or appointment of Chairman of the meeting shall be taken forthwith.

A poll demanded on any question other than adjournment of the meeting or appointment of Chairman shall be taken at such time, not being later than 48 hours from the time when the demand was made, as the Chairman of the meeting may direct.

Where a poll is to be taken, the Chairman of the meeting shall appoint a scrutinizer for observing the poll process and votes given on poll and to report thereon.

The results of the poll shall be deemed to be the decision of the meeting on the resolution.

The Chairman shall regulate the manner in which the poll shall be taken at the meeting and appoint such number of scrutinizers as may be necessary. Rule 21 lays down the manner in which the poll process shall be scrutinized.

\(^{13}\) In case of Specified IFSC Public Company - Section 109 shall apply in case of a Specified IFSC public company, unless otherwise specified in the articles of the company. *Notification Date 4th January, 2017*
The duties of a scrutinizer shall be as follows—

(i) To ensure proper conduct of the polling process;

(ii) To maintain proper records of the poll;

(iii) To submit a report to the Chairman of the meeting which shall contain the details of votes cast in the favour and against the resolution; and

(iv) To ensure that the compliance of the provisions of section 109 and Rule 21.

➢ The scrutinizer shall give a report to the Chairman in Form MGT -13 as per Rule 21 of the Companies (Management & Administration) Rules, 2014.

➢ The procedure describing the manner which the Chairman shall get the poll process scrutinized in Rule 21 is as follows –

- The Chairman of the meeting shall ensure that –
  - The Scrutinizers are provided with the Register of Members, specimen signatures of the members, Attendance Register and Register of Proxies.
  - The Scrutinizers are provided with all the documents received by the Company pursuant to sections 105, 112 and section 113.
  - The Scrutinizers shall arrange for Polling papers and distribute them to the members and proxies present at the meeting; in case of joint shareholders, the polling paper shall be given to the first named holder or in his absence to the joint holder attending the meeting as appearing in the chronological order in the folio and the Polling paper shall be in Form No. MGT.12.
  - The Scrutinizers shall keep a record of the polling papers received in response to poll, by initialling it.
  - The Scrutinizers shall lock and seal an empty polling box in the presence of the members and proxies.
  - The Scrutinizers shall open the Polling box in the presence of two persons as witnesses after the voting process is over.
  - In case of ambiguity about the validity of a proxy, the Scrutinizers shall decide the validity in consultation with the Chairman.
  - The Scrutinizers shall ensure that if a member who has appointed a proxy has voted in person, the proxy’s vote shall be disregarded.
  - The Scrutinizers shall count the votes cast on poll and prepare a report thereon addressed to the Chairman.
  - Where voting is conducted by electronic means under the provisions of section 108 and rules made thereunder, the company shall provide all the
necessary support, technical and otherwise, to the Scrutinizers in orderly conduct of the voting and counting the result thereof.

- The Scrutinizers’ report shall state total votes cast, valid votes, votes in favour and against the resolution including the details of invalid polling papers and votes comprised therein.
- The Scrutinizers shall submit the Report to the Chairman who shall counter-sign the same.
- The Chairman shall declare the result of Voting on poll. The result may either be announced by him or a person authorized by him in writing.

The scrutinizers appointed for the poll, shall submit a report to the Chairman of the meeting in Form No. MGT.13 and the report shall be signed by the scrutinizer and, in case there is more than one scrutinizer by all the scrutinizer, and the same shall be submitted by them to the Chairman of the meeting within seven days from the date the poll is taken.

**Applicability of section 109 to Private companies** - Section 109 shall apply unless otherwise specified in respective sections or the articles of the company provide otherwise. *Notification dated 5th June, 2015.*

This exception shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the Act, with the Registrar. *Notification dated 13th June 2017.*

**POSTAL BALLOT [SECTION 110]**

Shareholders who are unable to attend the meetings, there should a requirement which will enable them to vote by postal ballot for key decisions.

**Extract of the Act** *(Page 1765 of Chapter VII of Ramaiya’s Companies Act, 2013.)*

“(1) Notwithstanding anything contained in this Act, a company—

(a) shall, in respect of such items of business as the Central Government may, by notification, declare to be transacted only by means of postal ballot; and

(b) may, in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting, transact by means of postal ballot.

In such manner as may be prescribed, instead of transacting such business at a general meeting.
Provided that any item of business required to be transacted by means of postal ballot under clause (a), may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means under section 108, in the manner provided in that section.

(2) If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf."

♦ The section seeks to provide that the Central Government may declare items of business that can be transacted only by postal ballot and also in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting.

♦ Section 110(2) of the Act states that only those assents/ dissents are to be considered which have been sent by the members within 30 days as prescribed in Rule 22. Sub-section (2) makes a deeming provision that if a resolution is assented by requisite majority of shareholders by means of postal ballot, it shall be deemed to have been passed at a general meeting convened in that behalf.

♦ Manner in which postal ballot shall be conducted is prescribed in Rule 22 of the Companies (Management & Administration) Rules, 2014. The same is described as follows–

➢ Where a company is required or decides to pass any resolution by way of postal ballot, it shall send a notice to all the shareholders, along with a draft resolution explaining the reasons therefor and requesting them to send their assent or dissent in writing on a postal ballot because postal ballot means voting by post or through electronic means within a period of thirty days from the date of dispatch of the notice.

➢ The notice shall be sent either

(a) by Registered Post or speed post, or

(b) through electronic means like registered e-mail id or

(c) through courier service for facilitating the communication of the assent or dissent of the shareholder to the resolution within the said period of thirty days.

➢ An advertisement shall be published at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district, about having dispatched the ballot papers and specifying therein, inter alia, the following matters, namely:-

(a) a statement to the effect that the business is to be transacted by postal ballot which includes voting by electronic means;

(b) the date of completion of dispatch of notices;
(c) the date of commencement of voting;
(d) the date of end of voting;
(e) the statement that any postal ballot received from the member beyond the said date will not be valid and voting whether by post or by electronic means shall not be allowed beyond the said date;
(f) a statement to the effect that members, who have not received postal ballot forms may apply to the company and obtain a duplicate thereof; and
(g) contact details of the person responsible to address the grievances connected with the voting by postal ballot including voting by electronic means.

➢ The notice of the postal ballot shall also be placed on the website of the company forthwith after the notice is sent to the members and such notice shall remain on such website till the last date for receipt of the postal ballots from the members.

➢ The Board of directors shall appoint one scrutinizer, who is not in employment of the company and who, in the opinion of the Board can conduct the postal ballot voting process in a fair and transparent manner.

➢ The scrutinizer shall be willing to be appointed and be available for the purpose of ascertaining the requisite majority.

➢ Postal ballot received back from the shareholders shall be kept in the safe custody of the scrutinizer and after the receipt of assent or dissent of the shareholder in writing on a postal ballot, no person shall deface or destroy the ballot paper or declare the identity of the shareholder.

➢ The scrutinizer shall submit his report as soon as possible after the last date of receipt of postal ballots but not later than seven days thereof;

➢ The scrutinizer shall maintain a register either manually or electronically to record their assent or dissent received, mentioning the particulars of name, address, folio number or client ID of the shareholder, number of shares held by them, nominal value of such shares, whether the shares have differential voting rights, if any, details of postal ballots which are received in defaced or mutilated form and postal ballot forms which are invalid.

➢ The postal ballot and all other papers relating to postal ballot including voting by electronic means, shall be under the safe custody of the scrutinizer till the chairman considers, approves and signs the minutes and thereafter, the scrutinizer shall return the ballot papers and other related papers or register to the company who shall preserve such ballot papers and other related papers or register safely.

➢ The assent or dissent received after thirty days from the date of issue of notice shall be treated as if reply from the member has not been received.
The results shall be declared by placing it, along with the scrutinizer’s report, on the website of the company.

The provisions of rule 20 regarding voting by electronic means shall apply, as far as applicable, mutatis mutandis to this rule in respect of the voting by electronic means.

pursuant to clause (a) of sub-section (1) of section 110, the following items of business shall be transacted only by means of voting through a postal ballot—

(a) alteration of the objects clause of the memorandum and in the case of the company in existence immediately before the commencement of the Act, alteration of the main objects of the memorandum;

(b) alteration of articles of association in relation to insertion or removal of provisions which, under sub-section (68) of section 2, are required to be included in the articles of a company in order to constitute it a private company;

(c) change in place of registered office outside the local limits of any city, town or village as specified in sub-section (5) of section 12;

(d) change in objects for which a company has raised money from public through prospectus and still has any unutilized amount out of the money so raised under sub-section (8) of section 13;

(e) issue of shares with differential rights as to voting or dividend or otherwise under sub-clause (ii) of clause (a) of section 43;

(f) variation in the rights attached to a class of shares or debentures or other securities as specified under section 48;

(g) buy-back of shares by a company under sub-section (1) of section 68;

(h) election of a director under section 151 of the Act;

(i) sale of the whole or substantially the whole of an undertaking of a company as specified under sub-clause (a) of sub-section (1) of section 180;

(j) giving loans or extending guarantee or providing security in excess of the limit specified under sub-section (3) of section 186:

Provided that One Person Company and other companies having members upto 200 are not required to transact any business through postal ballot.

Example

How does the counting happen at the time of postal ballot?

It is important to know here that, a member who is voting by way of postal ballot, has votes in proportion to his share in the paid-up share capital of the company. And in this regard, he need not use all his votes not does he need to use all his votes in the same way. Therefore, 4 types of ballots may be received from the shareholders—

♦ Ballots which contain assents;
Ballots which contain dissents;
Ballots wherein the member has voted partially assenting, partially dissenting or using not all his shares in any particular way; and
Invalid ballots (due to absence/ mismatch of signature, overwriting, etc)

4.6 Circulation of Member’s Resolutions [Section 111]

Circulation of members’ resolution and statements: Students should carefully note the circumstances in which the members can make use of the administrative machinery of a company for introducing resolutions for consideration at next annual general meeting or for circulation of statements in regard to any resolution to be proposed at an extraordinary general meeting or business to be dealt with at any general meeting. Such circumstances are stated below:

(1) Notice to members: As per section 111 of the Companies Act, 2013, a company shall, on requisition in writing of such number of members, as required in section 100(Calling of EGM), give notice to members of any resolution which may properly be moved and is intended to be moved at a meeting; and circulate to members any statement with respect to the matters referred to in proposed resolution or business to be dealt with at that meeting.

(2) Exemption from serving notice: A company shall not be bound under this section to give notice of any resolution or to circulate any statement, unless-

(a) a copy of the requisition signed by the requisitionists (or two or more copies which, between them, contain the signatures of all the requisitionists) is deposited at the registered office of the company,- (i) in the case of a requisition requiring notice of a resolution, not less than six weeks before the meeting; (ii) in the case of any other requisition, not less than two weeks before the meeting; and

(b) there is deposited or tendered with the requisition, a sum reasonably sufficient to meet the company’s expenses in giving effect thereto.

Where however, after a copy of a requisition requiring notice of a resolution has been deposited at the registered office of the company, an annual general meeting is called on a date within six weeks after the copy has been deposited, the copy, although not deposited within the time required by this subsection, shall be deemed to have been properly deposited for the purposes thereof.

(3) Exception from circulation of any statement: The company shall not be bound to circulate any statement, if on the application either on behalf of the company or of any
other person who claims to be aggrieved, then the Central Government, by order, declares that the rights conferred are being abused to secure needless publicity for defamatory matter.

(4) **Order to bear the cost:** An order made may also direct that the cost incurred by the company shall be paid to the company by the requisitionists, notwithstanding that they are not parties to the application.

(5) **Default in contravention of the provision:** If any default is made in complying with the provisions of this section, the company and every officer of the company who is in default shall be liable to a penalty of twenty-five thousand rupees.

### 4.7 Representation of the president & Governors in meeting of companies to which they are member [Section 112]

Section 112 of the Companies Act, 2013 provides that the President of India or the Governor of a State, if he is a member of a company, may appoint such person as he thinks fit to act as his representative at any meeting and such other person shall be entitled to exercise the same rights and powers including the right to vote to proxy and postal ballot, as the President or, as the case may be, the Governor could exercise as a member of the company.

### 4.8 Representation of corporations meeting of companies and creditors [Section 113]

Section 113 of the Companies Act, 2013 seeks to provide that where a body corporate is member or creditor of the company, they may authorize a person to act as its representative in the meeting of the company. The provision is as under-

(1) **Appointment of representative by a body corporate:** A body corporate, whether a company within the meaning of this Act or not, may-

   (a) **if it is a member of company:** by resolution of its Board of Directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of the company, or at any meeting of any class of members of the company;

   (b) **if it is a creditor, including a holder of debentures:** of a company, by resolution of its directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of any creditors of the company held in pursuance of this Act or of any rules made thereunder, or in pursuance of the provisions contained in any debenture or trust deed, as the case may be.

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15 The Power of the Central Government has been delegated to Regional Director. **MCA Notification 4090 (E) dated 19th December, 2016.**
(2) **Powers and rights of a authorised person**: A person authorised by resolution as above, shall be entitled to exercise the same rights and powers, including the right to vote by proxy and by postal ballot, on behalf of the body corporate which he represents as that body could exercise if it were an individual member, creditor or holder of debentures of the company.

4.9 **Resolutions [Section 114–117]**

In lay man’s language, a resolution is the formal decision of an organization while transacting a business at a meeting. A motion which has obtained the necessary majority vote in favour becomes a resolution. So, in effect there is a difference between the two—Motion and Resolution.

**Difference between Motion & Resolution**—

- Most matters come before a meeting by way of a motion recommending that the meeting may express approval or disapproval or take certain action or order something to be done.
- A motion is a proposal, and a resolution is the adoption of a motion duly made and seconded. But every motion need not be followed by a resolution, as where a motion is made for the adjournment of the meeting.
- A motion whether it is passed for the closure of discussion or adjournment, etc. can be passed by an ordinary resolution unless there is a specific provisions in the articles.

As per the Companies Act, 2013, resolutions are of two types—

- Ordinary Resolutions – which are passed by simple majority; and
- Special Resolutions – which are passed by 75% majority.

**SECTION 114–ORDINARY & SPECIAL RESOLUTION**:

The section seeks to provide that a resolution shall be an ordinary resolution if the votes cast in the favour of the resolution exceeds the votes, if any, cast against the resolution by the members.

**Ordinary Resolution**—

Section 114(1) states that a resolution shall be ordinary resolution, if the notice required under this Act has been duly given and it is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution,
including the casting vote of the Chairman, if any, of the Chairman, by members, who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any cast against the resolution by members, so entitled and voting.

Simply put, the votes cast in the favour of the resolution, by any mode of voting should exceed the votes cast against it.

**Special Resolution**—

As per Section 114(2) of the Act, a resolution shall be a special resolution, when—

(a) The intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;

(b) The notice required under this Act has been duly given; and

(c) The votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote of the Chairman, if any, of the Chairman, by members, who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, are required to be not less than 3 times the number of the votes, if any, cast against the resolution by members so entitled and voting.

In simple words, a resolution shall be a special resolution, when it is duly specified in the notice, calling the general meeting and votes cast in favour is 3 times the votes cast against the resolution.

**Characteristics of Special Resolution**—

1. Specified Majority - 75%
2. Resolution shall be set out in the notice
3. Notice must state that resolution is to be passed as a special resolution and omission, would invalidate the resolution.
4. Proper notice of 21 days is given for holding the meeting
5. Explanatory Statement should be annexed to the notice for conducting special business
Now, how will one know that a section of the Act requires the passing of an ordinary resolution or special resolution? Where it is provided that “the company in general meeting may” do some act, this means that an ordinary resolution is required to be passed. On the other hand, a special resolution is one which has been passed by a majority of not less than 3/4ths of such members as, being entitled so to do, vote in person or by proxy at a general meeting of which notice specifying the intention to propose the resolution as a special resolution has been duly given.

Difference between Ordinary Business, Special Business and Ordinary Resolution & Special Resolution—

After studying the above concepts, it is quite common to get confused between the terms. Generally, the people think that a “special business” can only be transacted by means of a “special resolution”, which is a misapprehension. A special resolution is required for transacting business only where it is specifically so required by the Act. All other business can be transacted by an ordinary resolution.

Example

In the annual general meeting of Black Mango Limited, the notice contained the agenda for 8 special businesses to be transacted. The Chairman decided to move all the resolutions at one time in order to save time of the members present at the meeting. Discuss whether two or more resolutions can be moved together as per the provisions of the Companies Act, 2013.

For the sake of avoiding confusion and mixing up, the resolutions are moved separately. However, there is nothing illegal if the Chairman of the meeting desires that two or more resolutions should be moved together, unless any member requires that each resolution should be put to vote separately or unless a poll is demanded in respect of any.

The only case where a resolution should be moved separately is the one which requires that as regards the appointment of directors at a general meeting of a public or private company, where two or more directors may not be appointed as directors by a single resolution.

Where notice has been given of several resolutions, each resolution must be put separately. However, if the meeting unanimously adopts all the resolutions, this would not be material.

RESOLUTIONS REQUIRING SPECIAL NOTICE [SECTION 115]

Section 115 of the Companies Act, 2013 states that where any provision of this Act specifically requires or Articles of Association of a company so require that a special notice is required for passing any resolution, then the notice of the intention to move such resolution shall be given to the company by such number of members holding not less than 1% of the total voting power, or holding shares on which such aggregate sum not exceeding five lakh rupees, as may be prescribed, has been paid-up. In such a case, the company shall give its members notice of the resolution in the manner as prescribed in Rule 22 of the Companies (Management & Administration) Rules, 2014.
Rule 23—Special Notice—

1. A special notice required to be given to the company shall be signed, either individually or collectively by such number of members holding not less than one percent of total voting power or holding shares on which an aggregate sum of not less than 5,00,000 rupees has been paid up on the date of the notice.

2. The afore-mentioned notice shall be sent by members to the company not earlier than 3 months but at least 14 days before the date of meeting at which the resolution is to be moved, exclusive of the day on which the notice is given and the day of the meeting.

3. The company shall immediately after receipt of the notice, give its members notice of the resolution at least seven days before the meeting, exclusive of the day of dispatch of notice and day of the meeting, in the same manner as it gives notice of any general meetings.

4. Where it is not practicable to give the notice in the same manner as it gives notice of any general meetings, the notice shall be published in English language in English newspaper and in vernacular language in a vernacular newspaper, both having wide circulation in the State where the registered office of the Company is situated and such notice shall also be posted on the website, if any, of the Company.

5. The notice shall be published at least seven days before the meeting, exclusive of the day of publication of the notice and day of the meeting.

RESOLUTIONS PASSED AT ADJOURNED MEETING [SECTION 116]

The section simply states that where a resolution is passed at an adjourned meeting of—

♦ A company; or
♦ The holder of any class of shares in a company; or
♦ The Board of Directors of a company,

And states that if a meeting is adjourned then the date of passing of the resolution shall be the date on which it is actually passed and not an earlier date.

Example 1

The extra-ordinary general meeting of the company, Purple Banana Private Limited was due to be held on 23rd September 2016. However, due to want of quorum, the meeting was adjourned to a later date on 1st October 2016 and two resolutions were passed on that date. Now, as per section 116 of the Companies Act, 2013, the said two resolutions shall be deemed to have been passed on the original date of meeting, i.e. 1st October 2016 and not on the earlier date.

RESOLUTIONS AND AGREEMENTS TO BE FILED [SECTION 117]

Section 117 of the Companies Act, 2013 talks about the resolutions and agreements which are to be filed with the Registrar of Companies, together with the explanatory statement, within 30 days of its passing.
Extract of Act [Section 117(1)]

“A copy of every resolution or any agreement, in respect of matters specified in sub-section (3) together with the explanatory statement under section 102, if any, annexed to the notice calling the meeting in which the resolution is proposed, shall be filed with the Registrar within thirty days of the passing or making thereof in such manner and with such fees as may be prescribed within the time specified under section 403:

Provided that the copy of every resolution which has the effect of altering the articles and the copy of every agreement referred to in sub-section (3) shall be embodied in or annexed to every copy of the articles issued after passing of the resolution or making of the agreement.”

Applicability of the section –

Section 117(3) states that the following resolutions and agreements shall be filed with the RoC in Form MGT – 14 within 30 days of its passing –

♦ Special Resolutions
♦ Resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions;
♦ Any resolution of the Board of Directors of a company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director;
♦ Resolutions or agreements which have been agreed to by any class of members but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by a specified majority or otherwise in some particular manner; and all resolutions or agreements which effectively bind such class of members though not agreed to by all those members.
♦ Resolutions passed by a company according to consent to the exercise by its Board of Directors of any of the powers under section 180(1)(a) and 180(1)(c);
♦ Resolutions requiring a company to be wound up voluntarily passed in pursuance of section 59 of the Insolvency and Bankruptcy Code, 2016.

16 In case of Specified IFSC Public Company - Sub-section (1) of section 117, for the words “thirty days” read as “sixty days”. Notification Dated 4th January, 2017.

17 In case of Specified IFSC Private Company - Sub-section (1) of section 117, for the words “thirty days” read as “sixty days”. Notification Dated 4th January, 2017
18 & 19. Resolutions passed in pursuance of sub-section (3) of section 179.
Provided that no person shall be entitled under section 399 to inspect or obtain copies of such resolutions; and

any other resolution or agreement as may be prescribed and placed in the public domain.

Penalty under the Act-

Section 117(2) sets out the penalty in case of failure to intimate RoC about the resolutions and agreements that are required to be filed within the specified time under section 403 and states that the company shall be punishable with fine which shall not be less than ₹ 5,00,000 but which may extend to ₹ 25,00,000 and every officer of the company who is in default, including the liquidator, if any, shall be punishable with fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 5,00,000.

4.10 Minutes [Section 118]

Section 118 prescribes that every company shall cause minutes of the proceedings of every general meeting of any class of shareholders or creditors, and every resolution passed by postal ballot and every meeting of its Board of Directors or of every committee of the Board, to be prepared and signed in such manner as may be prescribed and kept within 30 days of the conclusion of every such meeting concerned, or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered. [Sub section (1)]

\[ Notification dated 5th June, 2015. \]

The above mentioned exemption shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar- \[ Notification dated 13th June, 2017. \]

19 In case of Specified IFSC Public Company - Clause (g) of sub-section (3) of section 117 shall not apply. \[ Notification Dated 4th January, 2017. \]

20 In case of Specified IFSC Public Company - In Sub-section (1) of section 118, the following proviso shall be inserted, namely:-
“Provided that in case of a Specified IFSC public company, the minutes of every meeting of its Board of Directors or of every committee of the Board, to be prepared and signed in the manner as may be prescribed under sub section (1) at or before the next Board or committee meeting, as the case may be and kept in books kept for that purpose.” - \[ Notification Date 4th January, 2017 \]

21 In case of Specified IFSC Private Company - In Sub-section (1) of section 118, the following proviso shall be inserted, namely:-
“Provided that in case of a Specified IFSC private company, the minutes of every meeting of its Board of Directors or of every committee of the Board, to be prepared and signed in the manner as may be prescribed under sub section (1) at or before the next Board or committee meeting, as the case may be and kept in books kept for that purpose.” - \[ Notification Date 4th January, 2017 \]
The minutes shall be prepared as prescribed in Rule 25 of the Companies (Management and Administration) Rules, 2014

The minute book shall be consecutively numbered.

The minutes of each meeting shall contain a fair and correct summary of the proceedings that took place at the concerned meeting.

All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting.

In the case of a Board Meeting or a meeting of a committee of the Board, the minutes shall also contain—

- The names of the directors present at the meeting; and
- In the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring with the resolution.

Any of the following matter shall not be included in the minutes of the meeting, which in the opinion of the Chairman of the meeting—

- Is or could reasonably be regarded as defamatory of any person; or
- Is irrelevant or immaterial to the proceedings; or
- Is detrimental to the interests of the company.

The matter to be included or excluded in the minutes of the meetings shall be at the absolute discretion of the Chairman of the meeting.

The minutes kept in accordance with the provisions shall serve as the evidence of the proceedings therein.

Where the minutes have been kept in accordance with this section, until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place, and the resolutions passed by postal ballot to have been duly passed and in particular, all appointments of directors, key managerial personnel, auditors or company secretary in practice, shall be deemed to be valid.

No document, purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters requires by this section to be contained in the minutes of the proceedings of such meeting.
Every company shall observe Secretarial Standards with respect to general and Board meetings, specified by the Institute of Company Secretaries of India and approved as such by the Central Government.\textsuperscript{22,23} [Sub section (10)]

Penalty for contravention--

- If any default is made in complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of Rs 25,000 and every officer of the company who is in default shall be liable to a penalty of Rs 5,000.

- If a person is found guilty of tampering with the minutes of the proceedings of the meeting, he shall be punishable with imprisonment for a term which may extend to 2 years and with fine which shall not be less than Rs 25,000 but which may extend to Rs 1,00,000.

*Rule 25 of the Companies (Management & Administration) Rules, 2014* prescribes the procedure for maintenance of minutes of proceedings of general meeting, meeting of Board of Directors and other meetings and resolutions passed by postal ballot as follows--

- A distinct minute book shall be maintained for each type of meeting namely:
  - general meetings of the members;
  - meetings of the creditors
  - meetings of the Board; and
  - meetings of each of the committees of the Board.

- The minutes of proceedings of each meeting shall be entered in the books maintained for that purpose along with the date of such entry within thirty days of the conclusion of the meeting.

- In case of every resolution passed by postal ballot, a brief report on the postal ballot conducted including the resolution proposed, the result of the voting thereon and the summary of the scrutinizer’s report shall be entered in the minutes book of general meetings along with the date of such entry within thirty days from the date of passing of resolution.

- Each page of every such book shall be initialled or signed and the last page of the record of proceedings of each meeting or each report in such books shall be dated and signed –
  - in the case of minutes of proceedings of a meeting of the Board or of a committee thereof, by the chairman of the said meeting or the chairman of the next succeeding meeting;

\textsuperscript{22} In case of Specified IFSC Public Company- Sub-section (10) of section 118 Shall not apply.
\textsuperscript{23} - Notification Date 4th January, 2017.

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(ii) in the case of minutes of proceedings of a general meeting, by the chairman of the same meeting within the aforesaid period of thirty days or in the event of the death or inability of that chairman within that period, by a director duly authorised by the Board for the purpose;

(iii) In case of every resolution passed by postal ballot, by the chairman of the Board within the aforesaid period of thirty days or in the event of there being no chairman of the Board or the death or inability of that chairman within that period, by a director duly authorized by the Board for the purpose.

♦ The minute books of general meetings, shall be kept at the registered office of the company and shall be preserved permanently and kept in the custody of the company secretary or any director duly authorised by the board.

♦ The minute-books of the Board and committee meetings shall be preserved permanently and kept in the custody of the company secretary of the company or any director duly authorized by the Board for the purpose and shall be kept in the registered office or such place as Board may decide.

**Exemption to Section 8 companies:** In case of Section 8 company - section 118 shall not apply as a whole except that minutes may be recorded within 30 days of the conclusion of every meeting in case of companies where the articles of association provide for confirmation of minutes by circulation - *Notification dated 5th June, 2015.*

The exceptions, modifications and adaptations, shall be applicable to a section 8 company which has not committed a default in filing its financial statements under 137 or Annual Return under section 92 with the Registrar. *Notification dated 13th June, 2017.*

### 4.11 Inspection of minute-books of general meeting [Section 119]

**How shall the inspection take place?**

As per section 119 of the Companies Act, 2013, the books containing the minutes of the proceedings of any general meeting of a company shall—

♦ Be kept at the registered office of the company; and

♦ Be open for inspection, during business hours, by any member, without charge, subject to such reasonable restrictions as specified in the articles of the company or as imposed in the general meeting. However, at least 2 hour in each business day shall be allowed for inspection [Sub – Section (1)].

Any member shall be entitled to be furnished, within seven working days after he has made a request in that behalf to the company, and on payment of such fees as may be prescribed, with a copy of any minutes referred [Sub – Section (2)].
What is the penalty for contravention of the provisions of the Act? [Sub section (3)]

If any inspection under sub-—section (1), is refused by the company to the member, or if the copy of minute-book is not furnished within the time specified under sub—section (2), then the company shall be liable to a penalty of ₹25,000 and every officer of the company who is in default shall be liable to a penalty of ₹5,000 for each such refusal or default as the case may be.

Power of Tribunal [Sub—Section (4)]

In the case of any such refusal or default, the Tribunal may, without prejudice to any action being taken under sub-section (3), by order, direct an immediate inspection of the minute-books or direct that the copy required shall forthwith be sent to the person requiring it.

Rule 26—Copy of minute book of general meeting—

Any member shall be entitled to be furnished, within seven working days after he has made a request in that behalf to the company, with a copy of any minutes of any general meeting, on payment of such sum as may be specified in the articles of association of the company, but not exceeding a sum of ten rupees for each page or part of any page:

Provided that a member who has made a request for provision of soft copy in respect of minutes of any previous general meetings held during a period immediately preceding three financial years shall be entitled to be furnished, with the same free of cost.

MAINTENANCE AND INSPECTION OF DOCUMENTS IN ELECTRONIC FORM [SECTION 120]

The said section seeks to provide that any document, record, register or minute, etc., required to be kept by a company or allowed to be inspected or copies given to any person by a company under this Act, may be kept or inspected or copies given, as the case may be, in electronic form in such form and manner as may be specified in Rule 27, 28 and 29 of the Companies (Management and Administration) Rules, 2014.

♦ Rule 27 of the Companies (Management and Administration) Rules, 2014 talks about the maintenance and inspection of documents in electronic form. It states that every listed company or a company having at least 1000 shareholders, debenture-holders and other security holders, may maintain its records, as required to be maintained under the Act or rules made thereunder, in electronic form.

♦ Rule 28 sets out the security of records maintained in electronic forms and mentions that the Managing Director, Company Secretary or any other director or officer of the company as the Board may decide shall be responsible for the maintenance and security of electronic records.

♦ Rule 29 states that where a company maintains its records in electronic form, any duty imposed by the Act or rules made there under to make those records available for inspection or to provide copies of the whole or a part of those records, shall be construed as a duty to make the records available for inspection in electronic form or to provide copies...
of those records containing a clear reproduction of the whole or part thereof, as the case may be on payment of not exceeding 10 rupees per page.

4.12 Meetings

Now that we have understood the basic terms which are required to call, convene and conduct the meeting properly, let us discuss the provisions related to meetings given in the Companies Act, 2013. The Act describes two types of general meeting to be held in a company which are–

SECTION 96–ANNUAL GENERAL MEETING (‘AGM’)

♦ Section 96(1) of the Companies Act, 2013 states that every company, whether public or private, except One Person Company, shall hold an annual general meeting every year and that the gap between two AGMs shall not be more than 15 months.

♦ The company shall specify the meeting as such [i.e. as AGM] in the notices calling it.

♦ In case of the First AGM of a company, it shall be held within a period of 9 months from the date of closing of the 1st financial year (i.e. April to March next year).

In any other case, AGM shall be held within a period of 6 months from the date of closing of its financial year.

♦ The section further states that where a company holds its first AGM as aforesaid, it shall not be necessary for the company to hold any AGM in the year of its incorporation.

♦ Moreover, the Registrar may grant an extension by 3 months, for holding the AGM to any company for special reasons, except in the case of first AGM of the company.

Example

1. **Abbeys Private Limited closed its financial year on 31st March 2018. According to section 96(1) of the Act, the Company should hold its annual general meeting for the year 2017-18 by 30th September 2018 unless an extension is granted by RoC on special reasons.**
2. **Abbyrush Limited** was incorporated on 11th December 2016. **When should the company hold its AGM?**

According to section 96(1), the company’s financial year will close on 31st March 2017. The company may hold its first AGM by 31st December 2017, i.e. within 9 months of the close of its financial year.

- Section 96(2) states 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:
  
  Provided that the Central Government may exempt any company from the provisions of this sub-section subject to such conditions as it may impose.

  Explanation—For the purposes of this sub-section, "National Holiday" means and includes a day declared as National Holiday by the Central Government.

**Exemption to Section 8 companies:**

In case of Section 8 company- In Sub-section (2) of Section 96 after the proviso and before the explanation the following proviso shall be inserted:

Provided further that the time, date and place of each annual general meeting are decided upon before-hand by the board of directors having regard to the directions, if any, given in this regard by the company in its general meeting. - Notification dated 5th, June 2015.

The above mentioned exception shall be applicable to a section 8 company which has not committed a default in filing of its financial statements under section 137 or annual return under section 92 with the Registrar. Notification dated 13th June, 2017.

**Exemption to Government companies:**

In case of Government company, section 96(2) shall be read as:

‘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 such other place within the city, town or village in which the registered office of the company is situate or such other place as the Central Government may approve in this behalf.’ Notification dated 5th June, 2015 read with Notification Dated 13th June, 2017

The above mentioned exception/ modification/ adaptation shall be applicable to Government company which has not committed a default in filing of its financial statements under section 137 or annual return under section 92 with the Registrar. Notification dated 13th June, 2017.

- Further, section 97 mentions that the if any default is made in holding the AGM of the company under section 96, the Tribunal, i.e. National Company Law Tribunal (‘NCLT’ or ‘the Tribunal’), may, on application of any member of the company, call or direct the calling
of an AGM of the company and give such ancillary or consequential directions as the Tribunal thinks fit.

Section 98 of the Act provides that if for any reason, it is impracticable to call a meeting of a company other than an AGM, the Tribunal shall have the power to order for calling the meeting either *suo motu* (on its own) or on the application of any director of the company or of any member of the company.

Extract of the Act

"SECTION 97: POWER OF TRIBUNAL TO CALL ANNUAL GENERAL MEETING

(1) If any default is made in holding the annual general meeting of a company under section 96, the Tribunal may, notwithstanding anything contained in this Act or the articles of the company, on the application of any member of the company, call, or direct the calling of, an annual general meeting of the company and give such ancillary or consequential directions as the Tribunal thinks expedient:

Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) A general meeting held in pursuance of sub-section (1) shall, subject to any directions of the Tribunal, be deemed to be an annual general meeting of the company under this Act.

SECTION 98: POWER OF TRIBUNAL TO CALL MEETINGS OF MEMBERS, ETC

(1) If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the articles of the company, the Tribunal may, either suomotu or on the application of any director or member of the company who would be entitled to vote at the meeting, —

(a) order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and

(b) give such ancillary or consequential directions as the Tribunal thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act or articles of the company:

Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) Any meeting called, held and conducted in accordance with any order made under sub-section (1) shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted.*

Punishment for default in complying with the provisions of section 96 to 98–

Section 99 lists out the punishment for contravention of section 96 to 98, i.e. default in holding a meeting of the company as AGM or on the directions issued by the Tribunal. It states that the
company and every officer of the company who is in default, shall be punishable with fine which may extend to ₹ 1,00,000 and in the case of a continuing default, with a further fine which may extend to ₹ 5,000 for every day during which the default continues.

SECTION 121: REPORT ON ANNUAL GENERAL MEETING

This section is applicable to listed public companies and states that they shall prepare a report in the Form MGT – 15 as prescribed in Rule 31 of the Companies (Management and Administration) Rules, 2014, on each AGM including the confirmation to the effect that the meeting was convened, held and conducted as per the provisions of this Act and the rules made thereunder.

♦ The company shall file with the Registrar a copy of the report referred to in sub-section (1) within 30 days of the conclusion of the annual general meeting with such fees as may be prescribed, or with such additional fees as may be prescribed, within the time as specified, under section 403.

♦ If the company fails to file such report before the expiry of the period specified under section 403 with additional fees then company shall be punishable with fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 5,00,000 and every officer of the company, who is in default, shall be punishable with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1,00,000.

SECTION 100: EXTRA-ORDINARY GENERAL MEETINGS

Who can call an EGM?

24 & 25. The Board may, whenever it deems fit, call an extraordinary general meeting of the company.

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;

24 In case of Specified IFSC Private Company - In sub-section (1) of section 100, the following proviso shall be inserted, namely:-

“Provided that in case of a Specified IFSC private company, the Board may subject to the consent of all the shareholders, convene its extraordinary general meeting at any place within or outside India.”.- Notification Dated 4th January, 2017.

25 In case of Specified IFSC Public Company- In sub-section (1), the following proviso shall be inserted, namely:- “Provided that in case of a Specified IFSC public company, the Board may subject to the consent of all the shareholders, convene its extraordinary general meeting at any place within or outside India.”. Notification Dated 4th January, 2017.
2. **The Board shall on the requisition** of –
   (a) In the case of company having a share capital, such number of members who hold, on the date of receipt of requisition, at least 1/10th of such paid-up capital of the company as on that date carries the right of voting;
   
   (b) In the case of company not having a share capital, such number of members who hold, on the date of receipt of requisition, at least 1/10th of total voting power of all the members having on the said date a right to vote.

   Call an EGM of the company within the period specified in sub-section (4).

**Other provisions related to calling of meeting by requisitionists**

1. The requisition shall set out the matters for the consideration of which the meeting is to be called and shall be signed by the requisitionists and sent to the registered office of the company.

2. If the Board does not, within twenty-one days from the date of receipt of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than forty-five days from the date of receipt of such requisition, the meeting may be called and held by the requisitionists themselves within a period of three months from the date of the requisition. [Sub section (4)]

3. A meeting under sub-section (4) by the requisitionists shall be called and held in the same manner in which the meeting is called and held by the Board.

4. Any reasonable expenses incurred by the requisitionists in calling a meeting under sub-section (4) shall be reimbursed to the requisitionists by the company and the sums so paid shall be deducted from any fee or other remuneration under section 197 payable to such of the directors who were in default in calling the meeting.

**Rule 17 of the Companies (Management and Administration) Rules, 2014.**

**Calling of Extraordinary general meeting by requisitionists.**

1. The members may requisition convening of an extraordinary general meeting in accordance with sub-section (4) of section 100, by providing such requisition in writing or through electronic mode at least clear twenty-one days prior to the proposed date of such extraordinary general meeting.

2. The notice shall specify the place, date, day and hour of the meeting and shall contain the business to be transacted at the meeting.-

   Explanation.- For the purposes of this sub-rule, it is here by clarified that requisitionists should convene meeting at Registered office or in the same city or town where Registered office is situated and such meeting should be convened on any day except national holiday.

3. If the resolution is to be proposed as a special resolution, the notice shall be given as required by sub-section (2) of section 114.
(4) The notice shall be signed by all the requisitionists or by a requisitionists duly authorised in writing by all other requisitionists on their behalf or by sending an electronic request attaching therewith a scanned copy of such duly signed requisition.

(5) No explanatory statement as required under section 102 need be annexed to the notice of an extraordinary general meeting convened by the requisitionists and the requisitionists may disclose the reasons for the resolution(s) which they propose to move at the meeting.

(6) The notice of the meeting shall be given to those members whose names appear in the Register of members of the company within three days on which the requisitionists deposit with the Company a valid requisition for calling an extraordinary general meeting.

(7) Where the meeting is not convened, the requisitionists shall have a right to receive list of members together with their registered address and number of shares held and the company concerned is bound to give a list of members together with their registered address made as on twenty first day from the date of receipt of valid requisition together with such changes, if any, before the expiry of the forty-five days from the date of receipt of a valid requisition.

(8) The notice of the meeting shall be given by speed post or registered post or through electronic mode. Any accidental omission to give notice to, or the non-receipt of such notice by, any member shall not invalidate the proceedings of the meeting.

**Example**

1. The Board of directors of Illusions Private Limited, a company registered in New Delhi, has decided to call an extra-ordinary general meeting in Madrid, Spain on 2nd October 2017. Discuss whether the general meeting can be convened on the said date.

   No, the meeting cannot be convened in the manner as stated in the facts of the question. As per Rule 17(2) of the Companies (Management and Administration) Rules, 2014, the requisitionists should hold the meeting in the registered office of the company or in the same city or town in which the registered office is situated and it should be a working day.

2. The members of the Blumove Peacocks Private Limited, holding 1/10th voting power of the company, requisitioned a meeting on 14th August, 2017 to the Board of Directors. However, the directors did not pay any heed to such a requisition and did not call an extra-ordinary meeting. Discuss the consequences of the contravention of the same in accordance with the Companies Act, 2013.

   Where the Board, after the receipt of the requisition, does not within 21 days call for a meeting within 45 days of the date of requisition, then the requisitionists may themselves call and convene the meeting.
4.13 Applicability of this Chapter to One Person Company [Section 122]

(1) The section states that the provisions of section 98 and section 100 to 111 shall not apply to One Person Company.

(2) The ordinary businesses as mentioned under section 102(2)(a), which a company is required to transact at an AGM, shall be transacted in the case of One Person Company, as provided in Sub-section (3).

(3) For the purposes of section 114, any business which is required to be transacted at an annual general meeting or other general meeting of a company by means of an ordinary or special resolution, it shall be sufficient if, in case of One Person Company, the resolution is communicated by the member to the company and entered in the minutes-book required to be maintained under section 118 and signed and dated by the member and such date shall be deemed to be the date of the meeting for all the purposes under this Act.

(4) Notwithstanding anything in this Act, where there is only one director on the Board of Director of a One Person Company, any business which is required to be transacted at the meeting of the Board of Directors of a company, it shall be sufficient if, in case of such One Person Company, the resolution by such director is entered in the minutes book required to be maintained under section 118 and signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all the purposes under this Act.

4.14 Company Law in a Computerized Environment

Section 398 of the Companies Act, 2013 empowers the Central Government to make rules in regard to filing of various applications, documents, returns etc. service or delivery of documents, notice or communication etc., maintenance of various applications, documents and returns filed etc. in the electronic form.

Ministry of Company Affairs (MCA), has initiated MCA 21 program, for easy and secure access to MCA services in a manner that best suits the businesses and citizens.

The program goals have been set as follows keeping in mind stakeholders' needs:

♦ **Business** shall be enabled to register a company and file statutory documents quickly and easily

♦ **Public** to get easy access to relevant records and effective grievances redressal

♦ **Professionals** to be able to offer efficient services to their client companies

♦ **Financial** Institutions to easily find charges registration and verification

♦ **Employees** to ensure proactive and effective compliance of relevant laws and corporate governance
**Procedure of electronic filing:** In order to carry out e-filing on MCA21 you have facility to download the eForm and fill it in an offline mode. Every form has the facility to pre-fill the data available in MCA21 system. Once the e-form is filled you would need to validate the e-form using Pre-scrutiny button. You would then have to affix the relevant digital signatures and save the form. You would need to be connected to the internet to carry out the pre-fill and pre-scrutiny functions. The step by step process is given below. The filled up e-form as per relevant instruction kit needs to be uploaded on the MCA21 portal. On successful upload, the Service request number would be generated and you would be directed to make payment of the statutory fees. The step by step process is given below. Once the payment has been made the status of your payment and filing status can be tracked on the MCA21 portal by using the ‘Track Your Payment Status’ and ‘Track Your Transaction Status’ link respectively.

**Steps for the e-filing:** Following are the steps given below to proceed to do eFiling:

1. Select a category to download an eForm from the MCA 21 portal (with or without the instruction kit)
2. At any time, can read the related instruction kit to familiarize with the procedures (download the instruction kit with eform or view it under Help menu).
3. Fill the downloaded eForm.
4. Attach the necessary documents as attachments.
5. Use the Prefill button in eForm to populate the grayed out portion by connecting to the Internet.
6. The applicant or a representative of the applicant needs to sign the document using a digital signature.
7. Need to click the Check Form button available in the eForm. System will check the mandatory fields, mandatory attachment(s) and digital signature(s).
8. Upload the eForm for pre-scrutiny. The pre-scrutiny service is available under the Services tab or under the eForms tab by clicking the Upload eForm button. The system will verify (pre-scrutinize) the documents. In case of any inadequacies, the user will be asked to rectify the mistakes before getting the document ready for execution (signature).
9. The system will calculate the fee, including late payment fees based on the due date of filing, if applicable.
10. Payments will have to be made through appropriate mechanisms - electronic (credit card, Internet banking) or traditional means (at the bank counter through challan).
   
   (a) Electronic payments can be made at the Virtual Front Office (VFO) or at PFO
   
   (b) If the user selects the traditional payment option, the system will generate 3 copies of pre-filled challan in the prescribed format. Traditional payments through cash, cheques can be done at the designated network of banks using the system generated
challan. There will be five banks with estimated 200 branches authorized for accepting challan payments.

11. The payment will be exclusively confirmed for all online (Internet) payment transactions using payment gateways.

12. Acceptance or rejection of any transaction will be explicitly communicated to the applicant (including facility to print a receipt for successful transactions).

13. MCA21 will provide a unique transaction number, the Service Request Number (SRN) which can be used by the applicant for enquiring the status pertaining to that transaction.

14. Filing will be complete only when the necessary payments are made.

15. In case of a rejection, helpful remedial tips will be provided to the applicant.

16. The applicants will be provided an acknowledgement through e-mail or alternatively they can check the MCA portal.

Program Scope
MCA 21 program provide for anytime anywhere electronic services with speed and certainty to all the stakeholders. It includes:
♦ Design and development of application system
♦ Setting up of IT infrastructure
♦ Setting up the Digital Signature/PKI delivery mechanisms and associated security requirements
♦ Setting up of Physical Front Offices (PFOs)
♦ Setting up of temporary FOs for the peak periods to meet with the requirements and subsequent shutdown of temporary FOs at the end of such peak periods
♦ Migrating legacy data and digitization of paper documents to the new system
♦ Providing MCA services to all MCA 21 stakeholders in accordance with the Service Oriented Approach
♦ Providing user training at all levels and all offices (Front and Back Offices)

The MCA 21 is designed to automate processes related to the proactive enforcement and compliance of the legal requirements under the Companies Act, 1956. However, it does not include processes related to OL.

Key Benefits
MCA 21 seeks to fulfill the requirements of the various stakeholders. The key benefits of MCA 21 project are the back office process relates to:
♦ Expeditious incorporation of companies
♦ Simplified and ease of convenience in filing of Forms/ Returns

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Better compliance management
Total transparency through e-Governance
Customer centric approach
Increased usage of professional certificate for ensuring authenticity and reliability of the Forms / Returns
Building up a centralised database repository of corporate operating
Enhanced service level fulfillment
Inspection of public documents of companies anytime from anywhere
Registration as well as verification of charges anytime from anywhere
Timely redressal of investor grievances
Availability of more time for MCA employees for monitoring and supervision.

The MCA-21 Programme also introduces the concept of Director Identification Number (DIN), which is a unique identification number being issued to all directors. All directors, be it those of existing companies or first time directors, will need to register themselves online for obtaining the DIN.

KEY POINTS

- The Unit discusses about the registers and returns to be kept and maintained by the company as per the provisions of the Companies Act, 2013 and the types of meetings to be held in accordance with the Act. It also discusses the terms relevant to properly convene and conduct the meetings.
- It states that the company is required to keep and maintain the register of members in Form MGT-1, register of debenture-holders and other security-holders in Form MGT-2, including foreign registers under section 88 read with Rule 7.
- Section 89 states that a person holding beneficial interest in the shares of the company shall intimate the company about the fact in Form MGT–4/5, as applicable, and thereafter the company shall intimate the RoC about the interest of member within 30 days in Form MGT–6.
- Section 91 deals with the time limits within which the registers of the company is allowed to be closed and also mentions the penalty for contravention of the same. It states that the registers may be closed for a maximum of 30 days at a time and 45 days in aggregate in a year.
- The section 92 of the Act provides that the company is required to file an annual return in Form MGT – 7 to RoC after the conclusion of AGM and specifies the content to be included in the annual return.
- The annual return should be signed by a Practising Company Secretary and in specific cases, it should be certified by the Company Secretary in MGT - 8.
Section 93 states that the every listed company shall file a return with the RoC in MGT – 10 mentioning the changes in number of shares held by the promoters and the top 10 shareholders within 15 days of such change.

Section 94 describes that the registers and returns and other documents of the company shall be kept at the registered office of company. However, they can also be kept at any other place where more than 1/10th of the total members reside but the same should be approved by way of a special resolution.

The Act prescribes two types of general meetings that are held within the company – Annual General Meeting as mentioned in section 96 and Extra-Ordinary General Meeting as per section 100.

Section 96 discusses about the annual general meeting to be held in a company every year and prescribes that the AGM shall be held within 6 months from the date of the closing of the financial year and that the gap between two AGM shall not exceed 15 months.

The AGM shall be held within the business hours and on a working day, i.e. other than National Holidays.

Listed public companies shall file a report on AGM with the RoC in MGT–15 within 30 days of the AGM.

Section 100 prescribes the provisions for holding the EGM and states that either the board of directors, or a requisition made to Board by a specific number of members, are authorised to call an EGM.

Further the chapter discusses about the notice to be sent to members and others for calling the meeting and sets out the length of the notice.

Also, the Act describes the Chairman to be appointed for the meetings and the proxies to be appointed by the member of the meeting.

Section 121 of the Act requires a listed public company to issue a report on the AGM to be filed with the RoC within 30 days of the conclusion of the AGM.