

CA Intermediate (New Syllabus)

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Paper-2

Corporate and Other Laws

2nd Edition



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CA Inter May-22

What Our Students have to Say....

Aman Mahajan (CA AIR 19)

I really liked your classes, especially the practical linkages explained with amazing graphics. The full subject test series helped a lot in improving my writing speed and presentation skills.

Sundar Sri Renganathan B (AIR 33)

I took Accounting from IndigoLearn and the classes were really good. They emphasized on conceptual clarity over getting things done quickly, which is really vital to score good marks in practical papers. Other resources like Notes, Quizzes and Forum was beneficial too.

Dwarakesh

Thank you IndigoLearn team for the guidance and support throughout the past few months. I had great conceptual clarity in all the subjects and the revision classes by Suraj Sir were very helpful. Study planner and Free resources were very useful. Thank you Team IndigoLearn.

Yug Manoj Kumar Bhattad

I have cleared my CA Foundation examination with the total of 286. And this was not possible without the efforts and support of IndigoLearn. The way of teaching with utmost conceptual clarity is the best thing at IndigoLearn.

Prakash Bhatt

Superb, one stop solution for All CA and Accountancy students they serve real Education at very very reasonable price

Naveen Kumar S

Good experience, unlimited views helped a lot in last one month preparation. Looking forward for

Bhagyasree Chougule

It was only because of IndigoLearn that my concepts became very clear, and I was able to crack the exam. I wasn't 100% prepared I needed more practice but luckily I got through. I'm definitely choosing IndigoLearn for group 2 preparation. A big thanks!

Mohd Thayyab

Theoretical subjects made easier through story based examples and charts. Concept clarity 100%. Fully exam+practical oriented classes will help not only to retain the concepts during exams but for the longer duration.

Lalit Chetan Sanpal

IndigoLearn has been fantastic and brilliant. Helped me a lot in my preparations. I cleared both the groups in first attempt with your brilliant classes and notes. Thanks to all the faculties, coordinators, forum admins and everyone at IndigoLearn. Really grateful. Will go for CA Finals at IndigoLearn For sure. Thank you so much IndigoLearn.

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Abishek M

I'd like to thank IndigoLearn for all the support they've provided me with. Modules were great. They were time saving and straight to the point. I extensively used the materials provided before exams, they were so helpful. Also I'd appreciate them for providing unlimited views as I kept looking into the maths modules till the end.

Munnur Nandini Sree

Accounting classes I have taken from IndigoLearn. Now I feel that it's a great choice that I have made (after seeing my result) because only in Accounting I got exemption. Thank you IndigoLearn.

Harshita G

Thank u so much IndigoLearn for your guidance. This is only possible because of u people... For my finals also my journey will continue with IndigoLearn.

Bharathsha PS

I purchased Economics, IT, FM, EIS and Audit from IndigoLearn. All your classes are superb and anyone can easily crack the CA exams. What makes u special is your classes help us to understand the concepts very well. Special thanks to the FM faculty, I studied only 2 chapters in economics, and still managed to score exemption in the 8th paper.

Nayi Mihir kumar

This platform is very helpful in all activity like mcq practise, notes, teaching activities, revisions and the forum interaction with all students which I like the most. If anybody want to clear their exams in first attempt then IndigoLearn is the best platform for them. My all regards to IndigoLearn. Thank you so much.

Rajalaxmi CA Inter

Can't believe I cleared. Sathya Sir, Suraj Sir, Yogita Mam ... thanks to all my faculties. Basically an Eng student with zero accounts knowledge. Thanks IndigoLearn for making me clear in first attempt.

Priyanka Udeshi

All the faculties have excellent knowledge of the subject and deliver it in very crisp & effective manner. Also, quick response at Forums never let any of my doubts go unresolved no matter how small they were. Thank you once again to all the teachers & staff at IndigoLearn!

Naveen Kumar T

It been a great journey with indigo learn team. Thanks to all the facilities and forum friends who support me a lot.

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This book is designed for students pursuing **CA Intermediate course, who are appearing for the Corporate & Other Laws** exams in **May'24 or thereafter**. Every effort has been made to avoid errors and omissions. Despite this, errors may still occur. Any mistake, error, or discrepancy may be brought to our attention by emailing us at support@indigolearn.com and we shall fix the same in the next edition of the book.

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Edition 2 – Nov 2023

**CA Inter - Paper 2A: Corporate and Other Laws
CHAPTER WISE WEIGHTAGE - BASED ON PAST EXAM ANALYSIS**

S. No.	CHAPTER NAME	70 Marks - excl. MCQs										Avg. of category (excl. MCQs)	ICAI Weightage (Incl. MCQs)
		May-23	Nov-22	May-22	Dec-21	Jul-21	Jan-21	Nov-20	Nov-19	May-19			
I COMPANIES ACT													
1	Ch 1: Preliminary	5*	5	6	2	11*	-	-	4	-	-	20.6 Marks	15 - 24 Marks
2	Ch 2: Incorporation of Company and Matters Incidental Thereto	-	5*	6	3	10	5*	15*	7	9*			
3	Ch 3: Prospectus and Allotment of Securities	5*	5*	5	8	3	15	-	4	6			
4	Ch 4: Share Capital and Debentures	11*	12	8	7	3	3*	8*	5*	-			
	TOTAL	16	22	25	20	27	20	20	20	15			
5	Ch 5: Acceptance of Deposits by Companies	5	-	2	5*	4	7	6	6	2			15 - 21 Marks
6	Ch 6: Registration of Charges	5	9	4	-	-	3	4	5	2		14.7 Marks	
7	Ch 7: Management & Administration	6	4	7	15*	9*	8	4	4	11			
	TOTAL	16	13	13	15	13	18	14	15	15			
8	Ch 8: Declaration and Payment of Dividend	6	6	2	2	3	5	6	5	7			
9	Ch 9: Accounts of Companies	9	5	7	6	6	6	6	6	12		17.3 Marks	21 - 24 Marks
10	Ch 10: Audit and Auditors	5	6	5	9	8	3	6	6	3			
	TOTAL	20	17	14	17	17	14	18	17	22			
	Companies Act (Total - Excl. MCQs)	52	52	52	52	52	52	52	52	52	52	52	60 Marks
II OTHER LAWS													
1	Ch 1: The Indian Contract Act, 1872												
	Unit 1: Contract of Indemnity and Guarantee	4	4	4	8	4	4	8	4	8			
	Unit 2: Bailment and Pledge	4	4	4	-	4	4	-	4	2		12 Marks	12 - 14 Marks
	Unit 3: Agency	4	4	4	4	4	4	3	4	2			
	TOTAL	12	12	12	12	12	12	11	12	12			
2	Ch 2: The Negotiable Instruments Act, 1881	10	10	10	10	10	10	10*	10	10		10 Marks	8 - 14 Marks
3	Ch 3: The General Clauses Act, 1897	7	7	7	7	7	7	8	7	4		7 Marks	6 - 10 Marks
4	Ch 4: Interpretation of Statutes	6	6	6	6	6	6	6	6	9		6 Marks	6 - 10 Marks
	Other Laws (Total - Excl. MCQs)	35	35	35	35	35	35	35	35	35	35	35 Marks	40 Marks

* Figures adjusted for internal choice in Question 5

NOTE:

1: Weightage of Optional questions has been taken in calculations: 2: MCQs are not considered in calculation. Only theory paper weightage has been taken.

CA Inter - Paper 2A- Corporate and Other Laws												
QUESTION WISE TOPICS BASED ON PAST EXAM PATTERN (Excl. MCQs - 70 marks)												
Ques No.	May-23	Nov-22	May-22	Dec-21	Jul-21	Jan-21	Nov-20	Nov-19	May-19			
Compulsory	M Topic	M Topic	M Topic	M Topic	M Topic	M Topic	M Topic	M Topic	M Topic	M Topic	M Topic	M Topic
1 (a)	6 Ch 4 Share capital & Deb	6 Ch 4 Share capital & Deb	3 Ch 2 Incorporation 3 Ch 1 Preliminary	3 Ch 2 Incorporation 3 Ch 4 Share capital & Deb	6 Ch 1 Preliminary	6 Ch 3 Prospectus & Allotment	6 Ch 2 Incorporation	6 Ch 1 (part (i) (ii)) & Ch 2 (part (iii))	4 Ch 2 Incorporation			
1 (b) (i)	6 Ch 8 Dividend	6 Ch 10 Audit	3 Ch 9 Accounts of Companies	2 Ch 10 Audit	3 Ch 9 Accounts of Companies	3 Ch 10 Audit	6 Ch 10 Audit	6 Ch 10 Audit	2 Ch 3 Prospectus & Allotment			
1 (b) (ii)			3 Ch 4 Share capital & Deb	2 Ch 10 Audit	3 Ch 8 Dividend	3 Ch 7 Management & Admin	3 Ch 7 Management & Admin		2 Ch 8 Dividend			
1 (b) (iii)			4 Contract Act - Agency	2 Ch 8 Dividend	4 Contract Act - Guaranteee	4 Contract Act - Pledge	3 Contract Act - Agency	4 Contract Act - Pledge	4 Ch 9 Accounts of Companies			
1 (c)	4 Contract Act - Guaranteee	4 Contract Act - Agency	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	4 Negotiable Instrument Act	3 Negotiable Instrument Act	4 Contract Act - Guaranteee			
1 (d)	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	4 Contract Act - Guaranteee			
1 (e)									3 Negotiable Instrument Act			
Optional (8 ques. of 4)												
2 (a)	4 Ch 7 Management & Admin	4 Ch 7 Management & Admin	4 Ch 6 Charges 2 Ch 8 Dividend	4 Ch 7 Management & Admin	4 Ch 7 Management & Admin	4 Ch 5 Deposits	5 Ch 4 Share capital & Deb	4 Ch 7 Management & Admin	4 Ch 5 & Ch 6			
2 (b) (i)	3 Ch 9 Accounts of Companies	6 Ch 8 Dividend	4 Ch 9 Accounts of Companies	6 Ch 7 Management & Admin	3 Ch 9 Accounts of Companies	3 Ch 9 Accounts of Companies	4 Ch 7 Management & Admin	6 Ch 9 A Accounts of Companies	3 Ch 9 Accounts of Companies			
2 (b) (ii)	3 Ch 10 Audit			3 Ch 10 Audit	3 Ch 10 Audit	3 Ch 9 Accounts of Companies	3 Ch 9 Accounts of Companies		3 Ch 10 Audit			
2 (c)	4 Contract Act - Agency	4 Contract Act - Agency	4 Contract Act - Agency	4 Contract Act - Agency	4 Contract Act - Pledge	4 Contract Act - Agency	4 Ch 2 Incorporation	4 Contract Act - Agency	4 Contract Act - Guaranteee			
2 (d)	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	3 Negotiable Instrument Act	4 Contract Act - Guaranteee	3 Negotiable Instrument Act	3 Negotiable Instrument Act			
3 (a)	6 Ch 9 Accounts of Companies	5 Ch 1 Preliminary	5 Ch 4 Share capital & Deb	3 Ch 3 Prospectus & Allotment Ch 1	5 Ch 2 Incorporation	5 Ch 3 Prospectus & Allotment (Direct)	6 Ch 9 Accounts of Companies (Direct)	5 Ch 2 Incorporation (Direct concept)	5 Ch 9 Accounts of Companies			
3 (b)	4 Ch 7 Management & Admin & Ch 10 Audit	5 Ch 9 Accounts of Companies	5 Ch 3 Prospectus & Allotment	5 Ch 10 Audit	5 Ch 10 Audit	5 Ch 8 Dividend	4 General Clause Act	5 Ch 8 Dividend	5 Ch 8 Dividend			
3 (c)	4 Negotiable Instrument Act	4 Negotiable Instrument Act	4 Negotiable Instrument Act	4 Negotiable Instrument Act	4 Negotiable Instrument Act	4 Negotiable Instrument Act	4 Ch 8 & Ch 2	4 Negotiable Instrument Act	4 Negotiable Instrument Act			
3 (d)	3 Interpretation of Statutes	3 Interpretation of Statutes	3 General Clause Act	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Negotiable Instrument Act	3 Interpretation of Statutes	3 Interpretation of Statutes			
4 (a) (i)	5 Ch 1 Preliminary	6 Ch 4 Share capital & Deb	3 Ch 1 Preliminary	3 Ch 9 Accounts of Companies	3 Ch 4 Share capital & Deb	4 Ch 3 Prospectus & Allotment	4 Ch 5 Deposits	4 Ch 3 Prospectus & Allotment	4 Ch 3 Prospectus & Allotment			
4 (a) (ii)			3 Ch 2 Incorporation	4 Ch 4 Share capital & Deb	3 Ch 3 Prospectus & Deb	3 Ch 5 Deposits	4 Ch 8 Dividend	6 Ch 5 Deposits	6 Ch 7 Management & Admin			
4 (b) (i)	5 Ch 5 Deposits	4 Ch 6 Charges	4 Ch 7 Management & Admin	4 Ch 4 Share capital & Deb	4 Ch 5 Deposits	3 Ch 6 Charges	2 General Clause Act	4 General Clause Act	2 General Clause Act			
4 (b) (ii)			4 General Clause Act	4 General Clause Act	2 General Clause Act	2 General Clause Act	2 General Clause Act	2 General Clause Act	2 General Clause Act			
4 (c) (i)	4 General Clause Act	4 General Clause Act	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes			
4 (d)	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes	3 Interpretation of Statutes			
5 (a) (i)	5 Ch 3 Prospectus & Allotment	5 Ch 3 Prospectus & Allotment	5 Ch 10 Audit	5 Ch 3 Prospectus & Allotment	5 Ch 2 Incorporation	3 Ch 4 Share capital & Deb	3 Ch 4 Share capital & Deb	5 Ch 4 Share capital & Deb	5 Ch 2 Incorporation			
5 (a) (ii)						2 Ch 3 Incorporation	3 Negotiable Instrument Act					
OR												
5 (a) (i)	5 Ch 4 Share capital & Deb	5 Ch 2 Incorporation	5 Ch 10 Audit	5 Ch 10 Audit	5 Ch 2 Incorporation	5 Ch 2 Incorporation	3 Negotiable Instrument Act	5 Ch 4 Share capital & Deb	5 Ch 2 Incorporation			
5 (a) (ii)												
5 (b)	5 Ch 6 Charges	5 Ch 6 Charges	3 Ch 7 Management & Admin	5 Ch 5 Deposits	5 Ch 1 Preliminary	5 Ch 7 Management & Admin	4 Ch 6 Charges	5 Ch 6 Charges	5 Ch 7 Management & Admin			
OR												
5 (b)			5 Ch 7 Management & Admin	5 Ch 7 Management & Admin	5 Ch 7 Management & Admin	5 Ch 7 Management & Admin	5 Ch 7 Management & Admin	5 Ch 7 Management & Admin	5 Ch 7 Management & Admin			
5 (c)	4 Contract Act - Bailment	4 Contract Act - Bailment	4 Contract Act - Bailment	4 Contract Act - Guaranteee	4 Contract Act - Agency	4 Contract Act - Agency	4 Contract Act - Guaranteee	4 Contract Act - Guaranteee	4 Contract Act - Agency (2m) &			
5 (d)	3 General Clause Act	3 General Clause Act	3 Interpretation of Statutes	3 General Clause Act	3 General Clause Act	3 General Clause Act	3 Interpretation of Statutes	3 General Clause Act	3 Interpretation of Statutes			

Index	Page #
The Companies Act, 2013	
Chapter 1: Preliminary	1
Chapter 2: Incorporation of The Company And Matters Incidental Thereto	18
Chapter 3: Prospectus and Allotment of Securities	61
Chapter 4: Share Capital and Debentures	87
Chapter 5: Acceptance of Deposits by Companies	126
Chapter 6: Registration of Charges	141
Chapter 7: Management & Administration	153
Chapter 8: Declaration and Payment of Dividend	196
Chapter 9: Accounts of Companies	207
Chapter 10: Audit & Auditors	240
Chapter 11: Companies Incorporated Outside India	266
Chapter 12: The Limited Liability Partnership Act,2008	278
The General Clauses Act, 1897	304
Interpretation of Statutes	321
Foreign Exchange Management Act,1999	336

Learning Outcomes –

- To know about the extent and commencement of the Companies Act, 2013.
- Know about the application of the Act.
- Gain familiarity with the definition clause given in the Act.

1. WHAT IS A COMPANY?

1.1 Introduction

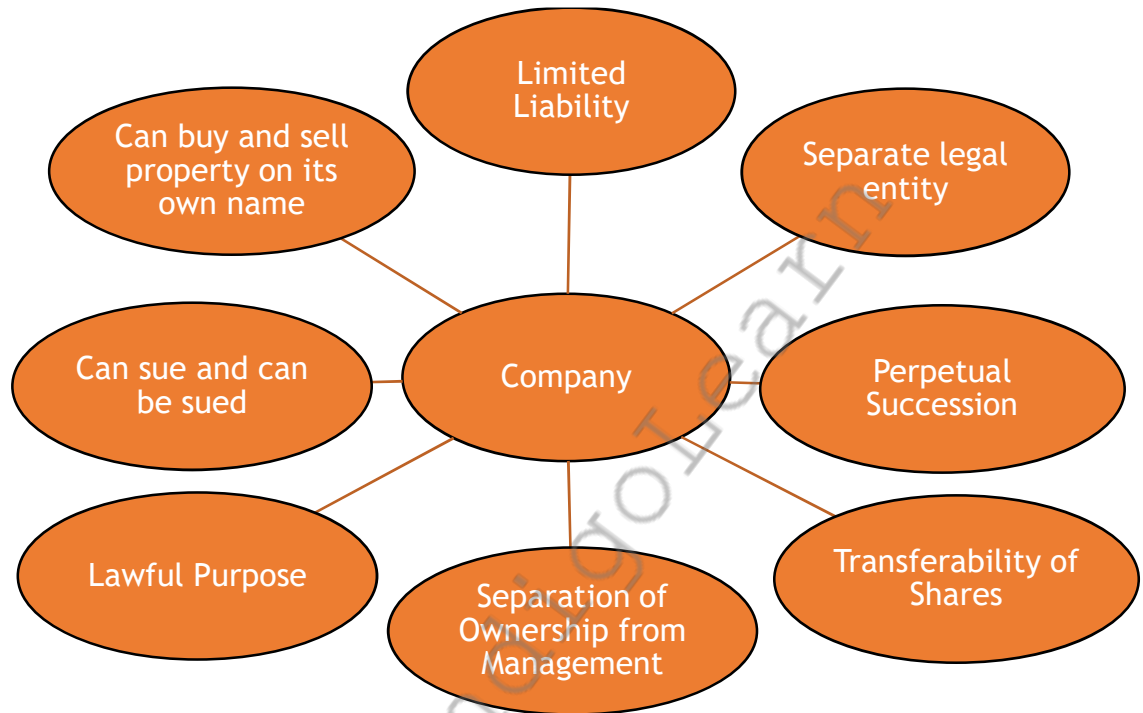
Company is one of the many structures in which business can be done. Other forms of business include sole proprietorship, partnership, societies, etc. The benefits offered by a company over other forms include separate ownership from management, longevity, expandability over generations, geographies and products and limited liability of investors.

1.2 Salient features of a company

The salient features of a company are as follows:

- a) **Limited Liability:** The Investors cannot lose more than what they have invested.
- b) **Separate Legal Entity:** The entity of the company is separate in the eyes of the law as compared to the persons that are working in the company. This means that the company can:
 - i. Buy and sell property on its own name.
 - ii. Borrow loans on its own name.
 - iii. Sue or be sued by anyone.
 - iv. Enter into contract in its own name.

- c) **Perpetual Succession:** Company continues even if all the members of the company change or die.



- d) **Transferability of Shares:** Shares, which represent the ownership of the company, is freely transferable from one person to another.
- e) **Separation of ownership and management:** The shareholders have the ownership of the company whereas the Board of directors (management) are responsible for decision making

2. LAW GOVERNING THE COMPANIES

2.1 Act

Companies are governed by the **Companies Act, 2013**. It contains 470 Sections divided into 29 Chapters where in sections relating to common topics are written together.

2.2 Rules

Every chapter of the Companies Act has relevant Rules running parallel to it. They **contain procedures** to be followed in order to implement law.

2.3 Notifications

Ministry of Corporate Affairs (MCA) **brings out amendments** in the existing law and rules through notifications in the official gazette. They must be read along with the Act. Laws are applicable from the effective date as mentioned in such notifications.

2.4 Judicial Pronouncements

Even with laws & procedures in place, there may be disputes during or after implementation or the lack thereof. Such disputes are handled by courts. The judgements of the different suits are also to be **read along with the Act & rules to fully understand law governing companies.**

3. THE COMPANIES ACT, 2013

3.1 Why Companies Act, 2013 was necessary?

- ✓ The legislation was necessitated to meet the changes in the national and international economic environment and for expansion and growth of economy of our country.
- ✓ The Act aims to improve corporate governance, simplify regulations and strengthen the interests of the investors.

3.2 Structure of the Act

- ✓ The Companies Act, 2013 is a rule based legislation with:
 - **470 Sections** and
 - **7 Schedules**
- ✓ The entire act has been divided into **29 chapters.**
- ✓ Each chapter has at least one set of **Rules.**

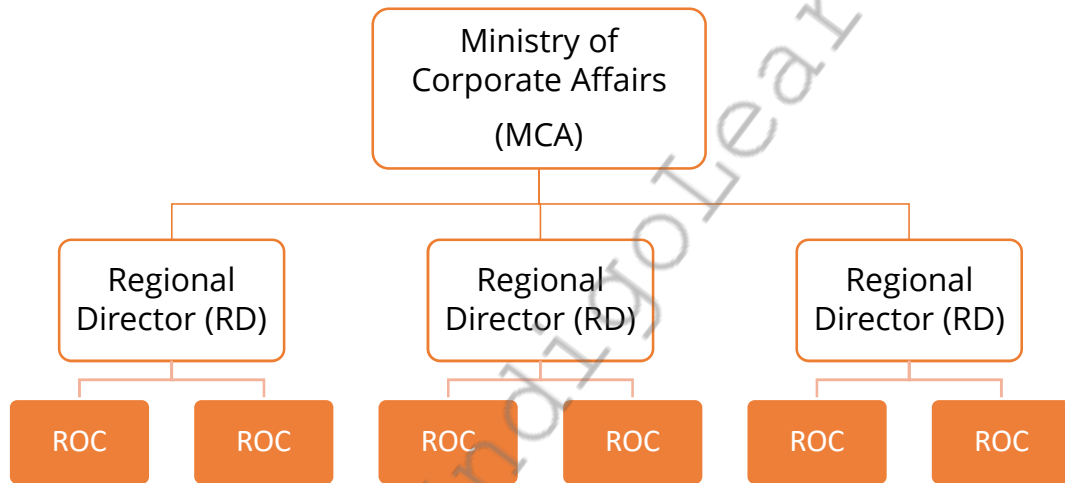
4. ADMINISTRATION MACHINERY UNDER THE COMPANIES ACT, 2013

Merely writing the law does not ensure its compliance. Hence, there is need for regulatory bodies to administer the compliance by companies. Such bodies include:

- ✓ **Ministry of Corporate Affairs:** MCA is the ministry of government that regulates corporate affairs at central level through the Companies Act, 1956, 2013 and other allied Acts, Bills and Rules. It also protects investors and offers many important services to stakeholders.
- ✓ **Regional Directors:** RD are in-charge of the respective regions, each region comprising a number of States and Union Territories. They supervise

the working of the offices of the Registrars of Companies and the Official Liquidators working in their regions.

- ✓ **Registrar of Companies:** ROC are vested with the primary duty of registering companies and LLPs, ensuring compliance with statutory requirements, maintaining registers and records, allowing their inspection on payment of the prescribed fee, etc. RoC's have prescribed jurisdiction within which their powers & functions can be exercised.



5. JUDICIAL STRUCTURE UNDER THE COMPANIES ACT, 2013

Judicial courts that handle disputes arising from Companies Act 2013 are:



6. SHORT TITLE, EXTENT, COMMENCEMENT AND APPLICATION

Section 1 of the Companies Act, 2013 deals with the title of the Act, extent of applicability, date of commencement and applicability of the Act.

6.1 Short Title

This Act may be called the **Companies Act, 2013**.

6.2 Extent of Applicability

It extends to the **whole of India**.

6.3 Date of commencement

This section (i.e., **Section 1**) 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.



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.

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 onwards and so on.

6.4 Applicability of the Act

The provisions of this Act shall apply to

(a) **Companies incorporated under this Act** or any other previous Company law;

Example: ABC Ltd. was incorporated on 1.1.1972 under the companies Act, 1956. So, the Companies Act, 2013 shall also be applicable on ABC

- (b) **insurance companies**, except in so far as the said provisions are inconsistent with the provisions of the Insurance Act, 1938 (4 of 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.
-



The term "except in so far as" shall mean excluding to the extent of, i.e., if any provision of Companies Act is inconsistent with any of the provisions of other Act (Insurance, Banking Regulation, Electricity Act, etc.) to which the company is regulated, then that company shall comply with the provisions of respective Act(s) to which it is governed and regulated by.

Title

- Companies Act, 2013

Extent

- Whole of India

Commencement

- Section 1 came into force at once and the remaining provisions on different dates through Notifications.

Application


- Companies
- Insurance companies
- Banking Companies
- Companies producing/ supplying electricity
- Company regulated by Special Act
- Entities as notified by the Central Government.

7. DEFINITIONS

Section 2 of the Companies Act, 2013 is a definition section which provides the various terminologies used in the Act.

- ✓ 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 is anything repugnant (i.e., contradictory) in the context.
- ✓ **Section 2(20)** defines **Company** as "company means a company incorporated under this Act or under any previous company law".

- ✓ 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 [**Section 2(95)**].
- ✓ Definitions have been covered at their respective topics. Few definitions which are not covered elsewhere are written below.
- ✓ **Sec 2(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.
- ✓ **Sec 2(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.
- ✓ **Sec 2(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 purpose of this clause, it is hereby clarified that a person holding fully paid-up shares in a company shall be considered as a contributory.
- ✓ **Sec 2(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.
- ✓ **Sec 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.
- ✓ **Sec 2(3): Alter or Alteration** includes the making of additions, omissions and substitutions.
- ✓ **Sec 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
 - applied in pursuance of this Act
- ✓ **Sec 2(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 purpose of this clause, —
 - (a) the expression **significant influence** means control of at least twenty per cent. of total voting power, or control of or participation in business decisions under an agreement;
 - (b) the expression **joint venture** means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement

It has been clarified that the shares held by a company in another company in a **fiduciary capacity** (a fiduciary is a person who holds a legal or ethical relationship of trust with one of more parties) shall not be counted for the purpose of determining the relationship of associate company.

- ✓ **Sec 2(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.
- ✓ **Sec 2(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.

- ✓ **Sec 2(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.
 - ✓ **Sec 2(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.
 - ✓ **Sec 2(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.
- For any individual to be called as managing director, an individual shall first be a director duly appointed by the Company under the provisions of the Act.
- ✓ **Sec 2(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;
 - (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.
 - ✓ **Sec 2(77): 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.

Example: The statutory auditors of a company were required to issue a certificate on the net worth of the company as per the requirement of the management as on 30th September 2020 computed as per the provision of section 2(57) of the Companies Act, 2013.

The company had fair valued its property, plant and equipment in the current year which was mistakenly taken into retained earnings of the company in its books of accounts. Advise whether this fair valuation would be covered in the net worth of the company as per the legal requirements.

Note: As per sec 2(57) of the Companies Act 2013, any reserves created out of revaluation of assets doesn't form part of net worth. The company fair valued its property, plant and equipment and took that to retained earnings. Even if the company has taken the fair valuation to the retained earnings in its books of accounts, the resultant credit in reserves (by whatever name called) would be in the category of 'reserves created out of revaluation of assets' which is specifically excluded in the definition of 'net worth' in section 2 (57) and hence should be excluded by the company. Further the auditors should also consider the matter related to accounting of this reserve separately at the time of audit of books of accounts of the company.

- ✓ **Sec 2(58): Notification** means a notification published in the Official Gazette and the expression **notify** shall be construed accordingly.
- ✓ **Sec 2(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.
- ✓ **Sec 2(66): Prescribed** means prescribed by rules made under this Act.
- ✓ **Sec 2(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.

- ✓ **Sec 2(74) Register of companies** means the register of companies maintained by the Registrar on paper or in any electronic mode under this Act.

- ✓ **Sec 2(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.

- ✓ **Sec 2(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.

✓ **Sec 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;

✓ **Sec 2(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.

✓ **Sec 2(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.

✓ **Sec 2(90): Tribunal** means the National Company Law Tribunal constituted under section 408.

✓ **Sec 2(85): Small company** means a company, other than a public company,—

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

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

*Since nothing has been prescribed so far in this case as well, there is no min. paid up share capital to form public company

- (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.

*** As per Rule 2(1)(t) of Companies (Specification of Definitions Details) Rules, 2014, paid up capital and turnover of the small company shall not exceed rupees four crores and rupees forty crores respectively.**

- ✓ **Section 2(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 1[or his relative] is a member or director;
 - (v) a public company in which a director or manager 2[and holds] is a director or 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;

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

(ix) such other person as may be prescribed*

✓ **Section 2(77): Relative** with reference to any person, means anyone who is related to

Exemption: This clause shall not apply with respect to section 188 (Related Party transactions) to a private company.

* As per Rule 3 of Companies (Specification of Definitions Details) Rules, 2014, 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.

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;

Accordingly, a person shall be deemed to be the relative of another, if he or she is related to

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.

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.

- ✓ **Sec 2(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.
- ✓ **Sec 2(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.
- ✓ **Sec 2(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;
Explanation - For the purposes of this clause, the **paid-up share capital** shall be construed as "total voting power", where shares with differential voting rights have been issued.
- ✓ **Sec 2(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.
- ✓ **Sec 2(52): Listed company** means a company which has any of its securities listed on any recognised stock exchange;
Provided that such class of companies, which have listed or intend to list such class of securities, **as may be prescribed** in consultation with the Securities and Exchange Board, shall not be considered as listed companies.
Rule 2A of Companies (Specification of definitions details) Rules, 2014 provides for **Companies not to be considered as listed companies**, namely –
 - (a) **Public companies** which have not listed their equity shares on recognized stock exchange but have listed their –
 - (i) non-convertible debt securities issued on private placement basis in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008; or
 - (ii) non-convertible redeemable preference shares issued on private placement basis in terms of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013; or
 - (iii) both categories of (i) and (ii) above

- (b) **Private companies** which have listed their non-convertible debt securities on private placement basis on a recognized stock exchange in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008
- (c) **Public companies** which have not listed their equity shares on a recognized stock exchange but whose equity shares are listed on a stock exchange in a jurisdiction as specified in section 23(3) of the Act.

1FIN BY IndigoLearn

INCORPORATION OF THE COMPANY AND MATTERS INCIDENTAL THERETO

Learning Outcomes –

- Explain the formation & incorporation of a company (Private Limited/ Public Limited), One Person company (OPC) and the formation of not for profit organization (Section 8 company).
- Identify the need for Memorandum of Association (MOA) and Articles of Association (AOA) and changes incidental thereto.
- Know the effect of registration.
- Explain and identify the concept 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. INTRODUCTION TO INCORPORATION OF COMPANIES

1.1 Incorporation

Incorporation of a company means the **process of registration of a company** to bring it to existence as a separate legal entity.

1.2 Promoter


The registration procedure is undertaken by 'Promoters' of the company. They are the founders of the company & they pitch the initial ideas for business.

Section 2(69) of the Companies Act, 2013 defines the term "**Promoter**" 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

- 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.

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

2. FORMATION OF COMPANY

Section 3 of the Companies Act, 2013 deals with the basic requirement with respect to the constitution of the company.

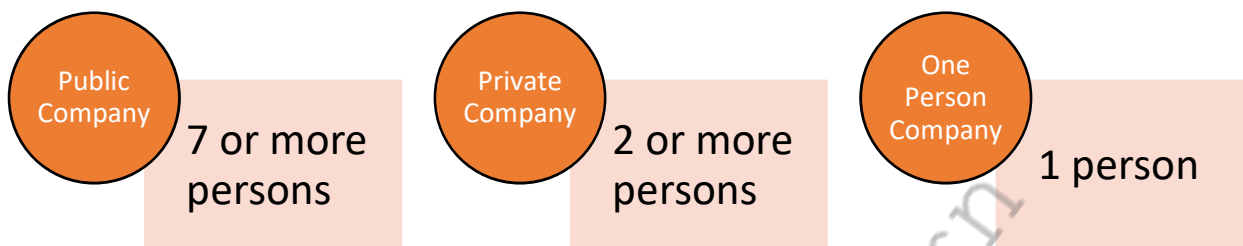
2.1 Minimum number of Members [Section 3(1)]

A company may be formed for any lawful purpose by-

- a) **7 or more persons**, where the company to be formed is to be a **public company**;
- b) **2 or more persons**, where the company to be formed is to be a **private company**; or
- c) **1 person**, where the company to be formed is to be **One Person Company** that is to say, a private company,

by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration.

Section 2(62) defines a **One Person Company** means a company which has only one person as a member.



2.2 Types of companies based on Liability [Section 3(2)]

A company formed under sub-section (1) may be either-

- a) A company **limited by shares**; or
- b) A company **limited by guarantee**; or
- c) An **unlimited** company

2.2.1 Company limited by Shares:

Section 2(22) defines a “company limited by shares” which 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.

2.2.2 Company limited by Guarantee:

Section 2(21) defines a “company limited by guarantee” which 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**.

2.2.3 Unlimited Company:

Section 2(92) defines an “unlimited company” which means a company **not having any limit on the liability of its members**.

Company limited by shares

- The Liability of the shareholders is limited to the amount which is unpaid on shares.

Company limited by guarantee

- Some of the shareholders agree to take up extra guarantee to pay an extra amount at the time of winding up.

Unlimited Company

- Shareholders who have agreed to take the unlimited liability will bring any amount of assets in order to satisfy the liabilities and the payment of the shareholders at the time of winding up.

2.3 Penalty if minimum members criteria not met [Section 3A]

If at any time the **number of members of a company is reduced**,

- ✓ In case of a public company, below 7,
- ✓ In case of a private company, below 2,

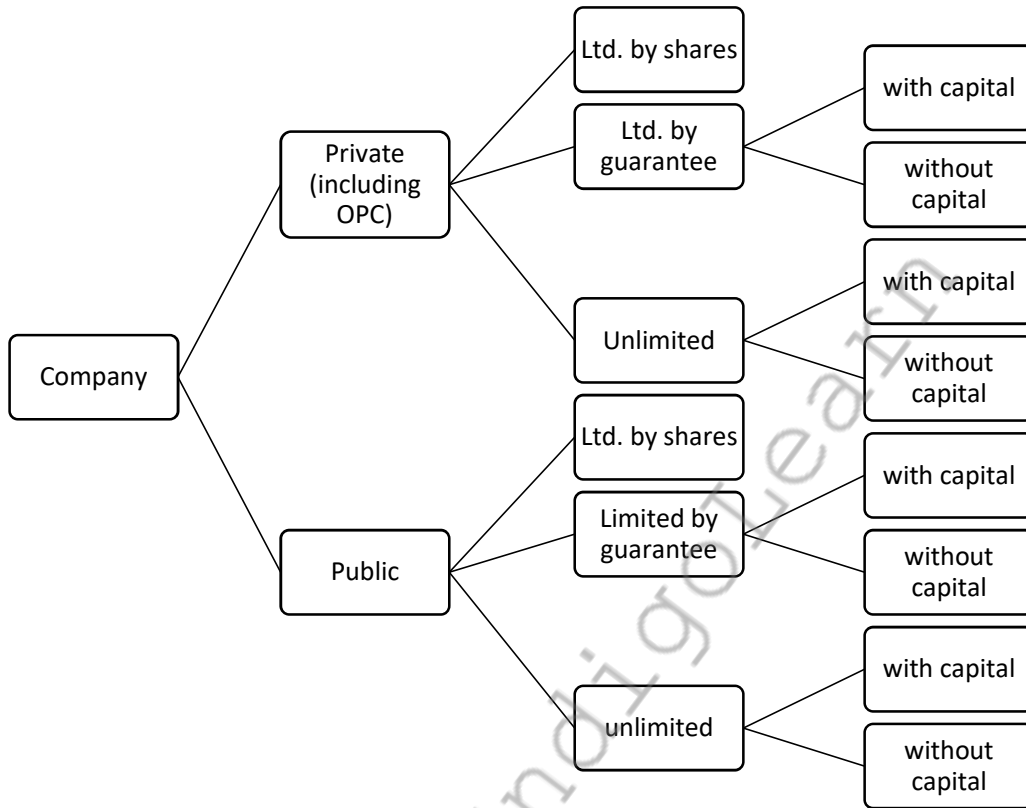
And the **company carries on business for more than 6 months** while the number of members is so reduced, then,

→ **Every person**

- **who is a member of the company during the time** that it so carries on the business after those 6 months **and**
- **who is cognizant (i.e., aware) of the fact** that it is carrying on business with less than 7 members or 2 members, as the case may be

→ **shall be**

- **severally liable for the payment of the whole debts** of the company contracted during that time (i.e., after 6 months) **and**
- may be **severally sued** therefore.



3. MEMORANDUM OF ASSOCIATION (MOA)

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

3.1 Memorandum

Section 2(56) defines “**Memorandum**” which means the memorandum of association (MOA) of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act.

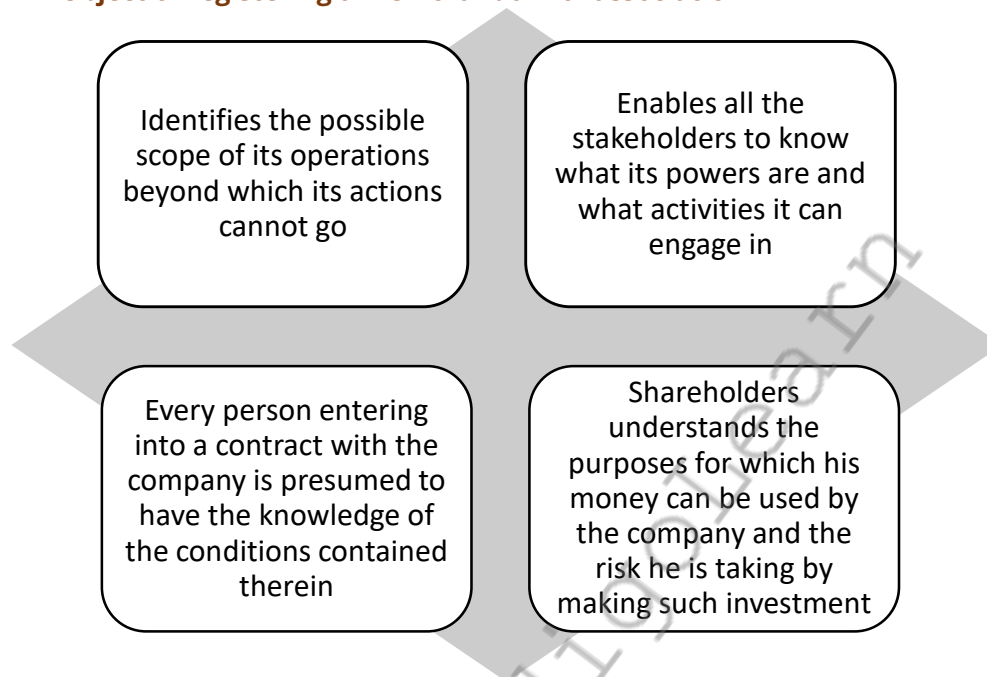
The memorandum of a company shall be in respective forms as outlined below (Specified

Memorandum 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.

in Schedule I):

Sl.No.	Table	Form
1.	Table A	MOA of a company limited by shares
2.	Table B	MOA of a company limited by guarantee and not having share capital
3.	Table C	MOA of a company limited by guarantee and having share capital
4.	Table D	MOA of an unlimited company and not having share capital
5.	Table E	MOA of an unlimited company and having share capital

3.2 Object of registering a memorandum of association



The **company cannot depart from the provisions contained in the memorandum** however imperative (i.e., utmost imperative) may be the necessity for the departure. **If it does so**, it would be **ultra-vires the company and void**.

3.3 Content of Memorandum of Association

Memorandum of Association contains the following clauses:

- Name Clause
- Object Clause
- Liability Clause
- Capital Clause
- Domicile/ Situation Clause
- Subscription Clause
- Nomination Clause

3.4 Name Clause

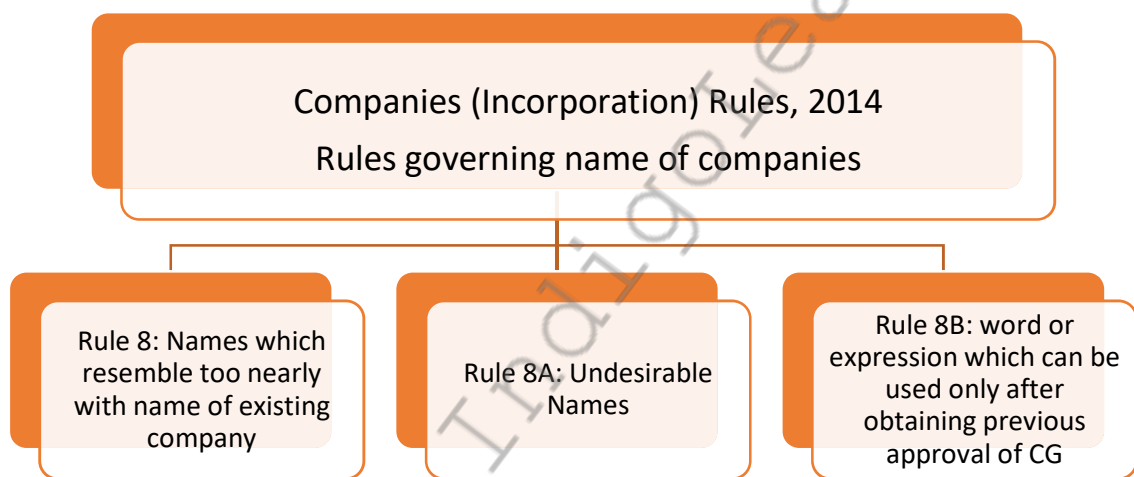
The memorandum of the company shall state, in relation to the name clause, the name of the company with the last word

- **“Limited”** in the case of a **public limited company**, or
- **“Private Limited”** in case of a **private limited company**.

3.4.1 Restrictions on Name of the company

Name of the company **should not be:**

- ✓ **Offensive**
- ✓ **Identical** to existing Name of another company
- ✓ **Similar** to existing Name of another company
- ✓ **Undesirable w.r.t. the objects** of the company
- ✓ **Indicating association with government of India** (unless approved by government)
- ✓ **Containing word “national”** unless specific permission obtained from central government
- ✓ **Containing word “bank”** unless it is involved in banking business.



3.4.2 Reservation of name

a) **Application for reserving a name** as

- The name of the proposed company; or
- The name to which the company proposes to change its name

Shall be **made to the Registrar** in the prescribed form and along with fee.

Application for reserving name for proposed company

A person may make an application in SPICe+ (Simplified Proforma for Incorporating Company Electronically Plus: INC-32) accompanied by fee, as provided in the Companies (Registration Offices and Fees) Rules, 2014, to the Registrar for reservation of a name set out in the application as name of the proposed company.

Resubmission shall be allowed within 15 days, for rectification of defect, if any.

A person may make an application, using web service RUN (Reserve Unique Name) along with fee as provided in the Companies (Registration Offices and Fees) Rules, 201

- b) Upon receipt of the application, the **Registrar may, reserve the name** of the company **for a period of 20 days** from the date of approval or such other period as may be prescribed.
- c) 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 60 days** from the date of approval.
- d) **Cancelling the name:**

Where after reservation of name, it is found that the name was applied by furnishing wrong or incorrect information, then:

 - ✓ If the **company has not been incorporated:**
 - The **reserved name shall be cancelled**, and
 - Person who has made the application shall be liable to a **penalty which may extend to Rs. One Lakh.**
 - ✓ If the **company has been incorporated:**
 - Direct the company to **change its name within a period of 3 months**, after passing an ordinary resolution;
 - Take action for **striking off the name** of the company from the register of companies; or
 - Make a **petition for winding up** of the company.

3.5 Object Clause

It contains the **objects for which the company is proposed to be incorporated** and any **matter necessary in furtherance** thereof.

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 RBI, SEBI, or IRDA

3.6 Liability Clause

This clause covers **details on liability of members** of a company, whether limited or unlimited

3.7 Capital Clause

In case of **company limited by shares**:

- the **amount of share capital** with which the company is to be registered,
- The **division of share capital into shares** of a fixed amount,
- 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.

In case of an OPC, this clause covers the name of the person (i.e., **nominee**) who in the event of death of subscriber, shall become the member of the company.

3.8 Domicile/ Situation Clause

This clause mentions the **name of the federal state** where the registered office of the company is to be situated.

3.9 Subscription Clause

It states the purpose of the subscribers to incorporate the company wherein they agree to take the shares in the company based on the number written in the Memorandum. It **contains signatures of such subscribers**.

4. ARTICLES OF ASSOCIATION (AOA)

Section 5 of the Companies Act, 2013 seeks to provide the contents and model of articles of association.

4.1 Articles

Section 2(5) defines "**Articles**" which 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 of this Act.

The articles of a company shall be in respective forms as outlined below (Model Articles - specified in Schedule I)

Sl.No.	Table	Form
1.	Table F	AOA of a company limited by shares
2.	Table G	AOA of a company limited by guarantee and having share capital
3.	Table H	AOA of a company limited by guarantee and not having share capital
4.	Table I	AOA of an unlimited company and having share capital
5.	Table J	AOA of an unlimited company and not having share capital

4.2 Content of Articles

- ✓ The AOA shall contain the **regulations for management** of the company.
- ✓ The AOA shall also contain such **matters, as are prescribed under the Rules.**
- ✓ However, a company may also include **such additional matters** in its AOA as may be **considered necessary for its management.**

4.3 Entrenchment Provision

- ✓ It is such provision in AOA that **makes certain amendments either more difficult or impossible to pass**, making such amendments inadmissible.
- ✓ **Time of Entrenchment:**
 - On **formation** of a company, or
 - **By an amendment** in the articles
 - agreed to by all the members of the company in case of a private company; and
 - by a special resolution in the case of a public company.
- ✓ **Notice to the registrar:**
Where the AOA contains provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the ROC in such form and manner as may be prescribed.

The company shall give notice to the Registrar of entrenchment provisions included in article

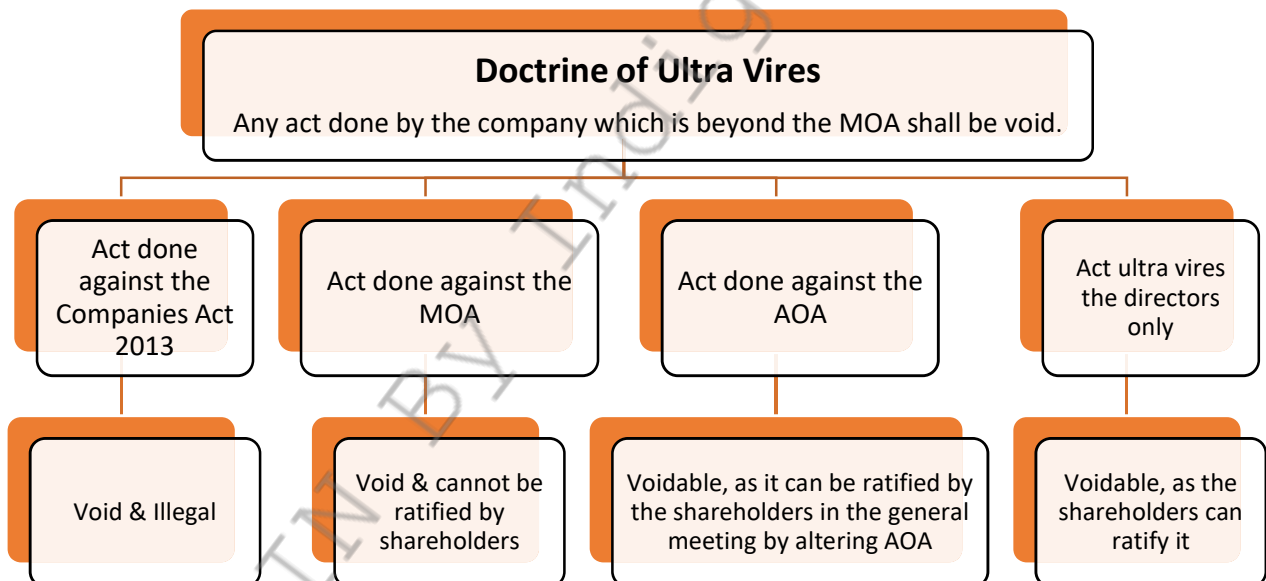
- a. In the SPICe+(Simplified Proforma for Incorporating company Electronically Plus: INC-32), along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014 at the time of incorporation of the company, and

b. In case of existing companies, in Form No. MGT-14 within thirty days from the date of entrenchment of the articles, along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014

5. DOCTRINE OF ULTRA VIRES

- ✓ The doctrine of ultra-vires prohibits any action which is not stated in the memorandum as the objects or powers of the company.
- ✓ **An act which is ultra vires (i.e., beyond the powers of) is void** and does not bind the company. Neither the company nor the contracting party can sue on it.

The doctrine of ultra vires was first enunciated by the House of Lords in the classic case, **Ashbury Railway Carriage and Iron Co. Ltd v Riche (1878)**



6. DOCTRINE OF CONSTRUCTIVE NOTICE

- ✓ The doctrine of constructive notice is a doctrine where **all persons dealing with a company are deemed (or "construed") to have knowledge of the company's articles of association and memorandum of association.**
- ✓ The **doctrine of indoor management is an exception** to this rule.

7. DOCTRINE OF INDOOR MANAGEMENT

- ✓ According to this doctrine, **persons dealing with the company cannot be assumed to have knowledge of internal problems of the company.** All stakeholders can simply assume that all the required things were get done properly in the company.
- ✓ This 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.

Enunciation of Doctrine of Indoor Management

The Doctrine of Indoor Management was first laid down in the case of **Royal British Bank v. Turquand**

The directors of a company were authorised by the articles to borrow on bonds such sums of money as should from time to time, by a resolution of the company in general meeting, be authorised to be borrowed. The directors gave a bond to Turquand without the authority of any such resolution. The question arose whether the company was liable on the bond. Held, the company was liable on the bond, as Turquand was entitled to assume that the resolution of the company in general meeting had been passed

7.1 Exceptions to the Doctrine of Indoor Management

- **Knowledge of irregularity:** Where the outsider has knowledge of irregularity within the company, the benefit under the doctrine of indoor management would not be available.
- **Negligence:** If, with minimum effort, the irregularities within a company could be discovered by the outsider, the benefit of doctrine of indoor management would not apply.
- **Forgery:** Where a person relies upon a document that turns out to be forged, the benefit of doctrine of indoor management would not apply.

8. ACT TO OVERRIDE MEMORANDUM, ARTICLES, ETC.

Section 6 of the Companies Act, 2013 states that the provisions of this Act shall have an overriding effect.

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
 - ✓ any **agreement executed** by it, or
 - ✓ 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 **provisions contained** in the memorandum, articles, agreement, or resolution shall, to the extent to **which it is repugnant (i.e., in conflict) to the provisions of this Act**, become or be **void**, as the case may be.



The provision of this section starts with **“Save as otherwise...”**. This means that if any other section says that article is superior, then we will treat it accordingly.

9. EFFECT OF MEMORANDUM AND ARTICLES

Section 10 of the Companies Act, 2013 covers the effects of registration of the memorandum and articles.

The effect of registration of MOA and AOA are as follows:

- 1) MOA and AOA shall **bind the company and the members** thereof and
- 2) All **monies which are payable by any member to the company** under the memorandum or articles **shall be a debt due from him** to the company.

Thus, based on MOA and AOA:

- ✓ Company is liable to the members
- ✓ Members are liable to the company

- ✓ But normally members are not liable to each other.

Hence, a company can recover calls in arrear from a member as forcefully as it is recovering a loan.

Section 7 of the Companies Act, 2013 provides for the procedure to be followed for incorporation of a company.

10. INCORPORATION OF COMPANY

10.1 Steps for incorporation of company

10.1.1 Reservation of name

- ✓ An application for reservation of name can be made through the web service available at **www.mca.gov.in** by using the **form RUN (Reserve Unique Name)** along with prescribed fees.
- ✓ The **application may either be approved or rejected**, as the case may be, by the Registrar, Central Registration Centre **after allowing re-submission of such application within 15 days for rectification of defects, if any.**

10.1.2 Drafting and signing of MOA and AOA and its submission to ROC.

- ✓ **Predefined formats given in Schedule I** can be used for drafting the MOA and AOA.
- ✓ These documents have to be **e-filed and e-stamped.**

10.1.3 Consent of directors to be submitted

Consent of persons nominated as directors to act as directors to be submitted electronically.

10.1.4 Submission of statutory declaration

Statutory declaration of compliance and other declarations are to be submitted electronically.

10.1.5 Payment of fees and amount of stamp duty electronically

10.1.6 Obtain Certificate of Incorporation digitally signed by ROC

- ✓ The Registrar shall on the basis of documents and information filed, **register all the documents and information** in the register and **issue a certificate of**

incorporation to the effect that the proposed company is incorporated under this Act.

- ✓ 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 shall also be included in the certificate.

corporate identity number

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 of incorporation.

CIN is a 21 alpha-numeric digit based unique identification number, comprising data sections/elements that reveals the basis aspects about company.

Example - Decode the CIN

CIN of Infosys Limited is L85110KA1981PLC013115

The first character – L (reveals listing status, L for listed and U for unlisted, for instance Infosys is Listed one)

The next five digits – 85110

The next two letters – KA (reveals the Indian state where the company is registered, for instance KA is for Karnataka)

The next four digits – 1981 (reveals the year of incorporation of a company)

The next three characters – PLC (reveals the company classification - PLC for public, PTC for private, FTC for foreign, and GOI for government)

The last six digits – 013115 (reveals registration number with concerned ROC)

10.1.7 File declaration about address of Registered office.

10.2 Documents and information to be filed with the registrar

For the registration of the company, the following documents and information are to be filed with the registrar within whose jurisdiction the registered office of the company is proposed to be situated –

- i. The **MOA and AOA duly signed** by all the subscribers to the memorandum.
- ii. A **declaration that all the requirements** of this act and rules thereunder **in respect of registration and related matters have been complied with**. This declaration is to be made by:

- Person who is engaged in the formation of the company (i.e., an advocate, a CA, CS, or CWA in practice) and
 - A person named in the articles (director, manager, or secretary of the company)
- iii. A **declaration from each of the subscribers and from the persons named as 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 the company, or
 - He has **not been found guilty of any fraud** or misfeasance or of any breach of duty to any company **during the last 5 years**, and
 - That **all the documents filed** with the registrar for registration of the company **contains information that is correct, complete, and true** to the best of his knowledge and belief.
- iv. The **address for correspondence** till its registered office is established.
- v. The **particulars** (name, residential address, nationality) **of every subscriber to memorandum** along with proof of identity.
- vi. The **particulars** (name, DIN, residential address, nationality) **of persons mentioned in the articles as the first directors** and such other particulars as may be prescribed.
- vii. The **particulars of interests of the** persons mentioned in the AOA as **first directors in other firms or body corporates** along with **their consent to act as directors** in such form and manner as may be prescribed.

The duly signed memorandum of association and articles of association (Ch2a)

Note:

Form No. INC-8 is prescribed form for Declaration of Compliance by Professional & Director, Manager or Secretary of company

Form No. INC-9 is prescribed form for Declaration by subscribers to the memorandum and persons named as the first directors

Following particulars of every subscriber to the memorandum shall be filled;

- a. Name (including surname or family name) and recent Photograph affixed
- b. Father's/Mother's name
- c. Nationality, Proof of nationality in case the subscriber is a foreign national
- d. Date and Place of Birth (District and State)
- e. Educational qualification and Occupation

- f. Permanent Account Number
- g. Email id and Phone number of Subscriber
- h. Permanent residential address and also Present address
- i. Residential proof such as Bank Statement, Electricity Bill, Telephone / Mobile Bill, provided that Bank statement Electricity bill, Telephone or Mobile bill shall not be more than two months old
- j. Proof of Identity (For Indian Nationals - Voter's identity card, Passport copy, Driving License copy, Unique Identification Number (UIN) & for Foreign nationals and Non Resident Indians – Passport)
- k. If the subscriber is already a director or promoter of a company(s), the particulars relating to name of the company; Corporate Identity Number; Whether interested as a director or promoter

Where the subscriber to the memorandum is a body corporate, then the following particulars shall be filed with the Registrar

- a. The name of the body corporate and Corporate Identity Number of the Company or Registration number of the body corporate, if any
- b. GLN, if any
- c. The registered office address or principal place of business
- d. E-mail Id
- e. If the body corporate is a company, certified true copy of the board resolution specifying inter-alia the authorization to subscribe to the MOA
- f. If the body corporate is a limited liability partnership or partnership firm, certified true copy of the resolution agreed to by all the partners specifying inter alia the authorization to subscribe to the MOA
- g. In case of foreign bodies corporate, the details relating to the copy of certificate of incorporation of the foreign body corporate; & the registered office address

An application for registration of a company shall be filed, with the Registrar within whose jurisdiction the registered office of the company is proposed to be situated, in SPICE+(Simplified Proforma for Incorporating company Electronically Plus: INC32) along with the fee as provided under the Companies (Registration offices and fees) Rules, 2014 accompanied by following documents and information;

SPICE+ is an integrated Web form offering 10 services by 3 Central Govt. Ministries & Departments. (Ministry of Corporate Affairs, Ministry of Labour & Department of Revenue in the Ministry of Finance) thereby saving as many procedures, time and cost for starting a business in India. SPICE+ is initiatives towards Ease of Doing Business. Students may refer to FAQs on SPICE+ form at MCAs' website for more details <https://www.mca.gov.in/MinistryV2/spicefaq.html>

The duly signed memorandum of association and articles of association

The memorandum (e-MOA in Form No. INC-33) and article (e-AOA in Form No. INC-34) of company so furnished shall be duly signed by all the subscribers to the memorandum in the manner prescribed by rule 13 of the *Companies (Incorporation) Rules, 2014* as stated below:

- a. Each subscriber shall add **his name, address, description & occupation**, if any, in the presence of **at least one witness** who shall attest the signature, shall sign and add his name, address, description and occupation, if any.
- b. Where a subscriber is illiterate, he shall **affix his thumb impression** or mark which shall be described as such by the person, writing for him, who shall place the name of the subscriber against or below the mark and **authenticate it by his own signature** and he shall also write against the name of the subscriber, the number of shares taken by him.

Note: The type written or printed particulars of the subscribers and witnesses shall be allowed as if it is written, so long as appends signature or thumb impression.

- c. Where the subscriber is a **body corporate**, the memorandum and articles of association shall be signed by **director, officer or employee** of the body corporate **duly authorized** in this behalf by a resolution of the board of directors.
- d. Where the subscriber is a **Limited Liability Partnership**, it shall be signed by a **partner** of the Limited Liability Partnership, **duly authorized** by a resolution approved by all the partners of the Limited Liability Partnership:

Note: In either case c or d stated above, the person so authorized shall not, at the same time, be a subscriber to the memorandum and articles of Association.

- e. Where subscriber to the memorandum is a foreign national residing outside India his signatures and address on the memorandum and articles of association and proof of identity shall be **notarized by a Notary (Public)** with a certificate. Further, if such person residing in a country outside the Commonwealth or which is not a party to the Hague Apostille Convention, 1961, the certificate of the Notary (Public) shall be **authenticated by a Diplomatic or Consular Officer**.
- f. Where subscriber to the memorandum is a foreign national residing outside India and visited in India and intended to incorporate a company, in such case the incorporation shall be allowed if, he/she is having a valid **Business Visa**. In case of Person is of Indian Origin or Overseas Citizen of India, requirement of business Visa shall not be applicable.

As per rule 12 of the Companies (Incorporation) Rules, 2014

In case any of the objects of a company requires registration or approval from sectoral regulators such as the RBI and SEBI, then such registration or approval shall be obtained by the proposed company before pursuing such objects and a declaration in this behalf shall be submitted at the stage of incorporation. In case of a Company being incorporated as a Nidhi, the declaration by the Central Government under Section 406 of the Act shall be obtained by the Nidhi before commencing the business and a declaration in this behalf shall be submitted at the stage of incorporation by the Company

10.3 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.

10.4 Furnishing of false or incorrect information or suppression of material fact at the time of incorporation

- ✓ If any person furnishes any false or incorrect information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to registration of company, he shall be **held liable for action for fraud u/s 447**.
- ✓ **If the company has already been incorporated by furnishing false or incorrect information or suppressing any material fact:** - the promoters, persons named as first directors, persons making declaration shall each be **held liable for fraud u/s 447**.
- ✓ **Order of the Tribunal:** The Tribunal may, on an application made to it, on being satisfied that the situation so warrants –
 - Pass such orders as it thinks fit for regulation of management of the company including **changes, if any, in its MOA and AOA**; or
 - Direct that **liability of the members shall be unlimited**; or
 - Direct the **removal of name of company** from the Register of companies; or
 - Pass an **order for winding up of the company**; or
 - Pass **such orders as it thinks fit**.

Before making such order, the company shall be given a **reasonable opportunity of being heard** and consider such transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.

11. EFFECT OF REGISTRATION

Section 9 of the Companies Act, 2013 provides the effect of registration of a company.

From the date 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.
- **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**,
 - ✓ to **contract**, and
 - ✓ to **sue and be sued**,by the said name.

12. COMMENCEMENT OF BUSINESS ETC.

Section 10A of the Companies Act, 2013 covers the provisions relating to commencement of business after incorporation of a company.

12.1 Declaration to be filed before commencement of business [Sec 10A(1)]

A company incorporated after the commencement of the Companies (Amendment) Ordinance, 2019 and having a share capital shall not commence any business or exercise any borrowing power unless –

- (a) A declaration is **filed by a director within a period of 180 days** of the date of incorporation of the company with the Registrar that **every subscriber to the memorandum has paid the value of the shares agreed** to be taken by him on the date of making such declaration: and
- (b) The company has filed with the Registrar a **verification of its registered office**.

12.2 Penalty on defaultssss

Rule 23A of the Companies (Incorporation) Rules, 2014 states that the **declaration u/s 10A** by the director shall be in the prescribed form with prescribed fees and the contents of the form **shall be verified by a CS/CA/CWA, in practice.**

If any default is made in complying with these provisions,

- the **company** shall be liable to a penalty of **Rs 50,000/-**, and
- every **officer in default** shall be liable to penalty of **Rs 1,000/- for each day** during which default continues subject to a **maximum penalty of Rs 1,00,000/-**.

Where **no declaration has been filed** with the registrar u/s 10A(1)(a) within 180 days and

- the Registrar has reasonable cause to believe that the **company is not carrying on any business or operations**,
- he may **initiate action for removal of name of Company** from the register of Companies.

13. AUTHENTICATION OF DOCUMENTS, PROCEEDINGS AND CONTRACTS

13.1 Authentication

Section 21 of the Companies Act, 2013 covers the provisions relating to authentication of documents or proceedings or contracts made by or on behalf of a company.

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 authorized** by the Board in this behalf.

13.2 Key managerial personnel

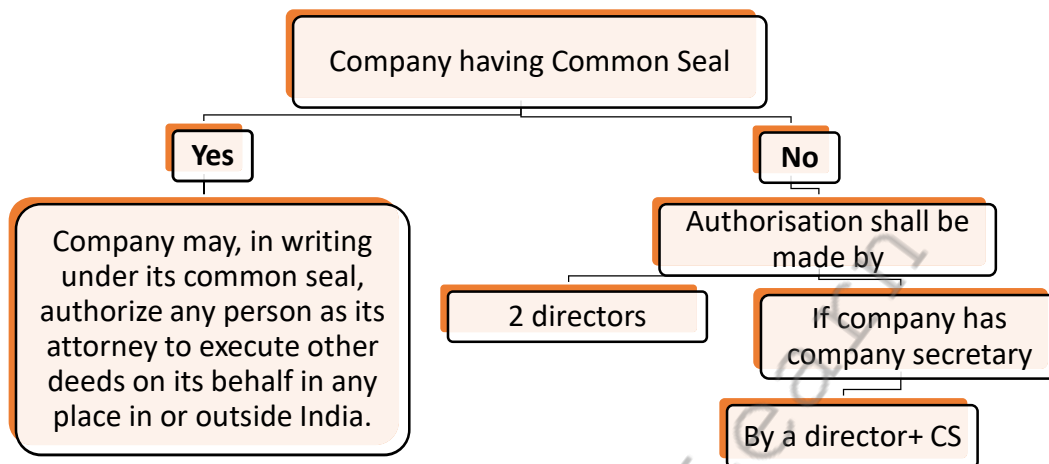
Section 2(51) defines “**Key managerial personnel**”, (KMP) in relation to a company, which means-

- (a) the CEO or the MD or the manager.
- (b) the company secretary.
- (c) the whole-time director.
- (d) the CFO.
- (e) such other officer not more than one level below the directors who is in whole time employment, designated as KMP by the Board: and
- (f) such other officer as may be prescribed.

14. EXECUTION OF BILLS OF EXCHANGE, ETC.

Section 22 of Companies Act, 2013 covers provisions relating to execution of Bills of exchange, hundi and promissory note and other deeds.

- (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 authorised by the company in this behalf**.
- (2) **Authorisation of a person by the company:**
 - **If the company has common seal:** Company may, by writing under its common seal, authorize any person, either generally or for specified matters, as its attorney to execute other deeds on its behalf in any place in or outside India.
 - **If the company does not have a common seal:**
 - **Company has appointed a company secretary:** The authorization shall be made by a director and the CS.
 - **Company does not have Company Secretary:** The authorization shall be made by 2 directors.
- (3) A **deed signed by such an attorney** on behalf of the company and under his seal **shall bind the company**.



15. SERVICE OF DOCUMENTS

15.1 Serving of document to the Company

Section 20 of the Companies Act, 2013 provides the mode in which documents may be served on the company, on the members and on the registrars.

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.

15.2 Serving of document to Registrar/ Member

→ A document may be served on registrar/ any member by **sending it to him by-**

- ✓ Post, or
- ✓ Registered post, or
- ✓ Speed post, or
- ✓ Courier service, or



Electronic mode means any mode using electronic media that is capable of retention, including:

- Fax or email
- Posting of an electronic message board or network designated by the registrar.
- Other means of electronic communication

- ✓ Leaving it at its registered office, or
 - ✓ Means of such electronic or other mode as may be prescribed.
- 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 AGM.
- Where the **Act or Rules made thereof provided for filing of documents with the Registrar in electronic mode**, it shall only be filed in electronic mode.

15.3 Time when service is effected

In case of delivery by post, such service shall be deemed to have been effected-

- In case of notice of meeting : at the expiration of 48 hours after the notice is posted; and
- In other case: at the time at which the letter would be delivered in the ordinary course of post.

16. SUBSIDIARY COMPANY NOT TO HOLD SHARES IN ITS HOLDING COMPANY

16.1 Holding Company [Section 2(46)]

Section 19 of the Companies Act, 2013 provides the provisions relating to holding of shares by subsidiary company in its holding company.

Holding company in relation to one or more other companies, means a company of which such companies are subsidiary companies.

16.2 Subsidiary Company [Section 2(87)]

Subsidiary company or subsidiary, in relation to any other company, means a company in which the holding company –

- a) Controls the composition of the Board of Directors; or
- b) Exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies.

16.3 Subsidiary company not to hold shares in the Holding Company [Section 19]

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**.

Exceptions:

- a) Subsidiary company holds such shares as **legal representative** of a deceased member of the holding company.
- b) Subsidiary company holds such shares as **trustee**.
- c) Subsidiary company is a **shareholder even before it became a subsidiary** of the holding company. However, the subsidiary company 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.

17. RECTIFICATION OF NAME OF THE COMPANY

Example:

- RPIP Ltd. has invested 51% in the shares of SSP Pvt. Ltd. on 31st March 2019.
- SSP Pvt. Ltd. have been holding 2% equity of RPIP Ltd. since 2013.
- SSP Pvt. Ltd. cannot increase its equity beyond that 2% on or after 31st March 2019.
- However, it could continue to hold or reduce its initial 2% stake.

Section 16 of the Companies Act, 2013 provides the provisions relating to rectification of the name of a company.

Note: Rectification is different from voluntary change of name.

17.1 Rectification based on opinion of Central Government [Section 16(1)(a)]

If a company on its first registration, or on its registration by a new name, is registered by a name which, **in the opinion of the Central Government (CG)**,

- **is identical with or too nearly resembles** the name by which a company in existence had been previously registered,
- it may **direct the company to change its name**
- and the **company shall change its name** or new name
- **within a period of 3 months** from the issue of such direction by passing an ordinary resolution.

17.2 Rectification based on an application by a registered proprietor of a trademark [Section 16(1)(b)]

If a company on its first registration, or on its registration by a new name, is registered by a name which, **on an application by a registered proprietor of a trademark**,

- **is identical with or too nearly resembles** to a registered trademark of such proprietor,
- **made to the CG within 3 years** of incorporation or registration or change of name of the company,
- the CG may **direct the company to change its name** or new name
- **within a period of 6-3 months** from the issue of such direction by passing an ordinary resolution.

17.3 Notice of change to registrar [Section 16(2)]

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 change to the Registrar along with the order of CG**, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

17.4 Default

- Central Government shall allot new name to company in such manner as may be prescribed and
- Registrar shall enter new name in register of companies in place of old name and issue a fresh certificate of incorporation with new name, which the company shall use thereafter
- Provided that it shall NOT prevent a company from subsequently changing its name in accordance with the provisions of section 13

18. REGISTERED OFFICE OF THE COMPANY

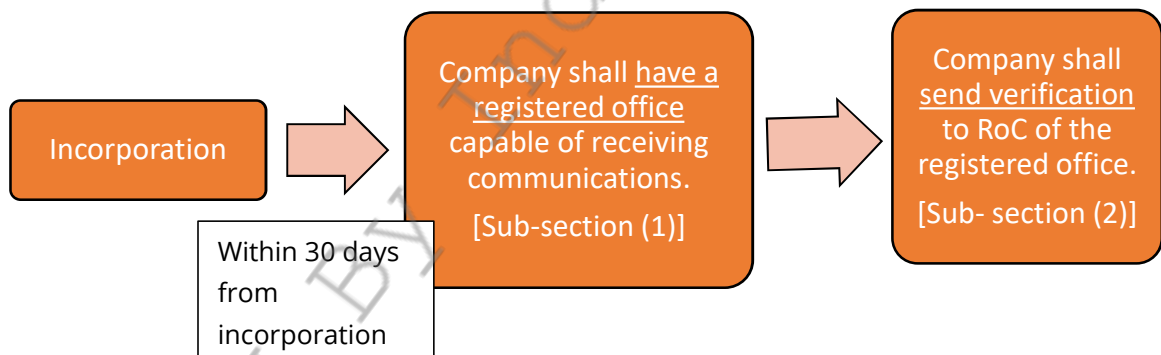
Section 12 of the Companies Act, 2013 seeks to provide for the registered office of the companies for the communication and serving of necessary documents, notices, letters etc.

The registered office of a company should be a **physical office** where the corporation will receive service of legal documents from ROC or in case of 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.

18.1 Need for Registered office

- ✓ For **communication** and serving of necessary documents, notices, letters etc.
- ✓ To determine the **domicile and nationality** of a company.
- ✓ To determine the **jurisdiction** of the court.

18.2 Verification of registered office



18.3 Labelling of Company

Every company shall -

- ✓ **Paint, or affix its name and the address of its registered office**, and keep the same painted and 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 in general use in that locality, then also in the characters of that language.
- ✓ Have its **name engraved in legible characters on its seal**, if any.

- ✓ Get its **name, registered office address, CIN, telephone number**, fax number, email, and website address, if any, printed in all its **business letters, bill heads, letter papers and in all its notices** and other official publications.
- ✓ Have its **name printed on hundis, promissory notes, bills of exchange** and such other documents as may be prescribed.

18.3.1 Name change by the company

Where a company has **changed its name(s) during the last 2 years**, it shall **paint or affix or print, along with its name, the former name(s) so changed** during the last 2 years.

18.3.2 In case of OPC

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

18.4 Change of Registered Office

18.4.1 Notice of change to the Registrar

- Verified in the manner prescribed,
- Shall be **given to the Registrar within 30 days of the change**, who shall record the same.

18.4.2 Change outside the local limits of any city

The registered office of a company shall be changed to outside the local limits of any city, town, or village where such office is situated **by passing a special resolution**.

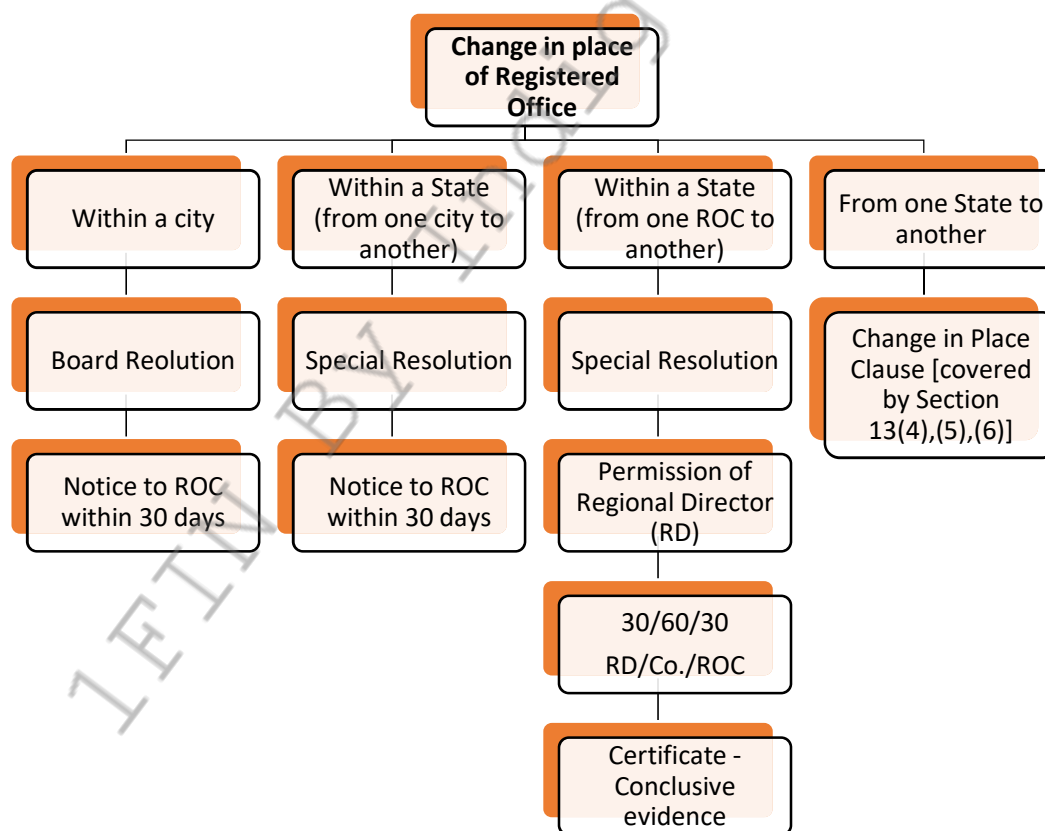
18.4.3 Change outside the jurisdiction of the Registrar

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**,

- Such change is **to be confirmed by the Regional Director** on an application made by the company.
- The **confirmation of such change shall be communicated within 30 days** from the date of receipt of application by the regional director to the company.
- The company shall **file the confirmation with the Registrar within 60 days** of the date of confirmation.
- The **Registrar shall** register the same and **certify the registration within 30 days** from the date of filing such confirmation.
- The certificate shall be conclusive evidence of compliance of requirements of this Act.

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 (power delegated to Regional Director by Central Government) 30 on an application in Form No. INC-23 along with the fee and shall be accompanied by the following documents, namely;

- a. Copy of Memorandum of Association, with proposed alterations;
- b. Copy of the minutes of the general meeting at which the resolution authorising such alteration was passed, giving details of the number of votes cast in favour or against the resolution;
- c. Copy of Board Resolution or Power of Attorney or the executed vakalatnama, as the case may be.
- d. List of creditors and debenture holders
- e. Acknowledgment of service of a copy of the application with complete annexures to the Registrar and Chief Secretary of the State Government or Union territory where the registered office is situated at the time of filing the application.



18.5 Penalty on default

- ✓ If any default is made in complying with the requirements of this section, the **company and every officer in default** shall be punishable with a penalty of
 - **Rs. 1,000/- for each day** during which the default continues
 - but **not exceeding Rs. 1,00,000/-**. [Sub-section (8)]

- ✓ If the ROC has reasonable cause to believe that **company is not carrying on any business or operations**,
 - He may cause a **physical verification** of the registered office of the company in prescribed manner and
 - If any **default is found to be made** in complying with the requirements of sub-section (1),
 - He may without prejudice to the provisions of sub-section (8), **initiate action for the removal of the name of the company** from the register of companies.

19. CONVERSION OF COMPANIES ALREADY REGISTERED

Section 18 of the Companies Act, 2013 provides the provisions relating to conversion of a company to some other class of company.

A registered company of any class may convert itself as a company of any other class **by alteration of memorandum and articles of the company.**



Where such conversion is required to be done, the company shall **file an application to the Registrar.**



The **Registrar shall**, after satisfying himself that the provisions applicable for registration of companies have been complied with, **close the former registration of the company.**



After registering the required documents, the **Registrar shall issue a certificate of incorporation.**



The conversion of companies shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the company before the conversion. Such debts etc may be enforced in the manner as if such registration had not been done.

20. ALTERATION OF ARTICLES

Section 14 of the Companies Act, 2013 vests companies with power to alter or add to its articles.

- a) Subject to the provisions of the Act and the conditions contained in the MOA, a company may, **by a special resolution**, alter its Articles.
- b) Alteration of Articles include the alterations having the effect of conversion of-
 - ✓ A private company to a public company; or
 - ✓ A public company to a private company.
- c) An alteration having the effect of **conversion of a public company into a private company shall be valid only if it is approved by the Central Government**, on an application made by the company.

- d) **Every alteration of AOA and a copy of the order of the Central Government** approving the order, shall be **filed with the Registrar**, together with a copy of the altered AOA, **within 15 days**, who shall register the same.
- e) Every alteration made in the AOA shall be **noted in every copy of the AOA**.
- f) **ALTERATION BY SPECIAL RESOLUTION**
Any alteration having the effect of conversion of a public company into a private company shall not be valid unless it is approved by an order of the Central Government on an application made within sixty days from the date of passing of special resolution, be filed with Regional Director in e-Form No. RD-1 along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 and shall be accompanied by the following documents, namely;
- a. Draft copy of Memorandum of Association and Articles of Association, with proposed alterations;
 - b. Copy of the minutes of the general meeting at which the special resolution authorising such alteration was passed together with details of votes cast in favour and or against with names of dissenters;
 - c. Copy of Board resolution or Power of Attorney dated not earlier than thirty days, as the case may be, authorising to file application for such conversion;
 - d. Declaration by a key managerial personnel regarding the compliance under difference section of the Act and rules made there under;
- g) **Penalty on default:** The company and every officer in default shall be liable to a penalty of **Rs. 1,000/- for every copy of AOA issued without such alterations**.

21. ALTERATION OF MEMORANDUM

Section 13 of the Companies Act, 2013 provides the provisions that deal with the alteration of the memorandum.

Section 15 of the Companies Act, 2013 provides that the alteration of MOA/AOA shall be noted in every copy of the MOA/AOA.

Company may alter the provisions of its MOA with the approval of the members by a Special resolution.

21.1 Name change of the company

- ✓ Name change shall be **effected only with the approval of the CG** in writing.
 - However, such **approval of CG is not necessary** where the change in the name is related only to **addition/ deletion of the word "Private"** upon conversion of any class of company into another.
- ✓ **Name change is not allowed to a company** which has not filed annual returns or financial statements with the Registrar or failed to pay or repay matured deposits or debentures or interest thereon.
- ✓ **On change of name, the ROC shall**
 - **enter the new name in the Register of companies**, in the place of the old name and
 - shall **issue a fresh certificate of incorporation** with the new name, and
 - the change in name shall be complete and effective only on the issue of such a certificate.

21.2 Change in the registered office

- ✓ The alteration of the MOA with respect to place of registered office from one State to another shall not have any effect unless it is **approved by the Central Government on an application filed to it.**
- ✓ The **Central Government shall verify that**
 - The alteration has the **consent of the creditors, debenture holders**, and other persons concerned with the company, **or**
 - **Sufficient provision** has been made by the company **for due discharge of all its debts and obligations, or**
 - **Adequate security** has been provided for such discharge.
- ✓ Once the Central Government is satisfied upon these verifications, it shall **dispose off the application within 60 days.**
- ✓ The company shall **file with the Registrar-**
 - The **special resolution** passed by the company, and
 - The **approval of the Central Government** for change in name of the company, if the alteration involves any such change.
- ✓ The company shall **file a certified copy of the order of the Central government approving the alteration with the Registrar of each of the States**, who shall register the same.

- ✓ The Registrar of the State to which the registered office is being shifted to, shall **issue a fresh certificate of incorporation indicating the alteration.**

21.3 Change in liability clause

The change in liability which results in **increase in liability of any shareholder** shall not be valid without the **consent of such shareholder.**

21.4 Change in capital clause

Every alteration of MOA should be approved by the company by passing a **Special resolution u/s 13.** Apart from this, **Section 61** of the Companies Act, 2013 **deals with the power of limited company to alter its capital clause.**

- A limited company having a share capital may, **if so authorized by its Articles, alter its share capital by passing an ordinary resolution.**
- The **notice of such alteration** must be **given to the registrar within 30 days** of such alteration in **Form SH-7** with the certified true copy of ordinary resolution along with the explanatory statement and altered copy of the MOA.

21.5 Change in the object of the company

- **A company, which has raised money from the public through prospectus and still has any unutilized amount** out of the money so raised, **shall not change its objects** for which it raised the money **unless a special resolution through postal ballot is passed** by the company.
- The **details of such resolution** shall be **published in the newspapers** (one in English and one in vernacular language) which is in circulation at the place where registered office of the company is situated.
- Also, the details of such resolution shall be **placed on the website** of the company, if any, indicating therein the reason for such change.
- The **dissenting shareholders** shall be given an **opportunity to exit.**
- The **registrar shall register any alteration of the MOA** with respect to the objects of the company and certify the registration **within 30 days** from the date of filing the special resolution.

21.6 Alteration to be noted in every copy [Section 15]

- ✓ Every alteration made in the MOA /AOA of a company shall be noted in **every copy** of the memorandum or articles, as the case may be.
- ✓ **If the company defaults:** The company and every officer in default shall be liable to a **penalty of Rs. 1,000/- for every copy of the MOA/AOA issued without alteration.**

22. COPIES OF MEMORANDUM, ARTICLES, ETC., TO BE GIVEN TO MEMBERS

Where any member of a company requests for the copies of

- (a) The memorandum,

Section 17 of the Companies Act, 2013 provides the provisions that deal with providing the members of the company with the copies of

- (b) The Articles; and
- (c) Every document and every resolution referred in section 117 (i.e., Resolutions and agreements to be filed), if and in so far as they have not been embodied (i.e., incorporated) in the MOA and AOA, the company shall, **within 7 days of the request** on the payment of fees, send copies of these documents.

In case of default: The company and every officer in default shall be liable for each default, to a **penalty of Rs. 1,000/- for each day** during which the default continues, subject to a **maximum of Rs. 1,00,000/-**.

23. ONE PERSON COMPANY (OPC) [Section 3]

23.1 Nominee of OPC

- ✓ The MOA of a One Person company shall **indicate the name of the other person (i.e., Nominee)**, with his prior consent in the prescribed form, who shall, **in the event of death of the subscriber or his incapacity to contract become the member of the company**, and
- ✓ The **written consent of such person shall be filed with the registrar** at the time of incorporation of the company along with its MOA and AOA.

- ✓ Such **nominee may, at any time, withdraw his consent** in such manner as may be prescribed.
- ✓ The **member of OPC may, at any time, change the name of the Nominee** by giving a notice in such manner as may be prescribed.
- ✓ It shall be the **duty of the member of OPC to intimate the company the change**, if any, in the name of the Nominee by indicating in the MOA or otherwise within such time and in such manner as may be prescribed. However, any change in the name of Nominee **shall not be deemed to be an alteration of the MOA.**

23.2 Qualifications of Member/ Nominee of OPC

- i. A natural person,
- ii. An **Indian citizen**, whether **resident in India or otherwise**
(*Resident in India means a person who has stayed in India for a period of not less than 120 days during the immediately preceding financial year.*)
- iii. **Not a minor.**



Can a minor start a OPC for his benefit through his guardian?
Ans: No. A minor cannot hold shares of OPC with beneficial interest.

23.3 Member/ Nominee of not more than one OPC

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

This means that a person can be the member of one OPC and nominee of another one OPC at the same time. However, no person can be the member/nominee of more than one OPC at the same time.

- ✓ Where a natural person being a member in OPC,
 - Becomes member in another OPC by virtue of his being nominee in that OPC,
 - Such person shall **meet the eligibility criteria within a period of 180 days.**

23.4 Restrictions upon OPC

- i. OPC **cannot be incorporated or converted into a Section 8 company** though it can be converted into private or public companies anytime after its incorporation.
- ii. OPC **cannot carry out Non-Banking Financial Investment activities** including investment in securities of any body corporate.

24. FORMATION OF COMPANIES WITH CHARITABLE OBJECTS, ETC.

Section 8 of the Companies Act, 2013 deals with the formation of not-for-profit companies.

24.1 Object of formation of Section 8 Company

- ✓ **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**.
- ✓ Section 8 company **prohibits the payment of any dividend** to its members.

24.2 Power of Central Government to issue the license

The Central Government shall register such person or association of person **as a company with limited liability without the addition of the words 'Limited' or 'Private Limited' to its name**, by issuing license 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.

REGISTRATION OF COMPANY USING LICENSE

After granting licence, an application shall be made to registrar under section 8(1) itself for registration of company in the manner specified in rule 19 of *the Companies (Incorporation) Rules 2014*.

Application for registration

A person or an association of persons desirous of incorporating a company with limited liability under section 8(1), shall make an application to registrar in **Form**

SPICe+ (Simplified Proforma for Incorporating company Electronically Plus: INC- 32) along with the fee as provided in *the Companies (Registration offices and fees) Rules, 2014*.

Supporting document along with Application

The application furnished as specified above shall be accompanied by the following documents;

- a. The memorandum and articles of association of the proposed company in the Form No. INC-13 and Form No. INC-31, respectively;
- b. An estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure;
- c. The declaration in by an Advocate, a Chartered Accountant, cost accountant or Company Secretary in practice Form No. INC-14 and by each of the persons making the application in Form No. INC-15, that;
 - ◆ the memorandum and articles of association have been drawn up in conformity with the provisions of section 8 and rules made thereunder and
 - ◆ all the requirements of the Act and the rules made thereunder relating to registration of the company under section 8 and matters incidental or supplemental thereto have been complied with;

24.3 Special provisions relating to Section 8 company

- i. On registration, the Section 8 company shall enjoy **same privileges and obligations as of a limited company**.
- ii. A **firm can be a member** of a Section 8 company.
- iii. **Shall not alter the provisions of its MOA/AOA** except with the **previous approval of the Central Government**.
- iv. Section 8 company 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.
- v. Can call its general meeting by giving a clear 14 days notice instead of 21 days.
- vi. Requirement of minimum number of directors, independent directors does not apply.

- vii. Need not constitute Nomination and Remuneration Committee and Shareholders Relationship Committee.

24.4 Revocation of license

24.4.1 Reasons for revocation of license

- (a) Company **contravenes any of the requirements or conditions** of this section subject to which a license is issued, or
- (b) The **affairs of the company are conducted fraudulently**, or in violation to its objects, or prejudicial to public interest.

Before such revocation the Central Government must give it a written notice of its intention to revoke the license and opportunity of being heard.

24.4.2 Effect of revocation of license

- ✓ The **Registrar shall put the words 'Limited' or 'Private Limited'** against the companies name in the register.
- ✓ 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 and having similar objects, after giving the company an opportunity of being heard.
- ✓ If upon winding up or dissolution, **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 Tribunal may impose, **or**
 - **may be sold** and proceeds thereof credited to the Insolvency and Bankruptcy Fund.

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 in rule 21 and 22 of the Companies (Incorporation) Rule 2014 as described below;

- a. A company shall pass a **special resolution** at a general meeting for approving such conversion

- b. An **explanatory statement** to notice of such general meeting must set-out the details on reason of such conversion.
- c. The company shall file an application in Form No. INC-18 with the **Regional Director** with the fee along with a certified true copy of the special resolution and a copy of the Notice convening the meeting including the explanatory statement for approval for conversion.

Also attach the proof of serving of the notice served by **registered post or hand delivery**, to:

1. the Chief Commissioner of Income Tax having jurisdiction over the company,
2. Income Tax Officer who has jurisdiction over the company,
3. the Charity Commissioner,
4. the Chief Secretary of the State in which the registered office of the company is situated,
5. any organisation or Department of the Central Government or State Government or other authority under whose jurisdiction the company has been operating.

Note: If any of these authorities wish to make any representation to Regional Director, it shall do so within sixty days of the receipt of the notice, after giving an opportunity to the Company.

- d. A **copy** of the application with annexures as filed with the Regional Director shall also be **filed with the Registrar**.

The company shall, within a week from the date of submitting the application to the Regional Director, **publish a notice** at its own expense, and a copy of the notice, as published, shall be sent forthwith to the Regional Director and the said notice shall be in Form No. INC-19 and shall be published;

1. 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; and
 2. on the **website of the company**, if any, and as may be notified or directed by the Central Government.
- e. The company should have filed all its **financial statements** and **Annual Returns** upto the financial year preceding the submission of the application to the Regional Director and all other returns required to be filed under the Act up to the date of

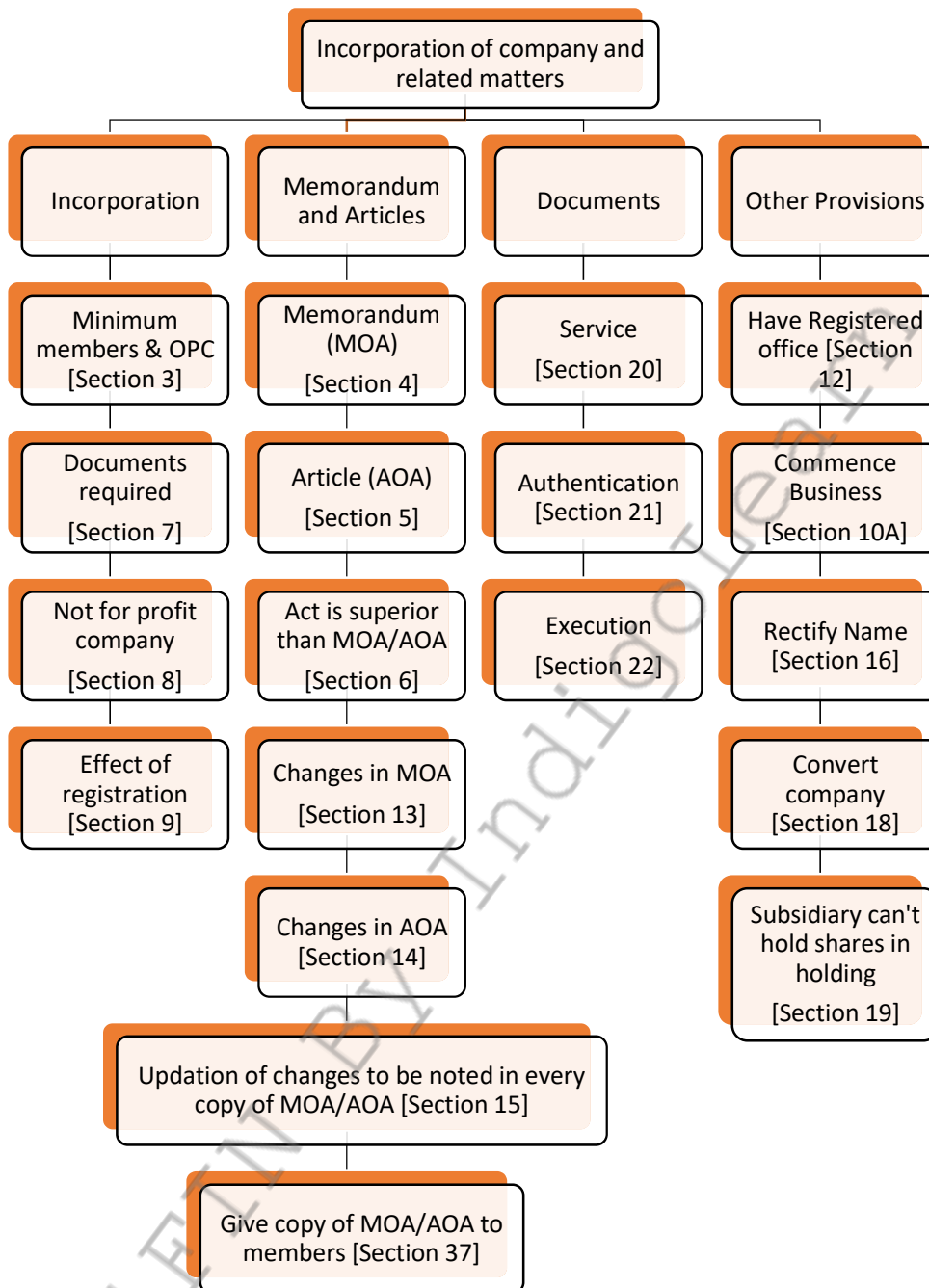
submitting the application to the Regional Director

Note: In the event the application is made after the expiry of three months from the date of preceding financial year to which the financial statement has been filed, a statement of the financial position duly certified by chartered accountant made up to a date not preceding thirty days of filing the application shall be attached.

- f. On receipt of the application, and on being satisfied, the Regional Director shall issue an **order approving the conversion** of the company into a company of any other kind subject to **such terms and conditions** as may be imposed in the facts and circumstances of each case.
- g. Before imposing the conditions or rejecting the application, the company shall be given a reasonable **opportunity of being heard** by the Regional Director
- h. On **receipt of the approval** of the Regional Director, the company shall convene a **general meeting** of its members to pass a **special resolution** for amending its **memorandum of association and articles of association** and the Company shall thereafter **file these with the Registrar** (with declaration to adhere conditions if any, imposed by Regional Director)
- i. On receipt of the documents referred above, the Registrar shall register the documents and **issue the fresh Certificate of Incorporation**.

24.5 Penalty/ punishment in contravention

- **Company:**
 - **Fine:** varying from Rs. 10 lakhs to Rs. 1 Crore.
- **Director and every officer in default:**
 - **Fine:** varying from Rs. 25,000/- to Rs. 25 lakhs,
 - Where the affairs of the company were conducted **fraudulently, every officer in default shall be liable for action u/s 447.**



Learning Outcomes –

- Define prospectus
- Understand various types of prospectus
- Explain the procedure for issue of prospectus and other related concepts
- Know about the criminal and civil liability for mis-statements in prospectus and punishment for fraudulently inducing persons to invest money
- Understand the procedure for allotment of securities by companies
- Know the procedure of private placement of securities.

1. INTRODUCTION

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

- ✓ **Part I** relates to **'Public offer'** (Section 23 to 41); and
- ✓ **Part II** relates to **'Private Placement'** (Section 42).

The provisions contained in Part I and II are supplemented by the **Companies (Prospectus and Allotment of Securities) Rules, 2014**.

2. PUBLIC OFFER AND PRIVATE PLACEMENT

Section 23 of the Companies Act, 2013 provides the provisions relating to public offer, private placement, right issue and bonus shares issue.

2.1 Issue of securities by Public company

As per **Section 23(1)**, a public company may issue securities-

- a) To public through **prospectus** (i.e., public offer); or
- b) Through **private placement**; or
- c) Through a **rights issue** or a **bonus issue**.

2.2 Issue of securities by Private Company

As per **Section 23(2)**, a private company may issue securities-

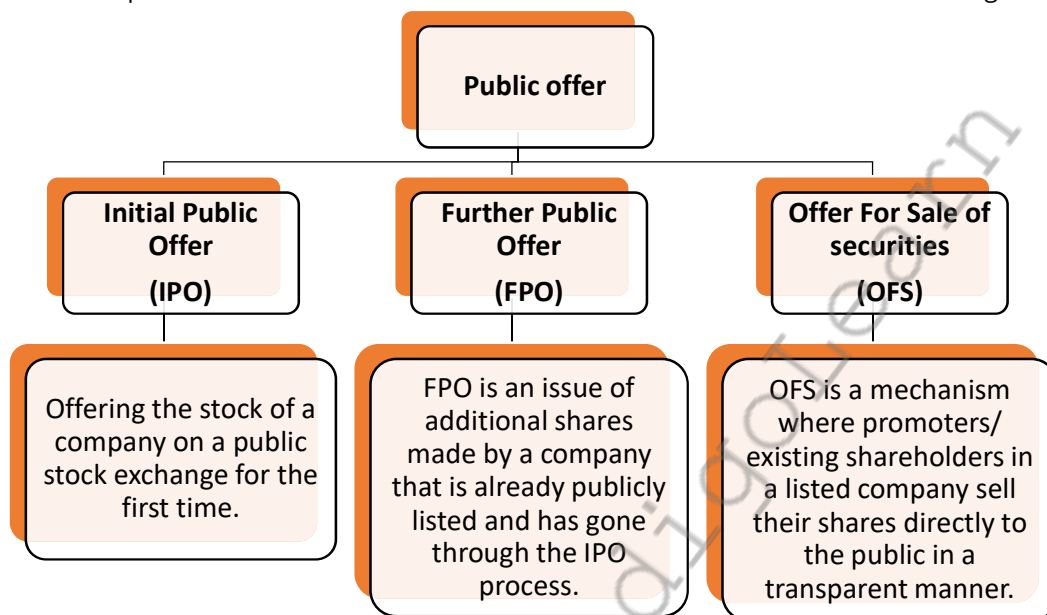
- a) By way of **rights issue** or **bonus issue**; or

	Private Company	Public Company
Right Issue	✓	✓
Bonus Issue	✓	✓
Private Placement	✓	✓
Public Offer by issue of prospectus	x	Allowed to 'Eligible Companies'

- b) Through **private placement**.

Note:

- i. **Rights issue:** It is a group of rights offered to existing shareholders to purchase additional stock shares in proportion to their existing holdings.
- ii. **Bonus shares:** It is an offer of free additional shares to existing shareholders in proportion to their existing holdings. (also known as 'capitalization of profits').
- iii. **Private Placement:** It means the sale of securities to a relatively small number of selected investors.
- iv. **Public offer:** It is the offering of securities of a company or a similar corporation to the public. In order to do that the securities are to be listed on a stock exchange.



Note:

To bring ease to doing business for corporates, Sub-section 3 and 4 to section 23 of the Act inserted vide, the Companies (Amendment) Act, 2020 (enforced w.e.f 28th September 2020) Prior to Amendments of 2020

Indian companies can access the overseas equity markets only through depository receipts (e.g. American Depository Receipts (ADRs) or Global Depository Receipts (GDRs) or by listing their debt securities (such as, foreign currency convertible bonds, masala bonds, etc.) on foreign markets.

Since more and more businesses are going global & capital raised from across the border is cost effective, hence section 23(3) is inserted to open ways of overseas direct listing for notified class of public companies by allowing them to issue notified securities for the purpose of listing on permitted stock exchanges in permissible foreign jurisdictions or such other jurisdictions as may be prescribed.

How overseas direct listing is different from ADRs/GRDs?

In a direct listing, a domestic company can enlist itself with the stock exchanges of other countries without an intermediary. Unlike American Depository Receipts (ADRs) and Global Depository Receipts (GDRs), the Indian company can directly offer their shares in foreign markets instead of giving them to a foreign depository bank. Direct listing excludes intermediaries, decreases the overall transaction cost, and increases transparency.

Section 23(4) of the Act empowers the Central Government to exempt any class or classes of public companies from complying with the provisions of Chapter III (Prospectus and Allotment of Securities), Chapter IV (Share Capital and Debentures), section 89 (Declaration in respect of a beneficial interest in any share), section 90 (Register of significant beneficial owners in a company) or section 127 (Punishment for failure to distribute dividends) of the Act, by issuing notification.

REGULATION OF ISSUE AND TRANSFER OF SECURITIES ETC. [SECTION 24]

Securities and Exchange Board of India is empowered to administer those provisions under chapter III and IV of the Act, which pertain to issue & transfer of securities and non-payment of dividend; by listed companies or those companies which intend to get their securities listed on any recognised stock exchange in India, by making regulations in this behalf.

All other matters (including matters relating to prospectus, return of allotment, redemption of preference shares) specifically provided in this Act, shall be administered by the Central Government, Tribunal or the Registrar, as the case may be.

3. SECURITIES

Section 2 (81) of the Companies Act, 2013 defines the term **Securities** which means the securities as **defined in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956 [SCRA]**.

List of securities as per Securities Contracts (Regulation) Act, 1956 –

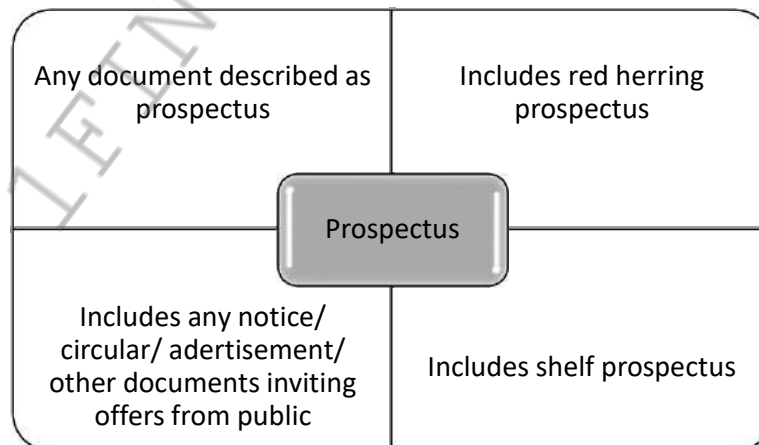
- ✓ Shares, stocks, debentures, bonds
- ✓ Derivatives
- ✓ Units- Collective Investment Scheme
- ✓ Mutual Fund Scheme
- ✓ Government securities
- ✓ Security receipts
- ✓ Central Government may declare other securities under this definition
- ✓ Rights and interests related to securities.

4. PROSPECTUS

4.1 Meaning of Prospectus

Section 2(70) defines '**prospectus**' which means **any document described or issued as a prospectus and includes**

- a **red herring prospectus** referred to in section 32 or
- a **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 a body corporate.



4.2 Matters to be stated in the prospectus

Section 26 of the Companies Act, 2013 mentions the various matters which are to be stated in a prospectus.

4.2.1 Prospectus to be dated and signed and to state specified information, etc.

Every prospectus issued by or on behalf of

- A public company either with reference to its formation or subsequently, or
- Any person who is or who has been engaged or interested in the formation of a public company,
- Shall be **dated and signed** and
- shall **state such information and set out such reports on financial information** as may be specified by the Securities and Exchange Board of India [SEBI].

The prospectus shall **make a declaration about**

- the **compliance of the provisions of the 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 SEBI Act, 1992 and the rules and regulations made thereunder.

Exceptions:

- a) Where the securities are being **issued to the existing members or debenture holders** of a company, whether an applicant has the right to renounce the shares or not in favor of any other person.
- b) Where the shares or debentures issued or to be issued are **uniform with the shares or debentures previously issued** and are being dealt in or quoted on a **recognised stock exchange**.

4.2.2 Prospectus to be issued after delivery to Registrar for filing

- No prospectus shall be issued unless **on or before the date of its publication**,
- a **copy thereof has been delivered** to the Registrar for filing.
- Such copy shall be **signed by** every person who is named therein as a director or proposed director of the company or by his duly authorised attorney.



The date indicated in the prospectus shall be deemed to be the **date of its publication**.

4.2.3 Prospectus not to include Expert's statement under certain circumstances

A prospectus issued shall not include a statement purporting to be made by an expert unless **2 conditions** are satisfied:

- i) The expert is a **person who is not**, and who has not been, **engaged or interested in the formation or promotion or management** of the company, and
- ii) He 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 and
 - a statement to that effect has been included in the prospectus.

4.2.4 Cover page of Prospectus

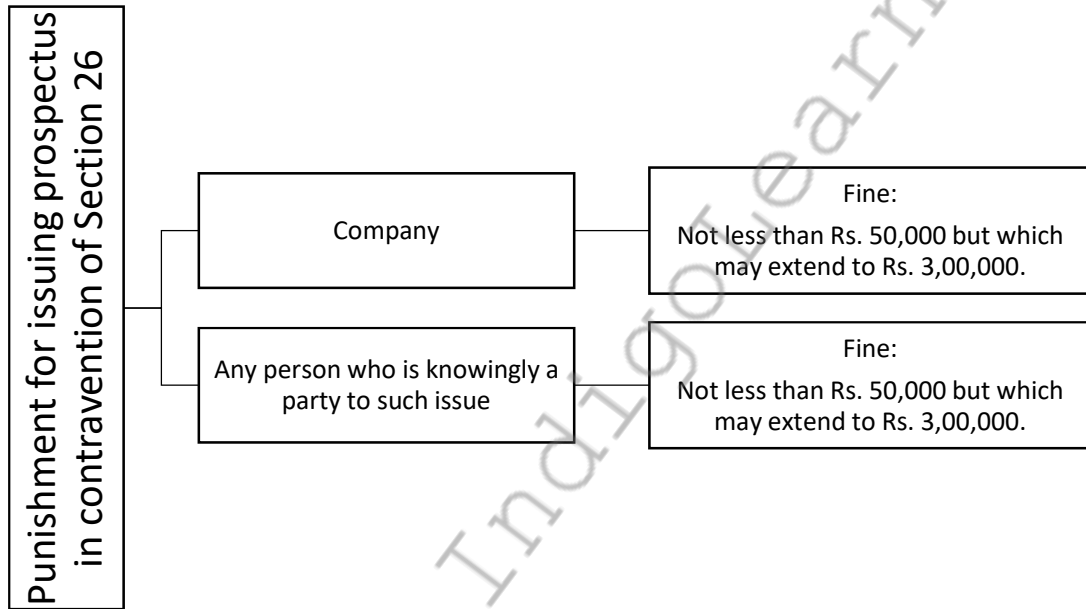
Every prospectus issued shall, on the face of it, **state the following matters:**

- State that a **copy has been delivered** for filing to the ROC
- **Specify any documents required to be attached** to the copy delivered or refer to the statements included in the prospectus which specify these documents.

4.2.5 Prospectus to be issued within specified time

No prospectus shall be valid if it is issued more than **90 days** after the date on which a copy thereof is delivered to the ROC

4.2.6 Punishment for contravention



4.3 Public offer of Securities to be in Dematerialised Form

Section 29 of the Companies Act, 2013 along with the Companies (Prospectus and Allotment of Securities) Rules, 2014 [PAS Rules] contain provisions which require public offer of securities to be in dematerialised form.

- Following companies shall issue securities only in dematerialised form by complying with the provisions of Depositories Act, 1996:
 - **Every company making public offer**, and
 - Such **other class/ classes of companies as may be prescribed**.
- In case of such class or classes of unlisted companies as may be prescribed, the securities shall be held or transferred only in dematerialised form in the manner laid down in the Depositories Act, 1996 and the regulations made thereunder [**Sub-section (1A)**].

→ Any **company, other than a company mentioned above, 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 [**Sub-section (2)**].

4.4 Advertisement of Prospectus

Section 30 of the Companies Act, 2013 provides the rules relating advertisement of the prospectus.

Wherever there is advertisement of prospectus published, **it must contain following details:**

- Objects,
- The liability of members and amount of share capital of the company,
- The names of subscribers to the MOA,
- The number of subscribers,
- The number of shares subscribed by each subscriber to the memorandum,
- The capital structure of the company.

4.5 Shelf prospectus

Section 31 of the Companies Act, 2013 contains provisions relating to Shelf Prospectus.

4.5.1 Meaning of Shelf prospectus

It is the **prospectus with the shelf life**, i.e., a validity period. In this type of public offering, company is allowed to offer and sell securities to the public **without a separate prospectus for each act of offering**.

4.5.2 Maximum period of validity

- Any class or classes of companies as provided may file a shelf prospectus with the ROC at the stage of the first offer of securities which shall indicate a **period not exceeding 1 year** as the period of validity and,
- in respect of subsequent offer within that validity period, not further prospectus is required.

The period of validity shall **commence from the date of opening of the first offer of securities** under that prospectus.


4.5.3 Information memorandum

Every **subsequent offer requires issuing an 'information memorandum'** containing the **details of changes** that took place from the previous issue, i.e.

- Financial changed
- New charges created
- Other material facts

If **Advance is received for further shares before the issue of Information memorandum:** then,

- Company must **intimate the investor** of all changes using Information Memorandum and
- **Give an 'Exit Option'** (Investor may withdraw his money. The refund shall be processed in 15 days).

 Information Memorandum shall be prepared in **Form PAS-2** and **filed with the ROC within 1 month prior to the issue of a second or subsequent offer** of securities under the shelf prospectus. [Rule 10 of PAS Rules, 2014]

4.6 Red Herring prospectus

Section 32 of the Companies Act, 2013 contains provisions relating to Red-herring Prospectus.

4.6.1 Meaning of Red Herring prospectus

In this kind of public offering, the **Price and quantity of shares to be allotted are not included in prospectus**. Thus the prospectus is incomplete.

Need of Red Herring Prospectus:

Developments taking place in the financial markets from time to time allow innovative methods of raising funds so as to avail 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.

4.6.2 Issuing and filing Red herring prospectus

- A company proposing to make an offer of securities may issue a red-herring prospectus **prior to the issue of the prospectus**.
- It shall be **filed with the ROC at least 3 days prior to the opening of the subscription list** and the offer.

4.6.3 Filing of the prospectus upon closing of the offer

Upon closing of the offer, the prospectus **stating the total capital raised** (by debt/share capital) **and closing price of securities** along with other prescribed details, shall be **filed with the ROC and SEBI**.

Note: Book Building is a price discovery method. In this method, the company doesn't fix up a particular price for the shares, but instead gives a **price range**. An underwriter builds a book by accepting orders from fund managers, indicating the number of shares they desire and the price they are willing to pay.

4.7 Abridged prospectus

As per **Section 2(1)**, 'Abridged Prospectus' means **a memorandum containing such salient features of a prospectus** as may be specified by the SEBI.

Abridged prospectus is a **summarised form of actual prospectus**.

4.7.1 Meaning of Abridged Prospectus [Section 2(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.

4.7.2 Need of Abridged Prospectus

In fact, 'Abridged Prospectus' is a summarized form of actual prospectus, containing the salient features of a prospectus to **cut the cost involved in the publication** of large number of prospectus which has to accompany the application forms for shares or debentures in case of public offer.

4.7.3 Abridged Prospectus accompany the application form [Sub-section 1]

Section 33(1) provides that every application form for shares or debentures has to be accompanied with the abridged prospectus.

Proviso to sub-section 1 provides exceptions, when the requirement of abridged prospectus does not apply;

- a. When application form is issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to shares or debentures;
- b. In relation to shares or debentures which were not offered to the public; or
- c. Where offer is made to existing members of the company.

4.7.4 Right to receive prospectus [Sub-section 2]

Sub-section 2 provides that a prospectus (full prospectus) is to be made available to any person who request for it before the closing of the subscription list and the offer.

4.7.5 Penalty [Sub-section 3]

A company who makes any default in complying with the provisions of section 33, shall be liable to a penalty of **fifty thousand rupees for each default**.

4.8 Deemed prospectus

Section 25 of the Companies Act, 2013 provides that a document by which offer of securities to the public is made, shall be a deemed prospectus.

- Where a **company allots or agrees to allot any securities** of the company (i.e., private placement)
- **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 be deemed to be a prospectus issued by the company.

→ All the enactments and rules of law as to the contents of prospectus shall apply to the deemed prospectus.

4.8.1 Offer for sale to the public

Any private placement of securities made by a company shall be considered as securities offered for sale to the public, if it is shown that –

- a) An offer of the securities or any of them for sale to the public was **made within 6 months of allotment or agreement to allot; OR**
- b) At the date when the offer was made, the **whole consideration to be received** by the company in respect of the securities **has not been received by it.**

CASE LAW

Above Sub-section of section 25 are not exhaustive in nature, there may be certain other situations when issuing document may construe as deemed prospectus.

SEBI v Kunnankulam Paper Mills Ltd Where a rights issue is made to existing members with a right to renounce in favour of others, if the number of such others exceeds fifty, it also becomes a deemed prospectus

4.8.2 Additional matters to be stated in the prospectus in an offer for sale to the public

- a) The **net amount of consideration** received or to be received by the company in respect of the securities to which the offer relates.
- b) The **time and place at which the contract** where under the said securities have been or are to be allotted **may be inspected.**

4.8.3 Signing of document in case of a company or a firm

Where a person making the OFS to the public is a company / firm, the deemed prospectus shall be signed by:

- 2 directors of the company, or
- Not less than one-half of the partners in the firm, as the case may be.

Since the provisions of the Act relating to prospectus and the penal provisions are attracted only when the prospectus (including deemed prospectus) has been **issued**. "Issued" means issued to the **public**.

Hence In context of 'Invitation to Public' 'Inviting offer from the Public' or 'Offer of securities for sale to Public' two valid questions arise here:

1. What constitute as 'Public'? Does only 'Public at large' constitute as Public?

The term public is not restricted to the public at large. It includes any section of the public, it is immaterial howsoever such section is selected.

Public connotes persons not personally known to the promoter as distinguished from his own friends, relatives, connections and acquaintances.

Re, South of England Natural Gas and Petroleum Co. Ltd

Facts – 3000 copies of a document which was offered for subscription of shares in a company and which was headed "For Private Circulation only," circulated to the members of certain number of gas companies only.

Legal Question – Was this a prospectus? Should it contain the particulars required by the Act?

– It was decided that though the offer was only to limited class, it was not less than an offer to the public in any sense, because **those persons from limited class were nonetheless the public**. Hence,

the distribution of a document entitled, "For Private Circulation only" offering the company shares was an offer to the public and their document was a prospectus. Therefore, it must contain the particulars required by the Act.

2. Whether a single private communication tantamount to issue; can it be construed to a prospectus to attract the provisions of the Act?

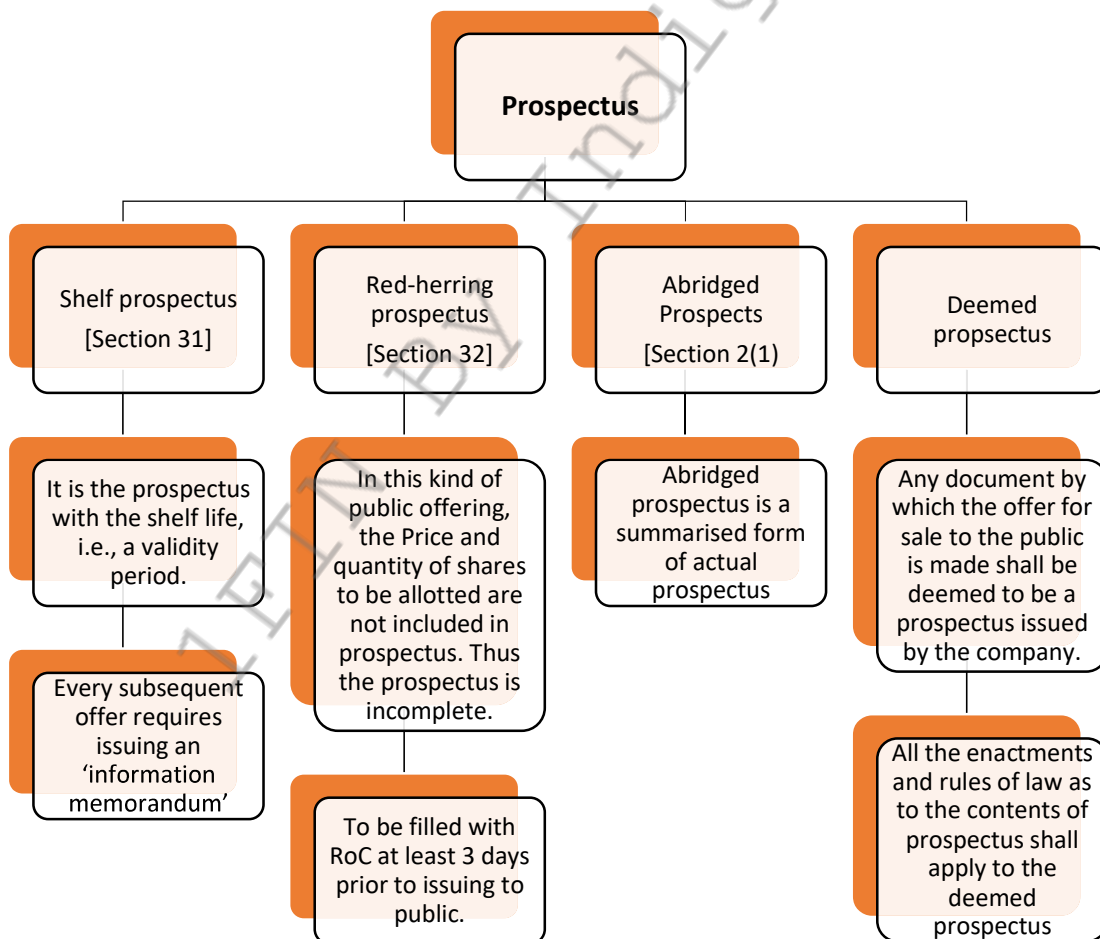
The term "issue" is **not satisfied by a single private communication**. There must be some measure of publicity, however modest. A **private communication** is not thus open and **does not construe to be a prospectus**, hence not attracting the provisions of the Act.

Nash Vs Lynde

Facts – Nash applied for certain shares in a company on the basis of a document sent to him by Lynde, the managing director of the company. The document was marked 'strictly private and confidential'. The document did not contain all the material facts required by the Act to be disclosed. Nash filed a suit for compensation for loss suffered by him by reason of the Omissions.

Decision – Suit was dismissed.

Viscount Sumner's landmark dictum in this case is worth to consider here as basis of above answer. "The public in the definition is of course a general word, no particular number are prescribed. Anything from two to infinity may serve, perhaps even one if he is intended to be the first of a series of subscribers but made further proceedings needless by himself subscribing the whole. The point is that the offer is such as to be opened to anyone who brings his money and applies in due from, whether the prospectus was addressed to him on behalf of the company or not. A private communication is not thus open and does not construe to be a prospectus."



4.9 Offer for sale by certain members of the company

Section 28 of the Companies Act, 2013 contains provisions which regulate the offer for sale of securities by certain members of company.

- Members may offer whole or part of their shareholding for sale to public **provided BOD approves.**
- **Document offered to public inviting subscription shall be Deemed Prospectus.** All provisions applicable to normal prospectus shall apply.
- Individuals/Body corporates whose shares are being OFS, shall
 - **authorize company** whose shares are being offered for sale to the public, to take all the actions in respect of OFS on their behalf and
 - **reimburse** the company of **all related expenses.**

4.9.1 Rule 8 of PAS Rules -

- (1) The provisions of Prospectus and Allotment of Securities and rules made thereunder shall be applicable to an offer of sale referred to in Section 28 except for the following: -
 - a) Provisions relating to **minimum subscription,**
 - b) Provisions for **minimum applicable value,**
 - c) Provisions requiring any statement to be made by the BOD in respect of **utilization of money,**
 - d) **Any other provision or information** which cannot be compiled or gathered by the offeror, with detailed justification for non-compliance.
- (2) The prospectus issued u/s 28 shall **disclose the name of the person** or persons or entity **bearing the cost of making the offer of sale** along with reasons.

4.10 Variation of terms of contract or objects in prospectus

Section 27 of the Companies Act, 2013 contains provisions relating to variation in terms of contract or objects in prospectus.

4.10.1 Variation on approval in general meeting by passing SR

Company may vary terms in the prospectus **only by**

- **passing SR in general Meeting**
- **Details of the notice** in respect of such resolution to the shareholders **shall be published in 2 Newspapers** (English and vernacular) in the city where registered office of

The 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.

the company is situated, and it shall clearly indicate the justification for such variation.

4.10.2 Rule 7 of PAS Rules

- (1) Where the company has raised money from public through prospectus and has any unutilised amount out of the money so raised, it **shall not vary the terms of contracts referred to in the prospectus or objects for which the prospectus was issued except by passing a SR through postal ballot.**

The notice of the proposed SR shall contain the following particulars –

- i) The original purpose/ object of the issue,
 - ii) The total money raised,
 - iii) The money utilised for the objects stated in the prospectus,
 - iv) The extent of achievement of the proposed objects,
 - v) The unutilised amount,
 - vi) The particulars of proposed variation,
 - vii) The reason and justification for seeking variation,
 - viii) The proposed time limit within which the proposed varied object would be achieved,
 - ix) Clause-wise details
 - x) The risk factors relating to new objects,
 - xi) Other relevant information.
- (2) The **advertisement of the notice** for getting the SR passed shall be in **Form PAS – 1**. It shall be published simultaneously with dispatch of Postal Ballot notices to the shareholders.
- (3) The notice shall **also be placed on the website of the company**, if any.

4.10.3 Exit offer to dissenting shareholders

Those **shareholders who have not agreed to the variation** shall be given an exit offer by promoters or controlling shareholders **at such exit price** as may be specified by the SEBI [Section 27 (2)].

5. DEMATERIALISATION OF SECURITIES OF UNLISTED PUBLIC COMPANIES

5.1 Issue of securities in dematerialised form [Rule 9A(1)]

Rule 9A of the Companies (Prospectus and Allotment of Securities) Rules, 2014 mentions about securities in dematerialised form by unlisted public companies.

Every unlisted public company (*excluding Nidhi Company, Government Company, and a wholly owned subsidiary*) shall **issue the securities only in dematerialised form** and also facilitate dematerialisation of all existing securities.

5.2 Conversion of securities in dematerialised form [Rule 9A(2)]

Also, **before making an offer** for

- a) issue of any securities or
- b) buyback of securities or
- c) issue of bonus shares or rights offer,

every unlisted company shall **ensure that entire holding of securities of its promoters, directors, key managerial personnel has been dematerialised.**

5.3 Responsibility of every holder of securities of an unlisted public company [Rule 9A(3)]

Every **holder of securities of an unlisted public company**:

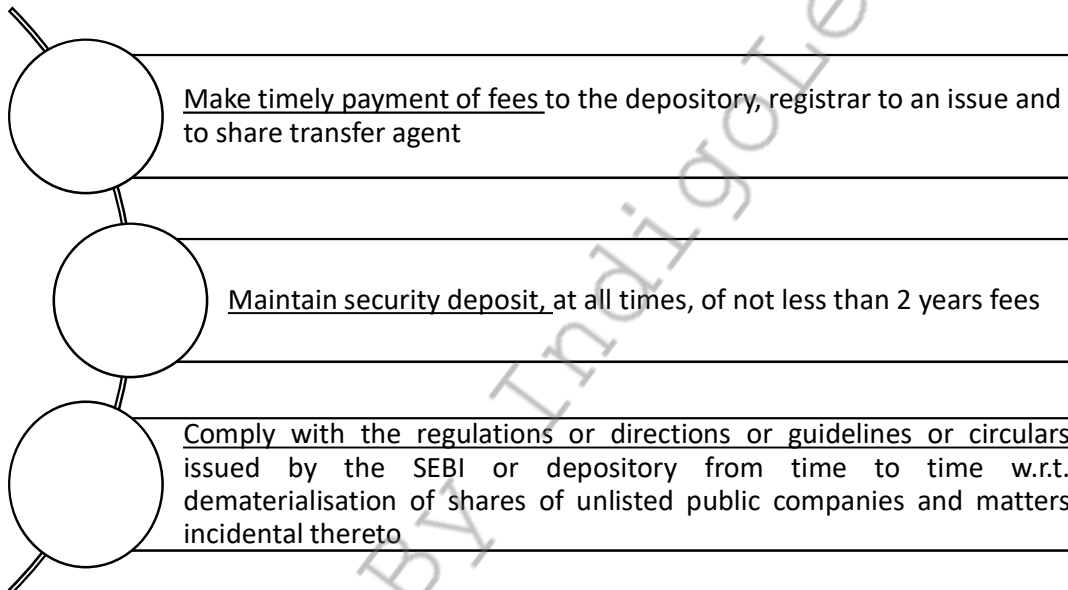
- Who **intends to transfer such securities** shall get the securities dematerialised before the transfer or
- Who **subscribes to any securities of an unlisted public company** shall ensure that all his existing securities are held in dematerialized form.

5.4 Application to the depository [Rule 9A(4)]

Every unlisted public companies shall

- **facilitate dematerialisation** of all its existing securities **by making necessary application to a depository**,
- **secure International Security Identification Number (ISIN)** for each type of security and
- **inform all its existing security holders** about such facility.

5.5 Obligations of every unlisted public company [Rule 9A(5 & 6)]



No unlisted public company which has **failed to comply with above obligations** shall make an offer of any securities or buyback its securities or issue any bonus or right shares till the payments to depositories or registrar or share transfer agent are made. [Sub-rule 6]

5.6 Application of certain provisions [Rule 9A(7)]

The provisions of –

- d) The **Depositories Act, 1996**,
- e) The **Securities and Exchange Board of India (Depositories and Participants) Regulations, 2018**, and
- f) The **Securities and Exchange Board of India (Registrars to an issue and Share Transfer Agents) Regulations, 1993**

shall apply mutatis mutandis to dematerialisation of securities of unlisted public companies.

5.7 Filing with the Registrar [Rule 9A(8 & 8A)]

- ✓ Every unlisted public company governed by Rule 9A shall **submit Form PAS-6 to the Registrar within 60 days** from the conclusion of each year **duly certified** by a CS/CA in practice.
- ✓ The company shall immediately bring to the notice of the depositories any **difference observed in its issued capital and the capital held** in dematerialised form [**Sub-rule (8A)**].

5.8 Grievances redressal mechanism [Rule 9A(9 & 10)]

- ✓ **Grievances** of the security holders of unlisted public companies under Rule 9A shall be **filed before the Investor Education and Protection Fund (IEPF)**.
- ✓ The IEPF authority shall initiate any **action against a depository or participant or registrar to an issue and share transfer agent** after prior consultation with the SEBI.

6. SECURITIES TO BE DEALT WITH IN STOCK EXCHANGES

Section 40 of the Companies Act, 2013 contains provisions in respect of securities which are to be dealt with in recognised stock exchanges.

6.1 Listing of Securities

- Every company, making public offer, shall **before making such offer**, make an application to one or more recognised stock exchange and obtain permission for the securities to be dealt with in such stock exchanges.
- The **prospectus shall state the names of the stock exchange** in which securities shall be dealt with.
- All **monies received** on application shall be **kept in a separate bank account in a scheduled bank** and shall be used only for adjustment against allotment and for repayment in case unable to allot.
- Nothing can be written in the prospectus to waive this section.
- **Default in compliance:**
 - **Company:** Fine- minimum Rs. 5 lakh and Maximum Rs. 50 lakhs.
 - **Defaulting officer:**
 - Fine of minimum Rs. 50,000/- and maximum Rs. 3 lakh, or

6.2 Payment of Commission

A company may pay commission to any person in connection with the subscription to its securities. The **conditions** for payment of commission are:

- Authorized by AOA.
- May be paid out of proceeds of issue or out of profits of the company or both.
- **Rate of commission:**

For shares	For Debentures
✓ Rate mentioned in AOA or	✓ Rate mentioned in AOA or
✓ 5 % of price at which shares are issued	✓ 2.5 % of price at which debentures are issued

→ **Disclosure in prospectus:**

- The **name of underwriters**,
- The **rate and amount of commission** payable to the underwriters,
- The **number of securities which is to be underwritten** or subscribed by the underwriter absolutely or conditionally.

→ No commission shall be paid to any underwriter on securities which are not offered to the public for subscription.

→ A **copy of the contract** for payment of commission is **delivered to the ROC** at the time of delivery of prospectus for registration.



Underwriting is the process through which an individual or institution takes on financial risk for a fee. In this case, such institutions agree to take over the unsubscribed portion of securities offered to public to meet minimum subscription.

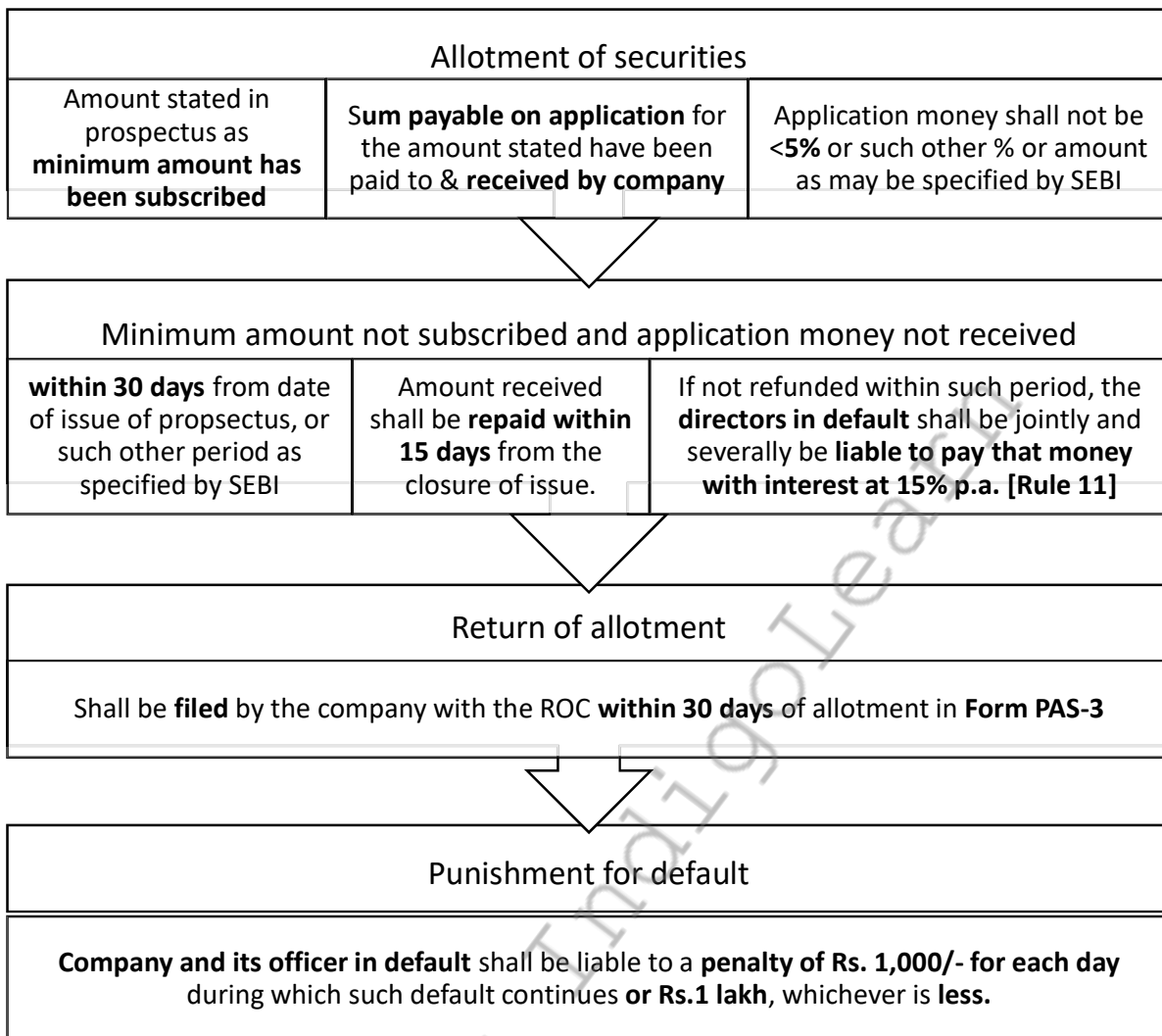
7. ALLOTMENT OF SECURITIES BY COMPANY

7.1 Meaning of Allotment

Section 39 of the Companies Act, 2013 contains provisions in respect of allotment of securities when there is a public offer.

Allotment means the **appropriation out of previously un-appropriated capital** of a company, of a certain number of shares to a person. Allotment is when the **ownership of shares is given** in the name of shareholder **and entry is made in the register of members**. It brings shares into existence.

7.2 Allotment of Securities



7.3 Rule 12 of PAS Rules

Note:

- As per the regulation 45(1) of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, the minimum subscription is 90% of the entire issue.
- As per the regulation 47(4) of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, the minimum sum payable on application per specified security shall be at least twenty five percent of the issue price.
- Further, proviso to regulation 47(4) provides that in case of an offer for sale, the full issue price for each specified security shall be payable at the time of application

7.3.1 Time limit for filing Return of Allotment [Rule 12(1)]

Whenever a company having a share capital makes any allotment of its securities, the company shall, **within 30 days**, file with the ROC a return of allotment in **Form PAS - 3**, along with the specified fees.

7.3.2 Details to be attached with PAS - 3

- a) A **list of allottees** stating their names, address, occupation, and number of securities allotted and shall be **certified by the signatory** as being complete and correct as per records of the company [Sub-rule (2)]
- b) Where the **securities are issued for consideration other than cash**:
 - A **copy of the contract duly stamped**, pursuant to which the securities have been allotted [Sub-rule (3)].
 - If such contract for issue of securities for consideration other than cash is not reduced in writing, the company shall furnish complete particulars of contract stamped with the same stamp duty as would have been payable if the contract had been reduced in writing [Sub-rule (4)].
 - A **report of a registered valuer** in respect of valuation of the consideration [Sub-rule (5)].
- c) In case of **issue of bonus shares**, a **copy of the resolution passed in the GM** authorizing the issue of such shares [Sub-rule (6)].
- d) In case **shares have been issued in pursuance of section 62(1)(c)** (i.e., Preferential issue of shares) by a company **other than listed company whose equity shares or convertible preference shares are listed** on any recognized stock exchange,
 - the **valuation report** of registered valuer shall be attached along with PAS – 3 [Sub-rule (7)].

8. MISSTATEMENT IN PROSPECTUS

Sections 34 and 35 of the Companies Act, 2013 contains provisions relating to punishment in case of misstatement in prospectus.

A contract of shares in a company is a contract of **Uberrimae fides (Latin)**, which means '**utmost good faith**'. The legal doctrine of Uberrimae fides provides that all parties to contract must deal in good faith, making a full declaration of all material facts. The intending purchasers of shares are entitled to true and correct disclosures of all the facts in the prospectus.

Some of landmark judicial pronouncements –

Mislead through false Statement (prima-facie of facts) - Henderson v. Lacon

It was stated in the prospectus, 'the directors and their friends have subscribed a large portion of the capital and they now offer to the public the remaining shares.' Whereas, in actuality each of director had subscribed only 10 shares. It was held that such a statement is misleading one.

Misled by hiding truth through superficial statement - Rex v. Kysant

In the prospectus, it is stated that the company had regularly paid dividends, in actual, company has been incurring substantial losses during all those years. Company used to write back some of the past provisions to the credit of the profit and loss account. It was held that the prospectus did not disclose the true picture of the company.

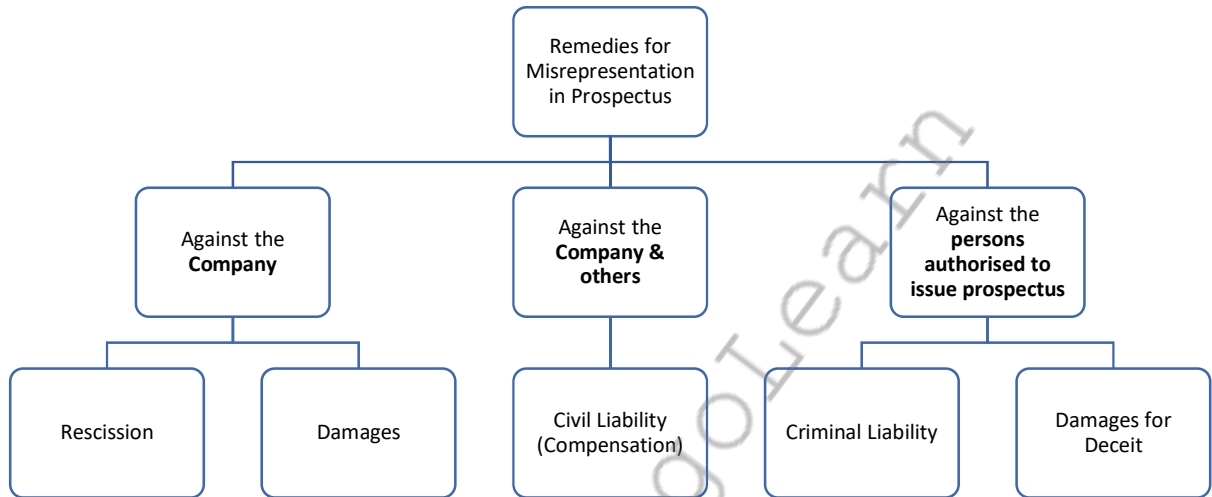
Misled through ambiguous statement - Smith v. Chadwick

The prospectus of a manufacturing company contain, 'the present value of turnover is £1million sterling per annum,' the statement was true only if production capacity is considered but untrue if it meant the present production level (capacity in utilisation). It was held that, such a statement

which director knew may bear multiple meaning out of which any can be false to their knowledge, considered to be furnishing of misleading statement

EFFECT OF MISLEADING PROSPECTUS – REMEDIES OF MISREPRESENTATION

The fear of heavy liability and criminal sanctions have controlled the directors' tendency of "using extravagant terms and flattering description". But if the prospectus contains a misleading or false statement or omits to disclose a material fact which amounts to misrepresentation, the aggrieved shareholder has the remedies. The law allows the following remedies for misrepresentation



RIGHT OF RESCISSION

When to seek rescission? A person who has purchased shares from the company on the basis of the prospectus containing untrue and misleading statement of material facts is entitled to apply to the court for the rescission of the contract, under the relevant provisions of the Indian Contract Act 1872.

Effect of rescission

The agreement to take up shares is voidable at the option of the subscriber to the shares, it will remain valid unless he actually rescinds it. If the court accepts his application for the repudiation of the contract, company will remove his name from the register of members and return his money with interest and other incidental cost.

Entitlement to compensation for any damages which he sustained through the nonfulfilment of the contract arises under section 75 of the Indian Contract Act 1872.

Exceptions – When right of rescission is not available?

- a. Right to rescind allotment of shares will not be available to the subsequent purchasers of shares from the market.
- b. A subscriber to the Memorandum of Association cannot also seek any relief, as the company cannot be considered to be in existence at the time when he appended his signatures to the Memorandum of Association. He cannot be said to have been influenced by any statement in the prospectus.

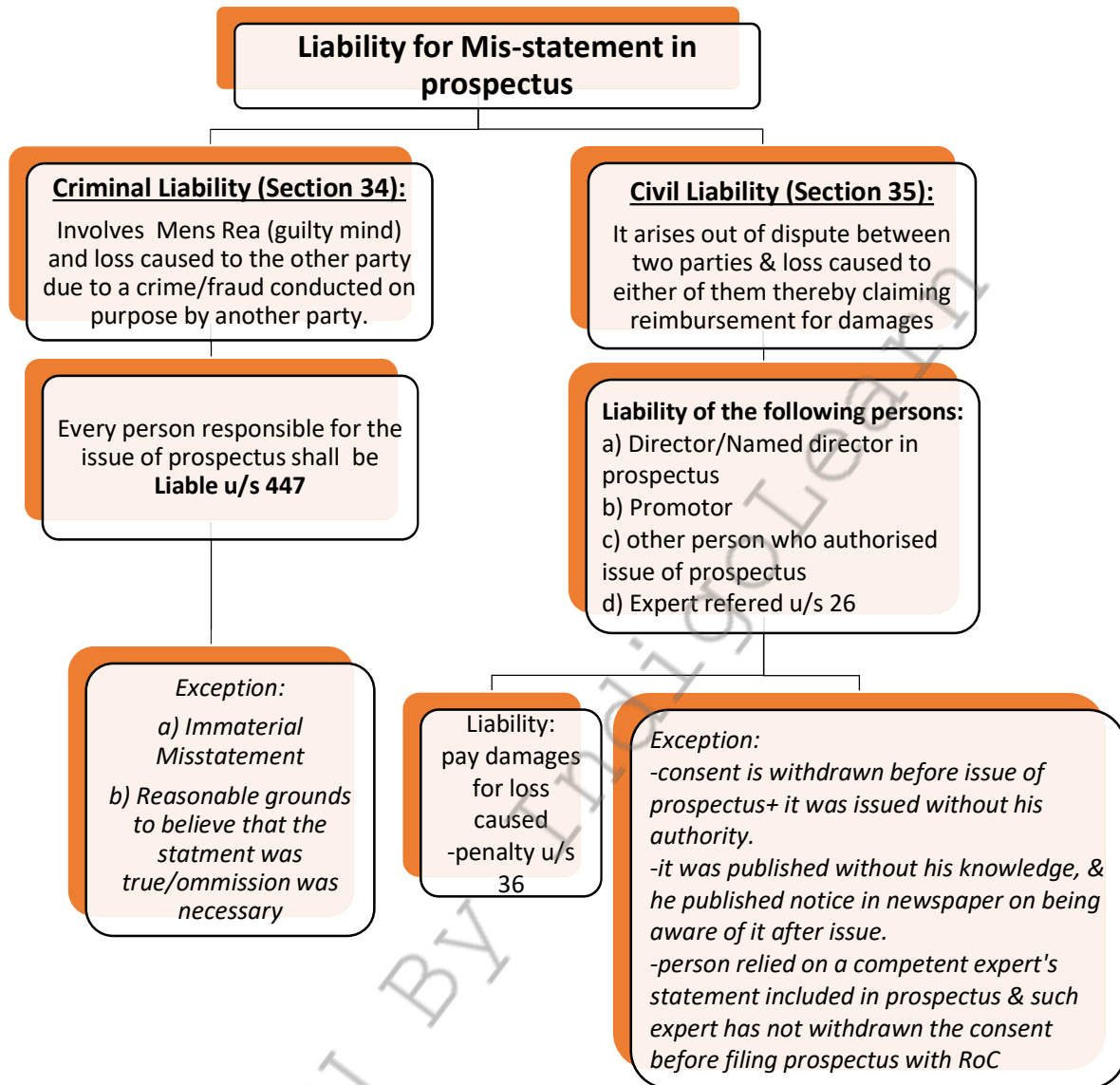
RIGHT OF ACTION FOR DAMAGES

When to evoke?

In the cases where mis- statement amounts to fraud, aggrieved investor also gets a right of action for damages against the company. This right is available even after the company has gone into liquidation.

Pre-requisite to claim for damages

- a. Misrepresentation (fraudulent) was there in the prospectus and it is of material fact
- b. Person is intended to act upon it
- c. Person suffered the damages as consequences of acting upon such fraudulent misrepresentation.



Note

- a. Loss from mis-statement is not essential, to held a person guilty under section 34.
- b. Liability for offence under section 34, is strict liability, hence it is immaterial where the omission is intentional or unintentional, in both case person will be held guilty under section 34 and liable for punishment under section 447 of this Act.

DAMAGES FOR DECEIT

When remedy of damages for deceit is available?

Persons responsible for the issue of prospectus can also be held liable in an action for deceit, under general law as provided by section 19 of the Indian Contract Act. This remedy shall be available even where the remedy by way of rescission as against the company is lost either through laches or negligence or even if the company goes into liquidation.

Prerequisite to claim damages for deceit is available

- a. There was a fraudulent mis-statement related to some existing material facts.
- b. He is original allottee and had seen the prospectus.
- c. He has been actually deceived.

Peek v. Gurney Gurney

issued a fraudulent prospectus on behalf of a company. No shares were purchased by Peek at that time. Several months afterwards, Peek purchased 2,000 shares of the company from the stock exchange. He brought an action against the directors for deceit (on the basis of prospectus). Court held, the directors were not liable as the shares were not purchased on the basis of prospectus.

9. PUNISHMENT FOR FRAUDULENTLY INDUCING PERSONS TO INVEST MONEY

- Any person who,
- **knowingly or recklessly,**
- makes any statement, promise or forecast,

Section 36 of the Companies Act, 2013 prescribes punishment for fraudulently inducing persons to invest money.

- 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,
 - any agreement for **acquiring, disposing of, subscribing for, or underwriting securities**, or
 - any agreement for the purpose of **securing any profit** to any parties from the yield of securities, or
 - any agreement for **obtaining credit facilities** from any bank/ financial institution shall be **liable u/s 447**.

10. ACTION BY AFFECTED PARTIES

Section 37 of the Companies Act, 2013 has paved way for class action.

Any person aggrieved u/s 34, 35, 36 may file a

- ✓ **Normal suit** or
- ✓ **Class action suit** [A group of parties having common grievance against another party, may file a single case together. In such case, representative of such group may attend the hearings and follow up with legal proceedings].

11. PUNISHMENT FOR PERSONATION FOR ACQUISITION, ETC., OF SECURITIES [SECTION 38]

The purpose of the section is to prevent allotment of shares in fictitious names.

Sub-section 1 provides, any person shall be liable for punishment under section 447, if:

- a. He makes or abets the making of an application in a fictitious name to a company for acquiring, or subscribing for, its securities; or
- b. He makes or abets the making of multiple applications in different names or 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 any securities to him or to any other person in a fictitious name.

Sub-section 2, provides that every company which issues a prospectus is required to reproduce prominently the provisions of the sub-section (1) in the prospectus and every form of application for securities.

Note:

A person who gets shares allotted in a fictitious name becomes liable as a shareholder. Thus, where a person carried on business under an assumed name and took shares in that name, his trustee in bankruptcy of the said person, could not avoid liability.

Sub-section 3 provides, where a person has been convicted under the section, the court may order disgorgement of any gain made by such person. The order may also include seizure and disposal of securities which may be found in his possession.

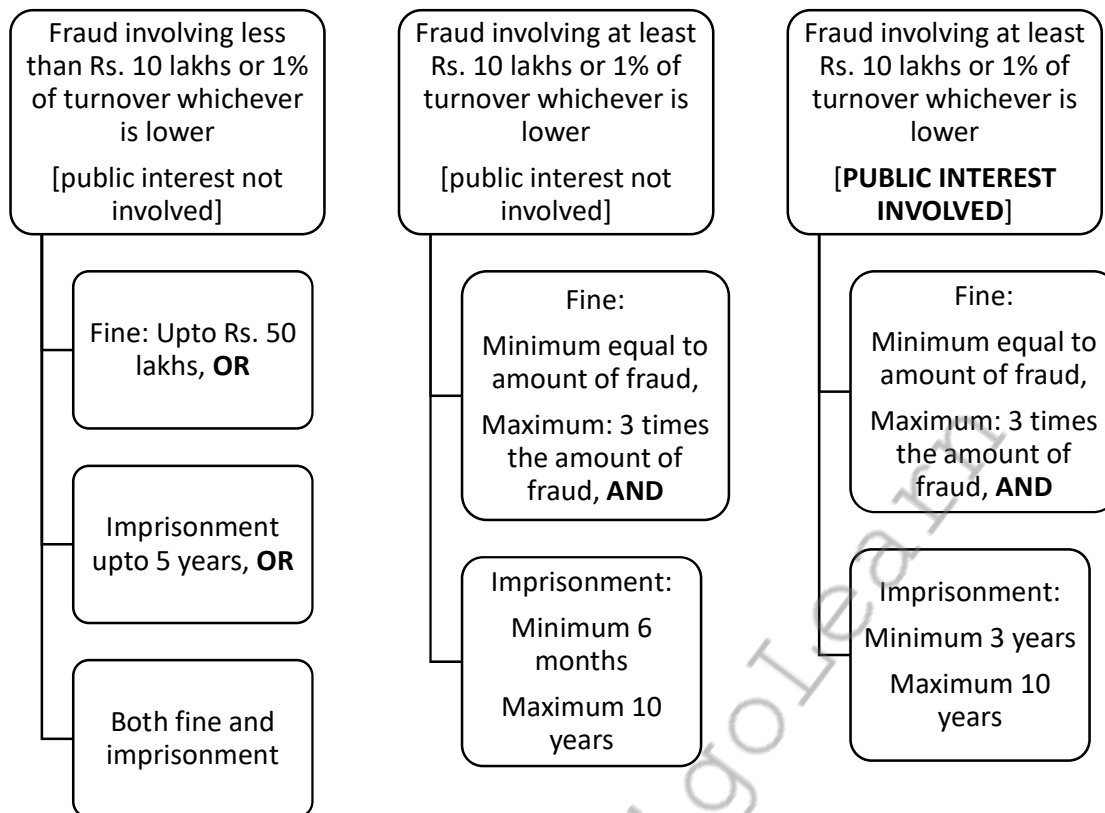
The amount received through disgorgement or disposal of securities under sub-section (3), is to be credited to the Investor Education and Protection Fund. [Sub section (4)]

12. PUNISHMENT FOR FRAUD

Section 447 of the Companies Act, 2013 describes the punishment for fraud.

Meaning of fraud: The term fraud in relation to affairs of a company or a body corporate **includes**

- any act, omission, concealment of fact, or abuse of position
- committed by any person, or any other person with the connivance (i.e., involvement) in any manner,
- with the 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.



GLOBAL DEPOSITORY RECEIPT [SECTION 41]

1. A global depository receipt is a general name for a depository receipt where a certificate issued by a depository bank, which purchases shares of foreign companies, creates a security on a local exchange backed by those shares.
2. GDR as per section 2(44) of this Act means any instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India & authorized by a company making an issue of such depository receipts.
3. Section 41 provides, company may issue depository receipts in any foreign country after passing a **special resolution** in its general meeting and subject to such conditions as may be prescribed in the Companies (Issue of Global Depository Receipts) Rules, 2014 (as further amended in 2020).

MANNER AND FORM OF DEPOSITORY RECEIPTS

1. The depository receipts can be issued by way of public offering or private placement or in any other manner prevalent in the concerned jurisdiction and may be listed or traded on the listing or trading platform in the concerned jurisdiction.
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 depository bank and against such shares, the depository receipts shall be issued by the overseas depository bank.

VOTING RIGHT

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.

13. PRIVATE PLACEMENT

Section 42 of the Companies Act, 2013 and **Rule 14** of Companies (PAS) Rules, 2014 provides the provisions which are applicable when shares are issued on private placement basis.

13.1 Meaning of private placement

Private placement means any **offer or invitation** to subscribe or issue of securities **to a select group of persons** by a company (other than by way of public offer) through private placement offer-cum-application.

13.2 Conditions for private placement

- a) Offer made only to a **select group of persons** identified by the **BOD**.
- b) Number of such identified persons shall not exceed **200 in a financial year**. [Rule 14(2) of PAS Rules, 2014]
- c) This limit **excludes**:
 - Employees offered securities under **ESOP** (Employee stock option plan)
 - Securities issued to **Qualified Institutional Buyers**
- d) Above limit of 200 Private placement in a FY **does not apply to**
 - **NBFC** registered with RBI
 - **Housing Finance Companies** registered with National Housing Bank if they comply with the regulations made by RBI/National Housing bank in respect of private placement.
- e) As per **Explanation** given in Rule, it is clarified that the restriction of 200 shall apply individually for each kind of security that is equity share, preference share or debenture.
- f) **Requirement of Special Resolution**: Prior approval of company by **special resolution in the general meeting** for each of the offers/ invitations in a FY is required. [Rule 14(1)]
 - In the explanatory statement annexed to the notice for shareholders' approval, following disclosure shall be made:-
 - ✓ **particulars of the offer** including date of passing of Board resolution;
 - ✓ **kinds of securities** offered and the price at which security is being offered;

- ✓ **basis** or justification **for the price** (including premium, if any) at which the offer or invitation is being made;
 - ✓ name and address of **valuer** who performed valuation;
 - ✓ **amount** which the company intends to raise by way of such securities;
 - ✓ **material terms** of raising such securities, proposed time schedule, purposes or objects of offer, contribution being made by the promoters or directors either as part of the offer or separately.
- **Other Provisos to Rule [14(1)]**
- ✓ Rule 14(1) shall not apply: In case of offer or invitation for non-convertible debentures, where the proposed amount to be raised < limit as specified in Sec 180(1)(c) - Relevant Board resolution under Section 179(3)(c) would be adequate
 - ✓ Previous **special resolution** only **once in a year** sufficient:
 - In case of offer or invitation for non-convertible debentures, where the proposed amount to be raised > limit as specified in Sec 180(1)(c)
 - In case of offer or invitation of any securities to qualified institutional buyers
 - ✓ No offer or invitation of any securities under this rule shall be made to a **body corporate** incorporated in, or a **national of, a country which shares a land border with India,**
 - unless such body corporate or the national, as the case may be,
 - have obtained Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 and
 - attached same with private placement offer cum application letter
- g) The **private placement offer-cum-application letter** shall be in **Form PAS-4** serially numbered and addressed specifically to the person to whom the offer is made. **[Rule 14(4)]**. It shall be issued only after resolution has been filed in the Registry. **[Rule 14(8)]**
- h) A **complete record** of private placement offers shall be maintained by the company in **Form PAS-5**. **[Rule 14(3)]**
- i) **No public advertisement** shall be made to inform the public about such an issue.

12.1 Subscribing to the Private Placement Issue

- Every identified person willing to subscribe to the private placement issue shall apply in the private placement and application issued.
- Along with the subscription money paid either by cheque, or DD, or other banking channel (**not by cash**).
- The monies raised **shall not be utilised until allotment is made and return of allotment is filed** with the ROC.
- The **payment shall be made from the bank account of the person subscribing** and the company shall keep the **record of the bank account** from where such payment for subscription has been received.
- In case of **joint holders**, the money shall be paid from the bank account of the person whose name appears first in the subscription.
- The monies received on an application shall be kept in a **separate bank account in a scheduled bank** and shall be used only for adjustment against allotment or for repayment of money where it is unable to allot the securities.

12.2 Limit on fresh offer

No fresh offer or invitation shall be made unless –

- ✓ the **allotment w.r.t any offer/ invitation made earlier have been completed, or**
- ✓ that offer or invitation has been **withdrawn or abandoned** by the company.

12.3 Time limit for allotment of securities

- Within **60 days** of receipt of application money.
- If the **company is unable** to allot the securities within that period, it shall **repay the money within 15 days** from the expiry of 60 days, and
- If the company **fails to repay the money** within that period, it shall be liable for **interest at 12% p.a.** from the expiry of 60 days.

12.4 Return of allotment

A return of allotment in **Form PAS-3** shall be filed by the company with the ROC **within 15 days** from the date of allotment including a complete list of allottees, their address, number of securities allotted, date of allotment, nominal value and amount paid on such securities, particulars of consideration, etc.

If the **company defaults** in filing the return of allotment within the above period, the **company, its promoters and directors shall be liable to a penalty of**

- **Rs. 1,000 for each default for each day** during which the default continues
- Subject to a **maximum of Rs. 25 lakhs.**

Note

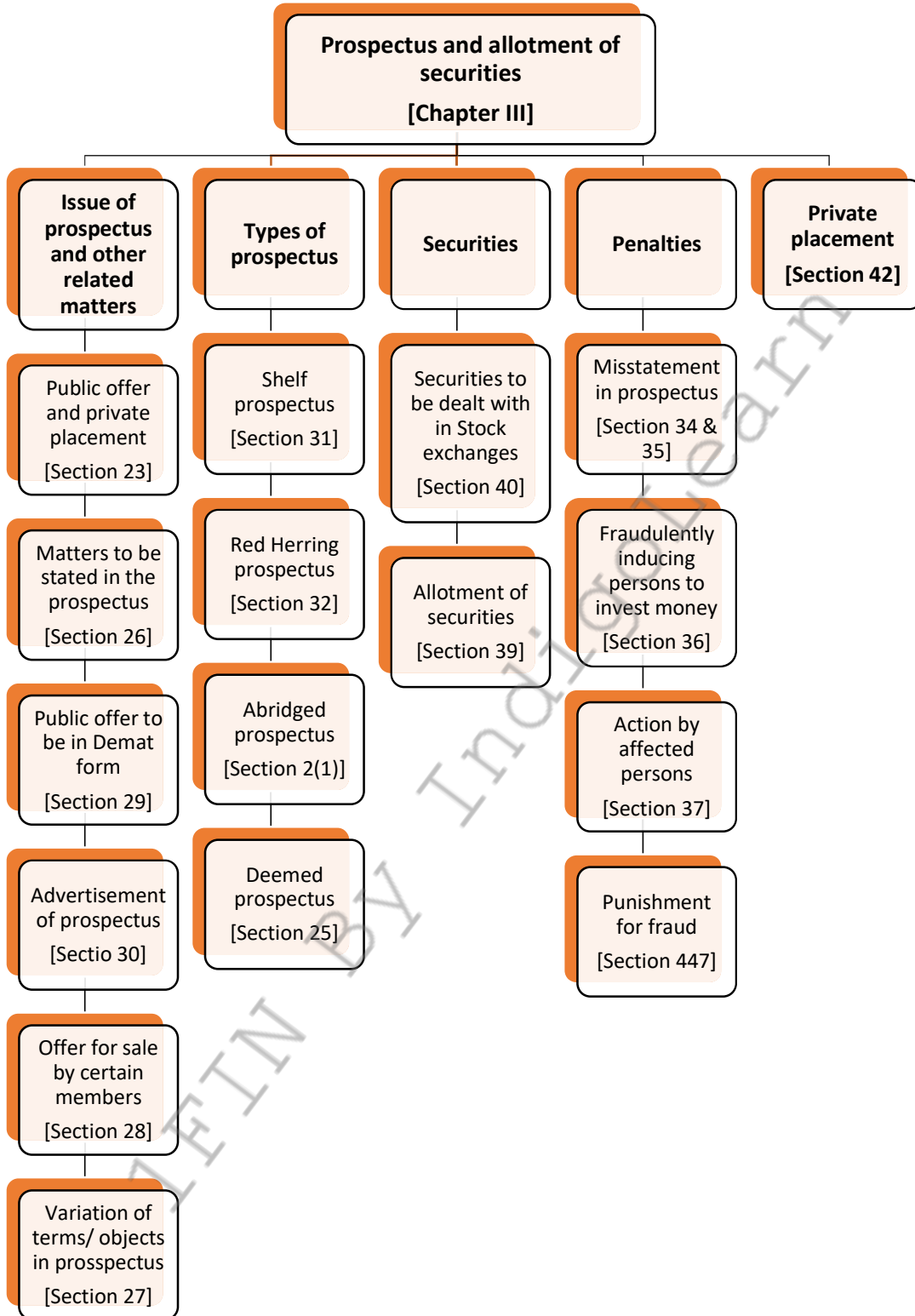
Proviso to Rule 4(1) states that when a company makes an offer or invitation to subscribe to securities, no offer or invitation of any securities shall be made to a body corporate incorporated in, or a national of, a country which shares a land border with India, unless such body corporate or the national, as the case may be, have obtained Government approval under the FEMA29 Rules, 2019 and attached the same with the private placement offer cum application letter.

This means that companies will now have to obtain government approval under the FEMA Rules before inviting subscription to securities or offering securities to any entity from a country that shares a land border with India i.e. China, Bhutan, Nepal, Pakistan, Bangladesh, and Myanmar

12.5 Punishment for contravention of private placement provisions

- The company, its promoters and directors shall be liable for **penalty**
- Which **may extend to:**
 - **amount raised** through the private placement **or**
 - **Rs. 2 crores, whichever is lower**
- And the **company shall also refund all monies with interest at 12%** to the subscribers **within 30 days** of order imposing the penalty.

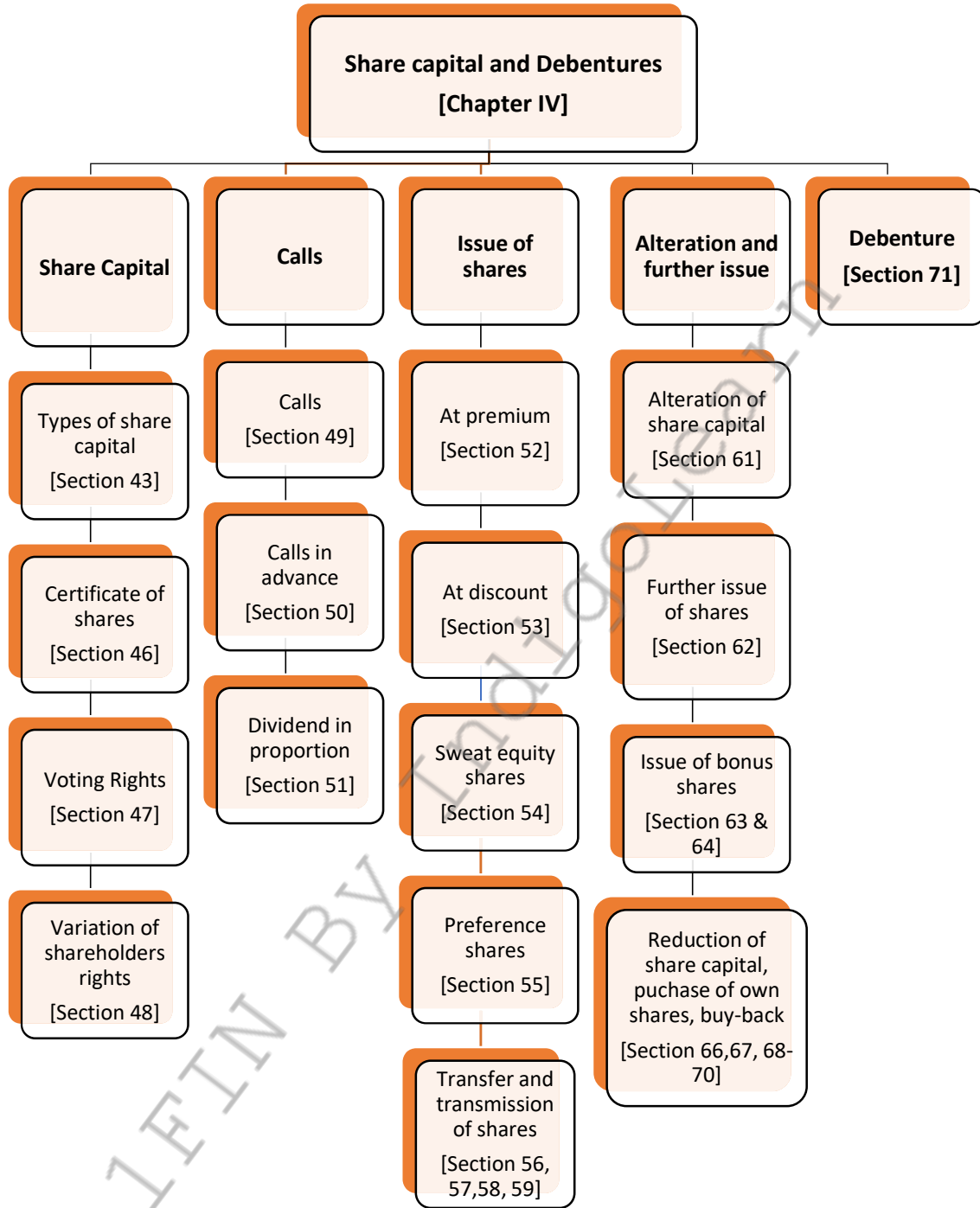
Any **offer made without complying this section** shall be '**deemed public offer**' and relevant provisions of this Act, SEBI Act, 1992 and SCRA 1956 shall apply.



SHARE CAPITAL AND DEBENTURES

Learning Outcomes –

- Know about the kinds of Share Capital
- Explain the basic requirements of issue of share certificates, voting rights and variation of shareholder's rights
- Explain calls on unpaid shares
- Know about the time period permitted for delivery of Certificate of securities
- Understand the application of Securities Premium Account
- Identify prohibition on issue of shares at a discount
- Understand the issue of Sweat Equity Shares, Issue and Redemption of Preference Shares and creation of Capital Redemption Reserve Account
- Know about the transfer and transmission of securities, refusal to register and appeal against refusal
- Explain the concepts relating to the alteration of share capital and notice to the Registrar thereof
- Understand the concept relating to further issue of Share capital
- Know about the issue of bonus shares, reduction of share capital, Buy-back of shares and applicable restrictions thereon
- Know about the issue of debentures and creation of Debenture Redemption Reserve Account
- Identify the punishments and penalties for various offences including impersonation



1. INTRODUCTION

Shares represent **ownership interest** in a company whereas **debentures** represent the **lenders' interest** in the company.

Shares and Debentures are financial instruments which help in arranging funds for the company. The legal provisions relating to Shares and Debentures are covered under **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.

2. SHARE CAPITAL- TYPES

Section 43 of the Companies Act, 2013 provides the provisions relating to the kinds of share capital.

2.1 Share

Section 2(84) defines 'share' as a **share in the share capital** of a company and **includes a stock**.

- ✓ The share capital of a company is divided into **small units having a certain face value**. Each such unit is called a share.
- ✓ The definition of 'share' states that the term **share includes 'stock'**.
- ✓ If a company undertakes to **aggregate fully paid-up shares of various members** as per their requests and merge those shares into one fund, then such fund is called 'stock'. Stock is not issued originally but it is obtained by conversion of fully paid-up shares.

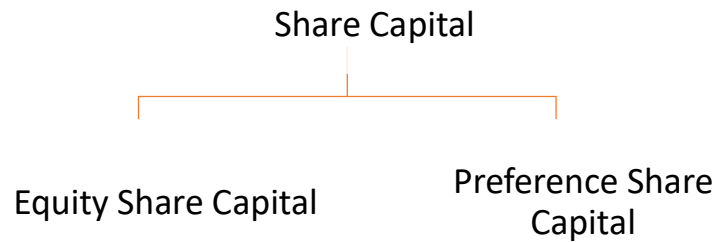
Case:

New London & Brazilian Bank v. Brockle Bank

A share is not a sum of money..., but is an interest measured in a sum of money, and made up of various rights, contained in the contract, including the right to a sum of money of a more or less amount.

Around two decade later, J. Farwell in landmark case of Borland's Trustee v Steel Brothers & Co Ltd² place his trust in the opinion stated above, and observe that share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place and of interest in the second, and also consists of a series of mutual covenants entered into by all the shareholders inter se in accordance with the provisions of the Companies Act and the Articles of Association.

2.2 Two kinds of Share Capital



Section 43 states that, 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 [prescribed in Rule 4 of Companies (Share Capital & Debentures) Rules, 2014]; and
- b) Preference share capital.

2.3 Equity Share Capital

Equity share capital means all share capital which is **not preference share capital**.

2.4 Preference Share Capital

Preference share capital 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, and**
- b) **Repayment** in case of a winding up or repayment of capital.

2.5 Equity Shares with Differential Rights

Rule 4 of the Companies (Share Capital & Debentures) Rules, 2014 contains provisions which need to be followed while issuing equity shares with differential voting rights.

2.5.1 Conditions for issue of equity shares with differential rights

- (i) Authorised by the **AOA**,
- (ii) Authorised by an **Ordinary Resolution** passed at a general meeting of the shareholders, In case of listed company, such issue shall be approved by the shareholders through postal ballot.
- (iii) The **voting power** of shares with differential rights **shall not exceed 74% of the total voting power**, at any point of time,
- (iv) Company has **not defaulted** in filing the financial statements and annual returns **for immediately preceding 3 FYs**.
- (v) Company has **no subsisting default** in
 - payment of a declared dividend to its shareholders or
 - repayment of its matured deposits or

→ redemption of its preference shares or debentures,

(vi) In the **preceding 5 FYs**, company has **not defaulted in**


- payment of the dividend on preference shares or
- repayment of any term loan from a public financial institution/Scheduled bank or interest payable thereon or
- dues w.r.t statutory payments relating to employees to any authority or
- crediting the amount in Investor Education and Protection Fund,

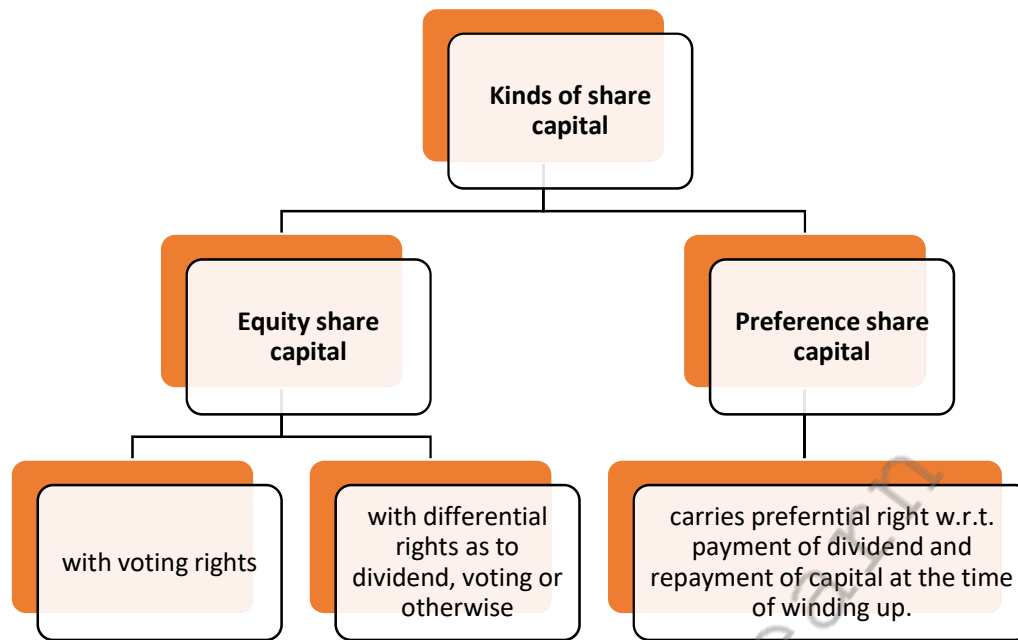
(vii) Company has **not been penalized by Court/Tribunal** during the **last 3 years** of any offence under the

- RBI Act, 1934
- SEBI Act, 1992
- SCRA, 1956
- FEMA, 1999 or
- Any other Special Act, under which such company is regulated.

2.5.2 Other Provisions for issue of equity shares with differential rights

- ✓ **Rule 4(2)** – The **explanatory statement to be annexed** to the notice of the general meeting or of a postal ballot shall contain various matters like particulars of the issue including its size, details of differential rights etc.
- ✓ **Rule 4(3)** – Company **shall not convert its existing equity share capital** with voting rights into equity share capital carrying differential voting rights.
- ✓ **Rule 4(4)** – The BOD shall, *inter-alia*, **disclose the specified particulars in the Board's Report** for the F.Y. in which issue of equity shares with differential rights was completed.
- ✓ **Rule 4(5)** – Holders of equity shares with differential rights shall **enjoy all other rights such as bonus shares, right shares, etc.**, which the holders of equity shares are entitled to.
- ✓ **Rule 4(6)** – The **Register of Members** shall contain all the relevant particulars of the shares issued with differential voting rights.

 **Inter-alia** is a Latin phrase which means "among other things".



Section 43 does not apply to:

- a) **Private company** where the MOA or AOA so provides, provided such company has not defaulted in filing its FS u/s 137 or Annual Return u/s 92 with the ROC.
- b) **Specified IFSC Company** where MOA or AOA so provides.

3. CERTIFICATE OF SHARES

Section 46 of the Companies Act, 2013 contain provisions which regulate the certificate of shares.

A certificate issued under the common seal, if any, of the company or signed by two directors or by a director and the CS, if any, specifying the shares held by a person, shall be **prima facie evidence of the title** of the person to such shares.

A share certificate must be **distinctively numbered**.

Where shares are held in depository form, **the record of the depository** shall be the prima facie evidence of the interest of the beneficial owner.

Note:

1. Since *w.e.f. 29-05-2015* though Companies Amendment Act 2015, requirement to have common seal is optional for companies, hence physical share certificate issued under sign of two director or of one director along with company secretary is valid.
2. If the composition of the Board permits of it, at least one of the aforesaid two directors shall be a person other than the managing or whole-time director
3. A director shall be deemed to have signed the share certificate if his signature is printed thereon

as a facsimile signature by means of any machine, equipment or other mechanical means such as engraving in metal or lithography, or digitally signed, but not by means of a rubber stamp, provided that the director shall be personally responsible for permitting the affixation of his signature thus and the safe custody of any machine, equipment or other material used for the purpose.

3.1 Duplicate Certificate

3.1.1 Circumstance for issue of duplicate certificate

Original certificate -

- Is proved to have been **lost or destroyed**, or
- Has been **defaced, mutilated, or torn and is surrendered** to the company.

ISSUE OF RENEWED/DUPLICATE SHARE CERTIFICATE [SUB-SECTION 2 READ WITH RULE 6 OF THE COMPANIES (SHARES AND DEBENTURES) RULES, 2014]

Issue of renewed certificate

A case wherein originally issued share certificate has been defaced, mutilated or torn, a renewed share certificate in replacement shall be issued, in lieu of surrender of such original certificate, to the company.

Note:

1. A company may replace all the existing certificates by new certificates upon sub-division or consolidation of shares or merger or demerger or any reconstitution without requiring old certificates to be surrendered
2. On renewed certificate it shall be stated that it is "Issued in lieu of share certificate No sub-divided/replaced/on consolidation"
3. Company may charge such a fee as board may think fit, but not exceeding 50 per certificate; and no fee shall be payable pursuant to scheme of arrangement sanctioned by the High Court or Central Government.

Issue of duplicate certificate

A case wherein share certificate originally issued has been lost or destroyed, a share certificate in duplicate may be issued if board is consented for the same based upon evidences produced.

Record of renewed and duplicate certificate to be maintained

Particulars of every renewed and duplicate share certificates maintained in Form SH 2 with cross reference to register of members, in shape of register.

Such register shall be kept at **registered officer or any other place where register of members in custody** of company secretary or such other person as may be authorised by the Board.

All entries made in such register shall be **authenticated by the company secretary** or such other person as may be authorised by the Board.

MANNER OF ISSUE OF CERTIFICATES/DUPLICATE CERTIFICATES

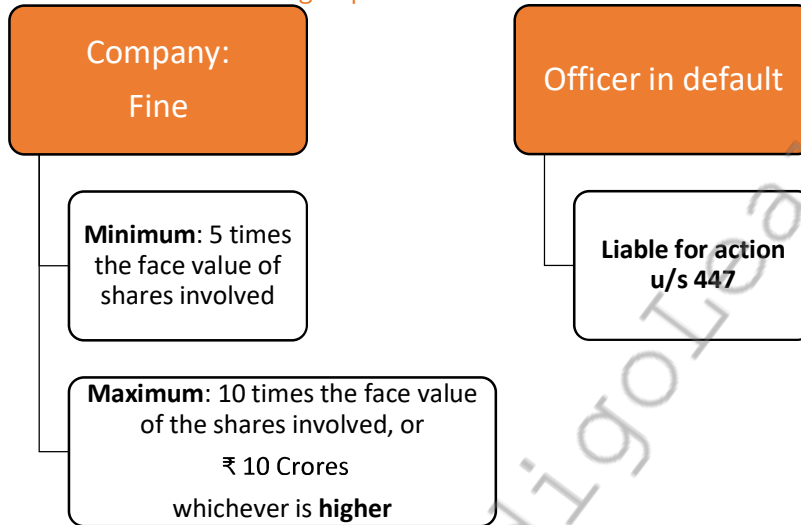
Sub-section 3 overrule the articles of a company, and say the issue of a certificate of shares or the duplicate thereof, the particulars to be entered in the register of members

and other matters shall be in manner and form as prescribed in rule 5, 6, and 7 of the Companies (Shares and Debentures) Rules, 2014.

Rule 5 of the *Companies (Shares and Debentures) Rules, 2014* applies, where shares are not in demat form

Share certificate is in vogue in case of shares which are **held in the physical form**, not in the demat form (under the depository mode). Hence provisions contained in *rule 5* of the Companies (Shares and Debentures) Rules, 2014 pertaining to share certificate applicable where shares are not in demat form.

3.1.2 Punishment for issuing duplicate certificate of shares with intent to defraud



3.2 Dematerialisation of shares

- ✓ **Listed shares** are required to be held in electronic form (i.e., dematerialised form)
- ✓ **Rule 9A** of the Companies (Prospectus and Allotment of Securities) Rules, 2014, requires every **unlisted public company** to issue the securities in dematerialised form and facilitate the dematerialisation of all its existing securities.



At present, there are two depositories in India, i.e.,

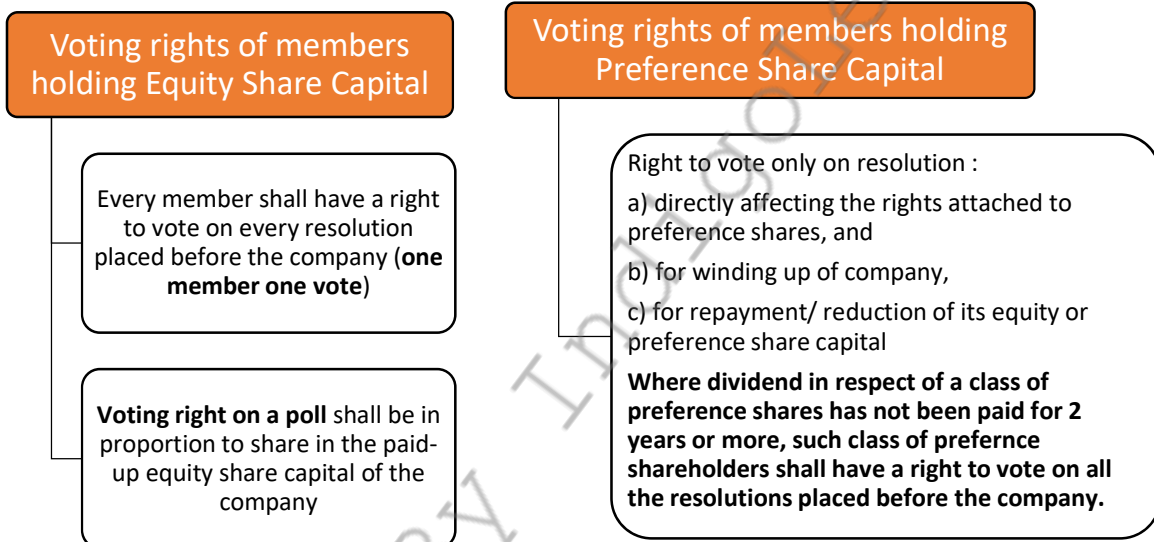
- National Securities Depository Ltd. (**NSDL**), and
- Central Securities Depository Ltd. (**CDSL**)

Rule 9A shall not apply to an unlisted public company which is:

- a) A Nidhi
- b) A government company
- c) A wholly owned subsidiary

[Rule 9A has been covered in detail in Chapter 3 'Prospectus and allotment of securities']

Section 47 of the Companies Act, 2013 governs the voting rights of the members of a company.



The **proportion of the voting rights of equity shareholders to the voting rights of 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.

Section 47 shall not apply to a private company, where MOA or AOA of the private company so provides and which has not defaulted in filing its financial statements or annual return with the Registrar.

5. VARIATION OF SHAREHOLDERS' RIGHTS

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.

5.1 Consent for variation

Such variation requires the consent –

- **In writing** of the holders of **not less than 3/4th** of the issued shares of that class, *OR*
- By means of a **SR** passed at a separate meeting of the holders of shares of that class.
- If the variation affects the rights of any other class of shareholders, the consent of 3/4th of

Section 48 of the Companies Act, 2013 deals with the variation of shareholder's rights.

such other class of shareholders is also to be obtained.

5.2 Conditions for variation in rights of shareholders

- Provision w.r.t such variation must be **contained in the MOA/AOA**, *OR*
- In the absence of such provision in the MOA/AOA, variation should **not be prohibited by the terms of issue of the shares of that class**.

5.3 No consent given for variation

- Where holders of **not less than 10% of the issued shares of a class** did not consent to the variation, they may **apply to the Tribunal** to have the variation cancelled.
- The application shall be made **within 21 days** after the date on which consent was given or resolution was passed.
- The **application may be made on behalf of all shareholders** entitled to make an application **by any one or more person** as they may appoint in writing for this purpose
- Where such application has been made, the **variation shall not have effect unless and until it is confirmed by the Tribunal**.
- The decision of the Tribunal shall be binding on the shareholders.
- **Within 30 days** of order of the Tribunal, company shall **file a copy thereof with the Registrar**.

6. CALLS, CALLS-IN-ADVANCE AND MATTERS INCIDENTAL THERETO

Section 49, 50 & 51 of the Companies Act, 2013 deals with making calls in respect of partly paid-up shares, call-in-advance and all the matters incidental thereto.

When the shares are partly paid up, the company issuing them can make calls asking the shareholders to pay the amount 'called up' in respect of such partly paid-up shares.

6.1 Calls [Section 49]

- ✓ Calls have to be **uniformly made**.

- ✓ There should be **no/ differentiation** for a given class of shareholders.
- ✓ However, where **different amounts are paid for shares of the same nominal value** by the shareholders, such shares shall be deemed to be different class of shares (i.e., this section shall not be applicable).

6.2 Calls-in-advance [Section 50]

- ✓ Company may accept from a 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., calls in advance)
- ✓ However, this should be **authorised by the AOA.**
- ✓ However, such **member shall not have voting right in respect such advance amount** paid by him till the amount is duly called up by the company.



Advance payment will not lead to increased voting rights. However, **delayed payment of call money could lead to decreased voting rights.**

6.3 Dividend in proportion [Section 51]

The company is permitted to pay dividends in proportion **to the amount paid-up on each share**, if *authorised by the AOA*.

7. ISSUE OF SHARES AT PREMIUM

Section 52 of the Companies Act, 2013 deals with the provisions relating to issue of shares at a premium and the application of such premium.

7.1 Premium

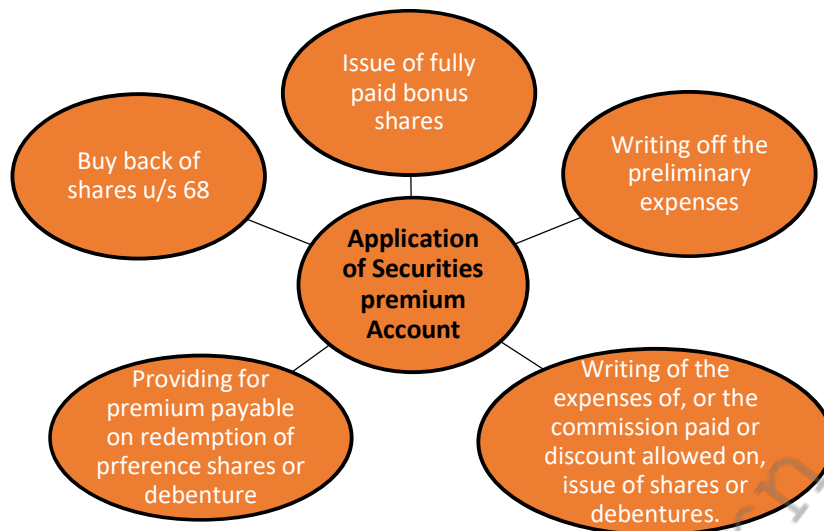
When a company **issues shares at a price higher than their face value**, the shares are said to be **issued at premium**, and the differential amount is termed as **premium**.

7.2 Application of Premiums

The aggregate amount of premium received shall be transferred

Example: A share having face value of ₹10 is issued at ₹14. The amount over and above ₹ 10 is called premium (i.e., ₹4).

to an account called "**Securities premium Account**".



The Securities premium Account may be applied by such class of companies as may be prescribed and whose FS comply with the accounting standards u/s 133 for such class of companies, **for the following purposes:**

- For **paying up unissued equity shares** of the company to be issued to members of the company **as fully paid bonus shares**, or
- For **writing off expenses** of or commission paid or discount allowed on any issue of equity shares of the company, or
- For the **purchase of its own shares** or other securities u/s 68.

No such cos. have been prescribed so far.

Transfer of premium to Securities Premium Account [Sub-section1]

Sub-section 1 lay-down following principles that shall be observed in regards to premium;

- Premium may be received in cash or in kind.
- The amount of premium so received, whether in cash or kind, shall be carried to a separate account to be known as the Securities Premium Account.
- The amount to the credit of share premium account has to be maintained with the same sanctity as paid-up share capital
- It can be reduced only in the manner of paid-up share capital can be reduced under this act.

8. ISSUE OF SHARES AT DISCOUNT

Section 53 of the Companies Act, 2013 prohibits the issue of shares at discount.

8.1 Discount

Where the **issue price is lower than the face value** of shares, such issue of shares is regarded as being at discount and the differential amount is known as **discount**.

Example: A share having face value of ₹5 is issued at a lower price of ₹4. The differential amount of ₹1 is known as discount.

8.2 Prohibition on issue of shares at discount

- ✓ **A company shall not issue shares at a discount, except as provided in Section 54** (i.e., Sweat equity Shares).
- ✓ Any share issued by a company at a discount shall be **void**.
- ✓ **Exception:** A company may issue shares at a discount to its **creditors** when its debt is **converted into shares** under any *statutory resolution plan/ debt restructuring scheme as per RBI*.

8.3 Punishment for default

- 1) **Fine:** Company and every officer in default shall be liable to penalty which may extend to
 - Amount raised through issue of shares at discount, or
 - ₹ 5 lakhs

} Whichever is less
- 2) Company shall also **refund all monies received with interest at 12% p.a.** from the date of issue of such shares to the persons to whom such shares have been issued.

Restrictions mentioned in Section 52 & 53 apply only in respect of issue of shares but not to the issue of debt related products like bonds/ debentures.

Section 54 of the Companies Act, 2013 mention the provisions to be adhered to by a company issuing sweat equity shares

9. ISSUE OF SWEAT EQUITY SHARES

9.1 Sweat Equity Shares [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.

9.2 Conditions for issue of sweat equity shares

- ✓ Authorised by a **SR passed by the company**.
- ✓ The resolution shall **specify**:
 - number of shares,
 - current market price,
 - consideration, if any,
 - class or classes of directors or employees to whom such equity shares are to be issued.
- ✓ **Listed companies** shall follow the regulations made by SEBI in this behalf.
- ✓ **Unlisted company** shall comply with the provisions of Rule 8 of the Companies (Share and Debentures) Rules, 2014.



- Employee means –
- a) A **permanent employee** working in/outside India,
 - b) A **director** of the company, or
 - c) An **employee or director** as defined in sub-clauses (a) or (b) above **in a subsidiary**, in/outside India, **or of a holding company** of the company [Rule 8]

9.3 Important provisions contained in Rule 8 of the Companies (Share and Debentures) Rules, 2014

- ✓ The **SR** authorising the issue of Sweat Equity shares shall be **valid only for 12 months** from the date of passing [Rule 8 (3)].

Limit on issue of Sweat equity share [Rule 8(4)]	
<p>Maximum issue of sweat equity shares shall be -</p> <ul style="list-style-type: none"> ○ 15% of existing paid-up share capital in a year OR ○ Shares of issue value of Rs. 5 crores, whichever is higher 	<p>The issuance of sweat equity shares in a company shall not exceed 25% of paid-up capital of the company <i>at any time</i>.</p> <p>• Exception: A start-up company may issue sweat equity shares not exceeding 50% of its paid-up capital up to 10 years.</p>

- ✓ **Lock-in-period:** Sweat equity shares issued shall be non-transferable for **3 years** from the date of allotment [Rule 8(5)].
- ✓ **Valuation of Sweat Equity shares:** Shall be at a **price determined by a registered valuer as the fair price** giving justification for such valuation [Rule 8(6)].
- ✓ The **valuation of intellectual property rights or of know how or value additions for which sweat equity shares are to be issued** shall be carried out by a registered valuer. A proper report giving justification for such valuation shall also be given to the BOD by such valuer [Rule 8(7)].
- ✓ **Treatment of non-cash consideration:** Where the sweat equity shares are issued for non-cash consideration, the treatment of such non-cash consideration shall be as follows:
 - **Where non-cash consideration is a depreciable asset** – presented in the Balance sheet in accordance with the Accounting standards.
 - **Other items** – expensed as provided in the Accounting standards. [Rule 8(9)].
- ✓ **Disclosure in the Director's Report:** The BOD shall, inter-alia, disclose in the Director's Report for the year in which such shares are issued, the **specified details of issue of sweat equity shares** [Rule 8(13)].

- ✓ **Maintenance of Register:** Company shall maintain a register of sweat equity shares in **Form SH 3** at the registered office of the company or such other place as BOD may decide in this behalf [Rule 8(14)].

Value additions means actual or anticipated **economic benefits** derived or to be derived by company from an expert or a professional for providing **know-how** or making available rights **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.

9.4 Sweat Equity shares to rank *pari passu* [Sec 54(2)]

- ✓ The rights, limitations, restrictions, and provisions as are for the time being applicable to equity shares shall be applicable to the sweat equity shares.
- ✓ The holders of sweat equity shares shall be ranked *pari passu* **with other equity shareholders.**

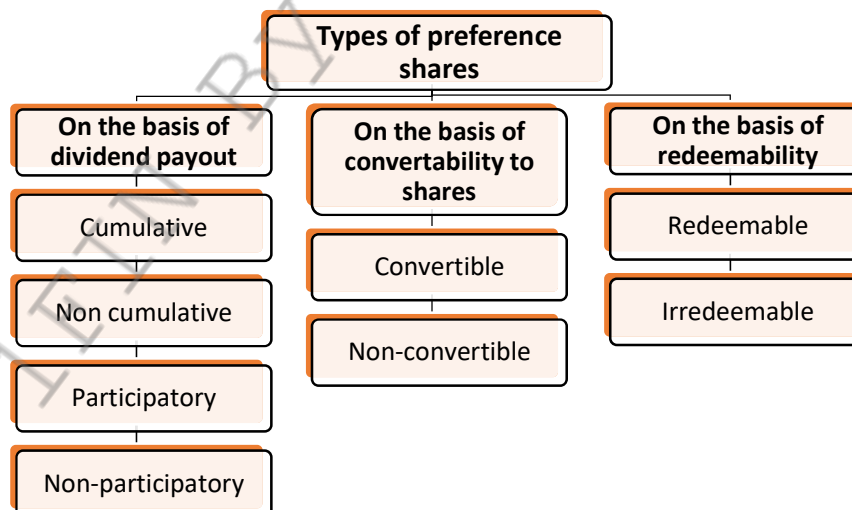
10. PREFERENCE SHARES - ISSUE AND REDEMPTION



Expression **pari**

Section 55 of the Companies Act, 2013 along with **Rule 9** of the Companies (Share Capital and Debentures) Rules, 2014. contains the provisions for regulation of issue & redemption of preference shares.

10.1 Types of Preference shares



A Company limited by shares shall issue only Redeemable Preference Shares.

10.2 Conditions for issuing preference shares

- (i) Authorised by passing a **SR in the general meeting** of the company [Rule 9(1)].
- (ii) Company should **not have subsisting default in the redemption of preference shares** issued earlier or in payment of dividend thereof [Rule 9(1)].
- (iii) **Register of members** shall contain the particulars in respect of such preference shareholders [Rule 9(4)].

10.3 Redemption of Preference Shares

Only fully paid preference shares are to be redeemed.

10.3.1 Time period within which Preference shares are to be redeemed

- ✓ 20 years, or
- ✓ Time specified in AOA

} whichever is less

Exception: For **Infrastructure projects** as specified in Schedule VI, preference shares can be issued for a period **exceeding 20 years but not exceeding 30 years** *subject to the redemption of 10% of such preference shares beginning in 21st year onwards or earlier*, on a proportionate basis, at the option of such preference shareholders.

10.3.2 Source of redemption of Preference shares

Preference shares shall be redeemed only out of

- **profits** of the company which would otherwise be available for dividend, or
- **proceeds of fresh issue** of shares made for the purpose of such redemption.

10.3.3 Transfer to CRR Account

Where the preference shares are proposed to be redeemed out of profits of the company,

- out of such profits, a **sum equal to the nominal amount** of the shares to be redeemed, shall be **transferred to** a reserve called the **Capital Redemption Reserve (CRR) Account**.

CRR may be applied for **issue of fully paid bonus shares [Sec 55(4)]**.

There is no need to transfer to the CRR account any amount paid towards premium.

10.3.4 Payment of Premium on redemption

In case of such class of companies, as may be prescribed and whose FS comply with the Accounting standards prescribed u/s 133,

- Premium, if any, payable on redemption shall be provided for out of the profits of the company, before the shares are redeemed.

In case of redemption of preference shares issued on or before the commencement of this Act,

- premium shall be provided for out of the profits of the company or out of the company's security premium account, before such shares are redeemed.

In a case not meeting above criteria,

- Premium 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.

10.3.5 Deemed Redemption

Where a company is not in a position to redeem any preference shares or to pay dividend on such shares (*called unredeemed preference shares*),

- It may **issue further redeemable preference shares** equal to the amount due, including dividend thereon and
- On such issue of further redeemable preference shares, such *unredeemed preference shares* shall be deemed to have been redeemed.
- **Conditions:**
 - **Consent of holders of 3/4th in value** of such preference shares
 - **Approval of Tribunal.**
 - Tribunal may pass order to **redeem shares of dissenting shareholders.**

11. TRANSFER AND TRANSMISSION OF SECURITIES

Section 56 of the Companies Act, 2013 deals with the transfer and transmission of securities or interest of a member of the company.

11.1 Transfer of Securities

- ✓ A company shall not register the transfer of securities of the company, unless a **proper instrument of transfer in Form SH-4**,
 - duly stamped, dated, and executed by or on behalf of the **transferor and the transferee**,
 - specifying the name, address, and occupation of the transferee
 - has been **delivered to the company by the transferor or the transferee** within **60 days** from the date of execution,
 - along with the certificate of securities or the letter of allotment of securities.
- ✓ **Exception:** Where the transfer is between persons both of whose names are entered as holders of beneficial interest in the records of a depository.

✓ **Where the instrument is lost or not delivered within prescribed time:**

The company may register the transfer on such terms as to indemnity as the Board may think fit.



Instrument of transfer in Form SH-4, dated and stamped	Signed by transferor and transferee	Name, address and occupation of transferee	Delivered within 60 days	With share certificate/ letter of allotment	Lost instrument/ delayed delivery- give indemnity
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11.2 Transmission of Shares

Transmission of shares shall take place in following cases:

- a) **Death** → Transmitted to Legal Representative
- b) **Insolvency** → Transmitted to his Official Receiver
- c) **Lunacy** → Transmitted to the administrator appointed by the Court of original shareholder

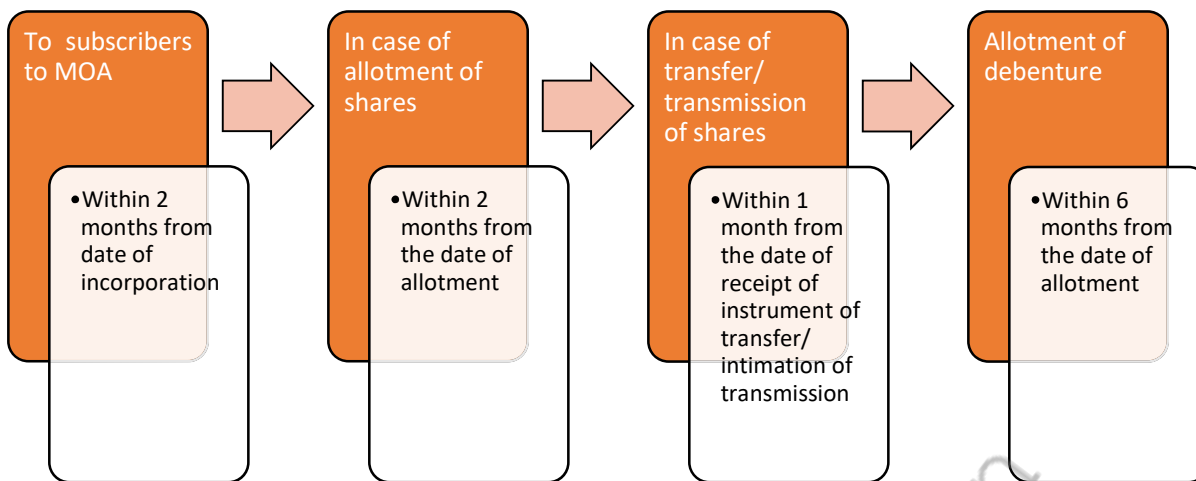
A company shall **register an intimation of transmission of any right to securities**, received by it, from any person to whom such right has been transmitted.

11.3 Transfer of partly paid shares

Where an **application** for transfer of partly paid shares is **made by the transferor**,

- the company shall give the **notice** of such application in **Form SH-5 to the transferee** [prescribed by **Rule 11 (3)** of the Companies (Share Capital and Debentures) Rules, 2014], *and*
- the **transferee gives no objection** to the transfer **within 2 weeks** from the date of receipt of notice, *and*
- the **company shall register** such transfer of partly paid shares

11.4 Time period for delivery of certificates



11.5 Transfer of securities of a deceased shareholder

The transfer of any securities or interest of a deceased person in a company by the **legal representative** shall be valid as if he had been the holder at the time of execution of the instrument of transfer.

11.6 Punishment for default

Company	Officer of the company in default	Depository
Penalty of ₹50,000	Penalty of ₹50,000	Where any depository or depository participant has transferred shares with an intention to defraud a person, it shall be liable u/s 447 .

11.7 Forged transfer

Forged transfer takes place when a company effects the transfer of shares on the basis of an instrument of transfer containing forged signatures of the transferor.

A forged transfer is a 'nullity' and is not legally binding.

However, if the transferee of the 'forged transfer' transfers the shares to another buyer who does not know about the forgery and the company also registers the transfer in the name of the new buyer and endorses the share certificates,

- The company cannot deny the ownership rights of the new genuine buyer but
- It cannot also deny the ownership rights of the **original shareholder** as forged transfer is *void-ab-initio*, and therefore the company has to **restore his name**.
- Hence, the company shall **compensate the new genuine buyer** who exercised good faith in purchasing the shares.
- The company shall **get itself indemnified by the first transferee** who used the forged instrument to get the shares transferred to his name.

12. PUNISHMENT FOR PERSONATION OF SHAREHOLDER

Section 57 of the Companies Act, 2013 contains provisions relating to punishment for personation of a shareholder.

If any person deceitfully personates –

- a) As the owner of any security or interest in a company, or
- b) As an owner of any share warrant or coupon issued in pursuance of the Companies Act, 2013

Such person shall be punishable with:

- ✓ **Imprisonment** – not less than **1 year** but may extend to **3 years**, and
- ✓ **Fine** – not less than **₹1 lakhs** but which may extend to **₹5 lakhs**.

13. REFUSAL OF REGISTRATION AND APPEAL AGAINST REFUSAL

13.1 Private Company refuses to register transfer/ transmission of securities

Section 58 of the Companies Act, 2013 contains procedures to be followed by a company while refusing to register the transfer of securities and the process for filing appeal against such refusal.

- The **company shall send a notice of refusal** to the transferor and the transferee or to the person giving intimation of such transfer, **within 30 days** from the date on which the instrument of transfer, or the intimation of such transmission, was delivered to the company.
- The **transferee may appeal** to the Tribunal against the refusal
 - **Within 30 days** of receipt of notice of refusal, or
 - **Where notice of refusal is not sent** by the company, **within 60 days** from the date on which the instrument of transfer/ intimation of transmission was delivered to the company.

13.2 Public Company refuses to register transfer/ transmission of securities without sufficient cause

The securities or other interest of any member in a public company are freely transferrable.

If a public company refuses **without sufficient cause** to register transfer/ transmission of securities within a period of 30 days from the date on which the instrument of transfer/ intimation of transmission was delivered to the company, the **transferee may appeal to the Tribunal –**

- **Within 60 days** of receipt of notice of refusal, or
- **Where notice of refusal is not sent** by the company, **within 90 days** from the date on which the instrument of transfer/ intimation of transmission was delivered to the company.

13.3 Order of the Tribunal

Tribunal shall **either dismiss** the appeal **or order –**

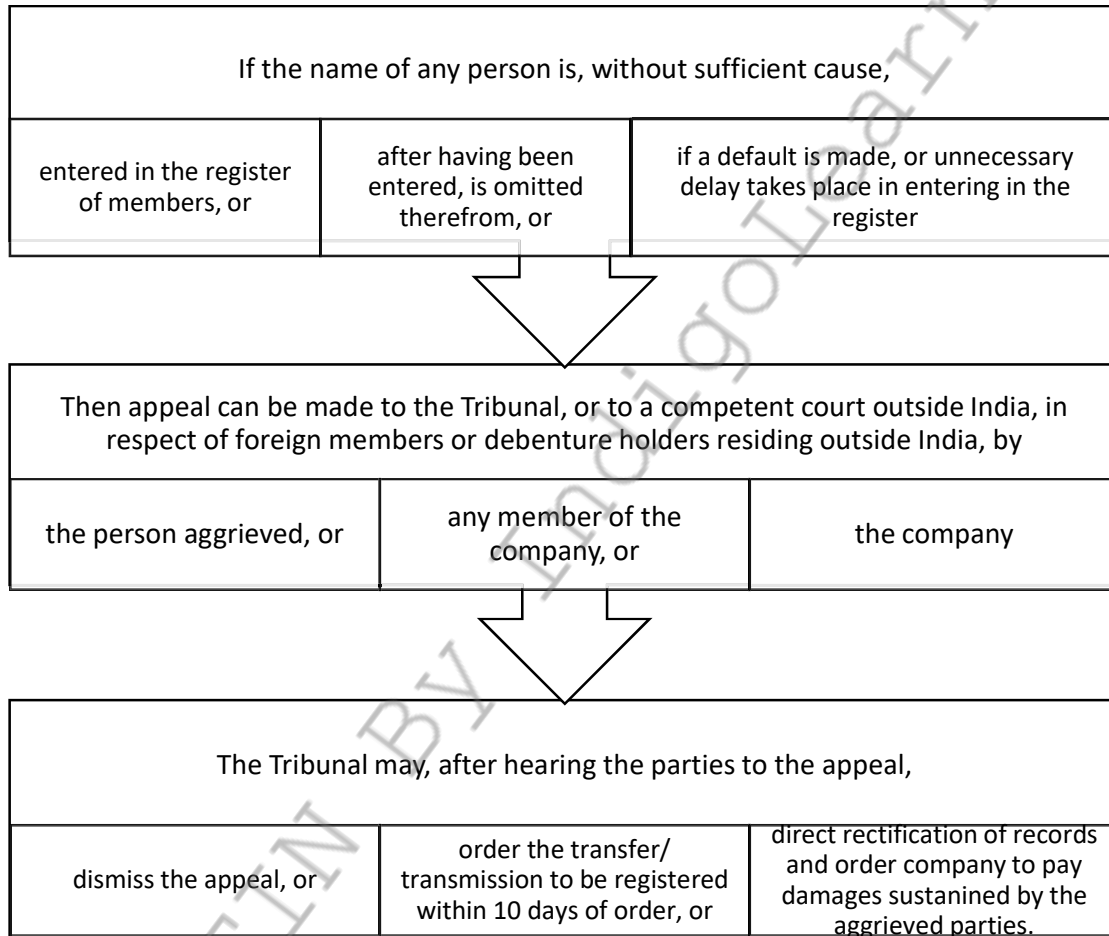
- a) **Transfer/ transmission** to be registered within **10 days**, or
- b) **Rectification of register** and also direct the **company to pay damages**, if any, sustained by any aggrieved party.

Punishment for contravention of order of Tribunal:

- **Imprisonment:** for not less than **1 year** which may extend **to 3 years**, and
- **Fine:** not less than **₹1 lakhs** which may extend **to ₹5 lakhs**.

14. RECTIFICATION OF REGISTER OF MEMBERS

Section 59 of the Companies Act, 2013 provides the procedure for rectification of register of members.



15. ALTERATION OF SHARE CAPITAL

Section 61 of the Companies Act, 2013 provides provisions for alteration of capital clause of the MOA.

limited company having a share capital may alter its MOA in its general meeting to:

A

- (i) **Increase its Authorised share capital,**
- (ii) **Consolidate and divide** all or any of its share capital into shares of a larger amount than its existing shares,
[Consolidation which results in change in the voting percentage of shareholders should be approved by the Tribunal]
- (iii) **Convert** all or any of its fully paid-up shares **into stock,**
- (iv) **Reconvert** stock into fully paid-up shares of any denomination,
- (v) **Sub-divide** its shares into shares of smaller amount than is fixed by the MOA *[However, the ratio between the amount paid and unpaid shall remain unchanged].*
- (vi) **Cancel the unsubscribed shares** and thus diminish the amount of share capital. *[Such cancellation shall not be deemed to be a reduction of share capital].*



Section 2(8) defines **Authorised Share Capital** to mean such capital as is authorised by the MOA of a company to be the maximum amount of share capital of the company.

The company shall within 30 days of alteration of share capital, give a notice to the Registrar in Form SH-7 along with the altered MOA.

The alteration must be authorised by the Articles of Association.

Section 62 of the Companies Act, 2013 deals with further issue of share capital.

16. FURTHER ISSUE OF SHARE CAPITAL

Further issue of shares can be through:

- ✓ Rights issue,
- ✓ Employee Stock Options, or
- ✓ Preferential allotment

A **right issue** involves pre-emptive subscription rights to buy additional securities in a company **offered to existing shareholders.**

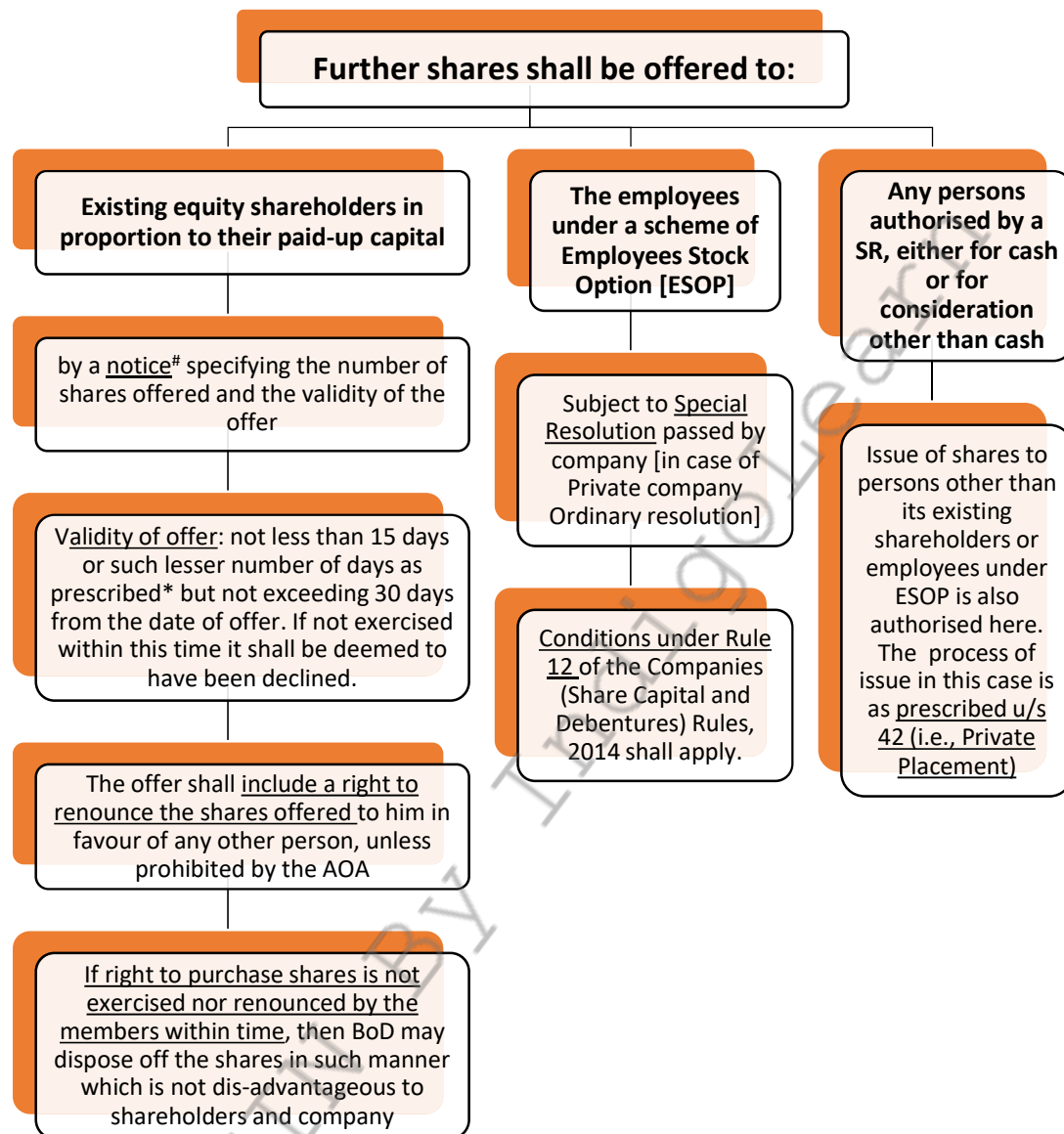
Employees Stock Option means

If a company announces '1:10 rights issue', it means an existing shareholder can buy one extra share for every 10 shares held by him/her. Usually, right shares are issued at less than the prevailing market price to encourage subscription.

- 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 2 (37)].

Preferential allotment means **issue of shares or other securities by a company to any selected person or group of persons**, whether or not those persons include existing shareholders or employees, on a preferential basis.

→ Thus, company is authorised to **issue to persons other than its existing shareholders and to employees under ESOP**. The issue of those shares is **covered u/s 42 of the Act (Private Placement)**.



#The notice shall be dispatched through registered post/ speed post/through electronic mode/ courier/ any other mode having proof of delivery to all the existing shareholders at least 3 days before the opening of the issue.

*As per Rule 12A time period within which offer shall be made for acceptance shall be **not less than seven days** from date of offer.

Section 62 shall not apply to conversion of Convertible Preference shares/ Debentures into shares.

16.1 Conversion of Debentures issued/ Loan obtained from the government

- ✓ Where any debenture issued/ loan obtained from any government by a company, the Government may **if it is considered necessary in public interest to do so**, by an **order**, direct that such debenture/ loans or part thereof shall be converted into shares of the company. This is possible even if the original terms of issue of debenture/ raising of loan did not include a term for conversion.
- ✓ If the **terms and conditions of such conversion are not acceptable** to the company, it may **appeal** to the Tribunal **within 60 days** of communication of such order.
- ✓ The Tribunal shall hear the company and the government and pass such order as it thinks fit.
- ✓ In case of conversion, the fresh issue of shares shall be **deemed increase in 'authorised share capital'** of the company. Accordingly, MOA shall be altered.

16.2 Conditions for issue of shares under ESOP Scheme [Rule 12]

In case of an **unlisted company desirous to issue shares under ESOP Scheme** to its directors, officers or employees, Rule 12 requires certain conditions to be fulfilled.

The **conditions** prescribed by Rule 12 are as follows:

Listed company while issuing shares under ESOP Scheme shall follow the provisions under SEBI (Share Based Employee Benefits) Regulations, 2014.

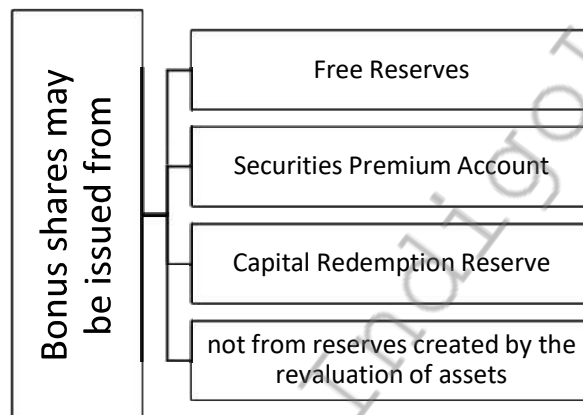
- (i) **Approved by the shareholders** of the company by passing a **SR** [Rule 12 (1)].
- (ii) Specified disclosures shall be made by company in the **explanatory statement** annexed to the notice for passing SR [Rule 12 (2)].
- (iii) The companies granting the ESOP will have the **freedom to determine the exercise price** [Rule 12 (3)].
- (iv) **Rule 12 (6) -**
 - a. There shall be a **minimum period of one year** between the grant of options and vesting of option.
 - b. The company shall have freedom to specify the **lock-in-period** for the shares pursuant to exercise of option.
 - c. The employees shall **not have right to receive any dividend or to vote** or in any manner enjoy the benefits of a shareholder, **till the shares are issued on exercise of option**.
- (v) **Rule 12 (8) -**
 - a. The option granted shall **not be transferrable** to any other person.
 - b. The option granted to employees **shall not be pledged, hypothecated, mortgaged**, or otherwise encumbered or alienated in any other manner.
 - c. No person other than the employees to whom the option is granted shall be entitled to **exercise the option**.
 - d. In the event of **death of the employee** while in employment, all the options granted to him till such date shall vest in the legal heirs or nominees of the deceased employee.

- e. In case employee suffers a **permanent incapacitation**, all the options granted shall vest in him on that day.
- f. In the event of **termination of employment**,
 - all options not vested in the employee on that day shall expire.
 - The options which are vested within the period specified in this behalf, can be exercised by the employee subject to the terms and conditions under the scheme.

17. ISSUE OF BONUS SHARES

Section 63 of the Companies Act, 2013 prescribes the condition and the manner of issue of fully paid-up bonus shares.

17.1 Source of issue of bonus shares



17.2 Other conditions for the issue of bonus shares

- a) Authorised by the **AOA**,
- b) **Authorised in the general meeting** of the company on the recommendation of the Board,
- c) **Not defaulted in payment of interest/ principal** in respect of fixed deposits or debt securities issued by it,
- d) **Not defaulted in the payment of statutory dues** of the employees,
- e) **Partly paid-up shares**, if any, outstanding on the date of allotment are **made fully paid-up**,
- f) such **conditions as prescribed by Rule 14** – company which has once announced the decision of its Board recommending a bonus issue, shall not subsequently withdraw the same

Hon'ble Supreme Court in case of Standard Chartered Bank v Custodian

Bonus share is an accretion. A bonus share is issued when the company capitalises its profits by transferring an amount equal to the face value of the share from its reserve to the nominal capital.

In other words, the undistributed profit of the company is retained by the company under the head of capital against the issue of further shares to its shareholders. Bonus shares have, therefore, been described as a distribution of capitalised undivided profit.

In the case of issue of bonus share there is an increase in the capital of the company by transferring of an amount from its reserve to the capital account and thereby resulting in additional shares being issued to the shareholders.

A bonus share is a property which comes into existence with an identity and value of its own and capable of being bought and sold as such.

17.3 Not issued in lieu of dividend

According to Section 63 (3), the **bonus shares shall not be issued in lieu of dividend**. But its permissible for a company to capitalise its profits or reserves for the purpose of issuing bonus shares.

18. NOTICE TO BE GIVEN TO REGISTRAR FOR ALTERATION OF SHARE CAPITAL

Where a company **alters its share capital** as specified u/s 61 or 62, **or redeems any redeemable preference share**, the company shall file a notice in **Form SH-7** with the Registrar **within 30 days** of

Section 64 of the Companies Act, 2013 provides provisions for notifying the Registrar in case of alteration of Share capital.

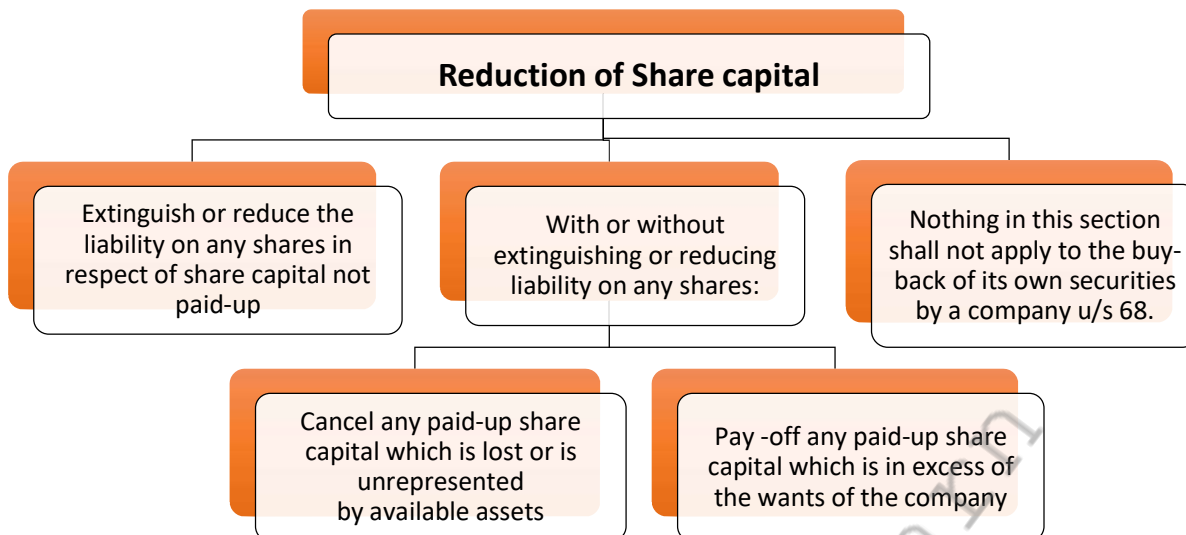
such alteration/ redemption, along with an altered memorandum.

Upon default, the company and every officer in default shall be liable to a penalty of

- ✓ ₹500 for each day during which the default continues,
- ✓ subject to maximum of ₹5L in case of company, and ₹1L in case of an officer who is in default.

19. REDUCTION OF SHARE CAPITAL

Section 66 of the Companies Act, 2013 deals with the reduction of share capital.



18.1 Conditions for reduction of Share Capital

- (i) **Applicable** to company limited by shares or limited by guarantee and having share capital,
- (ii) **Prior confirmation by the Tribunal** is required
- (iii) Authorised by **Special resolution**
- (iv) No reduction shall be made if the company is in **arrears in repayment of any deposits** accepted by it or the interest payable thereon.

18.2 Issue of Notice to the Tribunal and order of the Tribunal

- The Tribunal shall **notify the CG, Registrar and SEBI, in case of listed companies, and the creditors** and also **consider the representations** made to it by these parties **within 3 months** within the date of receipt of the notice. If no representation is received within this time, it shall be presumed that there is no objection to the reduction.
- The Tribunal may make an **order confirming the reduction of share capital** 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.
- The Tribunal shall not sanction an application for reduction of share capital unless
 - the **accounting treatment**, proposed by the company for such reduction is in **conformity with the accounting standards u/s 133** or any other provision of the Act, **and**
 - a **certificate to that effect by the company's auditor** has been filed with the Tribunal.
- A **certified copy of the order of the Tribunal and of the minute approved by the Tribunal** showing -
 - The amount of share capital,
 - The number of shares into which it is to be divided,
 - The amount of each share, and
 - The amount if any, deemed to be paid up on each share.

shall be **delivered to the ROC within 30 days** of receipt of order of the Tribunal. The ROC shall register the same and issue a certificate to that effect.

→ **Order of the Tribunal confirming the reduction in share capital shall be published** in such manner as may be directed by the Tribunal.

18.3 No liability to members

No member of the company, past or present, shall be liable **to any call or contribution in respect of any share held by him, which exceeds the difference, if any, between -**

- a) The **amount paid on the share**, or reduced amount, if any, which is deemed to have been paid thereon, **and**
- b) The **amount of the share as fixed by the order of reduction.**

18.4 In case a creditor who was entitled to object has not been included in the list of Creditors [Section 66 (8)]

Where the name of any creditor entitled to object to the reduction of capital is **not entered into the list of creditors by reason of his ignorance**, and **after such reduction, the company commits a default**, within the meaning of Section 6 of the Insolvency and bankruptcy Code, 2016 -

- a) **Every person who was a member of the company on the date of registration of the order of reduction by the ROC, shall be liable to contribute to the payment of that debt or claim**, an amount not exceeding that which 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 an application made by any such creditor and proof of his ignorance, if it thinks fit,
 - settle a list of person 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.

Nothing contained in sub-section (8) shall affect the rights of the contributories among themselves.

18.5 Punishment

any **officer of the company -**

- Knowingly **conceals** the name of the creditor entitled to object to the reduction,
- Knowingly **misrepresents** the nature or amount of debt or claim of any creditor, or
- **Assists or is party** to any such concealment or misrepresentation

liable u/s 447

20. RESTRICTION ON PURCHASE BY COMPANY OR GIVING OF LOANS BY IT FOR PURCHASE OF ITS SHARES

- ✓ **No company** having a share capital shall **buy its own shares unless the consequent reduction of share capital is effected** under the provisions of this Act.

Section 67 of the Companies Act, 2013 deals with the restrictions on purchase by the company of its own shares.

- ✓ A **public company** cannot, directly or indirectly, **lend money**/give financial assistance to any person **to purchase its own shares** or the shares of its holding company.

Exceptions to this:

- Lending by a **banking company** in the ordinary course of business,
- Lending money by a company in accordance with any **scheme approved by the company by a SR for the employees**.
- Loan to **employees (other than directors or KMP)** for purchase of shares of company up to 6 months of their annual salary. Disclosure in board report must be made if such employees have not exercised voting rights.

Note1:

1. In case the shares of the company are **listed** - Such purchase of shares shall be made only through a recognized stock exchange and not by way of private offers or arrangements.
2. Where shares of a company are **not listed** - the valuation at which shares are to be purchased shall be made by a **registered valuer**.
3. The **value of shares** to be purchased or subscribed in the aggregate **shall not exceed five percent** of the aggregate of paid up capital and free reserves of the company;
4. 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 for the relevant financial year, namely:
 - (a) Names of the employees who have not exercised the voting rights directly;
 - (b) Reasons for not voting directly;
 - (c) Name of the person who is exercising such voting rights;
 - (d) Number of shares held by or in favour of, such employees and the percentage of such shares to the total paid up share capital of the company;
 - (e) Date of the general meeting in which such voting power was exercised;
 - (f) Resolutions on which votes have been cast by persons holding such voting power;
 - (g) Percentage of such voting power to the total voting power on each resolution;
 - (h) Whether the votes were cast in favour of or against the resolution.

Note2:

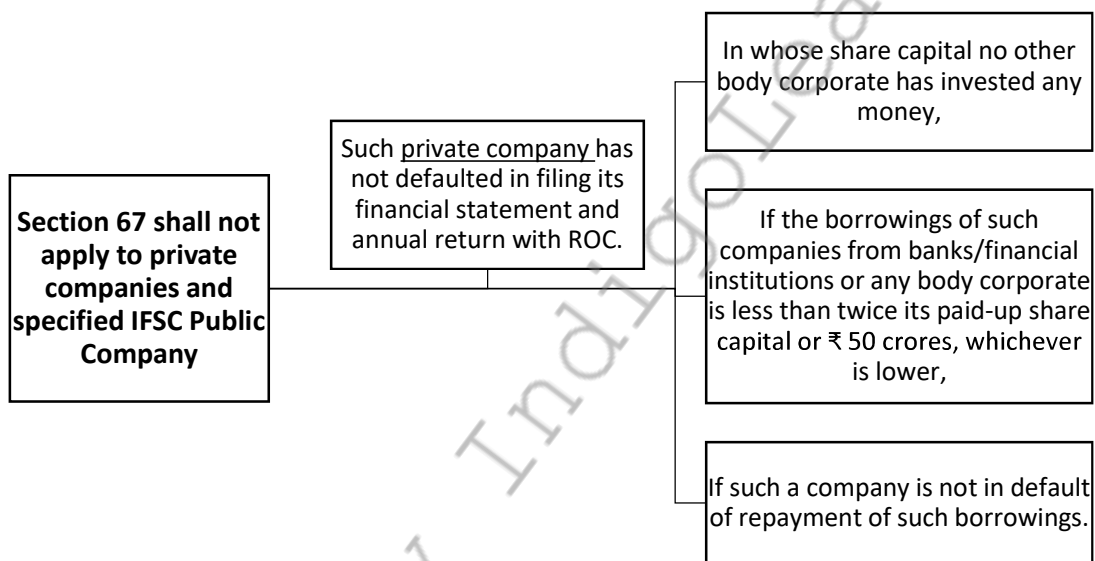
Section 67 sub section (1) shall not apply to Nidhi Companies, when shares are purchased by the company from a member on his ceasing to be a depositor or borrower and it shall not be considered as reduction of capital under Section 66 of the Companies Act, 2013. While

complying with such exception, the Nidhi Companies shall ensure that the interests of their shareholders are protected.

(Sub section 1 is No. company having a share capital shall buy its own shares unless the consequent reduction of share capital is effected under the provisions of this Act)

Section 67 **does not affect** the right of a company to **redeem** any **preference shares**.

20.1 Non applicability of Section 67

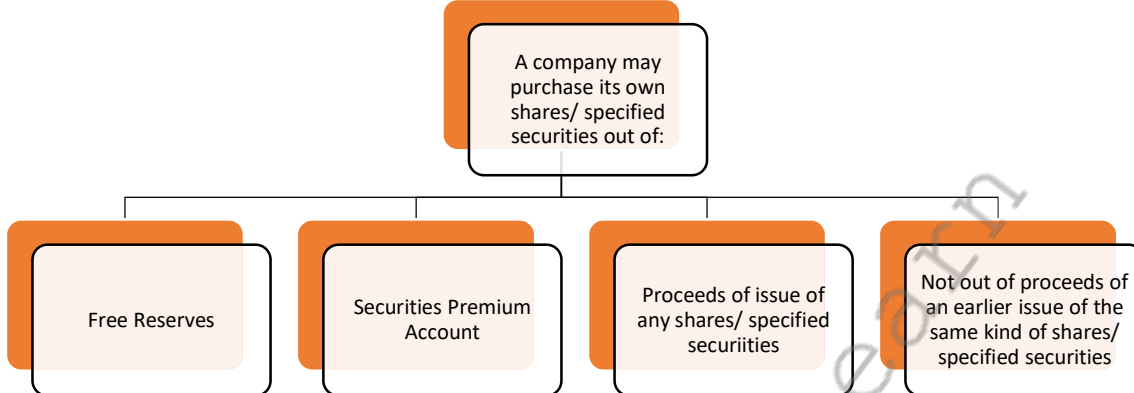


20.2 Punishment for contravention:

Company: Fine: Minimum ₹1 lakh Maximum ₹25 lakhs	Every officer in default: Imprisonment : may extend to 3 years Fine : Minimum ₹1 lakh Maximum ₹25 lakhs
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Section 68 to 70 of the Companies Act, 2013 contains the provisions for buy back of securities by the issuer company.

21.1 Power of company to purchase its own securities [Section 68]

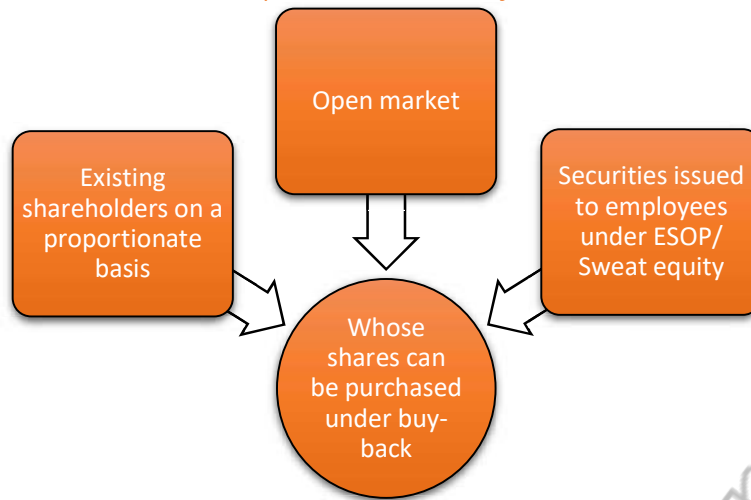


*Specified securities includes ESOP or other securities as may be specified by the CG.

21.1.1 Conditions for Buy-back

- Authorised by the **AOA**,
 - Authorised by **SR** passed in the general meeting,
Exception: No SR is required where the buy-back is 10% or less of the total paid-up equity capital and free reserves of the company, and it has been authorised by a Board resolution.
 - Buy-back is **25% or less of aggregate of paid up capital and free reserves** of the company.
 - **Maximum buy-back in a financial year** shall not exceed 25% of its total paid up equity capital in that F.Y.
 - The **ratio of aggregate debts owed by the company after buy-back** is not more than twice the paid-up share capital and its free reserves.
- The expression “**free reserves**” includes **securities premium account**.
- $$\frac{\text{Debts(secured and unsecured)after buyback}}{\text{Paid up share capital+Free reserves}} \leq 2$$
- All the shares/ specified securities for buy-back are **fully paid up**,
 - The **buy-back of listed shares/** specified securities is in accordance with the regulations of SEBI,

21.1.2 Whose shares are to be purchased under buy-back



21.1.3 Procedure for Buy-back

- (1) The notice of meeting at which SR is proposed to be passed shall be accompanied by an **explanatory statement**. Such explanatory statement shall **contain following details**:
 - Full and complete disclosure of all material facts,
 - Necessity for buy-back,
 - Class of shares/ securities intended to be bought back,
 - Amount to be invested under buy-back,
 - Time limit for completion of buy-back.
- (2) The buy-back shall be **completed within 12 months of passing the SR** or a resolution passed by the Board authorising the buy-back.
- (3) Before making the buy-back, the company shall **file with the ROC** and SEBI (*if listed company*),
 - a **declaration of solvency** in Form SH-9 and
 - verified by an **affidavit** to the effect that the Board has made a full enquiry of the company and that the company is capable of meeting its liabilities and will not be rendered insolvent within a period of 1 year from the date of declaration of solvency.
 - This declaration shall be **signed by at least 2 directors**, one of whom shall be the MD, if any.
- (4) The company shall **extinguish and physically destroy the shares** or securities so bought-back **within 7 days** of the last date of completion of buy-back.
- (5) After buy-back of shares, the company shall **not make further issue of the same kind of shares** including allotment u/s 62 or specified securities **within 6 months** except-
 - By way of bonus shares or
 - In discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity shares, or conversion of preference shares/ debenture into equity shares.
- (6) After completion of buy-back company shall **file a return in Form SH-11** with the ROC and SEBI (*if listed company*), within 30 days of completion.
- (7) A company shall **maintain a register** of shares or securities bought back in **Form SH-10**.

Time Check Points and Procedural aspects of Buy-Back

The company before the buy-back of shares, file with the Registrar a **letter of offer** in Form No. SH.8, along with the fee. The letter of offer shall be dispatched to the shareholders or security holders immediately after filing the same with the Registrar of Companies but not later than **twenty days** from its filing with the Registrar of Companies.

The **offer** for buy-back **shall remain open** for a period of not less than **fifteen days** and not exceeding **thirty days** from the date of dispatch of the letter of offer, but where all members of a company agree, the offer for buy-back may remain open for a period **less than fifteen days**.

In case the number of shares or other specified securities offered by the shareholders or security holders is more than the total number of shares or securities to be bought back by the company, the acceptance per shareholder shall be on **proportionate basis** out of the total shares offered for being bought back.

The company shall **complete the verifications** of the offers received within **fifteen days from the date of closure** of the offer and the shares or other securities lodged shall be deemed to be accepted unless a **communication of rejection is made within twenty one days** from the date of closure of the offer.

The company shall **make payment within seven days of verification process** and **make payment** in cash to those shareholders or security holders whose securities have been accepted. Company will **return the share certificates** to the shareholders or security holders whose securities have not been accepted at all or the balance of securities in case of part acceptance

21.1.4 Penalty for default

Company: Minimum ₹1 lakh Maximum ₹3 lakhs	Company officer in default: Minimum ₹1 lakh Maximum ₹3 lakhs
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21.2 Transfer of certain sums to CRR 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 share so purchased** shall be transferred to the CRR and details of such transfer shall be disclosed in the balance sheet.

21.3 Prohibition for buy-back in certain cases [Section 70]

Prohibited Buy-back of shares/ specified securities	Buy-back through any subsidiary company including its own subsidiary
	Buy-back through any investment company or group thereof
	Buy-back if a default is made in repayment of deposits or interest payments thereon, redemption of preference shares, payment of dividend to any shareholder, or repayment of any term loan or interest thereon to any financial institutions. However where default is remedied and 3 years have lapsed after such default ceased to subsist, then buy-back is not prohibited.
	If company has not complied with provisions of : Section 92- Annual Return Section 123- Declaration and payment of dividend Section 127- Punishment for failure to distribute dividend Section 129- Financial Statement

22. DEBENTURES

Section 71 of the Companies Act, 2013 provides the manner in which a company may issue debentures.

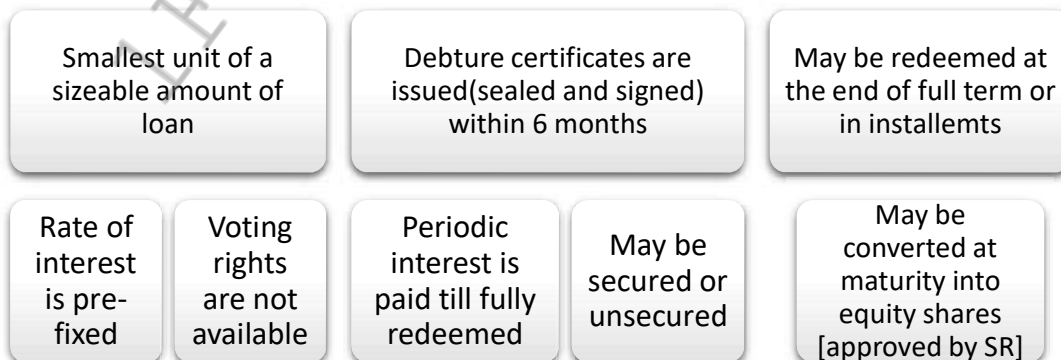
22.1 Debenture

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.

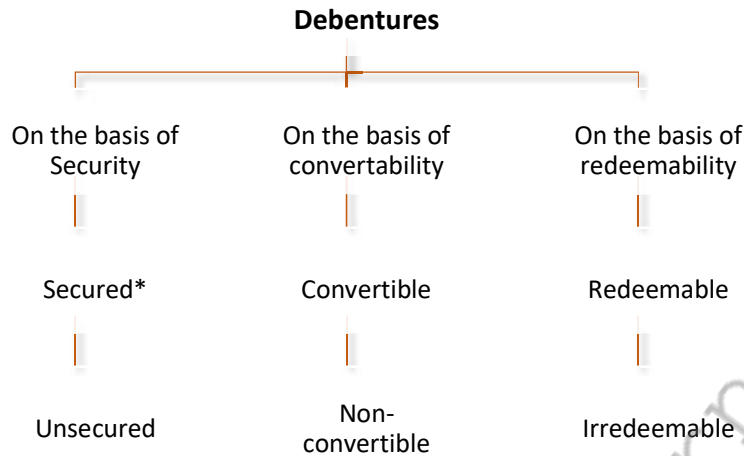
However, the **following shall not be treated as debentures:**

- Instruments referred to in Chapter III-D of the RBI Act, 1934, and
- Such other instrument as may be prescribed by the CG in consultation with the RBI, issued by a company.

22.2 Features of a Debenture



22.3 Types of Debentures



*Secured debentures shall be issued in compliance with **Rule 18** of Companies (Share Capital and Debentures) Rules, 2014, which states that:

- a) **Date of redemption** of secured debentures shall not exceed **10 years**,
- b) Following companies can issue debentures for a period **exceeding 10 years but not exceeding 30 years**,
 - Companies engaged in setting up of infrastructure projects,
 - Infrastructure finance companies,
 - Infrastructure debt fund NBFC,
 - Companies permitted by Ministry or Department of CG, RBI, or by the National Housing Bank or any other statutory body.
- c) Shall be **secured by creation of a charge** on the properties or assets of the company/ its subsidiaries/ its holding company/ associate companies. Such assets or properties shall be of value which is sufficient for the due repayment of the amount of debentures and interest thereon.
- d) The company shall **appoint a debenture trustee** before issuing prospectus or letter of offer for subscription.
- e) **Within 60 days** of allotment of debentures, company shall execute a **debenture trust deed in Form SH-12** to protect the interest of the debenture holders.

22.4 Creation of Debenture Redemption Reserve (DRR) and Investment

Where debentures are issued by a company, the company shall create a DRR **out of the profits** of the company available for payment of dividend and the amount credited shall be **utilised only for redemption of debentures**.

For this, provision of **Rule 18(7)** are as follows:

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All India Financial Institutions and Banking Company	Public issue/ Private Placement	N/A	N/A
Other Financial Institution u/s 2(72) Companies Act 2013	Public issue/ Private Placement	Same as on NBFC (i.e., N/A)	N/A
Listed companies. except 1.	Public issue of debentures by (i) NBFC registered with RBI & (ii) Housing finance companies registered with National Housing Bank. (iii) Other listed company	N/A	15% of outstanding Debenture **
	Or Private placement of debentures by above companies	N/A	N/A
Unlisted Companies except 1	Private placement of Debentures by (i) NBFC registered with RBI & (ii) Housing finance Companies registered with National housing bank	N/A	N/A
	Other Unlisted Companies	10% of outstanding debentures	15% of outstanding Debenture**
<p>**Note: Provided that the amount remaining invested or deposited shall not any time fall below 15% of the amount of the debentures maturing during the year ending on 31st day of March of that year.</p> <p>Allowed Investments:</p> <ul style="list-style-type: none"> • (A) in deposits with <u>any scheduled bank</u>, free • (B) in unencumbered securities of the Central methods of deposits or from any charge or lien; <u>Government or any State Government</u>. • (C) in unencumbered securities mentioned in sub-clause (a) to (d) and (ee) of section 20 of the <u>Indian Trusts Act, 1882</u>. • (D) in unencumbered bonds issued by any other company which is notified under sub-clause (f) of section 20 of the Indian Trusts Act, 1882 <p>→ Use of DRR and Investments = Only for the redemption of Debentures.</p>			

22.5 Limitation on issue of prospectus/offer/invitation to the public [Section 71 (5)]

No company shall issue a prospectus/make an offer or invitation to the public or its members exceeding 500, unless company has before issue/offer appointed one or more debenture trustees.

22.6 Conditions for appointment of Debenture Trustee [Rule 18 (2)]

The company shall appoint debenture trustee u/s 71 (5), after complying with the following conditions given in the rule:

- The **names of debenture trustee shall be stated in the letter of offer** and in all subsequent notices/other communications sent to debenture holders.
- Before appointment, a **written consent** shall be obtained from such proposed debenture trustees.

- **Disqualifications** to be appointed as a debenture trustee –
 - (1) Beneficially **holds shares** in the company,
 - (2) Is a **promoter, director, or KMP, or any other officer or employee** of the company/holding/subsidiary/associate company,
 - (3) **Beneficially entitled to moneys** which are to be paid by the company otherwise than as remuneration payable to the debenture trustee,
 - (4) **Indebted** to the company/holding/subsidiary/associate/subsidiary of such holding company,
 - (5) **Furnished any guarantee** for debts secured by debentures/ interest thereon,
 - (6) **Pecuniary relationship** with company amounting to-
 - 2% or more of its gross turnover, or Total income, or
 - ₹ 50 lakhs, or such higher amount as prescribed,
 Whichever is lower, during the 2 immediately preceding F.Y. or during current F.Y.
 - (7) **Relative** of promoter/ any person in employment as director/KMP of the company.
- **Casual vacancy in the office of the debenture trustee** may be filled by the BOD. However, while such vacancy continues, remaining trustee or trustees, if any, may act.
- Where the **casual vacancy is caused by the resignation of the debenture trustee**, the vacancy shall only be filled with the written consent of the majority of debenture holders.
- **Removal of debenture trustee from office before the expiry of his term** – Only if it is **approved by the holders of not less than 3/4th in value** of the debentures outstanding, at their meeting.

22.7 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.

Convening of meetings of debenture holders to protect their interests [Rule 18 (4)]: The meeting of all the debenture holders shall be convened by the debenture trustee on –

- a) **Requisition in writing** signed by debenture holders having at least 1/10th in value of the debentures for the time being outstanding.
- b) The happening of any event which constitutes a **breach, default** or which affects the interest of the debenture holders.

22.8 Liability of debenture trustee [Section 71 (7)]

There shall be no provision in a trust deed for securing the issue of debenture trust deed, or in any contract with the debenture holders, or in any contract with the debenture holders, which 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. Such a provision shall be void.

Also, 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 3/4th in value of the total debentures** at a meeting held for the purpose.

- He can **file a petition with the tribunal** if he concludes that assets of the company are insufficient to meet its debts.

22.9 Payment of Interest and Redemption of Debentures

A company shall pay interests and redeem the debentures **in accordance with the terms and conditions of their issue.**

22.10 Filing of Petition before the Tribunal and order thereon [Section 71 (9)]

- ✓ The debenture trustee may file a petition before the Tribunal where at any time he concludes that the **assets of the company are insufficient or likely to be insufficient to discharge the principal amount** as and when it becomes due.
- ✓ The Tribunal may, after hearing the company and or any other person interested in the matter, **by an order, impose restrictions on the incurring of any further liabilities by the company** as considered necessary by the Tribunal.

22.11 Failure to redeem debenture or pay interest [Section 71(10)]

Where a company fails to redeem the debentures on the date of their maturity or fails to pay interest thereon when it is due, the **Tribunal may,**

- On an **application of all or any of the debenture holders or debenture trustee,** and
- After **hearing the parties** concerned,

direct, by an order, the company to redeem the debentures forthwith on payment of principal and interest due thereon.


22.12 Specific Performance of the contract [Section 71(12)]

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.

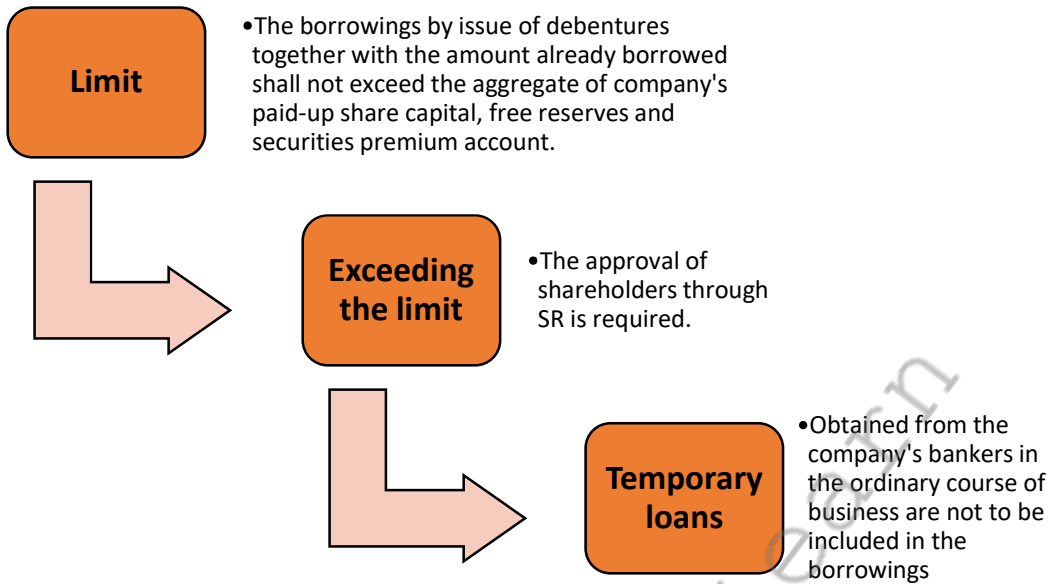
22.13 Procedure to be prescribed by the CG [Section 71(13)]

The CG may prescribe the procedure –

- For securing the issue of debentures,
- For the form of debenture trust deed,
- For inspection of the trust deed by the debenture holders and to obtain copies thereof,
- For the quantum of DRR required to be created, and
- Such other matters.

 The procedures have been prescribed in Rule 18 of the Companies (Share capital and Debentures) Rules,

22.14 Limit on Borrowing through Debentures* [Section 71(14)]



**Not applicable to a Private Company*

22.15 Return of Allotment [Section 71(15)]

If a **company having share capital** makes an allotment of any debentures, a Return of Allotment in **Form PAS 3** shall be filed with the Registrar **within 30 days** of allotment.

Learning Outcomes –

- Understand the meaning of the term 'Deposit'.
- Know the requirements for and restrictions on acceptance of deposits from members and public.
- Know about the 'eligible companies' which can accept deposits from public in addition to their members.
- Know the punishment for contravention of the provisions related to acceptance of deposits by companies.

1. INTRODUCTION

Deposits are an importance source of finance for companies. It is necessary to control the companies which invite deposits to safeguard the general and wider interest of all those persons who offer deposits out of their hard-earned money.

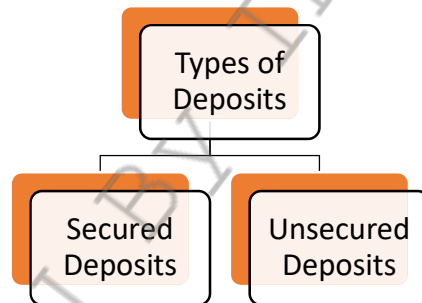
The statutory provisions as contained in **Chapter V (Section 73 to 76A)** of the Companies Act, 2013 and the **Companies (Acceptance of Deposits) Rules, 2014** govern the acceptance of deposits and their renewal.

2. DEPOSIT

2.1 Meaning of Deposit

According to **Section 2(31)**, 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.




2.2 Features

- The above definition of 'deposit' is inclusive one.
- It includes any money received by way of:
 - deposit; or
 - loan; or
 - in any other form.
- Repayment of 'deposit' is time-bound.
- It can be secured or unsecured.
- It does not include prescribed categories of amounts (as stated in the 'Acceptance of Deposits' Rules).
- It may be accepted in joint names not exceeding three persons.

- (vii) A depositor may nominate any person at any time.
- (viii) Every deposit accepted by the company shall be repaid with interest.
- (ix) Premature repayment of a deposit can be made by the company.
- (x) A private company can accept deposits from its members only.
- (xi) A public company can accept deposits from its members and also from the public if it fulfills certain parameters.

2.3 Amounts not considered as Deposits

- (1) Amount received **from the Central government (CG) / State government (SG)**, or from any other source whose **repayment is guaranteed by the CG/SG**, or from any local authority, or any amount received from a statutory authority constituted under any Act,
- (2) Any **amount from foreign governments**, foreign or international banks, multinational financial institution, foreign governments owned development financial institutions, foreign export credit agencies, foreign collaborators, foreign bodies corporate and foreign citizens, foreign authorities or persons resident outside India subject to FEMA, 1999,
- (3) any amount received as **a loan or facility from any banking company** or from State Bank of India or its subsidiary banks or from a notified banking institution or a corresponding new bank or from any co-operative bank,
- (4) any amount received as a **loan or financial assistance from Public Financial Institutions**, any regional financial institutions or insurance companies or any scheduled banks.
- (5) 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;
- (6) any amount received by a company **from any other company**. (Mainly known as **Inter Company Deposits (ICD)**)
- (7) any amount **received and held 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;
- (8) 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**;

 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.

The director of the company or relative of the director of the private company from whom money is received is required to furnish to the company at the time of giving the money, a **declaration in writing** to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the **company shall disclose the details of money so accepted in the Board's report**;

- (9) 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;
- (9a) any amount raised by **issue of non convertible debenture not constituting** a charge on the assets of the company and listed on a recognized stock exchange;
- (10) 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;
- (11) any non-interest bearing amount **received or held in trust**;
- (12) any **amount received in the course of, or for the purposes of, the business** of the company—
- 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 **365 days** from the date of acceptance of such advance:
However, 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.
 - 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;
 - as **security deposit** for the performance of the contract for supply of goods or provision of services;
 - as **advance** received under **long term projects** for **supply of capital goods** except those covered under item (b) above;




However, 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.**



However, it is clarified 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 on the expiry of 15 days** from the date they become due for refund under these rules.

- (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;
-
- (13) 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 subject to the *fulfilment of following conditions*:
- (a) the loan is brought because of the stipulation imposed by the lending institutions on the promoters to contribute such finance;
 - (b) the loan is provided by the promoters themselves or by their relatives or by both; and
 - (c) Such exemption shall be available only till the loans of financial institution or bank are repaid and not thereafter.
- (14) any **amount accepted by a Nidhi company** in accordance with the rules made under section 406 of the Act;
- (15) any amount received by way of subscription in respect of a **chit** under the Chit Fund Act, 1982
- (16) any amount received by the company under any **collective investment scheme** in compliance with regulations framed by the Securities and Exchange Board of India;

- (17) 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 **ten years** from the date of issue) in a single tranche, from a person;
- (18) any **amount received by a company from Alternate Investment Funds**, Domestic Venture Capital Funds, Infrastructure Investment Trusts, Real Estate Investment Trusts and Mutual Funds registered with the Securities and Exchange Board of India in accordance with regulations made by it.



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 agreed terms and conditions.

Example: Greewood limited (‘the company’) which is register as start-up company register under Companies Act, 2013 has received an amount of ` 20 lacs and ` 10 lakh on different date by way of a convertible note. Though the company has received an amount of twenty-five lakh rupees or more, the said amount will be considered as deposit since the aggregate amount has not received in single tranche in terms of the rule stated above Sub-clause (xvii)]

3. DEPOSITOR

As per **Rule 2(1)(d)**, the term ‘Depositor’ means:

- (a) Any **member of the company who has made a deposit with the company** in accordance with section 73(2) of the Act, or
- (b) Any **person who has made a deposit with a public company** in accordance with section 76 of the Act.

4. ELIGIBLE COMPANY

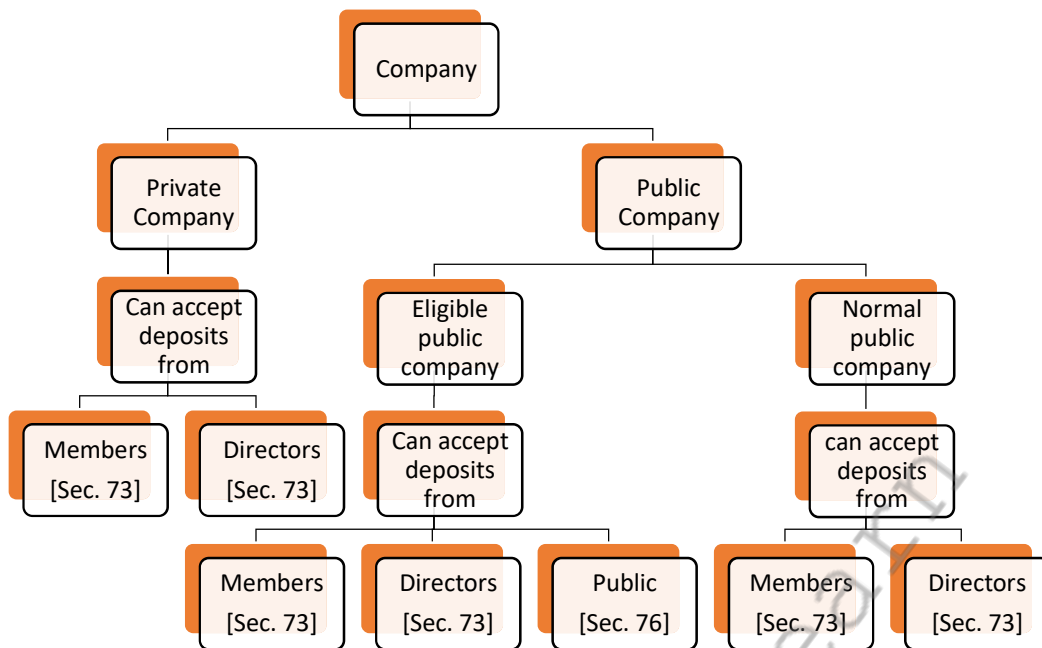
As per **Rule 2(1)(e)**, the term ‘Eligible Company’ means a **public company** as referred to in section 76(1), having

- a **networth** of not less than ₹ 100 crores *or*
- a **turnover** of not less than ₹ 500 crores *and*
- which has obtained the prior consent in general meeting by means of a **SR** *and*
- also **filed the SR** with the Registrar before making the invitation to the public for acceptance of deposits.

An ordinary resolution is sufficient if an eligible company is accepting deposits within the limits specified under section 180(1)(c).

5. PROHIBITION ON ACCEPTANCE OF DEPOSITS FROM PUBLIC

Section 73 of the Companies Act, 2013 prohibits the acceptance of deposits from the public by companies.

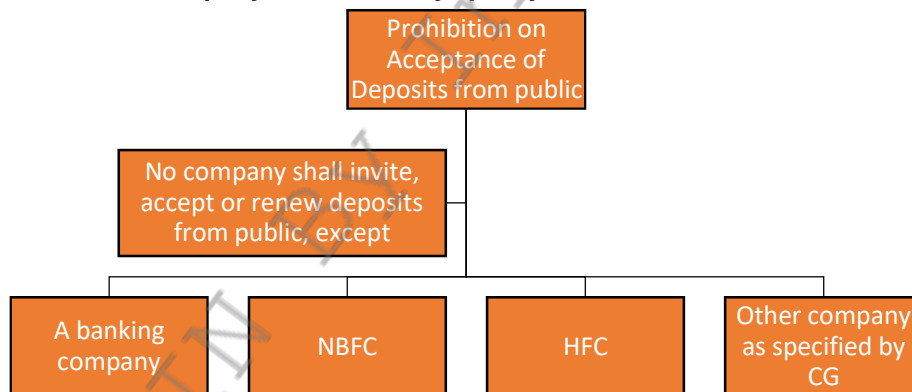


5.1 Acceptance of deposits from public [Section 73(1)]

No company shall invite, accept or renew deposits from public unless it follows the manner provided under this chapter (i.e., Chapter V of the Act).

However, this **prohibition shall not apply to** the following companies:

- A **banking company**,
- A non-banking financial company (**NBFC**) as defined in the RBI Act, 1934,
- Any housing finance company (**HFC**) registered with the National Housing Bank, and
- Such **other company as the CG may specify**, after consultation with the RBI.



5.2 Acceptance of deposits from members [Section 73(2)]

A company may accept or renew deposits from its members subject to the following conditions:

- (a) A **resolution is passed** in the general meeting.
- (b) **Circular** is issued by the company to its members including therein a statement showing:
 - The financial position of the company,
 - The credit rating obtained,
 - The total number of depositors and
 - The amount due towards deposits in respect of any previous deposits accepted by the company and
 - Such other particulars in prescribed form and manner.

- (c) The copy of the circular shall be **filed with the Registrar 30 days** before issue of the circular.

Rule 4 - Form and Particulars of Advertisements or Circulars

Such circular shall be issued to all its members by **registered post with acknowledgement due or speed post or by electronic mode in Form DPT-1.**

Circular may be **published in English language in an English newspaper** and in **vernacular language in a vernacular newspaper** having wide circulation in the State where Registered office of the company is situated.

A **certificate of the statutory auditor** shall be attached in Form DPT-1, stating that the company has not committed default in the repayment of deposits or payment of interest thereon.

If the company had made such a default, the certificate of the statutory auditor shall state that company has made good the default and a period of 5 years has lapsed since the date of making good such default.

The **advertisement shall remain valid till** the earliest of:

- (a) upto 6 months from the closure of the F.Y. or
- (b) the date on which FS are laid down before the company at AGM,
- (c) or in case no AGM has been held, the latest day on which AGM should have been held.

A **fresh circular shall be issued for each F.Y.** for inviting deposits during that financial year.

- (d) Deposit, on or before 30th April of each year, **at least 20%** of the amount of deposits maturing during the following F.Y. and kept in a scheduled bank account to be called the **deposit repayment reserve account.**

Such amount shall not at any time fall below 20% of the amount of deposits maturing during the F.Y.

- (e) **Company certifies** that it has **not committed any default** in repayment of deposits accepted or payment of interest thereon. In case any default had occurred, the company shall make good the default and 5 years had lapsed since the date of making good the default.
- (f) Company **may provide security** for the due repayment of the amount of deposit or the interest thereon. In case company does not secure or only partially secures such deposits, then the deposits shall be termed as "unsecured deposits".

Example: Ray Pharmaceuticals Limited issued a Circular inviting 'deposits' from its members on 14-02-2022. Its Annual General Meeting (AGM) was held on 07-09-2022. Since, six months from the closure of FY 2021-22 end on 30-09-2022, the Circular remains valid till 07-09-2022 only. After this date, a fresh Circular shall be issued if the company wants to invite further deposits from its members.

5.2.5 Repayment of Deposits

- ✓ Every deposit accepted shall be **repaid with interest** in accordance with the terms and conditions of the agreement.

Conditions (b) to (e) shall not apply to a private company:

- ✓ Which accepts from its members monies not exceeding (paid up share capital + free reserves + securities premium account), or
- ✓ Which is a start-up, for 5 years from the date of its incorporation, or
- ✓ Which fulfils all of the following conditions:
 - Not an associate or subsidiary company of any other company,
 - Borrowings from such banks or financial institutions or body corporates is less than twice the paid-up share capital or ₹ 50 crores, whichever is less, and
 - Such company has not defaulted in repayment of such borrowings subsisting at the time of accepting deposits.

However, these companies shall file the details of such deposits accepted to the Registrar in Form DPT-3.

- ✓ In case 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 due to such non-payment.
- ✓ The amount deposited in the Deposit Repayment Reserve Account shall be utilised only for repayment of deposits.

5.2.6 Maximum amount of deposits from members [Rule 3(3)]

- ✓ The maximum amount of deposits that a company can accept or renew, including other deposits outstanding as on a date, from its members, shall be **35% of aggregate of Paid-up share capital+ Free reserves+ securities premium account.**
- ✓ **Exception:** Specified **IFSC Public Company and private company** can accept deposits from its members up to 100% of aggregate of Paid-up share capital+ Free reserves+ securities premium account.
- ✓ Maximum limit **not applicable to following class of private companies:**
 - A private company which is a **start-up**, for 10 years from date of incorporation,
 - A private company which **fulfils all of the following conditions:**
 - (a) *Not associate/ subsidiary* of another company,
 - (b) *Borrowings from such banks or financial institutions* or body corporates is less than twice the paid-up share capital or ₹ 50 crores, whichever is less, and
 - (c) Such company has *not defaulted in repayment* of such borrowings subsisting at the time of accepting deposits.

5.2.7 Deposits in Joint names [Rule 3(2)]

Deposits may be accepted in joint name but **not more than 3 joint depositors.**

5.2.8 Ceiling on rate of interest and brokerage payable [Rule 3(6)]

Interest rate on deposits & Brokerage shall **not exceed the maximum rate** prescribed by RBI in case of **NBFCs for acceptance of deposits**.

5.2.9 Altering the terms [Rule 3(7)]

The **company has no right to alter any terms and conditions** of the deposit, deposit trust deed and deposit insurance contract which may be detrimental to the interest of the depositors after circular is issued and deposits are accepted.

6. ACCEPTANCE OF DEPOSITS FROM PUBLIC BY ELIGIBLE COMPANIES

Only '**eligible companies**' are permitted to accept deposits from the public, in addition to their members.

Section 76 of the Companies Act, 2013 and the Companies (Acceptance of Deposits) Rules, 2014 deals with the acceptance of deposits from public by eligible companies.

special resolution shall be passed in the general meeting which shall be **filed with the ROC** before making any invitation to the public for acceptance of deposits.

6.1 Obtaining Credit Rating

The eligible company shall be required to obtain the rating from a recognised credit rating agency **at least once in a year**. The copy of the credit rating shall be **sent to the ROC** along with the Return of deposits in Form DPT-3.

6.2 Charge creation on assets

- ✓ Every company which accepts secured deposits from the public shall **within 30 days**, create a charge on its assets.
- ✓ Charge shall be created **only on tangible assets** and not on intangible assets.

6.3 Appointment of Trustee for depositors [Rule 7]

- ✓ The company shall appoint one or more trustees for creating security for depositors.
- ✓ A written consent shall be obtained from the trustees before their appointment and a statement to this effect shall be given in the circular or advertisement.
- ✓ The company shall execute a trust deed in Form DPT-2 at least 7 days before issuing the circular.

Trustee to call Meeting of Depositors :

The trustee for depositors shall call a meeting of all the depositors in the following cases:

- (a) on receipt of a requisition in writing signed by at least one-tenth of the depositors in value for the time being outstanding;
- (b) on the happening of any event, which constitutes a default or which, in the opinion of the trustee for depositors, affects the interest of depositors.

2.1.1 Disqualification of Trustee

A person shall not be eligible to be appointed as the trustee if the person:

- (a) Is a **director, KMP or any other officer or an employee** of the company/ its holding/ subsidiary/ associate company or a **depositor in the company**,
- (b) Is **indebted** to the company/ its holding/ subsidiary/ associate company/ 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 (a)** above.

2.1.2 Removal of Trustee

- ✓ 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.**
- ✓ In case the **company is required to have independent directors, at least one independent director shall be present** in such meeting of the Board.

6.4 Maximum amount of deposits [Rule 3(4), (5)]

Eligible company		Eligible government company
From its members	From persons other than members	
<p>Amount of deposit together with outstanding deposit on the date of acceptance or renewal can be maximum 10% of aggregate of paid-up share capital, free reserves, and securities premium account.</p> <p><i>New deposit + outstanding deposit</i> $\leq 10\%$ (paid up share capital + free reserves + securities premium account)</p>	<p>Amount of deposit together with outstanding deposit on the date of acceptance or renewal can be maximum 25% of aggregate of paid-up share capital, free reserves, and securities premium account.</p> <p><i>New deposit + outstanding deposit</i> $\leq 25\%$ (paid up share capital + free reserves + securities premium account)</p>	<p>Amount of deposit together with outstanding deposit on the date of acceptance or renewal can be maximum 35% of aggregate of paid-up share capital, free reserves, and securities premium account.</p> <p><i>New deposit + outstanding deposit</i> $\leq 35\%$ (paid up share capital + free reserves + securities premium account)</p>

6.5 Issuance of Circular in the form of Advertisement [Rule 4]

- ✓ An eligible company intending to invite deposits is required to issue a circular in the form of an advertisement in **DPT-1.**
- ✓ Such advertisement **shall be published in English and vernacular language** in an English newspaper and vernacular newspaper having wide circulation in the state in which registered office is located. It shall also be placed on the website of the company, if any.
- ✓ A copy of the circular duly signed by a majority of directors or their authorised representatives shall be **filed with the ROC** for registration **at least 30 days before the issue of advertisement.**
- ✓ The **advertisement shall remain valid till** the earliest of:
 - (a) up to 6 months from the closure of the F.Y. or
 - (b) the date on which FS are laid down before the company at the AGM.

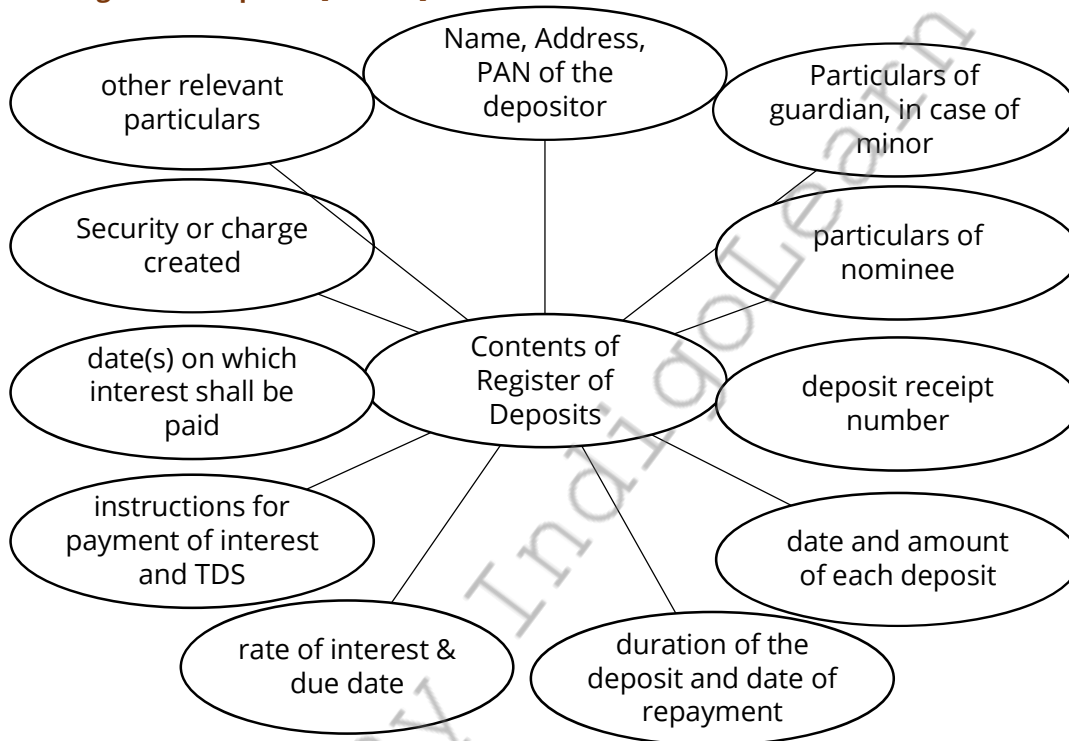
(c) or in case no AGM has been held, the latest day on which AGM should have been held.

- ✓ A **fresh advertisement** shall be issued in each succeeding F.Y. for inviting deposits during that F.Y.

6.6 Deposit Receipt [Rule 12]

- ✓ The company shall furnish a deposit receipt **to the depositor or his agent within 21 days** receipt of money or realization of cheque or renewal.
- ✓ It shall be **signed by the duly authorised officer**.
- ✓ It shall state the date of deposit, the name and address of the depositor, the amount of deposit, the rate of interest and maturity date.

6.7 Register of Deposits [Rule 14]



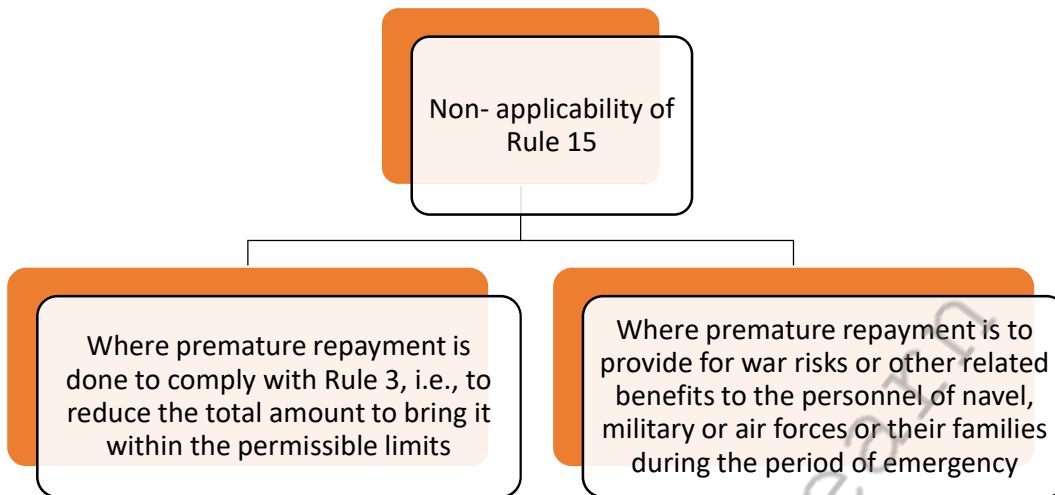
- The Register of Deposits shall be maintained in the registered office of the company.
- The **entries shall be made within 7 days** from the date of issue of receipt and it shall be duly authenticated by a director or secretary of the company or any other authorised by the Board for this purpose.
- The register shall be **maintained for not less than 8 years** from the F.Y. in which the latest entry is made in the register.

6.8 Premature Repayment of Deposits [Rule 15]

Where a company makes a repayment of deposits,

- **on the request of the depositor**,
- **after the expiry of a period of six months** from the date of such deposit but before the expiry of the period for which such deposit was accepted,
- the **rate of interest payable on such deposit shall be reduced by 1%** from the rate which the company would have paid had the deposit been accepted for the period for which such deposit had actually run.

Where the **premature closure of a deposit is for the purpose of earning a higher rate of interest**, the higher interest shall be paid by the company only if the deposit is renewed for a period longer than the unexpired period of deposit.



7. TENURE FOR WHICH DEPOSITS CAN BE ACCEPTED [RULE 3(1)]

- ✓ A company shall not accept or renew any deposit repayable on demand.
- ✓ The **minimum tenure** for which a deposit shall be accepted is **6 months** and **maximum period** of acceptance shall be **36 months**.

Exception: A company may accept or renew deposits for repayment earlier than 6 months to meet any short-term fund requirements, subject to the **condition** that:

- Such deposits shall **not exceed 10% of (paid-up share capital+ free reserves+ securities premium account)**, and
- Such deposits are **repayable only on or after 3 months** from the date of such deposits or renewal.

Example : Continuing the example of Swapnil Traders Private Limited, it is assumed that aggregate of its paid-up share capital, free reserves and securities premium account is ` 2,00,00,000. In order to meet its short-term requirement of funds, it can raise deposits maximum up to ` 20,00,000 (being 10% of ` 2,00,00,000) whose repayment tenure can be less than six months; but such tenure cannot be less than three months. Therefore, Swapnil Traders Private Limited must ensure that the short-term deposits so accepted are repaid only on or after three months from the date of such deposits.

8. OTHER RULES RELATED TO DEPOSITS

8.1 Filing return of deposits [Rule 16]

A duly audited return of deposits in **DPT-3** shall be filed with the ROC along with fees **on or before 30th June** of that year and declaration to that effect shall be submitted by the auditor in Form DPT-3.

8.2 Penal rate of Interest [Rule 17]

In case a company fails to repay deposits on maturity, after they are claimed, it shall pay penal interest of **18%** for the overdue period.

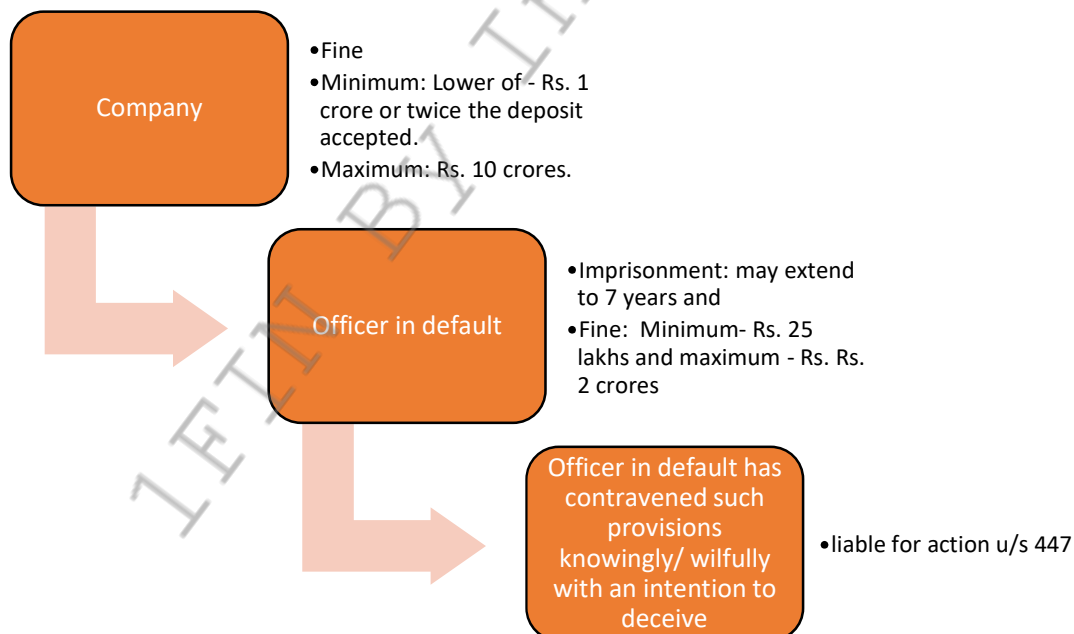
8.3 Punishment for contravention [Rule 21]

If any company inviting deposits or any other person contravenes any of the 'deposit rules' for which no punishment has been provided, the company and every officer-in-default shall be punishable as under:

- **Fine** which may **extend to ₹ 5,000/-, and**
- In case of *continuing contravention*, **further fine upto ₹ 500/- for each day** during which the contravention continues.

9. PUNISHMENT FOR CONTRAVENTION OF SECTION 73 OR 76

Section 76A of the Companies Act, 2013 provides the punishments for contravention of the provisions of Section 73 or Section 76.



10. REPAYMENT OF DEPOSITS ACCEPTED BEFORE COMMENCEMENT OF THE COMPANIES ACT, 2013

10.1 Filing of statement of deposits and repayment thereafter

In case of a deposit accepted by a company before the commencement of this Act, the company

Section 74 of the Companies Act, 2013 contains the provisions regarding repayment of deposits accepted before the commencement of this Act.

shall:

- **File** with the ROC, **within 3 months** from the date of commencement or from the date on which payments are due, **a statement** of all the deposits accepted by the company and sums remaining unpaid and interest payable thereon along with the arrangements for repayment, and
- **Repay within 3 years** from the date of commencement of this Act or on or before the expiry of the period for which deposits were accepted, whichever is earlier.

10.2 Extension of time for repayment

The **Tribunal** may, on an **application made by the company**, allow further time as considered reasonable to the company to repay the deposit.

For this purpose, the Tribunal shall consider:

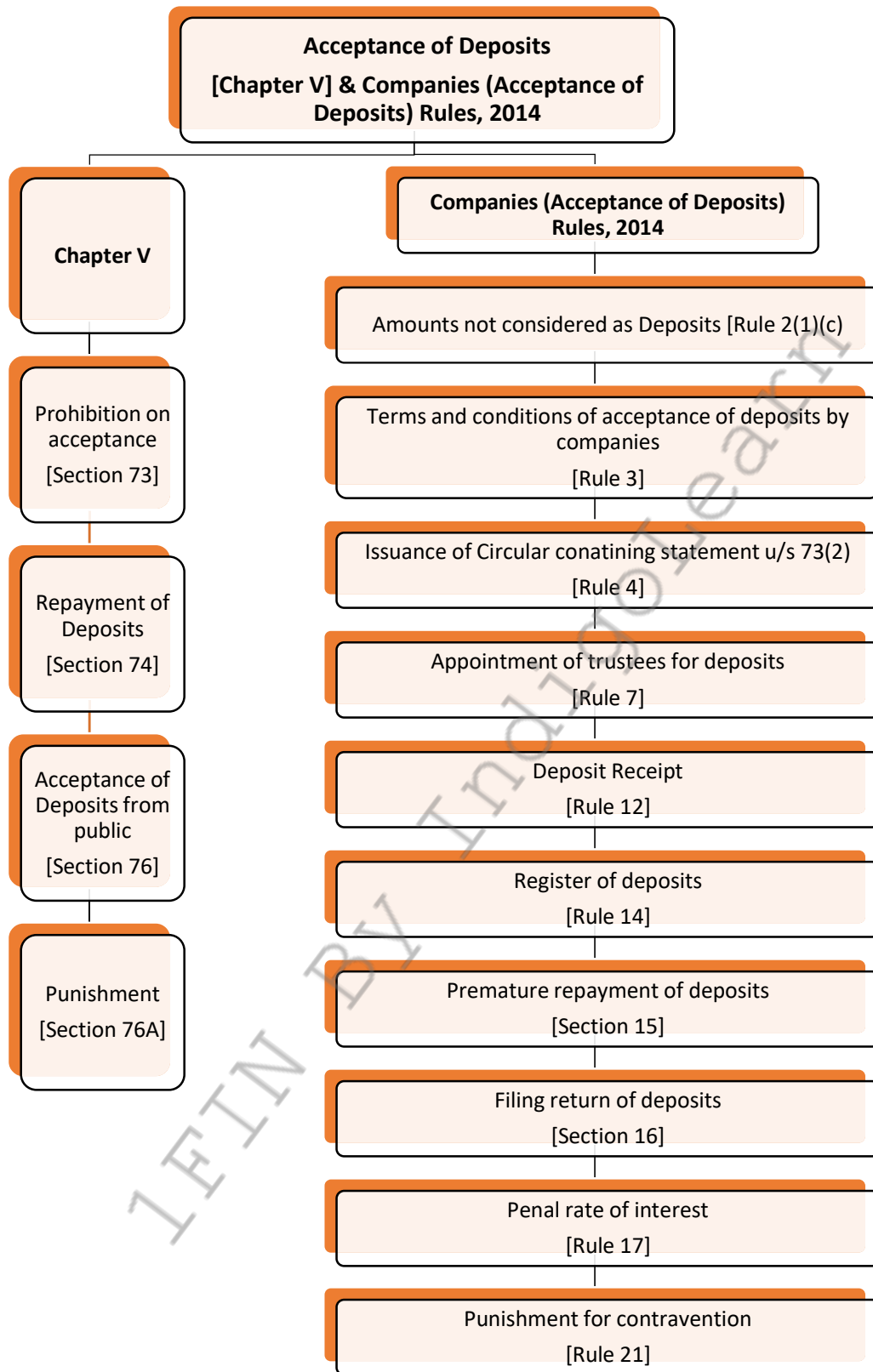
- (a) Financial condition of the company,
- (b) Amount of deposit and interest payable thereon, and
- (c) Such other matters.

10.3 Punishment for Non-repayment of deposits

- Company – Fine minimum of ₹ 1 crores and maximum of ₹ 10 crores.
- Every officer in default –
 - **Imprisonment** extendable to 7 years, or
 - **Fine** minimum of ₹ 25 lakhs and maximum of ₹ 2 crores, or
 - **Both.**

POWER OF CENTRAL GOVERNMENT TO DECIDE CERTAIN QUESTIONS

As per Rule 18, If any question arises as to the applicability of these rules to a particular company, such question shall be decided by the Central Government in consultation with the Reserve Bank of India.



Learning Outcomes –

- Understand the meaning of 'Charge'.
- Understand the difference between a Floating charge and a Fixed charge.
- Know the steps involved in registration of charges.
- Understand the consequences of non-registration of a charge and the steps to be followed for registering satisfaction of charge.
- Know the penal provisions in case of default.

1. INTRODUCTION

Whenever a company borrows money by way of loans including term loans or working capital loans from financial institutions or banks or any other persons, by offering its property or assets, a charge is created on such property or assets in favour of the lender. Such a charge is compulsorily registrable.

The law relating to registration of charges has been dealt in **Chapter VI** of the Companies Act, 2013 consisting of **sections 77 to 87** as well as the **Companies (Registration of Charges) Rules, 2014**.

1.1 Charge

Section 2(16) defines "charge" 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**.

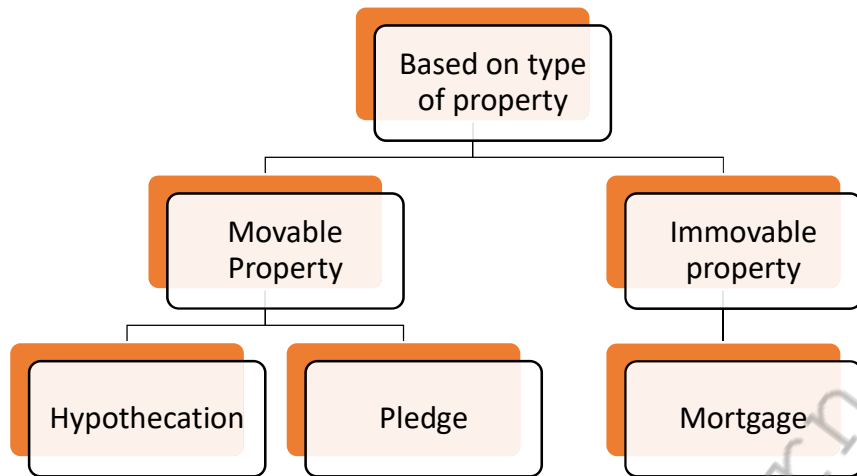
Charge is an interest or lien

It is created on the property or assets of a company/
any of its undertakings

It is created as security for repayment of a loan

Charge includes mortgage

1.2 Types of Charge



A charge may be either **fixed or floating**.

1.2.1 Fixed charge

- A fixed charge is a charge **on specific assets** of the borrowing company.
- These **assets are of permanent nature** like land & building, office premises, machinery etc.
- These assets are **identified at the time of creation of charge**.
- Usually created by way of **mortgage or deposit of title deeds**.
- The borrowing company is not permitted to sell such assets though it may use them. They **can be sold only with the permission of the charge-holder**.
- A fixed charge is **vacated when the money borrowed** against the assets subject to fixed charge **is repaid in full**.

Example : Pearl Electronics Limited raised a term loan ` 10 lakh from Everest Commercial Bank Limited, against the security of its office building. In this case, the company shall create a charge on specific asset i.e. its office building and such charge shall be a fixed charge. The company can sell this particular office building either by repaying the borrowed amount in full or after seeking permission from the charge-holder i.e. lender bank.

1.2.2 Floating charge

- **Created on assets** or a class of assets which are **of fluctuating nature** like raw material, stock-in-trade, debtors, etc.
- The assets under floating charge keep on changing because **company is permitted to use them** for trading or producing final goods for sale.

Example: A retail showroom contains numerous articles for sale. The owner may borrow against the security of all those goods. But he can still sell or deal with them in the ordinary course of business. The buyer of such goods will get it free of charge.

- When the creditor enforces the security or the company goes into liquidation, the floating charge will become fixed charge on all the assets available on that date and which may come into existence thereafter. This is called **crystallization of floating charge**.

- Crystallization of floating charge **occurs** –
- When the **terms & conditions** of the floating charge are **violated**, or
 - Company **ceases to continue its business**, or
 - Company goes into **liquidation**, or
 - The **creditors enforce the security** covered by the floating charge.

Example: Prism Limited had taken a loan from ABC Bank, on the security of its stock. Now, in the event of Prism Limited failing to repay the security interest or entering liquidation, the floating charge will change to a fixed charge. Once a floating charge gets converted to a fixed charge, the stock can neither be sold nor used by the company in its business operations.

2. DUTY TO REGISTER CHARGES, ETC.

Section 77 of the Companies Act, 2013 contains provisions regarding registration of charges by the company with the Registrar.

2.1 Registration of Charges

Registration of charges		
<p>By the company creating the charge [Section 77]</p> <ul style="list-style-type: none"> • It shall be the duty of the company creating the 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. 	<p>By the charge-holder [Section 78]</p> <ul style="list-style-type: none"> • In case the company creating a charge fails to register the charge within the time limit, the person in whose favour the charge is created can get the charge registered. 	<p>By the purchaser [Section 79]</p> <ul style="list-style-type: none"> • Where a company purchased some property in whose case a charge was already registered, the company purchasing the property shall get the charge registered in its name in place of seller in the records of the Registrar.

- ✓ The charge may be created in or outside India,
- ✓ The subject matter of the charge, i.e., the property or assets or any of the companies undertakings, may be situated within or outside India,
- ✓ The property may be tangible / intangible / financial asset.
- ✓ **A charge created by deposit of title deeds is also registrable** by the borrowing company.

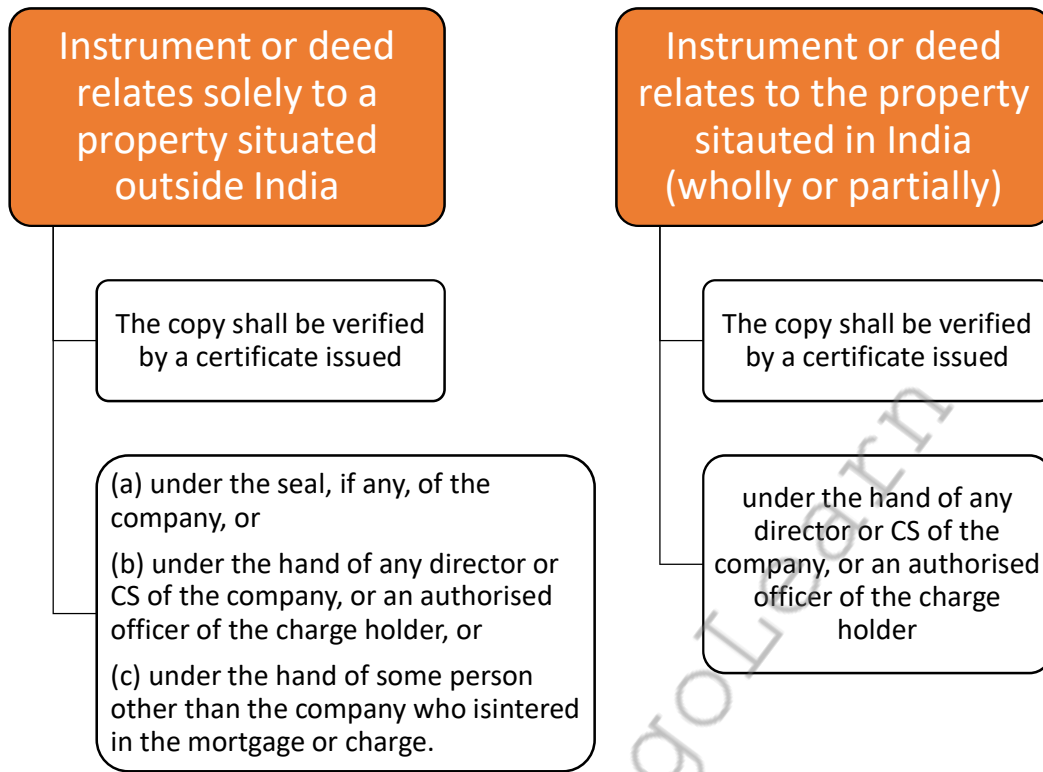
2.2 How to register charge

The **particulars of the charge** –

- ✓ in **Form CHG-1** or
- ✓ in **Form CHG-9 (in case of debentures)**,

along with the **copy of the instrument of charge**, if any, creating the charge duly signed by the company and the charge-holder shall be filed with the ROC **within 30 days** of creation of charge along with the prescribed fees.

2.3 Verification of Instrument of charge

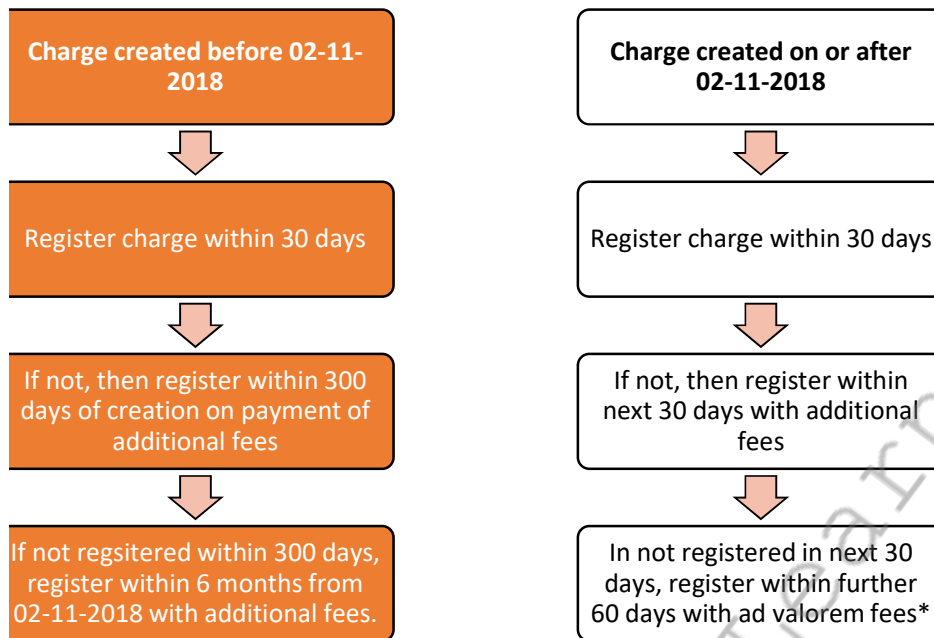


2.4 Exception - Registration of Creation/Modification of Charge

- Any charge required to be created or modified by a banking company under section 77 in favour of the Reserve Bank of India
- when any loan or advance has been made to it under sub-clause (d) of clause (4) of section 17 of the Reserve Bank of India Act, 1934 (2 of 1934)

Thus, the requirements of Rule 3 relating to Registration of Creation or Modification of Charge doesn't apply to above company.

2.5 Extension of Time Limit



*ad valorem fees means fees in proportion to the value of the charge.

- The company shall make an **application** to the ROC in **Form CHG-1 or CHG-9** (in case of debentures) seeking for extension of time.
- The application shall be **supported by a declaration** from the company signed by its CS or a director that such belated filing shall not adversely affect the rights of any other intervening creditors of the company.
- The ROC, upon being satisfied that the *company had sufficient cause for not filing the particulars of charge and instrument of charge, if any, within 30 days*, shall allow the extension of period.

2.6 Certificate of Registration

- Upon due registration of a charge, the ROC shall issue a certificate of registration in **Form CHG-2**. (Form CHG-3 for modification of charge)
- Such certificate shall be **conclusive evidence** that the requirements of this Chapter and rules thereunder have been complied with.

Section 77 shall not apply to certain charges which are prescribed in consultation with RBI.

2.7 Consequences of Non- Registration of Charges

- ✓ No **charge shall be taken into account by the liquidator** appointed under this Act or the Insolvency and bankruptcy Code, 2016 or any other creditor unless it is duly registered, and a certificate of registration is given by the ROC.



It may be noted that the failure to register charge shall not absolve the company from its liability in respect of any offence under this Chapter.

- ✓ This means that the **charge will be void**.
- ✓ **However, the debt is valid** and may be enforced against the company through the courts by filing a suit, but the security is lost.
- ✓ **Charge-holder loses his priority**.

3. APPLICATION FOR REGISTRATION OF CHARGE BY CHARGE-HOLDER

→ If a charge is created but the **company primarily responsible for registering the charge fails to do so** within the prescribed period of 30 days, the charge-holder (i.e., person in

Section 78 of the Companies Act, 2013 empowers the holder of charge to get the charge registered in case the company creating the charge on its property fails to do so.

whose favour charge is created) may apply to the Registrar for registration of the charge along with the instrument of charge within the prescribed time, form and manner.

→ The ROC shall, upon receipt of the application from the charge holder, give a **notice to the company**.

→ If no objection is received from the company, the ROC shall **register the charge within 14 days of giving the notice to the company** on payment of prescribed fees.

→ The ROC shall **not allow registration by the charge holder if:**

- i. Company itself registers the charge, or
- ii. Company shows sufficient cause why such charge should not be registered.

Where registration of charge is effected on application by the charge-holder, such person shall be entitled to recover from the fees and additional fees paid by him to the ROC for the purpose of registration of charge.

4. ACQUISITION OF PROPERTY SUBJECT TO CHARGE AND MODIFICATION OF CHARGE

4.1 Company acquiring any property subject to charge

Section 79 of the Companies Act, 2013 deals with the provisions relating to acquisition of a property already subject to charge and the modification of charge.

Where a **property where charge is already registered is sold with the permission of the charge holder**, it shall be the duty of the company acquiring such property to get the charge registered in accordance with section 77.

This means that the **earlier charge would get vacated** and a **new charge is registered** by the company acquiring the property.

4.2 Modification of charge when there is change in terms and conditions etc.

Where there is any **modification in the charge**, it shall be registered by the company in accordance with section 77 and the Registrar shall issue a **certificate of modification of charge in Form CHG-3**.

Examples of modification:

- a) Change in terms & conditions of the existing charge through an agreement,
- b) Any agreement for enhancing or decreasing the limits,
- c) Ceding a *pari passu* charge*,
- d) Change in rate of interest,
- e) Change in repayment schedule of loan,
- f) Partial release of the charge on a particular asset or property.

**A pari passu charge holder is entitled to a proportionate share in the mortgaged property. When this is ceded a charge holder will become a second charge holder and his right of entitlement will be subject to full satisfaction of the First charge holders claim.*

5. REGISTER OF CHARGES

5.1 Register of Charges to be kept by the Registrar

Section 81 of the Companies Act, 2013 contains provisions regarding Register of Charges to be kept by the Registrar.

Section 81 (1) states that the Registrar shall, in respect of every company, keep a register containing particulars of the charges registered under Chapter VI in the prescribed form and manner.

In addition, Rule 7 (1) states that 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.

Inspection of Register: According to section 81 (2) such register shall be open to inspection by any person on payment of such fees as may be prescribed for each inspection.

Similarly, Rule 7 (2) states that the Register shall be open to inspection by any person on payment of fee.

5.2 Register of Charges to be kept by the company

Section 85 of the Companies Act, 2013 contains provisions regarding Register of Charges to be kept by a company.

(i) According to section 85 (1):

- Every company shall keep a Register of Charges in the prescribed form¹⁷ and manner at its registered office.
- The Register shall include all charges and floating charges affecting any property or assets of the company or any of its undertakings, indicating in each case the prescribed particulars.

(ii) According to Proviso to section 85 (1):

- A copy of the instrument creating the charge shall also be kept at the registered office along with the Register of Charges.

(iii) Provisions of Rule 10 are as under:

- According to Rule 10 (1), the company shall enter in the Register particulars of all the charges registered with the Registrar on any of its property, assets or undertakings 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.
- According to Rule 10 (2), the entries in the Register shall be made forthwith after the creation, modification or satisfaction of charge, as the case may be.

- According to Rule 10 (3), the 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.

Inspection of Register of Charges and Instrument of Charges:

As regards inspection, section 85 (2) states that the register of charges and the instrument of charges shall be open for inspection¹⁸ during business hours:

- by any member or creditor without any payment of fees; or
- by any other person on payment of prescribed fees. subject to such reasonable restrictions as the company may, by its articles, impose.

Preservation of Register:

According to Rule 10 (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 eight years from the date of satisfaction of charge.

6. REGISTRATION OF CHARGE TO ACT AS A CONSTRUCTIVE NOTICE

Section 80 of the Companies Act, 2013 provides that the registration of charge shall act as a constructive notice.

- All charges registered with the ROC are public documents.
- Where a charge is registered u/s 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.
- In case a person **enters into a transaction without making any enquiry** and later on suffers any loss/ damage, **he cannot claim the loss from the company** for it shall be deemed that he had notice of the charge.

7. COMPANY TO REPORT SATISFACTION OF CHARGE

Section 82 of the Companies Act, 2013 deals with the requirement to intimate the Registrar of satisfaction any registered charges.

- ✓ A company shall give an intimation of payment or satisfaction* in full of any charge earlier registered, to the ROC in **Form CHG-4 within a period of 30 days (may be extended to 300 days)** on an application made to the Registrar) from the date of such payment or satisfaction.
- ✓ On receipt of such application, ROC shall cause a **notice to be sent to the charge holder** calling upon him to **show cause within such time as may be specified in the notice but not exceeding 14 days**, as to why payment/ satisfaction in full should not be recorded.
 - **No cause is shown:-** ROC shall order entering a memorandum of satisfaction in the register of charges kept by him and inform the company of having done so. ROC shall *issue a certificate of registration of satisfaction of charge in Form CHG- 5 (Rule 8)*

Satisfaction happens when the amount is not repaid but an asset of equal value is offered in the place of the property being released from charge.

- **If any cause is shown:-** ROC shall register a note to that effect in the Register of charges and inform the company.
- ✓ The instrument creating a charge/ modification shall be **preserved for 8 years** from the date of satisfaction of charge by the company.

8. POWER OF THE REGISTRAR TO MAKE ENTRIES OF SATISFACTION AND RELEASE IN THE ABSENCE OF INTIMATION FROM COMPANY

If the company hasnot informed the satisfaction of charge to the ROC & ROC receives evidence of

Section 83 of the Companies Act, 2013 empowers the ROC to make entries with respect to satisfaction and release of charges even if no intimation has been received from the company.

satisfaction of charge from other source, then,

- **ROC will enter in the Register of Charges himself** as a memorandum and
- **within 30 days**, intimate affected parties.
- Accordingly, '**Certificate of satisfaction of Charge**' in Form **CHG-5** shall be issued by ROC (Rule 8).

9. INTIMATION OF APPOINTMENT OF RECEIVER OR MANAGER

Section 84 of the Companies Act, 2013 deals with the appointment of a receiver or manager and of giving intimation to the company and the Registrar.

Section 86 of the Companies Act, 2013 deals with the punishments for the company and officer in default in case of contravention of the provisions relating to registration of charges.

10. PUNISHMENT FOR CONTRAVENTION

If any person obtains an order for the appointment of a receiver or a person to manage the property subject to any charge, or if any person appoints such receiver or manager under any power contained in any instrument, he shall give a notice of such appointment in Form CHG-6 to the company and the receiver along with a copy of the order/ instrument within 30 days of passing such order or making the appointment.

The ROC shall register the particulars of the receiver, person, or instrument in the register of charges.

On ceasing to hold the appointment the person appointed as receiver/ manager shall give a notice to that effect in Form CHG-6 to the company and the ROC, and ROC shall register such notice.



11. RECTIFICATION BY CENTRAL GOVERNMENT IN REGISTER OF CHARGES

10.1 Defaults upon which rectification order may be passed by CG

Section 87 of the Companies Act, 2013 and **Rule 12** empowers the CG to order rectification of Register of Charges.

The CG may order rectification of Register of Charges in the following cases of default:

- Omission in giving intimation to the ROC** w.r.t. payment or satisfaction of charges within specified time,
- Omission or misstatement of any particulars in any filing** previously made to the ROC relating to any charge or related matters.

10.2 Application to the CG

Where such default is made, the **company or any interested person** shall make an application to the CG in **Form CHG-8**.

Before making an order for rectification, the **CG needs to be satisfied that such default was**

- **accidental** or
- due to **inadvertence** or
- because of some other **sufficient cause** or
- it **did not prejudice the position** of the creditors/ shareholders.

10.3 Order of the CG

The Central Government may-

- 1) Direct **rectification of the omission/ misstatement** of any particulars in any filing previously recorded with the ROC,
- 2) Direct **extension of time for satisfaction of charge**, if such filing is not made within 300 days from the date of payment or satisfaction of charge.

12. SIGNING OF CHARGE E-FORMS FOR COMPANIES UNDER RESOLUTION OR LIQUIDATION

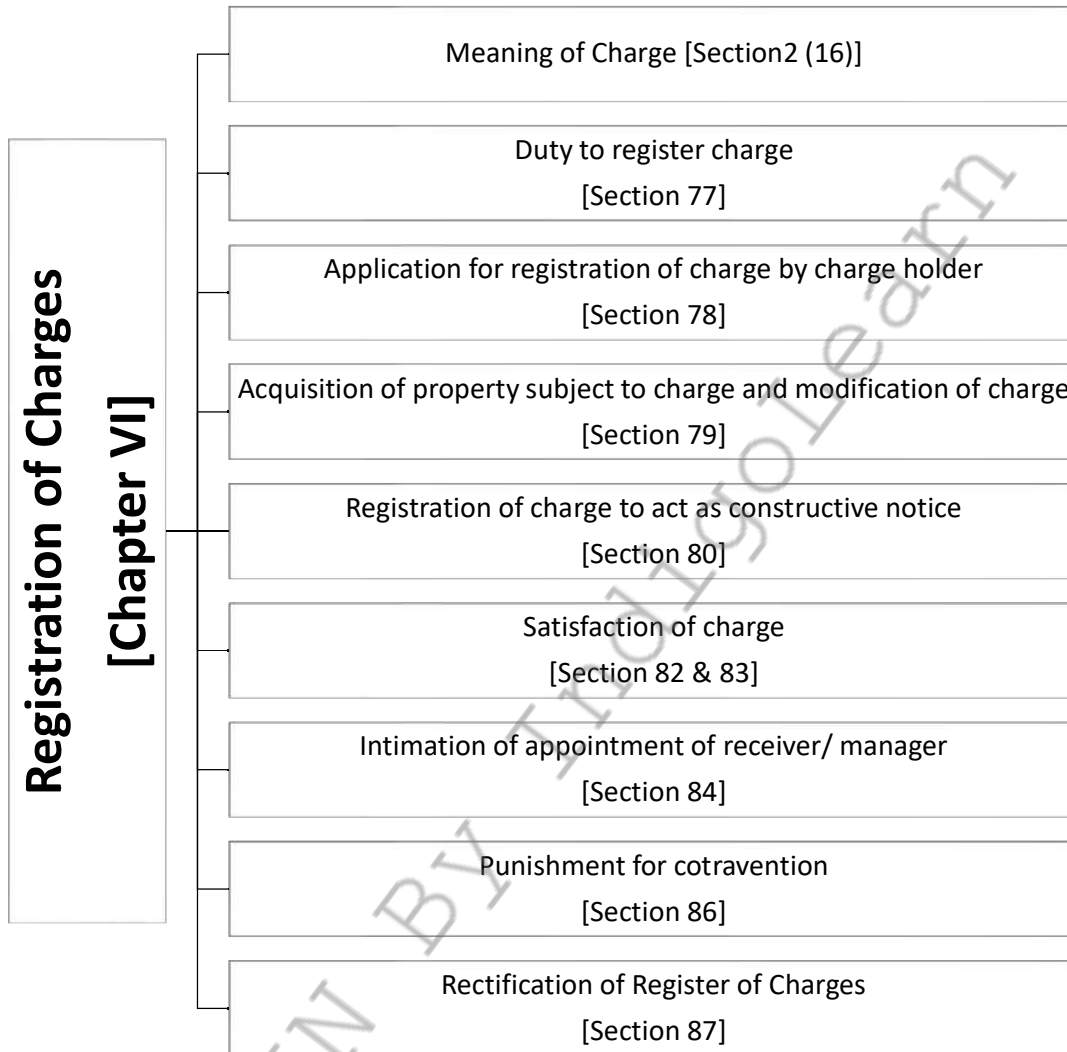
- ➔ Form No. CHG-1, CHG-4, CHG-8 and CHG-9
 - ➔ shall be signed by
 - Insolvency resolution professional or
 - resolution professional or
 - liquidator
- for companies under resolution or liquidation, as the case may be and
- ➔ filed with the Registrar [Rule 13]

13. LIST OF FORMS TO BE FILLED WITH ROC

S.No.	E-Form	Purpose
1.	CHG-1	Creating or Modifying charge (for other than Debentures)
2.	CHG-2	Certificate of Registration of charge.
3.	CHG-3	Certificate of Modification of charge.
4.	CHG-4	Intimation of the satisfaction to the Registrar.
5.	CHG-5	Memorandum of satisfaction of charge.
6.	CHG-6	Notice of appointment or cessation or receiver or manager.
7.	CHG-7	Register of charges.
8.	CHG-8	Application for condonation of delay shall be filed the CG

9.	CHG-9	Creating or modifying the charge in (for debentures including rectification)
10.	CHG-10	Application for delay to the registrar.

OVERVIEW



Learning Outcomes –

- 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.

1. INTRODUCTION

The provisions relating to management and administration of companies have been dealt with under **Chapter VII** of the Companies Act, 2013 [**Section 88 to 122**] and the **Companies (Management & Administration) Rules, 2014**.

This Chapter applies to all companies, public and private, and has special provisions applicable to One Person Company (OPC).

2. REGISTER OF MEMBERS, ETC

Section 88 of the Companies Act, 2013 contains provisions regarding maintenance of registers of members, debenture holders and other security holders.

2.1 Register of members, debenture holders & other security holders

✓ **Every company** shall keep and maintain the register of members, debenture holders and other security holders.

✓ **Form of Register :**

Register of Members (company limited by shares)	Form MGT-1
Register of debenture holders/ other security holders	Form MGT-2

✓ **Entries** have to be made in the Register **within 7 days of the date of approval by the Board or Committee** thereof, the allotment/transfer of shares, debentures, or any other securities.

✓ The Register shall be **maintained at the registered office** of the company.

Other Requirements applicable to all the Registers

Rule 5 contains certain requirements which are applicable to all types of registers (i.e. Register of Members, Register of Debenture-holders and Register of any Other Security Holders). These are stated as under:

◆ **Time period for making entries in Register**

As per Rule 5 (1), 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 of shares, debentures or any other securities, as the case may be.

◆ Place of maintaining Register

According to Rule 5 (2), 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 information also to be referred in register

1. In terms of Rule 5 (6), if any order is passed by any judicial or revenue authority or by Security and Exchange Board of India (SEBI) or competent authority attaching the shares, debentures or other securities and giving directions for remittance of dividend or interest, the necessary reference of such order shall be indicated in the respective register.
2. According to Rule 5 (7), in case of companies whose securities are listed on a stock exchange in or outside India, the particulars of any pledge, charge, lien or hypothecation created by the promoters in respect of any securities of the company held by the promoter including the names of pledgee/pawnee and any revocation therein shall be entered in the register within fifteen days from such an event.
3. According to Rule 5 (8), if promoters of any listed company, which has formed a joint venture company with another company have pledged or hypothecated or created charge or lien in respect of any security of the listed company in connection with such joint venture company, the particulars of such pledge, hypothecation, charge and lien shall be entered in the register members of the listed company within fifteen days from such an event.

◆ Updating of change in status of members

Rule 5 (4) states that 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 (IEPF) or due to any other reason entries thereof explaining the change shall be made in the respective registers.

◆ Rectification in register

According to Rule 5 (5), if any rectification is made in the register maintained under section 88 by the company pursuant to any order passed by the competent authority under the Act, the necessary reference of such order shall be indicated in the respective register

✓ Particulars in register of members [Rule 3]:

- Name of the member, address, email address, PAN/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.
- ✓ Every register shall include an **index of names** included therein. Index is not required wherein the number of members is less than 50.

- ✓ The **register and index of beneficial owners** maintained by a depository shall be **deemed to be corresponding register and index**.
- ✓ The entries made in the registers and index shall be **authenticated** by the CS of the company or any other person authorised by the Board for this purpose.

2.2 Foreign Register [Section 88(4) r.w. Rule 7]

A company **may**, if so **authorised by the AOA, keep in any country outside India, a part of the register** of members, or debenture holders, or other security holders, or of beneficial owners, **resident in that country**. Such a register may be referred to as **"Foreign Register"**.

2.2.1 Conditions:

- a) **Within 30 days** of opening the foreign register, **file with the ROC notice** of the situation of the office in **Form MGT-3**.
- b) In case of **change in situation of such office or of its discontinuance, within 30 days file a notice in Form MGT-3** with ROC of such change or discontinuance.
- c) Maintained in the **same format as the principal register**.
- d) **Inspection** of foreign register, closing, taking extracts therefrom and copies thereof – **same manner** as applicable to principal register. **Exception:** The advertisement before closing the register shall be inserted in at least 2 newspapers circulating in the place wherein foreign register is maintained.
- e) The company shall –
 - **Transmit a copy of every entry made in foreign register** to its registered office in India **within 15 days** of making such entry.
 - Keep at such office a **duplicate register** of every foreign register, duly updated from time to time.
 - **Not register any transaction** relating to any share, debenture or security holder which is registered in a foreign register, **in any other register**.
- f) Where the company **discontinues the keeping of any foreign register**, all the entries in that register shall be transferred to some other foreign register kept by the company outside India or to the principal register.
- g) The entries made in the foreign register shall be **authenticated** by the CS of the company or any other person authorised by the Board by appending his signature to each entry.

2.3 Penalty for failure to maintain the register

The company and every officer in default shall be liable to penalty of ₹3L and ₹50,000 respectively.

Register of members - Rule 3;
Form MGT - 1

Register of debenture-holders/
any OSH - Rule 4;
Form MGT - 2

Maintenance of Registers of members etc.- Rule 5

Index of names of members - Rule 6

Foreign Register - Rule 7

Section 89 of the Companies Act, 2013 contains provisions relating to declaration in respect of beneficial interest in any share.

Members not holding beneficial interest in the company [Sec. 89(1)]	Person holding beneficial interest in the shares [Sec. 89(2)]	Any changes in the beneficial interest [Sec. 89(3)]
<ul style="list-style-type: none">•File declaration in Form MGT-4.•Specify the name and other particulars of the person who holds the beneficial interest in such shares.	<ul style="list-style-type: none">•Declaration to the company in Form MGT- 5.•Specify the nature of interest, particulars of the person in whose name such shares stand registered in the books of the company and other particulars	<ul style="list-style-type: none">•Change occurs in the beneficial interest in any shares in respect of which a declaration has been filed u/s 89(1) & (2).

Shall file a declaration of beneficial interest with the company within 30 days and company shall file a return to ROC in Form MGT- 6 within 30 days.

Where any declaration required u/s 89 is **not filed** by the beneficial owner, then any **right w.r.t. such shares shall not be enforceable** by the beneficial owner or any person claiming through him.

The duty of the company to pay **dividend shall not be affected** by this section.

3.1 Beneficial interest [Section 89(10)]

Beneficial interest in a share **includes**

- Directly or indirectly,
- Through any contract, arrangement or otherwise,
- the **right or entitlement** of a person alone or together with any person to-
 - (i) **exercise** or cause to be exercised any or all the **rights attached to such share**, or
 - (ii) **receive or participate in any dividend** or other distribution in respect of such share.



Trust which is created, to set up a Mutual Fund or Venture Capital Fund or such other fund as may be approved by SEBI, **need not file the declarations** as envisaged under this section

3.2 Penalty for default

Any person fails to make declaration u/s 89

- Penalty - ₹50,000
- In case of continuing default further penalty of ₹200 for each day after the first during which failure continues.
- *Subject to a maximum of ₹5L*

Company fails to file the return to ROC within 30 days

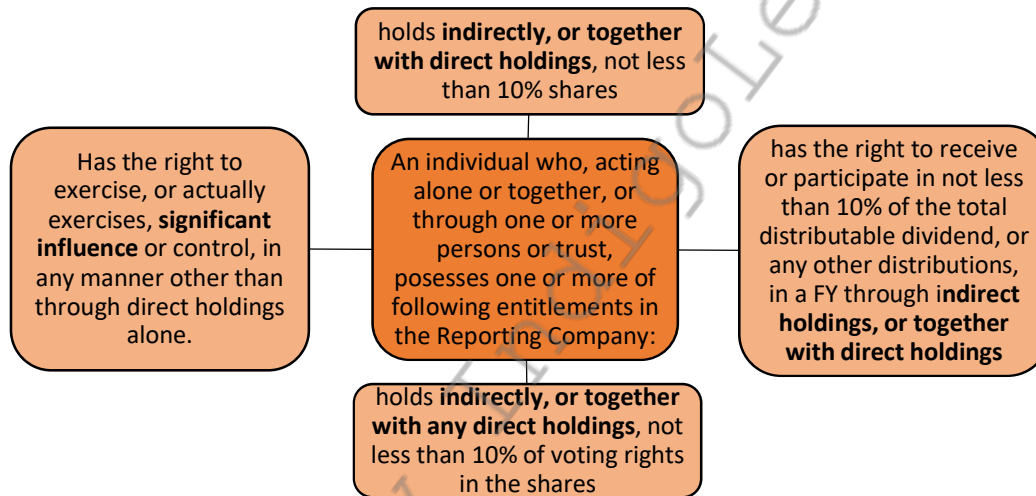
- Company and every officer in default shall be liable to penalty of ₹1,000 for each day during which such failure continues, subject to max. of ₹5L - in case of company
₹2L - in case of officer in default

- **Section 89 shall not apply to a government company** which has not committed a default in filing its financial statements u/s 137 or Annual Return u/s 92 with the ROC.
- **Central Government may, by notification, exempt** any class (es) of persons from complying with any of requirements of section 89, except sub-section (10), if it is considered necessary to grant such exemption in public interest and any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification.

4. REGISTER OF SIGNIFICANT BENEFICIAL OWNERS IN A COMPANY

4.1 Significant Beneficial Owner (SBO)

Section 90 of the Companies Act, 2013 states the requirement for every significant beneficial owner to state his interest and other particulars to the company. MCA has issued **Companies (Significant Beneficial Owners) Rules, 2018 (SBO)**, which deals with identification and reporting in connection with SBO.



4.1.1 Direct or indirect shareholding

direct shareholding:	direct shareholding:
<ul style="list-style-type: none"> Shares in the relevant company are held in the name of such individual, or The individual holds or acquires a beneficial interest in the shares of the relevant company and has made a declaration in this regard. 	when a shareholder is a <ul style="list-style-type: none"> Body corporate, HUF, Partnership, Trust, Pooled Investment vehicle.

4.1.2 Significant Influence

The **power to participate**, directly or indirectly, **in the financial and operating policy decisions** of the reporting company but is not control or joint control of those policies.

2.1.3 4.1.3. Majority Stake

- ✓ holding more than one-half of the equity share capital in the body corporate; or
- ✓ holding more than one-half of the voting rights in the body corporate; or

- ✓ Having the right to receive or participate in more than one-half of the distributable dividend or any other distribution by the body corporate.

4.2 Duty of the reporting company

(1) To give **notice in the Form BEN-4** to the person whom the **company knows or has reasonable cause to believe –**

- **To be an SBO** of the company,
- To be **having knowledge of the identity of an SBO** or another person likely to have such knowledge, or
- To have **been an SBO of the company at any time during the 3 years** immediately preceding the date on which notice is issued

Who have not registered themselves with the company as SBO. (i.e., unregistered SBOs)

(2) Maintain a **register of SBOs** in **Form BEN-3** which shall be open for inspection during the business hours on payment of such fee as may be prescribed by the company, but not exceeding ₹ 50 for each inspection.

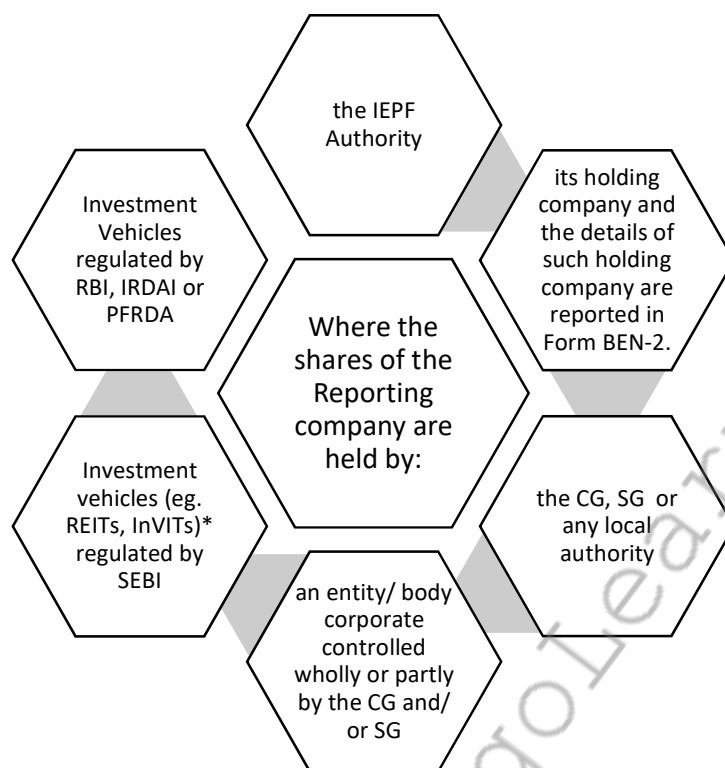
4.3 Application to the tribunal

- Where the **person fails to give the company information** required by the notice in Form BEN-4 **within 30 days** or, the information given is not satisfactory, the **company shall apply to the Tribunal within 15 days** of the expiry of the period specified in the notice.
- The Tribunal may, after giving an opportunity of being heard to the parties concerned, make such **order restricting the rights attached with the shares within 60 days** of receipt of application or such other period as may be prescribed.
- Any **person aggrieved with the order** of the tribunal **may make an application to the Tribunal** for relaxation or lifting of the restrictions **within 1 year** from the date of such order.
- If **no such application has been filed within 1 year**, such **shares shall be transferred**, without any restrictions, to the Investors Education and Protection Fund (IEPF).

4.4 Declaration by SBO

Every individual who becomes a SBO in the reporting company or whose significant beneficial ownership undergoes any change, is required to **file a declaration** with the Reporting company in **Form BEN-1 within 30 days**.

4.5 Non-applicability of Companies (Significant Beneficial Owners) Rules, 2018



*REIT – Real Estate Investment Trust

*InVIT – Infrastructure Investment Trusts

4.6 Punishment for contravention

SBO fails to give required disclosure	Reporting company fails to maintain register of SBO/ file return of SBO with ROC/ denies inspection
<ul style="list-style-type: none"> • Penalty – ₹50,000 ▪ If the failure continues – Further penalty of ₹1,000 for each day after the first day during which the failure continues. ▪ Subject to maximum of ₹2L 	<p>Company</p> <ul style="list-style-type: none"> • Penalty – ₹1L • If the failure continues –Further penalty of ₹500 for each day, after first during which such failure continues • Subject to maximum of ₹5L <p>Officer in default</p> <ul style="list-style-type: none"> • Penalty – ₹25,000 • If the failure continues –Further penalty of ₹200 for each day, after first during which such failure continues • Subject to maximum of ₹1L
<p style="text-align: center;">Such contravention is compoundable. Contravention with the intention commit fraud - liable u/s 447.</p>	

Section 90 shall **not be applicable** to a **Government Company** which has not committed a default in filing its FS u/s 137 or Annual Return u/s 92.

Section 91 of the Companies Act, 2013 deals with the closing of register of members, debenture holders and other security holders.

5. POWER TO CLOSE REGISTER OF MEMBERS OR DEBENTURE HOLDERS OR OTHER SECURITY HOLDERS

- ✓ The register of members, debenture holders and other security holders may be closed by the company by giving **minimum 7 days' notice period** or such lesser period as specified by SEBI **to its members**.
- ✓ Company closing the register shall give a minimum 7 days' previous notice by an **advertisement at least once in an English & Vernacular language** in English & vernacular newspaper respectively having wide circulation in place where registered office is situated. It shall also be published on the website notified by the CG and **website of the company**, if any.
 - Listed company or company intending to get its securities listed to follow manner of giving 7 days' notice as may be specified by SEBI
 - Requirement of advertisement shall not applicable to private company provided that the notice has been served on all members not less than seven days prior to closure of the register
- ✓ **Maximum period for closing register:**
 - 30 days at a time and
 - 45 days aggregate in a year.
- ✓ **Punishment for contravention:**
 - **Company and every officer in default** – Penalty of ₹ 5,000/- per day subject to a maximum of ₹ 1,00,000, during which the register is kept closed.
 - The offence is **compoundable** u/s 441.

6. ANNUAL RETURN

6.1 Contents of Annual Return

Section 92 of the Companies Act, 2013 together with **Rules 11 & 12** of Companies (Management & Administration) Rules, 2014 provides the provisions with regard to Annual Return.

Registered office, principal business activities, particulars of its holding, subsidiary and associate companies

Its shares, debentures, and other securities and shareholding pattern

Members and debenture holders along with the changes therein since the close of the previous F.Y.

Promoters, directors, KMP, along with the changes therein since the close of the previous F.Y.

Meetings of the members, BOD

Remuneration of directors and KMP

Penalty or punishment on directors, officers and details of compounding

Matters relating to certification of compliances, disclosures

Details as may be prescribed in respect of shares held by or on behalf of FII

6.2 Maintenance of Annual Return

- ✓ Every company shall prepare an annual return in **Form No. MGT-7**.
 - Except OPC and small company which shall file annual return from F.Y. 2020-2021 onwards in Form No. **MGT-7A**
- ✓ It shall be **signed by** -
 - A director and the CS of the company, if any,
 - In case of company has no CS, director, and a CS in practice,
 - OPC and Small Company and private company (which is a start-up) – by the CS of the company. If no CS, then director of the company.
- ✓ Central Government may prescribe **abridged form of annual return** for OPC, small company and such other class(es) of companies as may be prescribed
- ✓ **Certification by CS** -
 - In case of a listed company or company having paid-up share capital of ₹ 10 crore or more, or a turnover of ₹ 50 crore or more,
 - Shall be certified by a **CS in practice**.
 - Certificate shall be in **Form MGT-8**.

- ✓ Every company shall place a **copy** of the Annual Return **on the website** of the company, if any, and the web-link of such annual return shall be disclosed in the Board's report.
- ✓ Copy of the Annual Return shall be **filed with the ROC**
 - **within 60 days** from the date on which AGM is held or
 - where no AGM is held – within 60 days from the date on which AGM should have been held, along with reasons for not holding the AGM.

6.3 Punishment for contravention

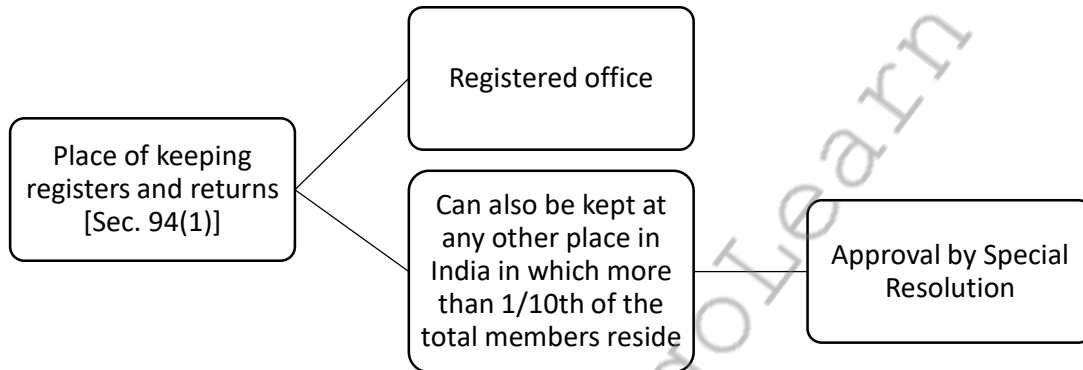
Company fails to file the Annual Return	CS in practice certifies otherwise than in accordance with this section
<ul style="list-style-type: none"> • Company and every officer in default shall be liable • Penalty of ₹10,000 • In case of continuing failure - further penalty of Rs. 100/- for every day during which the failure continues • Subject to a maximum of <ul style="list-style-type: none"> • ₹2L - in case of company • ₹50,000 - in case of officer in default 	<ul style="list-style-type: none"> • Liable to penalty of ₹2L

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7. PLACE OF KEEPING AND INSPECTION OF REGISTERS, RETURNS, ETC.

7.1 Place of keeping registers and returns

Section 94 of the Companies Act, 2013 provides the provisions with regard to place of keeping the registers and returns of a company and their inspection.



7.2 Inspection of registers and returns [r.w. Rule 14]

- ✓ The registers and returns shall be open for inspection during **business hours**, at such reasonable time, on **every working day** as decided by the BOD,
 - By any **member, debenture holder, other security holder or beneficial owner** without the payment of fee, and
 - By any **other person on payment of fees** as prescribed by the BOD but not exceeding ₹ 50/- for each inspection.
- ✓ Any member, debenture holder, other security holder or beneficial owner can
 - **take extracts** during business hours without payment of fee, and
 - also **get copies** on payment of fee not exceeding ₹ 10/- for each page.
- ✓ Copies/ entries/ return shall be **supplied within 7 days** of deposit of fee.
- ✓ Following particulars of the register/index/return in respect of the members of a company shall not be made available for any inspection under S. 94(2) or for taking extracts or copies under S.94(3) :
 - i. address or registered address (in case of a body corporate);
 - ii. e-mail ID
 - iii. Unique Identification Number
 - iv. PAN Number

7.3 Preservation of register of members etc. and annual return [Rule 15]

Preservation of register of members along with index

- Preserved permanently.
- Kept in the custody of Company Preservation of register of members secretary or any other person authorised by the BOD for such purpose.

Preservation of register of debenture holders/ other security holders

- Preserved for a period of 8 years from date of redemption of debentures or securities
- Kept in the custody of CS of the company or any other person authorised by the BOD for such purpose.

Preservation of documents filled with ROC

- Preserved for 8 years from the date of filing with the ROC.

Preservation of foreign register

- Preserved permanently unless discontinued and all entries are transferred to any other foreign register or to the principal register.
- Foreign register of debenture holders and other security holders shall be preserved for 8 years from the date of redemption of such denture or securities.

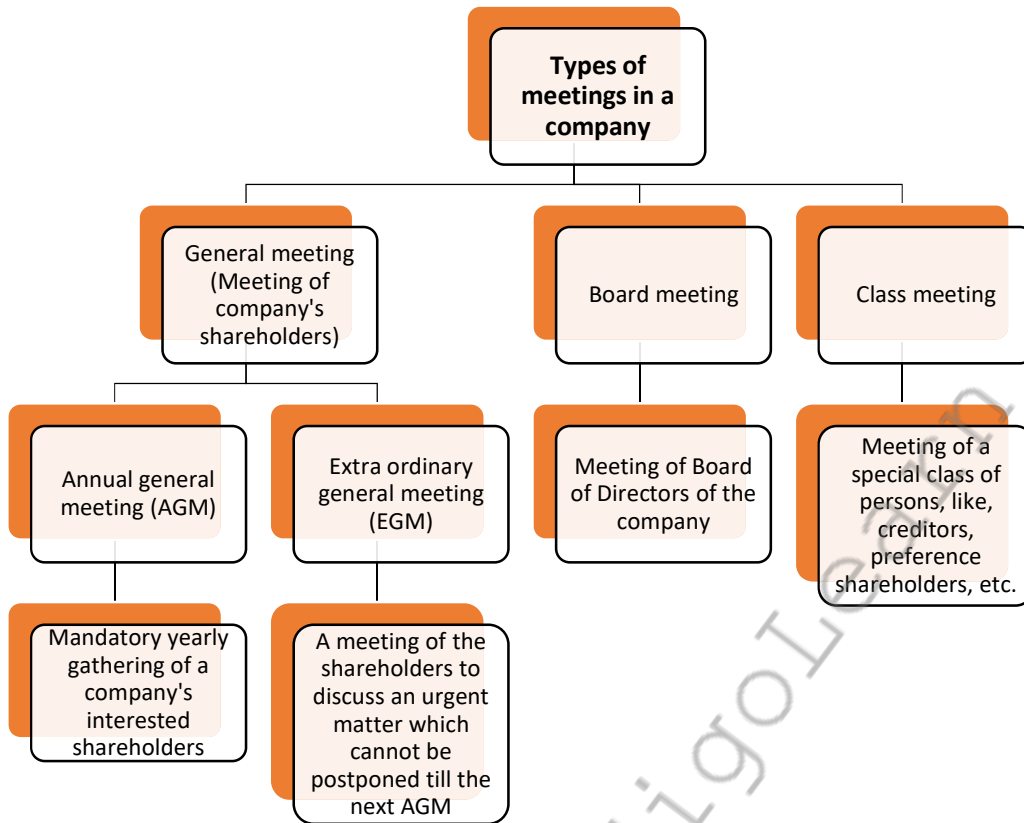
7.4 Penalty for refusing inspection or making any extract or copy required

- ✓ **Company and every officer of the company in default** shall be liable to a **penalty of ₹ 1,000/- for every day subject to a maximum of ₹ 1,00,000/-** during which the default continues.
- ✓ The **CG may also direct an immediate inspection** of the document or direct that required extract be forthwith allowed to be taken by the person requiring it.

8. REGISTERS, ETC. TO BE EVIDENCE

Section 95 of the Companies Act, 2013 provides that the registers, indices, and copies of annual return shall be a **prima facie evidence** of any matter directed or authorised to be inserted therein.

9. TYPES OF MEETINGS IN A COMPANY



10. NOTICE OF A MEETING

Section 101 of the Companies Act, 2013 together with **Rule 18** of the Companies (Management & Administration) Rules, 2014 lays down the rules regulating the notice to be sent calling a meeting.

10.1 Notice of general meeting

To properly call a meeting, a notice –

Of **at least 21 clear days** (14 days for Section 8 company), before the meeting,

→ Should be **given to**:

- All the **members**,
- **Legal representative** of any deceased member,
- The **assignee** of any insolvent member,
- The **auditors**, and
- The **directors**,

→ In **writing / electronic mode / other prescribed mode**.

The notice shall be **placed** simultaneously **on the website** of the company, if any, and on any website notified by the CG.



21 clear days means that date on which notice is served, and date of meeting are excluded for sending the notice. Company cannot reduce this requirement through its AOA.

Note:

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 No. GSR 8 (E), dated 4th January, 2017.]

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. This exception shall be applicable to a section 8 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 No. GSR 466 (E), 5-6-2015 as amended by Notification No. GSR 584 (E), dated 13th June, 2017.]

10.1.1 Electronic mode [Rule 18]

Where a notice for the GM is **sent by post**, it shall be **deemed to be served at the expiration of 48 hours** after the letter containing the same is posted. [Rule 35(6) of the Companies (Incorporation) Rules, 2014]

- Any communication sent by a company **through its authorised and secured computer programme**
- which is **capable of producing confirmation and keeping record** of such communication addressed to the email address provided by such member who is entitled to receive such communication.
- A notice may be sent through e-mail as a -
 - (a) Text, or
 - (b) As an attachment to e-mail, or
 - (c) As a notification providing electronic link, or
 - (d) URL for accessing such notice.

10.1.2 Accidental omission to give notice [Sec. 101(4)]

Any accidental omission to give notice to or the non-receipt of such notice by, any member or other person who is entitled to such notice for any meeting **shall not invalidate the proceedings of the meeting**.

It is the **duty of the company to prove** that the omission was not deliberate.

10.2 Meetings held at shorter notice

A GM may be called at a shorter notice if **consent in writing/ by electronic mode** is given by:

- (1) **In case of AGM:** *not less than 95% of the members* entitled to vote thereat.
- (2) **In case of other GM:** by members of the company having
 - *Company having share capital – majority number* of members entitled to vote and who represent not less than 95% of paid-up share capital members entitled to vote in that meeting.
 - *Company not having share capital – not less than 95% of total voting power* exercisable at that meeting.

10.3 Contents of the notice

- Day, date, hour of meeting,
- Place of meeting,

- Statement of business to be transacted at a meeting.

10.4 Authority to call a GM

- ✓ A GM has to be called by the **Board of Directors (BOD)**.
- ✓ An individual director cannot call a GM.
- ✓ A **notice of the GM given without sanction of the BOD** is *invalid*. However, the same *can be ratified by the BOD*.

11. EXPLANATORY STATEMENT TO BE ANNEXED TO NOTICE

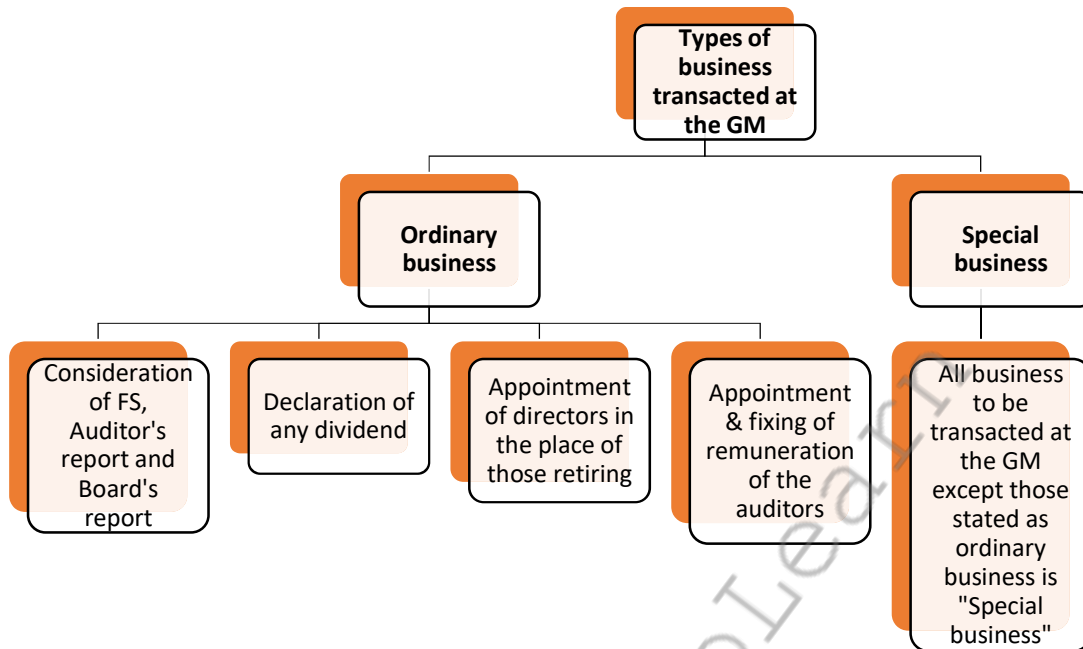
Section 102 of the Companies Act, 2013 provides the provisions relating to explanatory statement to be attached to a notice of a general meeting where any special business is to be transacted.

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 GM.

11.1 Content of the explanatory statement

- 1) The **nature of interest in respect of each items** to be transacted of
 - Every director and the manager if any
 - Every other KMP, and
 - Relatives of above persons.
- 2) Any **other information / facts** that may enable the members to understand the meaning, scope, and implications of the items of business and to take decision thereon.
- 3) If the **special business relates to or affects any other company**, then the **extend of shareholding** in that other company of every promoter, director, manager and every other KMP **shall be disclosed**, *if the extend of shareholding is 2% or more of the paid-up capital of that other company*.
- 4) In case any business refers to any document to be considered at the meeting, then time and place where such document can be inspected.

11.2 Types of business transacted at GM



11.3 Contravention of these provisions

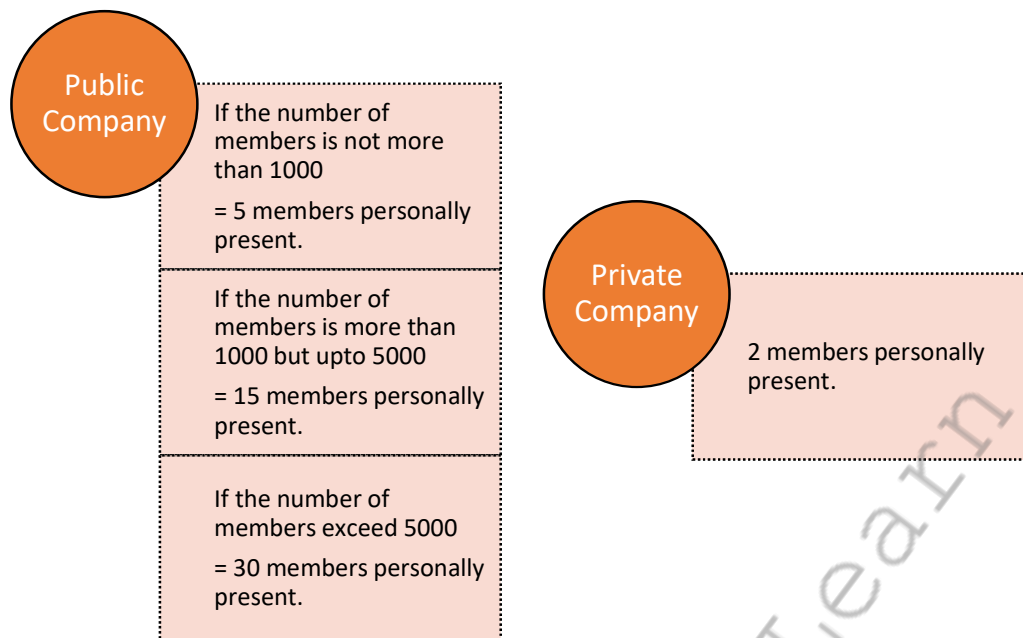
- 1) If as a result of **non-disclosure or insufficient disclosure** in explanatory statement, **any benefit accrues** to a promoter, director, manager, other KMP, or their relatives,
 - Such person shall **hold such benefit in trust** for the company, **and**
 - Shall be liable to **compensate the company** to the extent of the benefit received by him.
- 2) If any **default is made in complying with the provisions** of this section, every promoter, director, manager, or other KMP of the company who is in default shall be liable to a **penalty of**
 - ₹ 50,000/- or
 - *5 times the benefit* accruing to the promoter, director, manager, or other KMP or any of his relatives**Whichever is higher.**

12. QUORUM FOR MEETINGS

Section 103 of the Companies Act, 2013 provides the quorum for the meetings of the company.

Quorum = The minimum number of members who must be present in order to constitute a valid meeting.

12.1 Quorum for the meeting



Note: The AOA may provide for a larger number to be the quorum for meetings of the company.

12.2 Who shall be considered as quorum?

a) Proxies	x
b) Authorised representative of company	✓
c) Joint holders	counted as 1
d) Person in dual capacity	counted more than 1

12.3 Adjourned meeting due to want of Quorum

- ✓ If the **quorum is not present within half -an-hour** from the time appointed for the 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, time and place as the BOD may determine, *or*
 - b) If the *meeting was called by requisitionists u/s 100*, the meeting shall **stand cancelled**.
- ✓ In case of an **adjourned meeting**/ change of day, time or place of meeting , company shall give **not less than 3 days’ notice** to the members –
 - Either individually, or
 - By publishing an advertisement in the newspapers (English & vernacular) having wide circulation at the place where the registered office is situated.
- ✓ If **quorum is not present in adjourned meeting** also within half-an-hour, *members present shall form the quorum*.

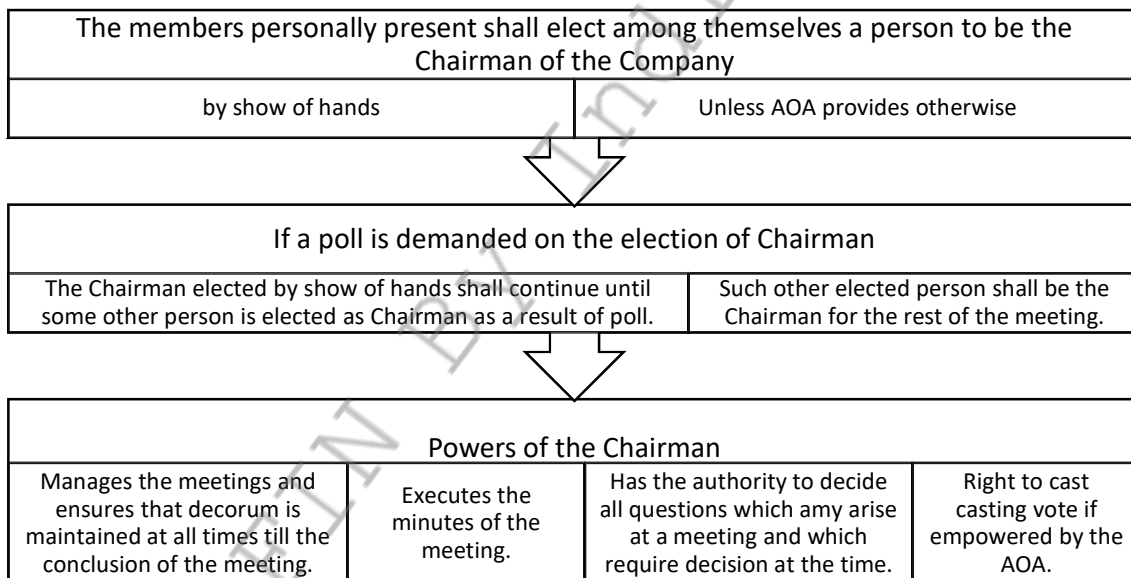
Note:

The following points have been prescribed by Secretarial Standard – 2:

1. One person can be an authorised representative of more than one body corporate. In such a case, he is treated as more than one Member present in person for the purpose of Quorum. However, to constitute a meeting, at least two individuals shall be present in person. Thus, in case of a public company having not more than one thousand members with a Quorum requirement of five members, an authorised representative of five bodies corporate cannot form a Quorum by himself but can do so if at least one more member is personally present.
2. Quorum shall be present not only at the time of commencement of the Meeting but also while transacting business
3. Members who have voted by Remote e-voting have the right to attend the General Meeting and accordingly their presence shall be counted for the purpose of Quorum.
4. A Member who is not entitled to vote on any particular item of business being a related party, if present, shall be counted for the purpose of Quorum.
5. The stipulation regarding the presence of a Quorum does not apply with respect to items of business transacted through postal ballot.

13. CHAIRMAN OF MEETINGS

Section 104 of the Companies Act, 2013 provides the provisions relating to election of chairman of the company and his powers.



Casting vote = In the 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 for a casting vote in the AOA, an ordinary resolution on which there is equality of votes is deemed to be dropped.

14. PROXIES

14.1 Meaning of Proxy

Section 105 of the Companies Act, 2013 deals with the appointment of proxy of a member of the company.

Any member of a company who is entitled to attend and vote 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.**

14.2 Applicability

- Company having a **share capital**, or
- If the company has no share capital, the **AOA of the company provides** for appointment of proxy.

14.3 Who can be appointed as proxy

- **Generally** – Non-member / member of the company
- **Section 8 companies** – Only member of such company.

14.4 Role of Proxy

- ✓ Proxy shall **not have the right to speak** at such meeting,
- ✓ Proxy shall **not be entitled to vote except on a poll.**
- ✓ A person can **act as proxy of more than one member provided it is not more than-**
 - 50 members **and**
 - **Members holding in aggregate not more than 10% of total share capital** of the company carrying voting rights.
 - A **person who is holding more than 10% of share capital** carrying voting rights **may appoint a single person as proxy** and such person shall not act as a proxy for any other person or shareholder.

14.5 Procedure to appoint Proxy

- In **every notice** calling a meeting of a company, there shall appear with reasonable prominence a **statement that a member entitled to attend, and vote is entitled to appoint a proxy**, or, where that is allowed, one or more proxies to attend and vote instead of himself, and that proxy need not be a member.
- Instrument for appointment of proxy – Form **MGT-11**
- It shall be **signed** by the appointer or his attorney duly authorised in writing.

If the appointer is a body corporate – the instrument should be under its seal or signed by an officer or an attorney duly authorised by the body corporate.

- A proxy **shall be received 48 hours before the meeting** (even if articles provide for a longer period).



In a listed company, the notice of the meeting shall clearly state that the members who have cast their vote by remote e-voting prior to the meeting may also attend the meeting but shall not be entitled to cast their vote again

14.6 Inspection of Proxy

- ✓ **Every member** entitled to vote at a meeting of the company, or on any resolution to be moved thereat, shall be entitled to inspect the proxies.
- ✓ **Time for inspection** – during the **period beginning 24 hours before the commencement of meeting and ending with the conclusion of the meeting**, at any time during the **business hours**.

At least 3 days prior notice in writing of the intention so to inspect should be given to the company.

14.7 Penalty for default

** Officer shall not be **liable** by reason only of issue to member at his request in writing of a form of appointment naming the proxy, or of a list of persons willing to act as proxies, if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy*

If the notice does not state the proxy may be appointed

- Every officer of the company in default shall be punishable
- penalty of Rs. 5,000/-.

If an invitation to appoint as proxy any specified person is sent to any member of the company entitled to attend and vote thereat by proxy*

- every officer of the company who issues invitation as aforesaid or authorises or permits their issue shall be liable to penalty of ₹50,000

15. RESTRICTION ON VOTING RIGHTS

Section 106 of the Companies Act, 2013 overrules the whole of the Act and provides for restriction on voting rights of a member.

15.1 Grounds on which voting right may be restricted.

AOA 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
- On which **any other sum payable to the company**, or
- In regard to which the **company has exercised the right of lien**.

Voting right shall not be restricted on any other grounds.

Also, such a member **cannot sign a requisition for an EGM.**

15.2 Member entitled to more than one vote

On a poll taken at a meeting, **a member entitled to more than one vote**, or his proxy, where allowed, other another 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 [Sec. 106(3)]

15.3 Vote of joint holders

- Joint shareholders **must vote in consensus** *unless the AOA provide otherwise.*
- The voting in case of joint holders 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. Joint holders have a right to instruct the company as to the order in which their name appears in the register.

15.4 Vote of Directors, who are also shareholders

- Directors, who are also shareholders of the company stand in a **fiduciary relationship** with the company in their capacity as directors.
- However, the director should **vote as a common shareholder** and need not be influenced by the fact of his being a director.

16. VOTING BY SHOW OF HANDS

Section 107 of the Companies Act, 2013 deals with the provisions relating to voting by show of hands in a meeting of the company.

- ✓ Unless the voting is demanded by way of poll or by electronic means, the **voting should be done by way of hands in the first instance.**
- ✓ The **declaration by the Chairman of the meeting in the minutes books** shall be conclusive evidence that the resolution is passed.
- ✓ Even an **insolvent shareholder can vote** at the meeting by show of hands provided:
 - He has no longer any beneficial interest in the shares and
 - The dividends are payable only to his trustee in bankruptcy.

17. VOTING THROUGH ELECTRONIC MEANS

Section 108 of the Companies Act, 2013, together with Rule 20 of the Companies (Management & Administration) Rules, 2014 provides the procedure for electronic voting.

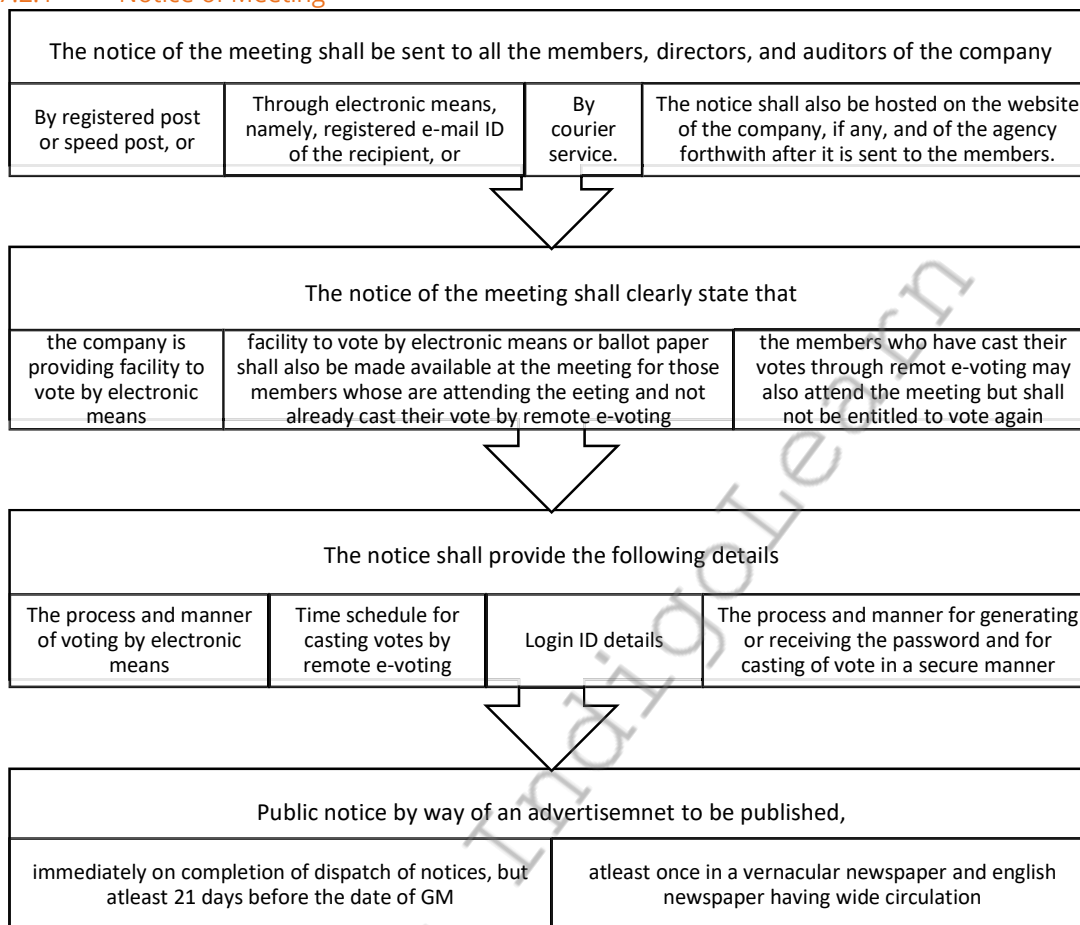
17.1 Companies to provide facility to vote by electronic means

- (i) Every listed company,
- (ii) Every company having not less than 1,000 members.

Exception: A Nidhi Company or an enterprise or institutional investor referred to in Chapter XB and XC of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

17.2 Procedure to vote through electronic means

17.2.1 Notice of Meeting



17.2.2 Remote e-voting

- The time for remote e-voting shall remain **open for not less than 3 days** and shall **close at 5.00 p.m. on the date preceding the date of GM.**
- Members having physical shares or dematerialised shares may opt for e-voting.
- Once a member casts the vote, he shall not be allowed to change it subsequently or cast the vote again.
- At the end of remote e-voting the facility shall forthwith be blocked.

Sending of Notice of Meeting through Electronic Mode:

As per *Rule 18 of the Companies (Management & Administration) Rules, 2014*, sending of notices through electronic mode has been statutorily recognized. Accordingly, it is permitted for a company to give notice through electronic mode.

The expression "electronic mode" shall mean any communication sent by a company through its authorized and secured computer programme which is capable of producing confirmation and keeping record of such communication addressed to the person entitled to receive such communication at the last electronic mail address provided by the member.

- 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.
- Rule 18(3)
- ◆ 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.

It is to be noted that 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 e-mail ID recorded or to update a fresh e-mail ID and not from the members whose e-mail ids are already registered.

- a. The subject line in e-mail shall state the name of the company, notice of the type of meeting, place and the date on which the meeting is scheduled.
- b. If notice is sent in the form of a non-editable attachment to e-mail, such attachment shall be in the Portable Document Format or in a non-editable format together with a 'link or instructions' for recipient for downloading relevant version of the software.
- c. 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.
- d. If a member entitled to receive 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.
- e. The company may send e-mail through in-house facility or its registrar and transfer agent or authorise any third-party agency providing bulk e-mail facility.
- f. 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.

17.2.3 Appointment and function of scrutinizer

The BOD shall **appoint one or more scrutinizer** who may be CA/ CS/ CWA in practice, or an advocate or any other person who is not in employment of the company. His function is **to count the votes** in a fair manner and prepare its report.

Scrutiniser shall **maintain a register** either manually or electronically to record the assent or dissent received with details of member. Register and all other papers shall **remain in the safe custody of the scrutiniser until minutes are prepared.**

17.2.4 Counting of votes

- The chairman shall **at the GM, allow the voting**, with the help of the scrutinizer, **by using ballot paper or by using an e-voting system** for all those members who are present at the meeting and have not cast their votes by availing the remote e-voting facility.
- The scrutinizer shall **after conclusion of voting at the GM -**
 - First **count the votes cast at the meeting**,
 - Thereafter, **unblock the votes cast through remote e-voting** in the presence of **at least 2 witnesses** not in employment of the company and
 - Make a **consolidated report, within 3 days** of conclusion of meeting, of the total votes cast in favour or against, to the chairman or the person authorised by him.
- The **chairman** or other person authorised by him shall **declare the result** of the voting forthwith.

17.2.5 Results and date of resolution

- ✓ 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 and the website of recognised stock exchange in case of listed shares, **immediately after the result is declared by the Chairman.**
- ✓ If required number of votes are received, the resolution shall be deemed to be passed on the date of the relevant general meeting.

Note:

Procedural aspect of Voting by E mode are covered in Rule 20. Rule 20(20) defines certain terms as under :

'cut-off date' means a date not earlier than seven days before the date of general meeting for determining the eligibility to vote by electronic means or in the general meeting. [Explanation II (ii) to Rule 20(2)]

✓ 'cyber security' means protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorised access, use, disclosures, disruption, modification or destruction;

✓ 'electronic voting system' means a secured system based process of display of electronic ballots, recording of votes of the members and the number of votes polled in favour or against, in such a manner that the entire voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralised server with adequate cyber security. [Explanation II(iv) to Rule 20(2)]

remote e-voting' means the facility of casting votes by a member using an electronic voting system from a place other than venue of general meeting. [Explanation II(v) to Rule 20(2)]

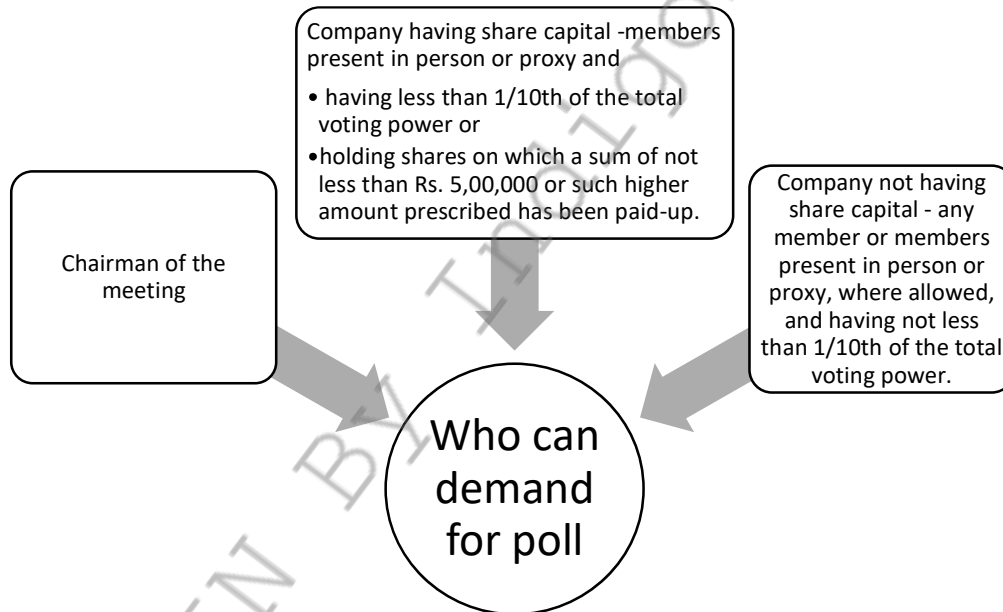
✓ 'secured system' means computer hardware, software, and procedure that - (a) are reasonably secure from unauthorised access and misuse; (b) provide a reasonable level of reliability and correct operation; (c) are reasonably suited to performing the intended functions; and (d) adhere to generally accepted security procedures; [Explanation II (vi) to Rule 20(2)]

✓ 'voting by electronic mean' includes "remote e-voting and voting" at the general meeting through an electronic voting system which may be the same as used for remote e-voting. [Explanation II (vii) to Rule 20(2)]

18. DEMAND FOR POLL

18.1 Who can demand for poll

Section 109 of the Companies Act, 2013 provides the provisions for demand for voting through poll.



The demand for poll may be withdrawn by the persons who made the demand, at any time.

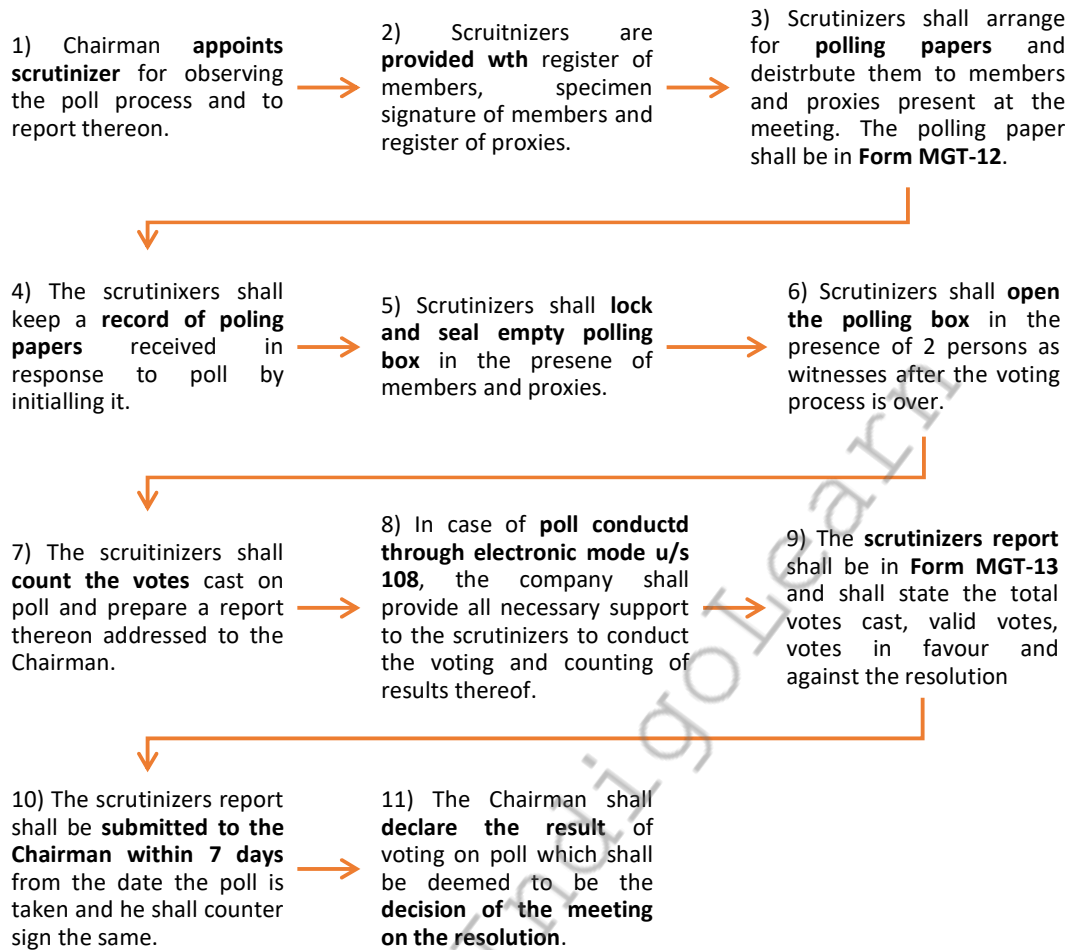
18.2 Time for demanding for a poll

- 1) **Before declaration of result** of voting by show of hands, or
- 2) **On declaration** of such result.

18.3 When to take the poll

- **Poll demanded for adjournment of the meeting/ appointment of Chairman of the meeting** - immediately
- **Poll demanded on any other question** - taken at such time as Chairman may direct, but not later than 48 hours from the time of demand.

18.4 Procedure for conducting the poll

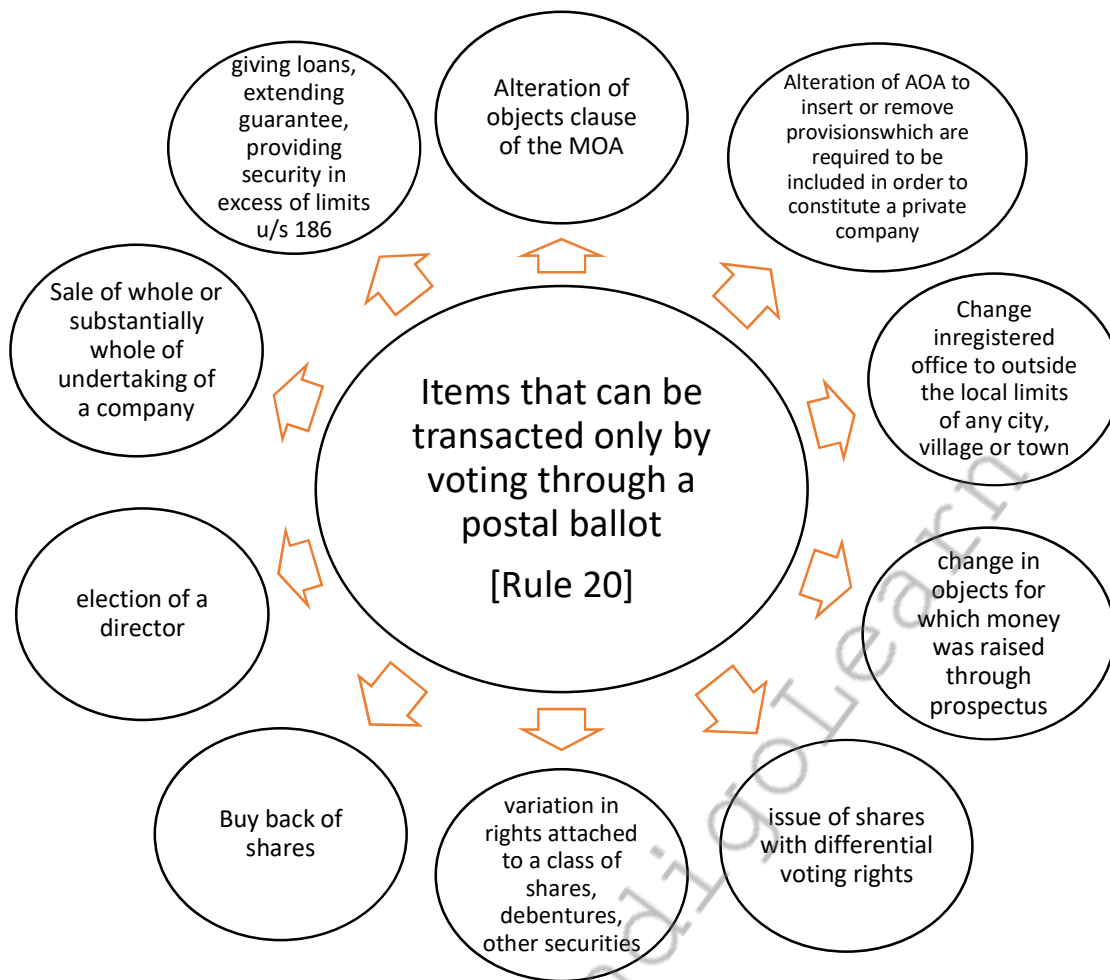


19. POSTAL BALLOT

Section 110 of the Companies Act, 2013 r.w. Rule 22 of Companies (Management & Administration) Rules, 2014 covers the provisions relating to passing of resolution by postal ballot

19.1 Items of business that can be transacted by postal ballot

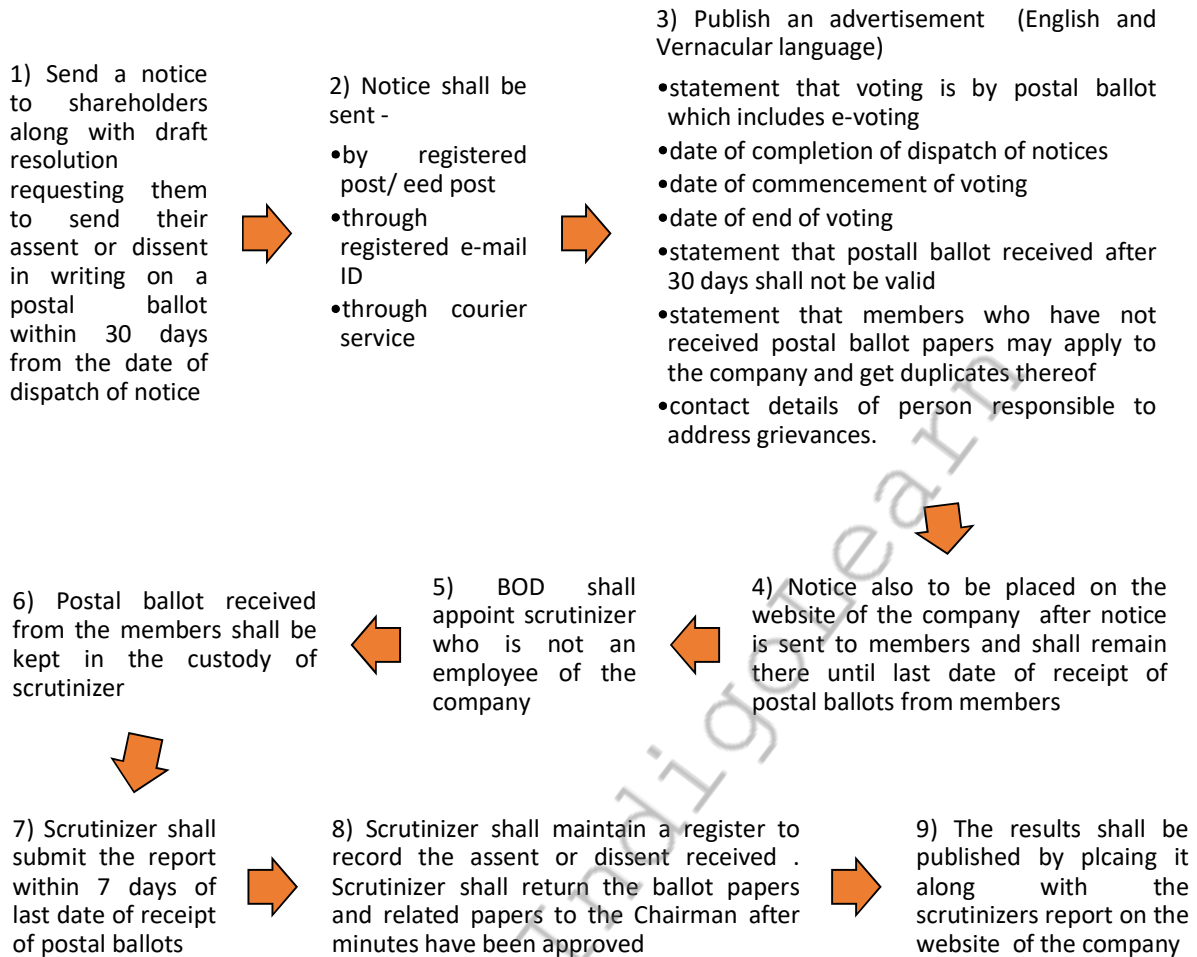
- ✓ Items of business as **CG may declare** that can be transacted only by postal ballot.
- ✓ **Any other item** of business **other than** –
 - **Ordinary business** and
 - Any business **in respect of which directors or auditors have a right to be heard** at the meeting.



These items may be transacted at a GM by a company which is required to provide the facility to members to vote by electronic means u/s 108.

OPC and other companies having members up to 200 are not required to transact any business through postal ballot.

19.2 Procedure for conducting postal ballot



19.3 Counting at the time of postal ballot

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 he need not 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 members have voted partially assenting and partially dissenting or not using all his votes in any particular way, and
- Invalid ballots (due to absence/ mismatch of signature, overwriting, etc)

20. CIRCULATION OF MEMBERS' RESOLUTION

20.1 Prerequisites of a valid requisition

Section 111 of the Companies Act, 2013 gives the right to propose resolutions for consideration at the general meetings.

- The **number of members required to make a valid requisition** under this section is the same as required to requisition a general meeting **u/s 100**.
- The requisition must be made in **writing**.
- It should be **signed** –
 - *In case of company having share capital* – by such number of members who hold, not less than 1/10th of such paid up share capital of the company having right to vote.
 - *In case of company not having share capital* – by such number of members who have not less than 1/10th of the total voting power of all the members having right to vote.
- **Time for requisition** – the requisition shall be deposited at the registered office of the company
 - *Requisition requiring notice of a resolution* - not less than 6 weeks before the meeting.
 - *Other requisitions* – not less than 2 weeks before the meeting.
- A **reasonable sum must be deposited** to meet the company's expenses in giving effect to proposing the resolution.

20.2 Notice to members

On receipt of a valid requisition u/s 111, the company shall **give a notice to the members of any resolution** to be moved and **circulate to members any statement** with respect to the matters referred to in proposed resolution/ business to be dealt with at the meeting.

The company is not duty bound to circulate the notice when the prerequisites are not complied with.

The **company shall not be bound to circulate any statement** if the **CG**, on an application received either on behalf of the company or of any person who claims to be aggrieved, **declares that the rights conferred are being abused** to secure needless publicity for defamatory matter.

20.3 Punishment for contravention

The company and every officer in default shall be liable to a **penalty of ₹ 25,000/-**.

21. REPRESENTATION OF THE PRESIDENT & GOVERNORS IN THE MEETING OF COMPANIES TO WHICH THEY ARE MEMBER

President of India or the Governor of a State if he is a member of a company, may **appoint his representative at any meeting**.

Section 112 of the Companies Act, 2013 provides for the representation of president & governors in companies in which they are member.

Such Representative shall **have all rights and powers of a member**.

22. REPRESENTATION OF CORPORATIONS MEETING OF COMPANIES AND CREDITORS

Any **Body Corporates who are members/creditor** of a company may **appoint their representative at any meeting** by resolution of its directors or other governing body. Such Representative shall **have**

Section 113 of the Companies Act, 2013 provides for the representation of corporations meeting of companies and creditors.

all rights and powers of member. Such representative shall be appointed by resolution of the board of directors or of the governing body of such corporation.

23. ORDINARY AND SPECIAL RESOLUTIONS

Section 114 of the Companies Act, 2013 defines an Ordinary and Special resolution.

Ordinary resolution
[Sec. 114(1)]

Notice has been duly given

Passed if the votes cast in favour of the resolution, including the casting vote of the Chairman, if any, **exceeds** the votes cast against the resolution by members so entitled and voting.

Special resolution
[Sec. 114(2)]

Intention to propose the resolution as a special resolution has been duly specified in the notice

Notice has been duly given

Passed if the votes cast in favour of the resolution, including the casting vote of the Chairman, if any, are **not less than 3 times** the votes cast against the resolution by members so entitled and voting.

23.1 Difference between Motion and Resolution.

Motion	Resolution
Oral opinion or recommendation/ proposals of resolution to be passed.	Actual votes in favour and against are cast to adopt a motion.
No need of quorum	Quorum is mandatory
No types	2 types, Ordinary and special resolution
Eg: fixing a date of adjournment of GM	Eg: Appointing Auditor/Director: OR required

23.2 Moving two or more resolutions together

- ✓ Generally, resolutions are **moved separately**.
- ✓ However, there is **nothing illegal if the Chairman of the meeting desires that two or more resolutions can be moved together**, unless any member requires each resolution to be put to vote separately or unless a poll is demanded in respect of any.
- ✓ The only case where resolutions are to be moved separately is with regard to **appointment of directors in a GM**.

24. RESOLUTIONS REQUIRING SPECIAL NOTICE

24.1 Situations where special notice is required

Section 115 of the Companies Act, 2013 r.w. Rule 23 of Companies (Management & Administration) Rules, 2014 deals with resolutions requiring special notice.

- a) Resolution for **appointment of auditors other than retiring auditor** at an AGM.
 - b) Resolution at an AGM to provide that a **retiring auditor shall not be re-appointed**.
 - c) Resolution to **move a director before the expiry of his period** of office.
 - d) Resolution to **appoint another director in the place of the removed director**.
- Further, *the AOA may provide for additional matters* which may require special notice.

24.2 Special notice

- 1) Special notice to be given to the company shall be **signed**, either individually or collectively by such **number of members**
 - holding **not less than 1% of the total voting power** or
 - holding shares on which an **aggregate sum of not less than ₹5,00,000/- has been paid up**.
- 2) Special notice shall be **sent** by the members to the company
 - **not earlier than 3 months** but
 - **at least 14 clear days before** the date of meeting at which resolution is to be moved
- 3) The company shall immediately after receipt of notice, **give its members notice of resolution at least 7 days before the meeting**.
- 4) Where company is **unable to give such notice of special resolution**, it shall **publish the notice in the newspaper** (English & vernacular) at least **7 clear days before the meeting** and also be posted on the website, if any, of the company.

25. RESOLUTIONS PASSED AT ADJOURNED MEETING

Section 116 of the Companies Act, 2013 provides the provisions relating to resolutions passed at adjourned meeting.

Where a resolution is passed at an adjourned meeting, the resolution shall be **treated as passed on the day it was actually passed** and not on any earlier date.

26. RESOLUTIONS AND AGREEMENTS TO BE FILED

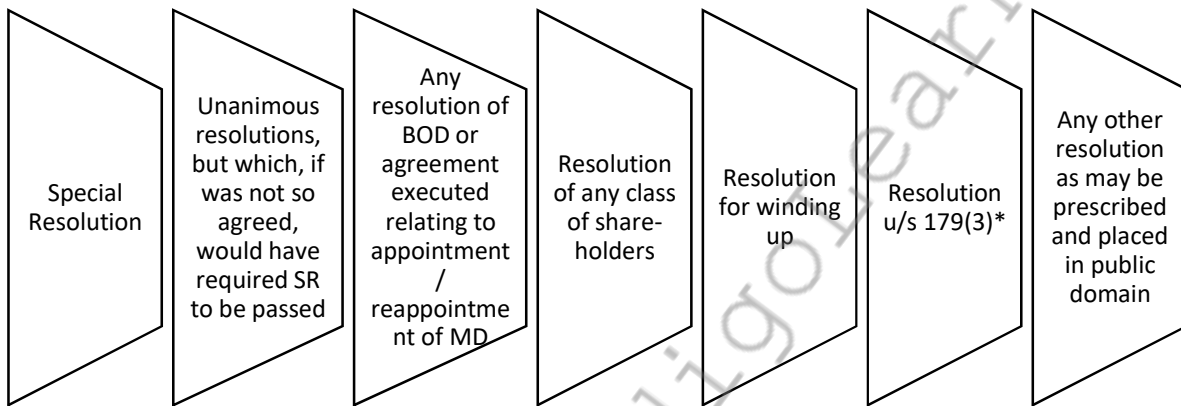
A copy of every resolution and an agreement in respect of matters specified therein together with an

Section 117 of the Companies Act, 2013 provides the provisions relating to filing of resolutions and agreements.

explanatory statement shall be **filed in Form MGT-14** with the ROC **within 30 days of its passing** and the ROC shall register the same.

Any **resolution/agreement that causes alteration of AOA** shall be annexed to every copy of AOA.

26.1 Resolutions and agreements to be filed with the ROC



*Provided no person shall be entitled under section 399 to inspect or obtain copies of such resolutions. Provided further that nothing shall apply in respect of a resolution passed to grant loans, or give guarantee or provide security in respect of loans under section 179(3)(f) in the ordinary course of its business by,—

- (a) a banking company;
- (b) any class of NBFC registered under Chapter IIIB of the Reserve Bank of India Act, 1934, as may be prescribed in consultation with the RBI;
- (c) any class of HFC registered under the National Housing Bank Act, 1987, as may be prescribed in consultation with the NHB;

26.2 Penalty for failure to file the resolution and agreement

- Company →
 - Penalty of ₹10,000
 - Continuing failure = further penalty of ₹100 for each day after the first during which the failure continues, subject to maximum of ₹2,00,000
- Officer of the company in default (including liquidator of the company) }
 - Penalty of ₹10,000
 - Continuing failure = further penalty of ₹100 for each day after the first during which the failure continues, subject to maximum of ₹50,000

27. MINUTES

→ Every company shall **prepare, sign, and keep minutes** of every general meeting, Board meeting or

Section 118 of the Companies Act, 2013 provides the provisions relating to preparation and maintenance of minutes of the meeting.

of every committee of the Board,

→ **within 30 days** of the conclusion of every such meeting, or passing of resolution by postal ballot

→ in books kept for that purpose with their **pages consecutively numbered**.

27.1 Content of the minutes

- **Fair and correct summary** of proceedings that took place at the concerned meeting.
- All **appointments made** at any of the meetings aforesaid.
- In case of **Board meeting or meeting of committee of Board**:
 - The name of directors' present
 - For each resolution passed, names of directors dissenting from or not concurring with the resolution.
- **Following matters shall not be included**: Any matter, which in the opinion of the Chairman of the meeting –
 - Is or could be defamatory to any person,
 - Is irrelevant or immaterial to the proceedings,
 - Is detrimental to the interests of the company.
- The matters to be included or excluded shall be at the **absolute discretion of the Chairman of the meeting**.

27.2 Penalty for contravention

- 1) **Default in complying with this section** –
 - ✓ **Company** shall be liable to a penalty of **₹ 25,000/-**
 - ✓ Every **officer in default** shall be liable to a penalty of **₹ 5,000/-**.
- 2) Any person found guilty of **tampering with minutes** –
 - ✓ Punishable with **imprisonment** for a term which may extend **to 2 years** and
 - ✓ **Fine** which shall not be less than **₹ 25,000/-** but which may extend **to ₹ 1,00,000/-**.

27.3 Procedure for maintenance of minutes [Rule 25]

Distinct Minute book	for each type of meeting
Time limit for entry	within 30 days of conclusion of the meeting
Resolution passed by postal ballot	a brief report of the postal ballot conducted including the resolution proposed shall be entered •within 30 days from the date of passing of resolution
Initialling or signing	on every page •last page shall be dated and signed by: •Board meeting/ Committee meeting - by the chairman of said meeting/ next succeeding meeting •General meeting - chairman of said meeting within 30 days or in the event of death/ inability of said chairman, by a duly authorised director •Resolution passed by postal ballot - by the chairman of the BOD within 30 days or in the event of death/ inability of said chairman, by a duly authorised director
Preservation of minutes of GM	shall be kept at the registered office of the company •preserved permanently •shall be kept in the custody of CS or any director duly authorised by the BOD
Preservation of minutes of meetings of Board/ committee	shall be preserved permanently •shall be kept in the custody of CS or any director duly authorised by the BOD •shall be kept at the registered office or such other place as BOD may decide

This section shall **not apply to Section 8 company** except that minutes may be recorded within 30 days in case of companies where AOA provide for confirmation of minutes by circulation.

28. INSPECTION OF MINUTE-BOOKS OF GENERAL MEETING

Section 119 of the Companies Act, 2013 provides the provisions relating to inspection of minutes book of general meeting.

28.1 Time for inspection

The minute books of general meeting shall be open for inspection

- During **business hours**
- By any **member**, without charge
- Subject to such reasonable restrictions as specified in the AOA or as imposed in the GM.

At least 2 hours in each business day shall be allowed for inspection.

A **copy of the minutes referred shall be liable to be furnished** to the member, **within 7 days** after the request was made in that behalf to the company, and on payment of such fees as prescribed.

28.2 Consequence of contravention

- ✓ **Contravention:** refusing right of inspection to a member or non-furnishing of copy of minutes within the time specified.
- ✓ **Penalty to company** – ₹ 25,000/-
- ✓ **Penalty to every officer in default** – ₹ 5,000/- for each such refusal or default.
- ✓ Also, **Tribunal may, by an order direct an immediate inspection** of the minute books or direct that copy required shall forthwith be sent to the person requiring it.

29. MAINTENANCE AND INSPECTION OF DOCUMENTS IN ELECTRONIC FORM

Section 120 of the Companies Act, 2013 provides the provisions relating to maintenance and inspection of documents, record, register or minute in electronic form.

Provisions prescribed in Rules 27, 28 and 29 of the Companies (Management and Administration) Rules, 2014 are relevant in this respect. Rule 30 states the penalty in case of contravention

Companies which may maintain records in electronic form:

Rule 27 of the Companies (Management and Administration) Rules, 2014 states as under:

1. 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**.
2. The records in electronic form shall be maintained in such manner as the Board of directors may think fit:
Provided that -
 - (a) the records are maintained in the same formats and in accordance with all other requirements as provided in the Act or the rules made thereunder;
 - (b) the information as required under the provisions of the Act or the rules made thereunder should be adequately recorded for future reference;
 - (c) the records must be capable of being readable, retrievable and reproducible in printed form;
 - (d) the records are capable of being dated and signed digitally wherever it is required under the provisions of the Act or the rules made thereunder;
 - (e) the records, once dated and signed digitally, shall not be capable of being edited or altered;
 - (f) the records shall be capable of being updated, according to the provisions of the Act or the rules made thereunder, and the date of updating shall be capable of being recorded on every updating.

Who is responsible for the maintenance and security of electronic records:

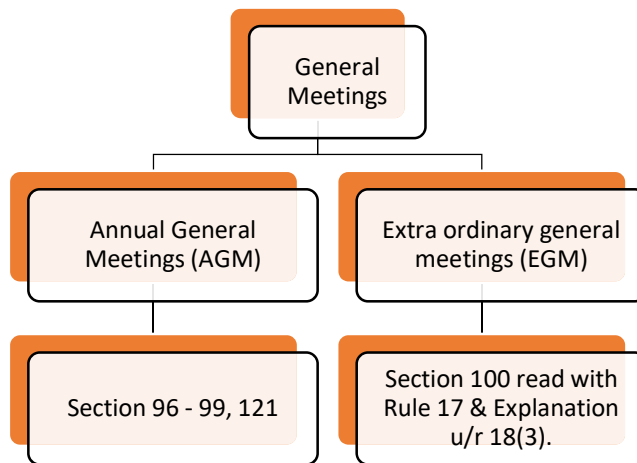
Rule 28 sets out that the Managing Director, Company Secretary or any other director or officer of the company as the Board may decide shall be responsible for the maintenance and security of electronic records.

The person who is responsible for the maintenance and security of electronic records shall-

- (a) provide adequate protection against unauthorized access, alteration or tampering of records;
- (b) ensure against loss of the records as a result of damage to, or failure of the media on which the records are maintained;
- (c) ensure that the signatory of electronic records does not repudiate the signed record as not genuine;
- (d) ensure that computer systems, software and hardware are adequately secured and validated to ensure their accuracy, reliability and consistent intended performance;
- (e) ensure that the computer systems can discern invalid and altered records;
- (f) ensure that records are accurate, accessible, and capable of being reproduced for reference later;
- (g) ensure that the records are at all times capable of being retrieved to a readable and printable form
- (h) ensure that records are kept in a non-rewritable and non-erasable format like pdf. version or some other version which cannot be altered or tampered;
- (i) ensure that at least one backup, taken at a periodicity of not exceeding one day, are kept of the updated records kept in electronic form, every backup is authenticated and dated and such backups shall be securely kept at such places as may be decided by the Board;
- (j) limit the access to the records to the managing director, company secretary or any other director or officer or persons performing work of the company as may be authorized by the Board in this behalf;
- (k) ensure that any reproduction of non-electronic original records in electronic form is complete, authentic, true and legible when retrieved;
- (l) arrange and index the records in a way that permits easy location, access and retrieval of any particular record; and
- (m) take necessary steps to ensure security, integrity and confidentiality of records.

Inspection and copies of records maintained in electronic form:

Rule 29 states that the records maintained in electronic form shall be made available for inspection by the company in electronic form. Copies of the records maintained in electronic form, containing a clear reproduction of the whole or part thereof, shall be provided on payment of not exceeding 10 per page.



30.1 Annual general meeting (AGM)

Section 96 of the Companies Act, 2013 provides the provisions relating to conducting Annual general meeting of a company.

30.1.1 Holding of AGM

- AGM should be held **once every year**.
- **First AGM** should be held *within 9 months of incorporation*.
- **Subsequent AGM** should be held *within 6 months* from the closing of the FY.
- The **gap between two AGMs** should not exceed **15 months**.

30.1.2 Extension of validity period of AGM

- ✓ If a company is unable to hold an AGM within the prescribed time, the ROC may, *for special reasons*, **extend the time within which AGM shall be held**.
- ✓ Such extension **cannot be for a period exceeding 3 months**.
- ✓ However, ROC **cannot grant extension for holding the first AGM**.

30.1.3 Time and place for holding AGM

- ✓ **Time** – during **business hours** (i.e., between 9.00 a.m. and 6.00 p.m.)
- ✓ **Day** – any day that is **not a national holiday**.
- ✓ **Place** – **registered office** or any other place within the same city, town, or village.
- ✓ AGM of **unlisted company** may be held at any place if consent is given in writing or by electronic mode by all the members in advance.

30.2 Power of Tribunal to call AGM

Section 97 of the Companies Act, 2013 deals with the power of Tribunal to call AGM in certain circumstances.

- If the **company defaults in holding the AGM** u/s 96,
- the Tribunal may, on an **application of any member** of the company,
- call, or direct the calling of an AGM and
- **give** such ancillary or consequential **directions** (including the direction that one member of the company present in person or proxy shall be deemed to constitute a quorum).

30.3 Power of Tribunal to call meetings of members, etc

Section 98 of the Companies Act, 2013 deals with the power of Tribunal to call the meeting of members etc. in certain circumstances.

If it is impractical to call an **EGM**, the Tribunal may,

- Either ***suo moto***, or
- On an **application of any director or member** of the company entitled to vote at the meeting,

order a meeting of the company to be called, held and conducted in the manner as Tribunal thinks fit, and **give ancillary or consequential directions**.

30.4 Punishment for default in complying with Section 96 to 98

Section 99 of the Companies Act, 2013 provides the punishment for contravention of the provisions of sections 96 to 98, i.e., default in holding a meeting as AGM or on directions issued by the Tribunal.

Company and every officer in default shall be punishable with

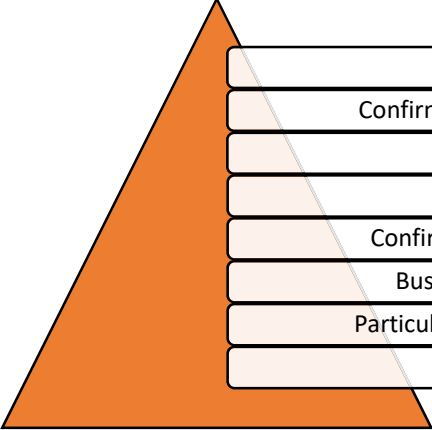
- **Fine** which may extend to **₹ 1,00,000/-**
- In case of **continuing default**, with **further fine** which may extend to **₹5,000/-** for every day during which the default continues.

30.5 Report on AGM

Section 121 of the Companies Act, 2013 r.w. **Rule 31** of the Companies (Management & Administration) Rules, 2014 provides the provisions relating to preparation of report on AGM and penalty for

- Every **listed public company** shall prepare a report on each AGM
- **including the confirmation** to the effect that the meeting was convened held and conducted as per the provisions of the Act and Rules.
- A copy shall be filed with the ROC in **Form MGT-15** within **30 days** of conclusion of AGM along with prescribed fee.
- This report shall be **in addition to the minutes of GM**.
- The report shall be **signed and dated**
 - by the Chairman of the meeting or
 - in case of his inability to sign, by any two directors one of whom shall be MD and the CS of the company.

30.5.1 Content of the Report on AGM



Date, day, hour, venue of the AGM
Confirmation w.r.t. appointment of Chairman of the meeting
Number of members attending the meeting
Confirmation of quorum
Confirmation w.r.t. compliance with Act, Rules & standards
Business transacted at the meeting and report thereof
Particulars of adjournment, postponement & change of venue
Any other relevant points

30.5.2 Penalty for default

	Company	Officer in default
Penalty	₹ 1,00,000/-	Not less than ₹25,000/-
Continuing failure - further penalty	500/- for each day after the first during which failure continues	₹ 500/- for each day after the first during which failure continues
Maximum	₹ 5,00,000/-	₹ 1,00,000/-

6 30.6 Extra-ordinary general meetings (EGM)

Section 100 of the Companies Act, 2013 r.w. **Rule 17** of the Companies (Management & Administration) Rules, 2014 provides the provisions relating to extra ordinary general meetings.

30.6.1 Who can call an EGM?

- 1) **The Board** – the BOD may, whenever it deems fit, call an EGM of the company.
- 2) The board **on requisition** of –
 - a. **In case of company having share capital** – such number of members who hold at least 1/10th of the paid up capital having voting right.
 - b. **In case of company not having share capital** – such number of members who hold at least 1/10th of total voting power of all members having voting right.

Within 21 days of receipt of a valid requisition, the BOD shall **proceed to call a meeting on a day not later than 45 days** from the date of receipt of such requisition.

- 3) **By requisitionists** –

The BOD does not proceed to call a meeting within 21 days of receipt of a valid requisition on a day not later than 45 days from the date of receipt of requisition



The requisitionists themselves may call and hold the meeting within **3 months** from the date of requisition

30.6.2 Place of holding EGM

- a) **Generally** for all companies covered under the Act → any place within India
- b) Wholly owned subsidiary of a company incorporated outside India → In/Outside India

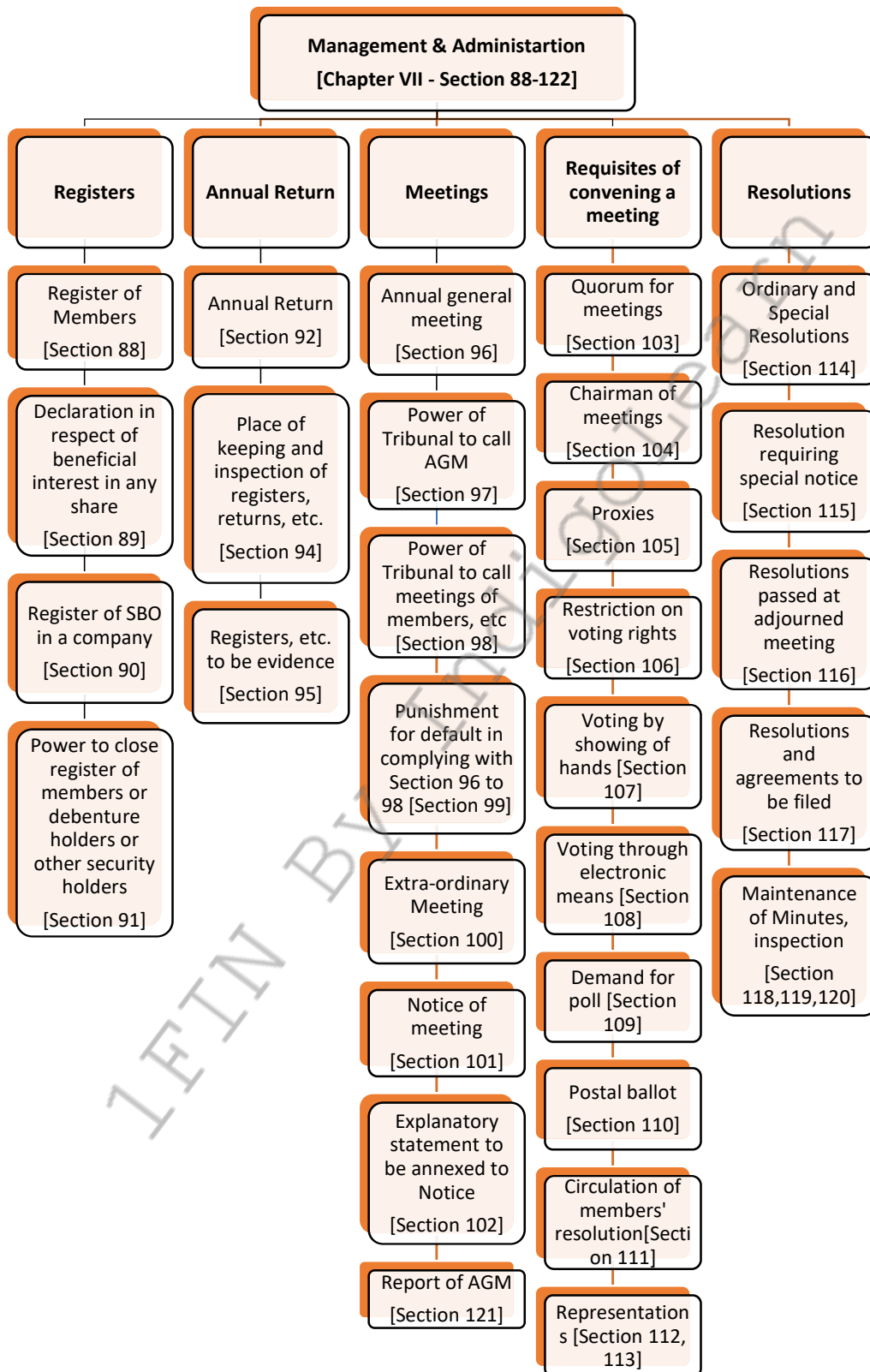
31. APPLICABILITY OF THIS CHAPTER TO ONE PERSON COMPANY

Section 122 of the Companies Act, 2013 deals with the applicability of provisions of this chapter (i.e., Chapter VII) to OPC.

Provisions of section 98 (i.e., power of Tribunal to call EGM)	Not applicable to OPC
Provisions of section 100 to 111 (i.e., relating to EGM, meetings, and voting)	Not applicable to OPC
Business required to be transacted at GM	In case of OPC, it shall be sufficient if the resolution is communicated by the member to the company and entered in the minute book maintained u/s 118 and signed and dated by such member. Such date shall be deemed to be the date of meeting.
Business required to be transacted at Board Meeting	In case of an OPC where there is only one director on the Board, it shall be sufficient if the resolution by such director is entered in the minute book maintained u/s 118 and signed and dated by such director. Such date shall be deemed to be the date of board meeting.

Penalty

If any default is made in compliance with any of the provisions of this rule, the company and every officer or such other person 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 during which such contravention continues. [Rule 30]



DECLARATION AND PAYMENT OF DIVIDEND

Learning Outcomes –

- Understand the legal provisions relating to declaration and payment of dividend.
- Learn about the conditions that need to be fulfilled before declaring dividend out of accumulated reserves.
- Appreciate the manner in which unpaid and unclaimed dividend is to be dealt with.
- Understand the nature and framework of the Investor Education and Protection Fund (IEPF).
- Appreciate the consequences for failure to distribute dividend.

1. INTRODUCTION

The provisions relating to declaration and payment of dividend have been dealt with under **Chapter VIII** of the Companies Act, 2013 [**Section 123 to 127**] and the **Companies (Declaration & Payment of Dividend) Rules, 2014**.

1.1 Meaning of dividend

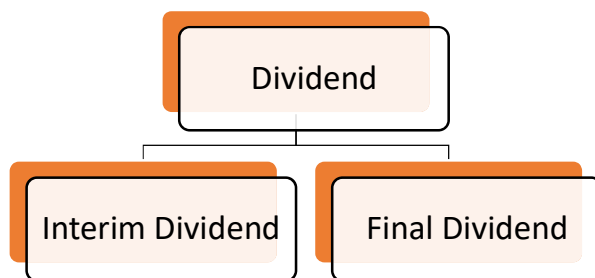
Section 2(35) defines **dividend** which states that **dividend includes any interim dividend**.

- Dividend is the distribution of profits i.e., a portion of profits earned and allocated as payable to the shareholder whenever declared.
- Dividend is recommended by the BOD in the Board's Report (u/s 134(3)) and approved by the shareholders at the AGM. It is not a liability until declared by the shareholders by passing an ordinary resolution at the rates recommended by the BOD or at such lower rates as they may decide.
- Dividend cannot be declared at a rate higher than that recommended by the BOD.
- It is declared as a proportion of nominal or face value of a share.

2. TYPES OF DIVIDEND

2.1 Classification based on time

Section 123 (3) and (4) of the Companies Act, 2013 contains provisions regarding interim dividend.



Basis for comparison	Interim Dividend	Final Dividend
Definition	The dividend that is declared and paid during an accounting year, i.e., before finalization of accounts for the year.	The dividend recommended by the BOD and approved by the shareholders at the AGM, after the close of F.Y.
Announcement	Announced by the BOD.	Recommended by the BOD and approved by the shareholders
Time for declaration	Before preparation of FS.	After preparation of FS.
Revocation	Can be revoked with the consent of all shareholders.	Cannot be revoked.

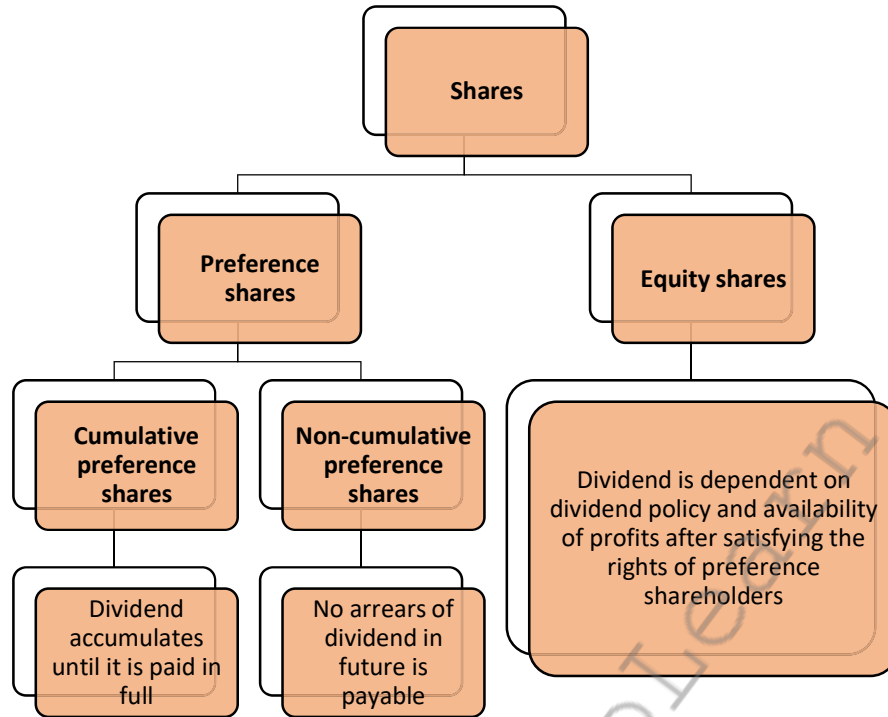
2.1.1 Sources for declaring interim dividend

- Surplus in the Profit & Loss account
- Profit of the F.Y. in which dividend is sought to be declared
- Profits generated in the F.Y. till the quarter preceding the date of declaration of the interim dividend.

2.1.2 Conditions for declaring interim dividend

- ✓ Declaration of interim dividend shall be **ratified in the ensuing AGM** by the members.
- ✓ *If the company has incurred loss during the current F.Y. up to the end of quarter immediately preceding the date of declaration of interim dividend* – Interim dividend shall **not be declared at a rate higher than the average rate of dividend declared during the immediately preceding 3 F.Ys.**
- ✓ **Within 5 days** of declaration the amount of dividend declared shall be **deposited in a separate bank account.**
- ✓ All the provisions as applicable to payment of dividend shall also apply to interim dividend.

2.2 Classification based on nature of shares



3. PROVISIONS REGARDING DECLARATION AND PAYMENT OF DIVIDEND

3.1 Sources for declaration of dividend

Section 123 of the Companies Act, 2013 contains provisions regarding declaration and payment of dividend.

- ✓ **Profits of the current financial year** after providing for depreciation under Schedule II.
- ✓ **Profits of any previous F.Y.(s) remaining undistributed**, after providing for depreciation under Schedule II.

It is to be noted that only free reserves and no other reserves are used for declaration or payment of dividend.

Money provided by the CG/ SG for the payment of dividend in pursuance of a guarantee given by that government.

Section 2(43) defines **Free Reserves** to mean such reserves, which as per the latest audited balance sheet of the company are available for distribution as dividend.

3.2 Computation of Profits

- ✓ Before declaration of any dividend, carried over previous losses and depreciation not provided in the P.Y. (s) are required to be set off against profit of the company for the current year.
- ✓ In computing profits, any amount representing unrealised gains, notional gains, revaluation profits, capital profits shall be excluded.

Note: If depreciation is not provided for, the value of the asset will be overstated in Balance Sheet & the profits of the current year will be overstated.

3.3 Transfer to reserves

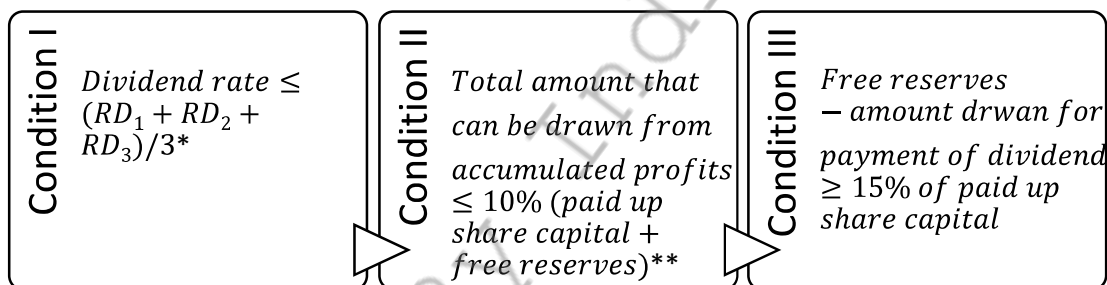
- **At the discretion of the company.**
- Any portion of its profit can be transferred by a company to its reserves.
- **Not mandatory**, company may decide not to transfer any amount.

3.4 Declaration of dividend when there is inadequacy or absence of profits

In such a case, company may declare dividend out of profits of any P.Y. transferred by it to its free reserves in accordance with the **procedure laid out in Rule 3**.

Under Rule 3, following conditions have been laid out for such dividend declaration:

- **Condition 1:** Rate of dividend shall not exceed average rate at which dividend was declared by company in immediately preceding 3 years.
- **Condition 2:** Total amount to be drawn from such accumulated profits shall not exceed 10% of its paid-up share capital and free reserves as appearing in the latest audited FS.
- **Condition 3:** Balance of reserves after such withdrawal shall not fall below 15% of its paid up capital as appearing in the latest audited FS



* This condition shall not apply if company has not declared any dividend in each of the 3 preceding F.Y.

** Amount so drawn shall first be utilised to set off the losses incurred in the F.Y. in which dividend is declared and only then, any dividend in respect of equity shares shall be declared.

3.5 Depositing amount of dividend

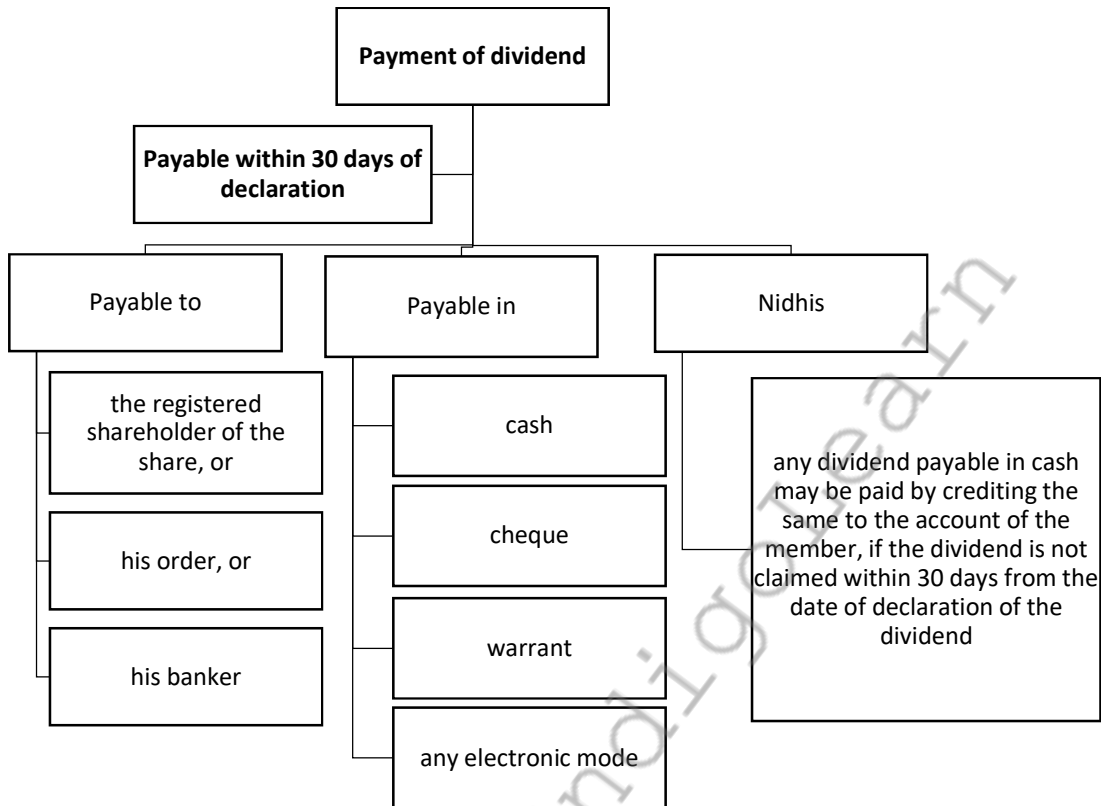
The **amount of dividend, including interim dividend** shall be deposited in a **separate account** maintained with a scheduled bank **within 5 days of date declaration** of dividend.

Exception: This requirement shall not apply to a Government company in which the entire paid up share capital is held by

- The CG, or
- Any State government or governments, or
- By the CG and one or more State governments or
- One or more Government company.

3.6 Payment of dividend

A purchaser of shares whose name is not entered in the register of members cannot claim payment of dividend to him though he might have made full payment to the seller of shares.



Note: Declaration of dividend does not affect the company's power to issue fully paid up bonus shares, such shares cannot be issued in lieu of dividend.

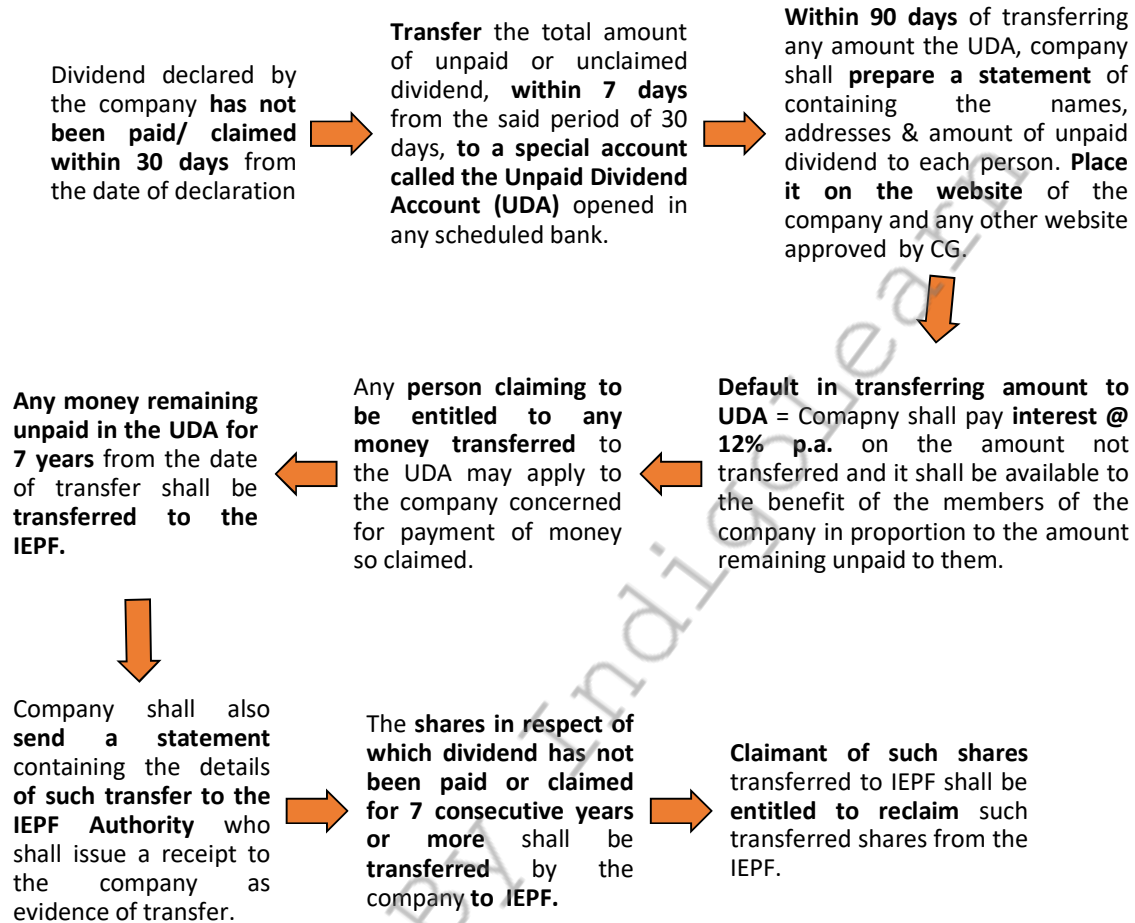
3.7 Prohibition on declaration of dividend

- a) **Defaulting company:** A company which fails to comply with the provisions of Section 73 and 74 (relating to acceptance and repayment of deposits) shall not, so long as such failure continues, declare any dividends on its equity shares.
- b) **Section 8 companies:** A section company is prohibited from paying any dividend to its members. Its profits are intended to be applied only in promoting the objects for which it is formed.

4. UNPAID DIVIDEND ACCOUNT

4.1 Procedure for dealing with unpaid/unclaimed dividend

Section 124 of the Companies Act, 2013 contains provisions relating to Unpaid Dividend Account (UDA).



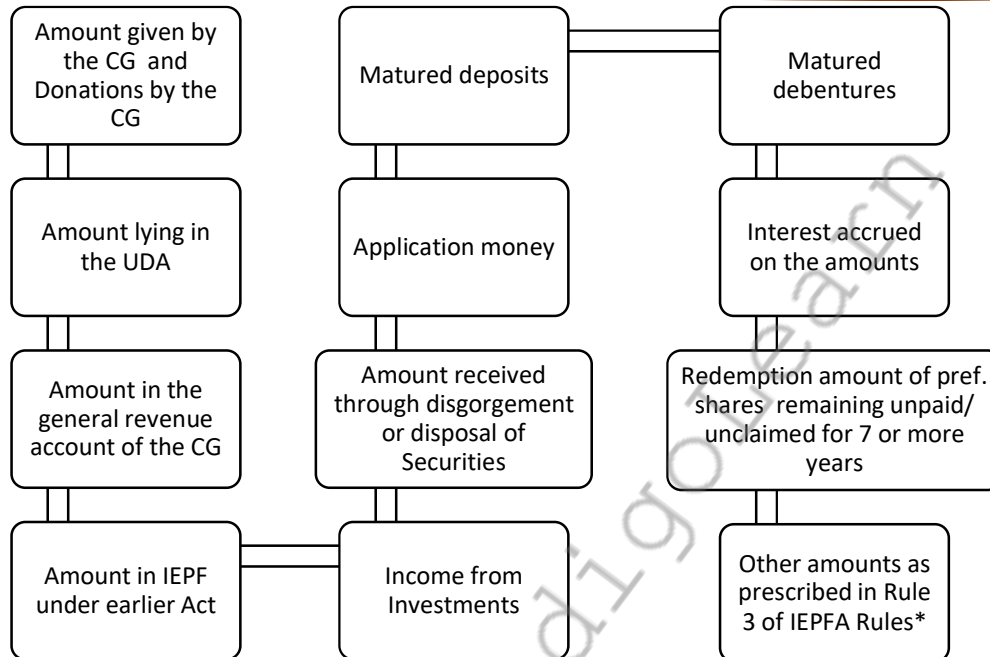
4.2 Punishment for default:

	Company	Every officer in default
Penalty	₹1,00,000	₹25,000
Continuing Failure: Further penalty after first day during which such failure continues	₹500 for each day	₹100 for each day
Maximum limit	₹10,00,000	₹2,00,000

5. INVESTOR EDUCATION AND PROTECTION FUND (IEPF)

5.1 Credit of specified amounts to the Fund

Section 125 of the Companies Act, 2013 along with Investor Education & Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016 deals with the IEPF.



Other Amounts- Such other amounts as prescribed in Rule 3 of the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016. They are as under:

- all amounts payable as mentioned in clause (a) to (n) of section 125 (2) of the Act [as stated above];
- all shares in accordance with section 124 (6) i.e. all those shares in whose case dividends have not been claimed or paid for seven consecutive years or more;
- all the resultant benefits arising out of shares held by the Authority under clause (b) above;
- all grants, fees and charges received by the Authority under these rules;
- all sums received by the Authority from such other sources as may be decided upon by the Central Government;
- all income earned by the Authority in any year;
- all shares held by the Authority in accordance with proviso of subsection (9) of section 90 of the Act and all the resultant benefits arising out of such shares, without any restrictions;
- all amounts payable as mentioned in sub-section (3) of section 10B of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, section 10B of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 sub-section (3) of section 38A of the State Bank of India Act, 1955 and section 40A of the State Bank of India (Subsidiary Bank) Act, 1959; and;
- all other sums of money collected by the Authority as envisaged in the Act.

Further, according to Rule 3 (3), in case of term deposits and debentures of companies, due unpaid or unclaimed interest shall be transferred to the Fund along with the transfer of the matured amount of such term deposits and debentures.

5.2 Utilization of the Fund

The Fund shall be utilized for –

- **Refund** of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon.
- **Promotion of investor's education**, awareness, and protection.
- **Distribution of any disgorged amount** among eligible and identifiable applicants for shares or debentures, shareholders, debenture holders or depositors who have suffered losses due to wrong actions by any persons.
- **Reimbursement of legal expenses** in pursuance of class action suits
- Any other purpose incidental thereto.

5.3 Authority for administration of the Fund

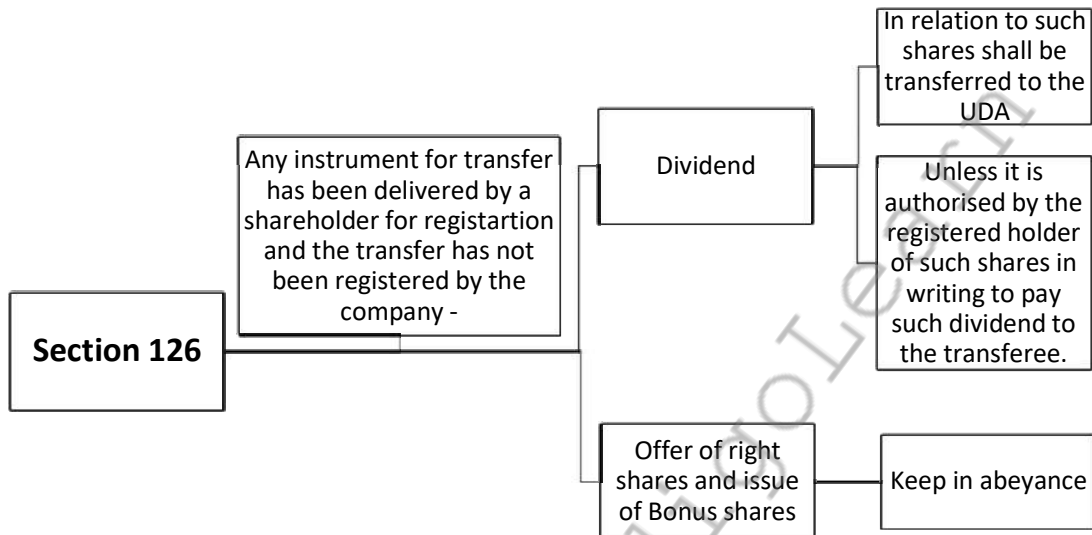
- 1) **CG has set up an authority** under this section by notification
- 2) **Purpose:** administration of the Fund
- 3) **Composition:** a chairperson + such other members, not exceeding seven + a CEO as appointed by CG

5.4 Other provisions governing IEPF

- CG appoints required no. of **officers and employees** to handle the fund.
- **Separate Accounts** are required to be maintained for the fund.
- Authority is competent to spend money out of the Fund for carrying out the specified objects.
- Accounts are annually **audited** by auditor appointed by CAG.
- **Audit Report** along with Annual report is forwarded to CG and laid in both houses of parliament.

6. RIGHT OF DIVIDEND, RIGHT SHARES AND BONUS SHARES TO BE HELD IN ABEYANCE PENDING REGISTRATION OF TRANSFER OF SHARES

Section 126 of the Companies Act, 2013 provides the provisions regarding holding in abeyance the right of dividend, right shares and bonus shares pending registration of transfer.



7. PUNISHMENT FOR FAILURE TO DISTRIBUTE DIVIDENDS

Section 127 of the Companies Act, 2013 contains the time limit for distribution of dividends and punishment for failure to distribute dividend on time and exemptions thereto.

7.1 Time limit for distribution of dividend

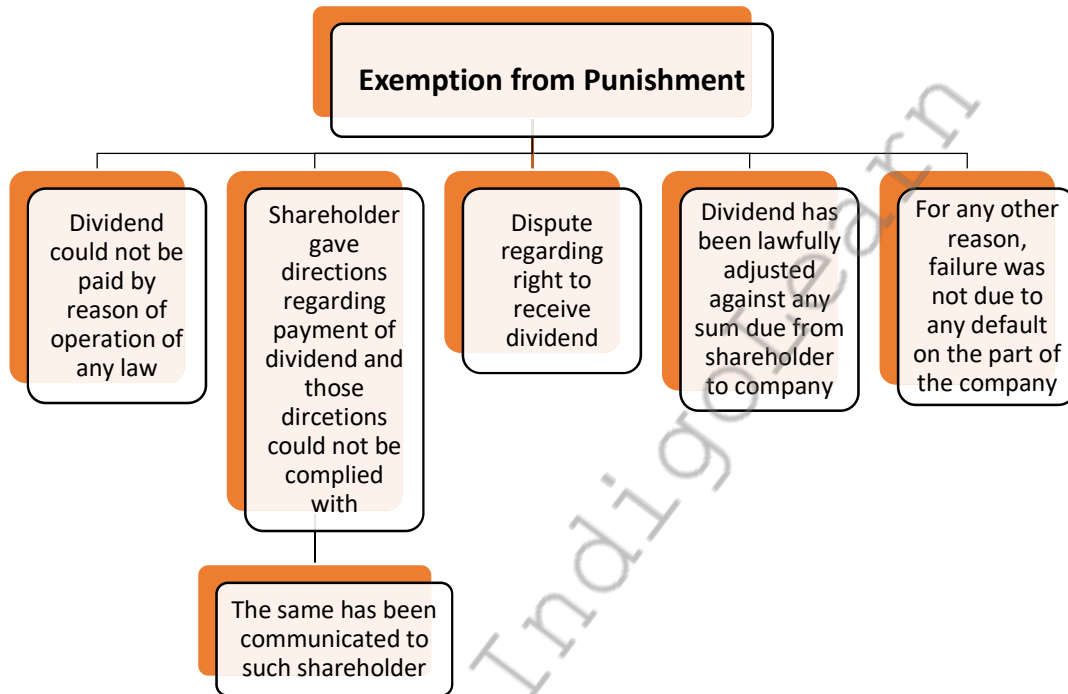
Where a company declares dividend, it must be paid, or dividend warrant thereof must be posted **within 30 days from the date of declaration** of dividend to the shareholders.

Posting of dividend warrants within 30 days absolves the company from any punishment irrespective of whether it is received by the shareholder concerned within this time or not. Offence is committed only when the company fails to post dividend warrants to the members within 30 days of declaration. Non-receipt of dividend warrants by the shareholders within the prescribed time does not attract any punishment.

7.2 Punishment for failure

- 1) Every **director** of the company who is knowingly a party to the default –
 - **Imprisonment** – up to 2 years
 - **If the default continues** – minimum fine of ₹ 1,000/- for every day during which the default continues.
- 2) **Company** – liable to pay **simple interest @ 18% p.a.** during the period for which default continues.

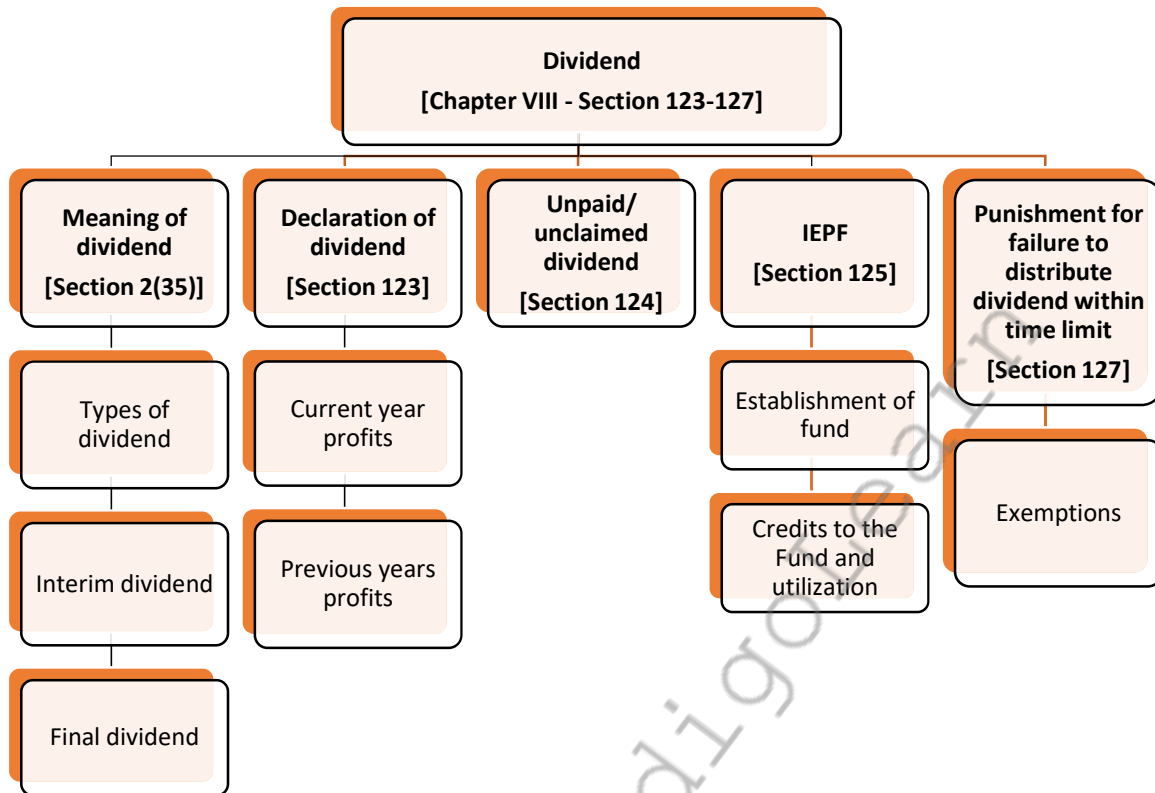
7.3 Exemption from punishment



7.4 Applicability of Section 127 to Nidhis

In case of Nidhi company, if the **dividend payable to a member is ₹ 100/- or less**, it shall be sufficient if

- the **declaration** of dividend **is announced in the local language** in a local newspaper having wide circulation *and*
- **the announcement** of the said declaration is **displayed on the notice board of the Nidhis for at least 3 months.**



1FIN BY INDIGOLEARN

Learning Outcomes –

- Know about preparation and maintenance of books of account etc. to be kept by company.
- Know about the requirements as to preparation and filing of financial statement and other related matters.
- Know about the reopening and revision of financial statements.
- Know about constitution, working and power of National Financial Reporting Authority (NFRA).
- Explain various concepts related to Corporate Social Responsibility (CSR).
- Explain procedure related to internal audit of companies.

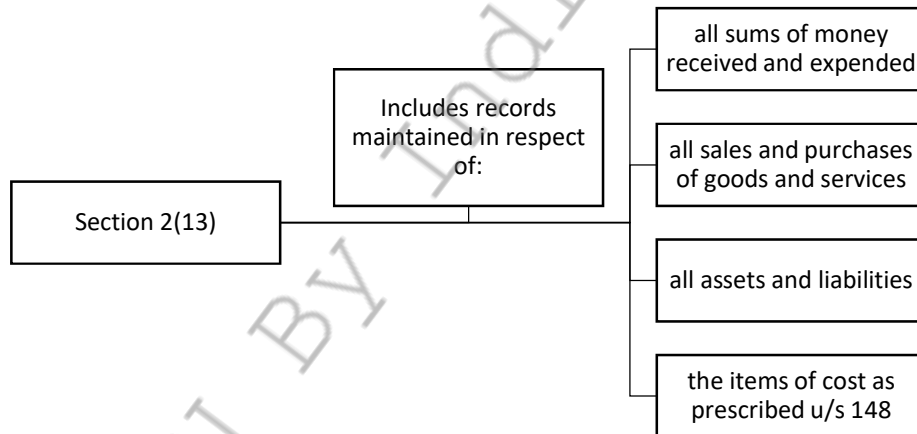
1. INTRODUCTION

The provisions relating to accounts of companies have been dealt with under **Chapter IX** of the Companies Act, 2013 [**Section 128 to 138**] and the **Companies (Accounts) Rules, 2014**.

2. BOOKS OF ACCOUNT, ETC.

Section 128 of the Companies Act, 2013 contains provisions regarding maintenance of books of account and records of the company.

2.1 Books of Accounts – Definition



2.2 Book and paper – Definition

Section 2(12) defines “book and paper” which **includes**:

- Books of account,
- Vouchers,
- Deeds,
- Writings,
- Documents,
- Minutes and
- Registers maintained on paper or in electronic-form.

2.3 General requirement

Every company shall prepare books of accounts and other relevant books and records and financial statement for every F.Y. which –

- a) Gives a **true and fair view** of the state of affairs of the company and its branch office(s)
- b) **Explains the transactions** effected.
- c) Must be kept on **accrual basis** and according to **double entry system** of accounting.

2.4 Place of keeping books of account

- **Registered office** of the company.
- All or any of the books of accounts **may be kept at any other place in India as BOD may decide** and the company shall **file within 7 days** thereof, a notice in writing in **Form AOC-5** with the ROC giving full address of that other place.

2.5 Maintenance of books of account in electronic form

Rule 3 of the Companies (Accounts) Rules, 2014 lays down the manner of books and accounts to be kept in electronic mode. The conditions are as follows:

- 1) Such books of account shall remain **accessible in India, at all times**.
Provided that for F.Y. commencing on or after the 1st day of April, ~~2022~~, 2023 every company which uses accounting software for maintaining its books of account, shall use only such accounting software which has a feature of
 - Recording audit trail of each and every transaction,
 - Creating an edit log of each change made in books of account along with the date when such changes were made and
 - Ensuring that the audit trail cannot be disabled.
- 2) Information contained is **retained in the original format** & shall remain **complete and unaltered**.
- 3) **Information from branch offices** shall not be altered & shall be kept in a manner to show what was originally received.
- 4) It is **displayed in legible form**.
- 5) There shall be **Proper system** for storage, retrieval, display or printout of electronic records. **Back-up** of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if any, shall be **kept in servers physically located in India** on a daily basis.
- 6) **ROC is given details annually** about the
 - a) the name of the service provider,
 - b) the internet protocol address of service provider,
 - c) the location of the service provider (wherever applicable),
 - d) where the books of account and other books and papers are maintained on cloud, such address as provided by the service provider,
 - e) where the service provider is located outside India, the name and address of the person in control of the books of account and other books and papers in India.

2.6 Books of account – Branch office

- **May be maintained at the branch office itself**.
- The **summarised returns** of books of account **kept and maintained outside India** shall be *sent to the registered office at quarterly intervals* and shall be available for inspection by directors.

2.7 Inspection by directors

- Any director may inspect the books of account and other books and papers of the company **during office hours.**
- Books of account of **subsidiary can be inspected only on authorisation** by way of resolution of the BOD.
- **Other financial information maintained outside country** (Rule 4) –
 - Director himself may *furnish a request* to the company setting out the full details of the financial information sought and the period for which it is sought.
 - The company shall *furnish the details sought within 15 days* of receipt of written request.
 - Information *can be sought by the director only individually* and not through his attorney holder/ agent/ representative.

2.8 Preservation of books

- Books of account together with relevant vouchers, shall be preserved in good order **for not less than 8 years immediately preceding the relevant F.Y.**
- **Where an investigation is ordered** in respect of the company, *CG may direct that the books of accounts may be kept for such period longer than 8 years, as it may deem fit and give directions to that effect.*

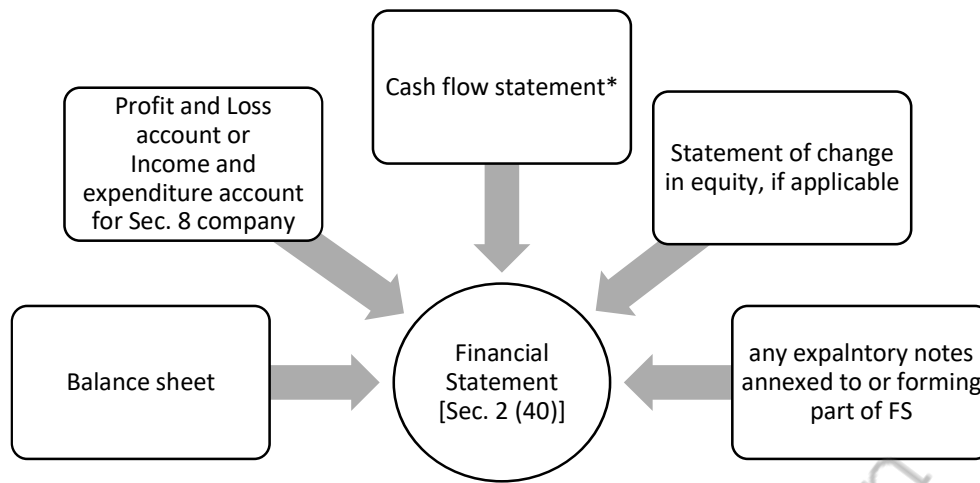
2.9 Persons responsible and penalty

Person responsible for maintenance of books of account etc.	Penalty for contravention
<ul style="list-style-type: none">✓ Managing Director,✓ Whole Time Director in charge of finance,✓ Chief Financial Officer,✓ Any other person of the company charged by the BOD.	<ul style="list-style-type: none">• Fine – not less than ₹ 50,000/- but which may extend to ₹ 5,00,000

3. FINANCIAL STATEMENT

Section 129 of the Companies Act, 2013 contains provisions regarding preparation and maintenance of financial statements of the company.

3.1 Financial Statement



*Financial statement of OPC, small company, dormant company and private company which is a start-up# may not include the cash flow statement

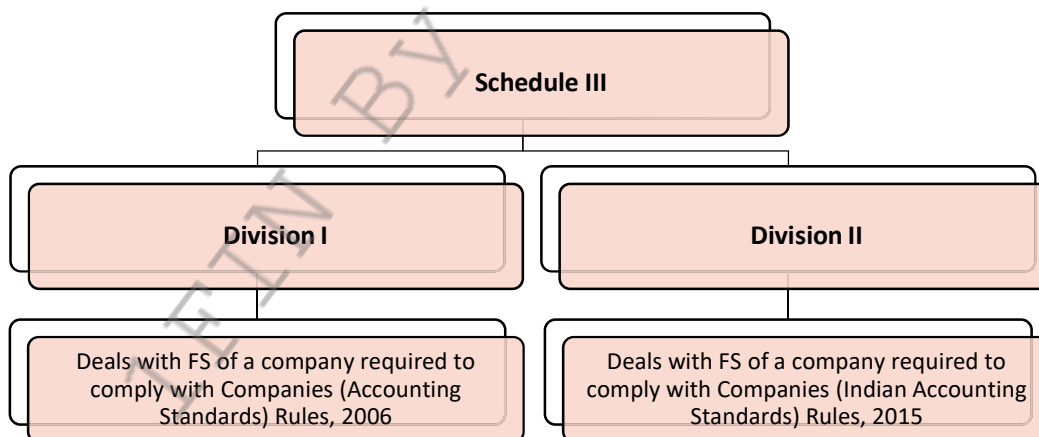
Recognised as start-up in accordance with the notification issued by Department of Industrial Policy and Promotion

The financial statements shall give a **true and fair view** of the state of affairs of company and shall comply with **accounting standards u/s 133**.

Financial statement should be prepared for the F.Y. and as per the requirements of Schedule III.

Non-applicability: Insurance Company, banking company or company engaged in generation or supply of electricity, or to any other class of company to which a form of FS has been specified under the Act governing such class of companies.

It is also provided that merely because of the matters which are not required to be disclosed under the respective acts for above companies, F.S. shall not be treated as not disclosing a true and fair view of the state of affairs of the company



3.2 Financial Year - Definition

- Section 2 (41) defines "Financial year" which means the **period ending on 31st day of March every year.**
- Where a *company has been incorporated on or after 1st day of January* of a year, F.Y. means the **period ending on the 31st day of March of the following year.**

→ **Exception:** A company which is the **holding/subsidiary company** of a company incorporated outside India and is required to follow a different financial year for consolidation of A/c, it may do so with the permission of the CG (delegated to RD)

Note:

It is worth noting that in case of a specified IFSC public company² and specified IFSC private company³ that is a subsidiary of a foreign company, the financial year of the subsidiary may be same as the financial year of its holding company and approval of the Tribunal shall not be required.

3.3 Laying of Financial Statements

BOD must lay at every AGM –

- i) **Financial statement** of the company
- ii) **Consolidated financial statement** of the company including financial details of all its subsidiaries and associate companies
- iii) **Attach** salient features of subsidiaries and associate companies of the company (**Form AOC-1**).

3.4 Consolidation of Financial Statements (CFS)

- Where a company has **one or more subsidiaries or associate companies**, it shall prepare CFS in the same form and manner as that of its own and in accordance with the applicable accounting standards
- CFS shall be laid before AGM along with F.S.
- Company shall **attach** along with its F.S., a **separate statement** containing the **salient features** of F.S. of its subsidiary(ies) or associate company(s) or companies in **Form AOC- 1** [Rule 5]
- Provisions applicable to preparation, adoption and audit of F.S. of holding company shall, mutatis mutandis, also apply to CFS

Exemptions from preparation of CFS Rule 6 of Companies (Accounts) Rules, 2014		
It is a wholly-owned subsidiary, or is a partially owned subsidiary of another company and all its members have been intimated in writing and for which proof of delivery is available with the company, do not object to the company not presenting CFS	It is an unlisted company and not in the process of listing, whether in or outside India	Its ultimate or any intermediate holding company files CFS with the ROC.

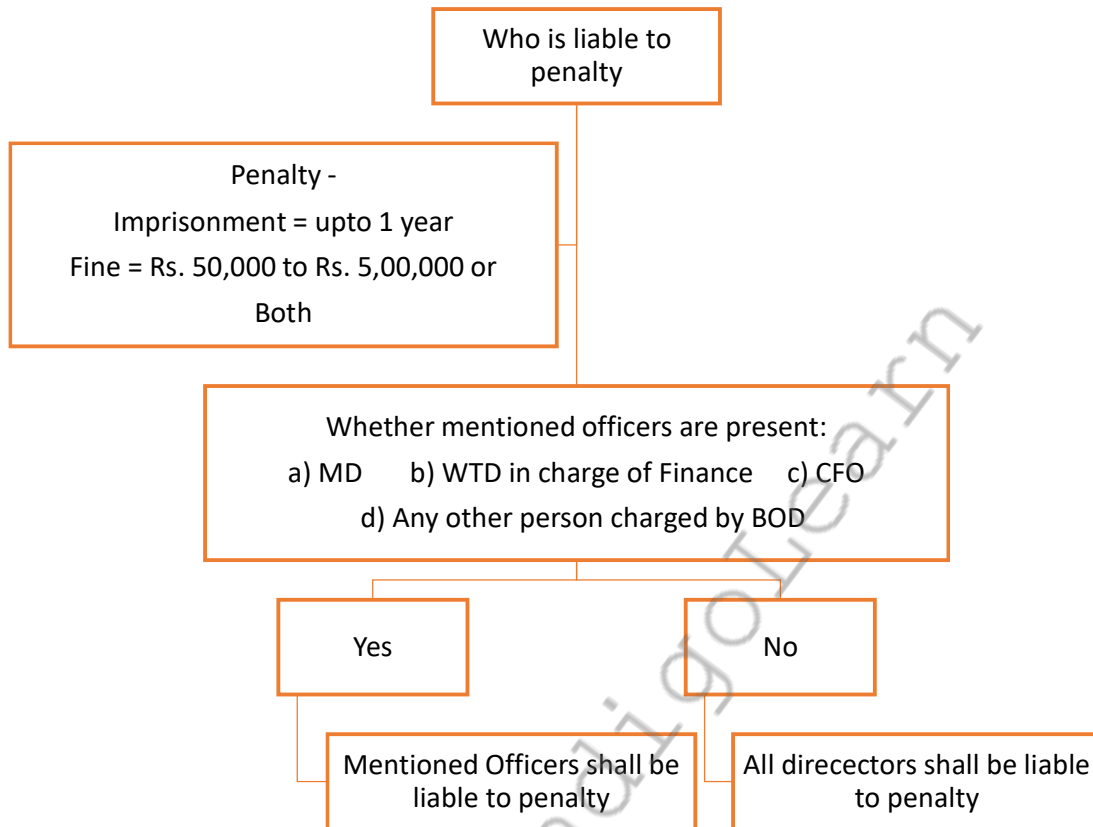
3.5 Other provisions of Section 129

- **Sec 129(5):** Without prejudice to Sec 129(1), where F.S. of company **do not comply with accounting standards**, company shall disclose in its F.S.,
 - ✓ Deviation from accounting standards
 - ✓ Reasons for such deviation and
 - ✓ Financial effects, if any, arising out of such deviation
- **Sec 129(6): CG may**, on its own or on an application by a class or classes of companies, **by notification, exempt** any class or classes of companies from complying with any of

requirements of this section or rules, if it is considered necessary to grant such exemption in the public interest

- Exemption may be granted either unconditionally or subject to specified conditions

3.6 Penal Provisions



Explanation: For the purposes of section 129, any reference to F.S. shall include any notes annexed to or forming part of such F.S.

3.7 Periodical financial results [Sec 129A]

CG may, require such class(es) of unlisted companies, as may be prescribed,

- to prepare financial results of company on such periodical basis and in such form as may be prescribed;
- to obtain approval of Board of Directors and complete audit or limited review of such periodical financial results in such manner as may be prescribed; and
- file a copy with the Registrar within a period of 30 days of completion of the relevant period with such fees as may be prescribed.

4. RE-OPENING OF ACCOUNTS ON COURT'S OR TRIBUNAL ORDERS

A company shall not reopen its books of account and not recast its FS, unless an **application in this**

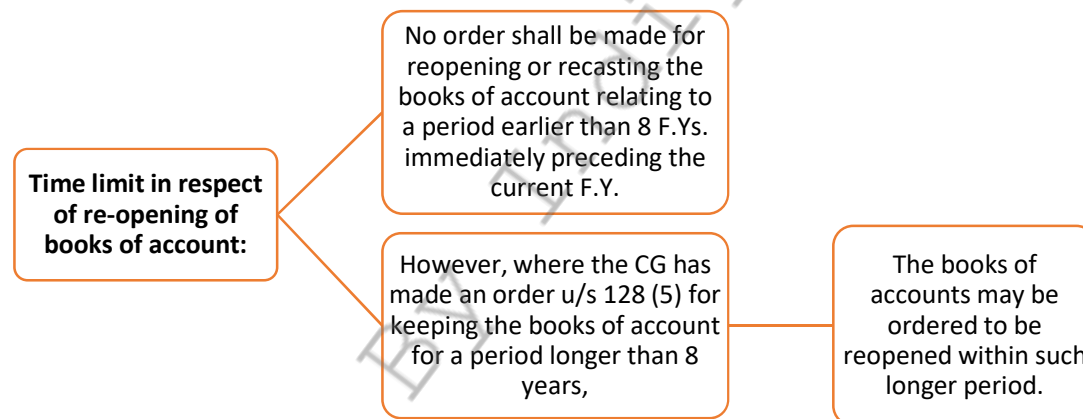
Section 130 of the Companies Act, 2013 contains provisions regarding re-opening of accounts or recasting of F.S. of a company.

regard is made by -

- ✓ The CG,
 - ✓ The Income Tax Authorities,
 - ✓ The SEBI,
 - ✓ Any other statutory regulatory body or authority or any person concerned
- and an **order is made** by the competent court/ Tribunal **to the effect that -**
- a) The relevant earlier accounts were **prepared in a fraudulent manner**, or
 - b) The **affairs of the company were mismanaged** during the relevant period, casting a doubt on the reliability of the FS.

Court/Tribunal shall give notice to CG, I-Tax authorities, SEBI or any other statutory regulatory body or authority or any person concerned & shall take into consideration the representations made, if any, **before passing any order.**

The accounts so revised or re-casted shall be final.



5. VOLUNTARY REVISION OF FINANCIAL STATEMENTS OR BOARD'S REPORT

5.1 Procedure for revision of FS or Board's Report

Section 131 of the Companies Act, 2013 contains provisions regarding voluntary revision of financial statements or board's report.

1) If it appears to the BOD that the FS or Board's Report are not in compliance with Sec 129 or Sec 134

2) Application may be filed with the Tribunal seeking approval to make suitable changes in F.S. and Board's Report in respect of any of the 3 preceding F.Ys.

3) The Tribunal shall notify the CG and Income Tax Authorities and consider the representations made before passing the order

4) Copy of the order of the Tribunal shall be filed with the ROC

5) Such revised FS or report shall not be prepared for more than once in a F.Y. The reasons for such revision shall also be also be stated in the Board's Report in the relevant F.Y. in which such revision is being made.

Additional Steps To be followed:

Rule 77 of the National Company Law Tribunal Rules, 2016 requires:

- a. The application shall contain the following particulars/details, namely:
 - Financial year or period to which such accounts relates;
 - The name and contact details of the Managing Director, Chief Financial Officer, directors, Company Secretary and officer of the company responsible for making and maintaining such books of account and financial statement;
 - Where such accounts are audited, the name and contact details of the auditor or any former auditor who audited such accounts;
 - Copy of the Board resolution passed by the Board of Directors;
 - Grounds for seeking revision of financial statement or Board's Report;
 - In case the majority of the directors of company or the auditor of the company has been changed immediately before the decision is taken to apply under section 131, the company shall disclose such facts in the application.
- b. The company shall advertise the application at least fourteen days before the date of hearing;
- c. On receipt of approval from Tribunal a general meeting may be called and notice of such general meeting along with reasons for change in financial statements may be published in newspaper in English and in vernacular language

- d. In the general meeting, the revised financial statements, statement of directors and the statement of auditors may be put up for consideration before a decision is taken on adoption of the revised financial statements
- e. On approval in the general meeting, the revised financial statements along with the statement of auditors or revised report of the Board, as the case may be, shall be filed with the Registrar of Companies within thirty days of the date of approval by the general meeting.

5.2 Limits of revision

The revisions must be confined to –

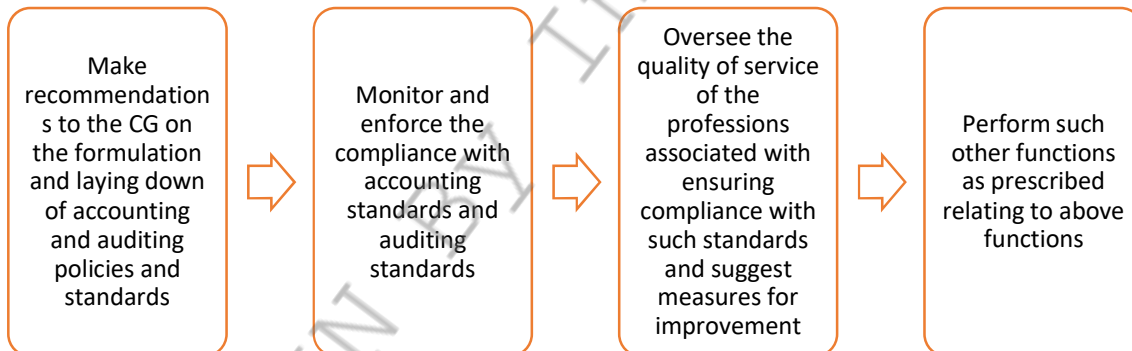
- a) The **correction in respect of which previous FS or Board's Report do not comply with the provisions of section 129 or section 134**, and
- b) The making of any necessary **consequential alteration**.

CG may make rules as to the application of provisions of this Act in relation to revised F.S. or a revised director's report.

constitution of NFRA to provide for matters relating to accounting and auditing standards.

6. CONSTITUTION OF NATIONAL FINANCIAL REPORTING AUTHORITY (NFRA)

6.1 Functions of NFRA



NFRA shall perform its functions through such divisions as may be prescribed. There shall be an executive body of NFRA consisting of chairperson and full-time members for efficient discharge of its functions (except 1st above)

6.2 Constitution of NFRA

- ✓ **Chairperson** – a person of eminence and having expertise in accountancy, auditing, finance or law – appointed by the CG.
- ✓ Such **other members** (part time or full time) – **not exceeding 15**.
- ✓ Each **division of the NFRA** shall be presided over by the chairperson or a full-time member authorised by the chairperson.
- ✓ The chairperson and members shall make a declaration to the CG in regarding no conflict of interest or lack of independence

- ✓ The chairperson and full time members of the NFRA shall not be associated **with any audit firm** during the course of their appointment and 2 years after ceasing to hold such appointment.

The following persons shall be appointed as part time members of NFRA, namely:

- One member to represent the MCA, who shall be an officer not below the rank of Joint Secretary, ex-officio;
- One member to represent the CAG of India, who shall be an officer not below the rank of Accountant General or Principal Director, ex-officio;
- One member to represent the RBI, who shall be an officer not below the rank of Executive Director, ex-officio
- One member to represent the SEBI, who shall be an officer not below the rank of Executive Director, ex-officio;
- President, ICAI, ex-officio;
- Chairperson, Accounting Standards Board, ICAI, ex-officio;
- Chairperson, Auditing and Assurance Standards Board, ICAI, ex-officio; and
- Two experts from the field of accountancy, auditing, finance or law.

Sub-section 11 empowers the Central Government to appoint a secretary and such other employees as it may consider necessary

6.3 Powers of NFRA

- Power to investigate**, either Suo moto or on a reference made to it by the CG, into matters of professional or other misconduct committed by any member or firm of Chartered Accountants registered under the Chartered Accountants Act, 1949.
- Powers as are vested in a civil court while trying a suit, namely
 - **Discovery and production of books** of account and other documents,
 - **Summoning and enforcing the attendance** of persons and examining them on oath,
 - **Inspection** of any books, registers, and other documents of any person,
 - **Issuing commissions** for examination of witnesses or documents.
- Where professional or other misconduct is proved, the **power to make order for imposing punishments** as follows:

No other institute or body shall initiate / continue proceedings of misconduct where NFRA has initiated investigation.

	Individuals CA	Firm of CAs
Imposing penalty of –	Minimum: ₹ 1,00,000/- Maximum: 5 times the fees received	Minimum: ₹ 5,00,000/- Maximum: 10 times the fees received
Debarring for min. 6 months or higher period not exceeding 10 years from	i) Being appointed as auditor/ internal auditor/ undertaking any audit in respect of FS or internal audit of the functions and activities of any company or body corporate, or ii) Performing any valuation as provided u/s 247.	

Note1:

For the purpose of recommending accounting standards or auditing standards for approval by the Central Government, Rule 6 requires, the NFRA:

1. Shall receive recommendations from the Institute of Chartered Accountants of India (ICAI) on proposals for new accounting standards or auditing standards or for Amendment to existing accounting standards or auditing standards;
2. May seek additional information from the ICAI on the recommendations received under clause (a), if required.

The Authority shall consider the recommendations and additional information in such manner as it deems fit before making recommendations to the Central Government.

Note2:

For the purpose of monitoring and enforcing compliance with **accounting standards** under the Act by a company or a body corporate, Rule 7 requires NFRA:

1. May review the financial statements of such company or body corporate, as the case may be, and if so required, direct such company or body corporate or its auditor by a written notice, to provide further information or explanation or any relevant documents relating to such company or body corporate, within such reasonable time as may be specified in the notice.
2. May require the personal presence of the officers of the company or body corporate and its auditor for seeking additional information or explanation in connection with the review of the financial statements of such company or body corporate.
3. Shall publish its findings relating to non-compliances on its website and in such other manner as it considers fit, unless it has reasons not to do so in the public interest and it records the reasons in writing.
4. Where the Authority finds or has reason to believe that any accounting standard has or may have been violated, it may decide on the further course of investigation or enforcement action through its concerned Division.

For the purpose of monitoring and enforcing compliance with **auditing standards** under the Act by a company or a body corporate, Rule 8 requires NFRA:

1. May review working papers (including audit plan and other audit documents) and communications related to the audit;
2. May evaluate the sufficiency of the quality control system of the auditor and the manner of documentation of the system by the auditor; and
3. May perform such other testing of the audit, supervisory, and quality control procedures of the auditor as may be considered necessary or appropriate.
4. May require an auditor to report on its governance practices and internal processes designed to promote audit quality, protect its reputation and reduce risks including risk of failure of the auditor and may take such action on the report as may be necessary.
5. May seek additional information or may require the personal presence of the auditor for seeking additional information or explanation in connection with the conduct of an audit.
6. Shall perform its monitoring and enforcement activities through its officers or experts with sufficient experience in audit of the relevant industry.
7. Shall publish its findings relating to non-compliances on its website and in such other manner as it considers fit, unless it has reasons not to do so in the public interest and it records

- the reasons in writing.
8. Shall not publish proprietary or confidential information, unless it has reasons to do so in the public interest and it records the reasons in writing.
 9. May send a separate report containing proprietary or confidential information to the Central Government for its information.
 10. Where the Authority finds or has reason to believe that any law or professional or other standard has or may have been violated by an auditor, it may decide on the further course of investigation or enforcement action through its concerned Division.

Note3:

1. Rule 9 provides, on the basis of its review, the NFRA may direct an auditor to take measures for improvement of audit quality including changes in their audit processes, quality control, and audit reports and specify a detailed plan with time-limits.
2. It shall be the duty of the auditor to make the required improvements and send a report to the NFRA explaining how it has complied with the directions made by the NFRA.
3. The NFRA shall monitor the improvements made by the auditor and take such action as it deems fit depending on the progress made by the auditor.
4. The NFRA may refer cases with regard to overseeing the quality of service of auditors of companies or bodies corporate referred to in rule 3 to the Quality Review Board constituted under the Chartered Accountants Act, 1949 or call for any report or information in respect of such auditors or companies or bodies corporate from such Board as it may deem appropriate.
5. The NFRA may take the assistance of experts for its oversight and monitoring activities

Additional functions of NFRA

- Promote awareness in relation to the compliance of accounting standards and auditing standards;
- Co-operate with national and international organisations of independent audit regulators in establishing and overseeing adherence to accounting standards and auditing standards; and
- Perform such other functions and duties as may be necessary or incidental to the aforesaid functions and duties

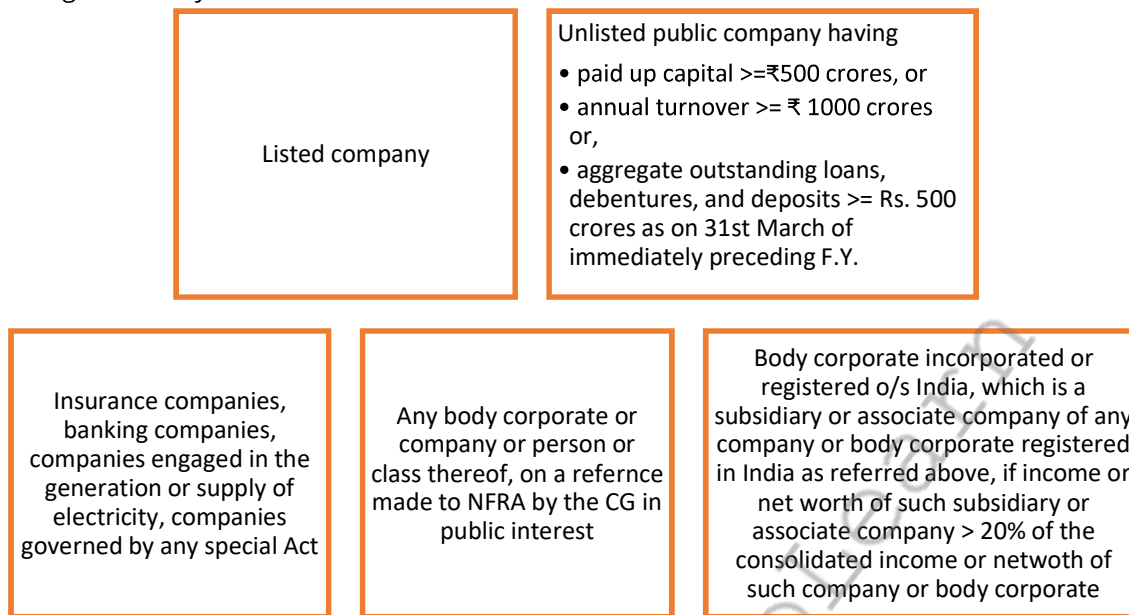
Note: The Central Government may, By notification, Delegate any of its powers or functions under the Act to NFRA, other than the power to make rules; Subject to such conditions, limitations and restrictions as may be specified in such notification. Sub-section 2 has overriding effects anything contained in any other law for the time being in force.

6.4 Other provisions

- **Appeal against orders** – Aggrieved person may prefer appeal before Appellate Tribunal in prescribed manner + fee
- **CG may appoint** a secretary and such other employees as necessary for efficient performance of functions by NFRA
- **Head Office** – at New Delhi
- **Audit of Account of NFRA** – by C&AG. Audited accounts together with audit report thereon shall be forwarded annually to the CG by the NFRA
- **Annual Report** – must be prepared for each F.Y. by the NFRA and forward a copy to the CG which shall be laid before each house of Parliament.

6.5 Classes of companies governed by NFRA

Rule 3 of the NFRA Rules, 2018 provides for the classes of companies and body corporate governed by the NFRA:



Note: A company/ body corporate other than a company governed under NFRA Rules, shall **continue to be governed by the NFRA for 3 years** after it ceases to be listed or its paid-up capital or turnover or aggregate of loans, debentures and deposits falls below the limit stated therein.

6.6 Punishment for non-compliance

If a company or any officer of a company or an auditor or any other person contravenes any of the provisions of the NFRA Rules:

- the company and every officer in default or auditor or such other person shall be **punishable u/s 450 of the Act.**

7. CENTRAL GOVERNMENT TO PRESCRIBE ACCOUNTING STANDARDS

The CG may prescribe the standards of accounting or any addendum thereto, as recommended by the ICAI in consultation with and after examination of the recommendations made by the NFRA.

Section 133 of the Companies Act, 2013 deals with the power of Central Government to prescribe the accounting standards.

Section 134 of the Companies Act, 2013 deals with the preparation and laying down of financial statement, Board's report etc.

8. FINANCIAL STATEMENT, BOARD'S REPORT, ETC.

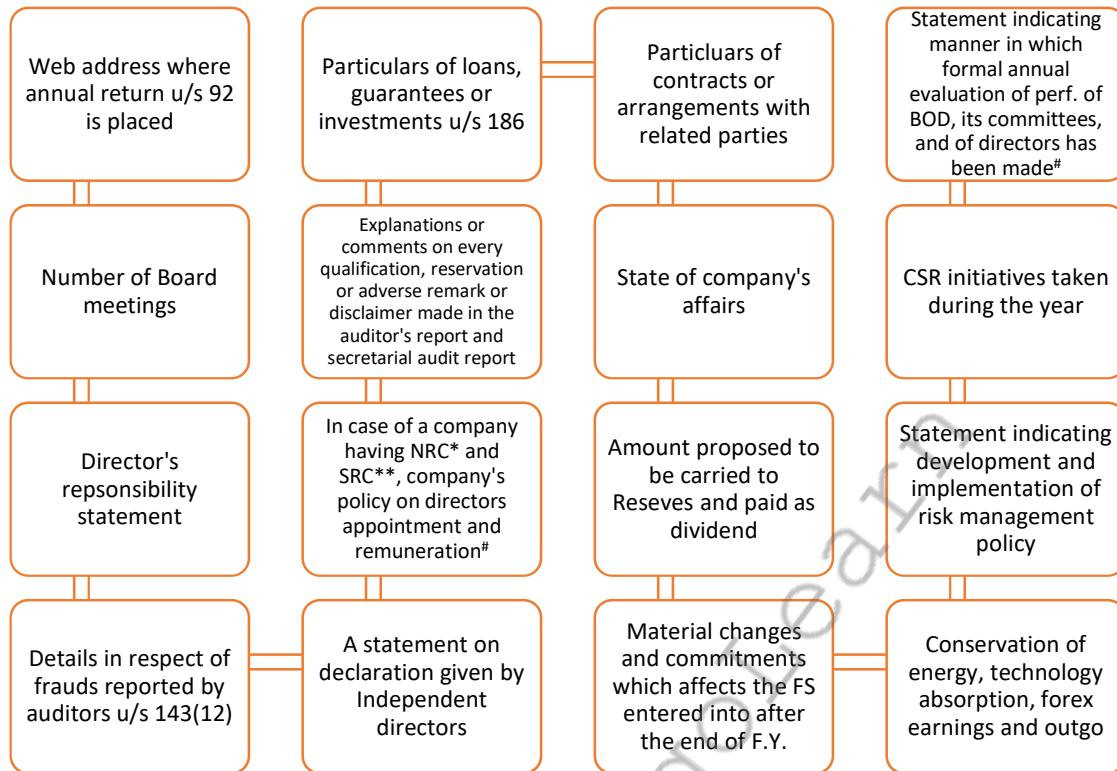
8.1 Authentication of FS

- ✓ The FS, including CFS, shall be **approved by the BOD before they are signed on behalf of the Board.**
- ✓ It shall be **signed** on behalf of the Board **at least by –**
 - By the **chairperson** of the company where he is authorised by the Board, *or*
 - **by two directors** out of which **one shall be MD**, if any, *and*
 - **the CEO, CFO & CS of the company**, wherever they are appointed, *or*
 - **In case of OPC – by one director.**
- ✓ The signed FS shall be **submitted to the auditor** for his report thereon.
- ✓ The **Auditors report shall be attached to every FS.**
- ✓ A signed copy of the FS, including CFS, shall be issued, circulated or published along with a copy of-
 - Any notes annexed to or forming part of such FS,
 - The Auditor's report, and
 - The Board's report.

8.2 Board's Report [Section 134 (3)]

The Board's report shall be prepared based on the standalone FS of the company. It shall report on the highlights of performance of subsidiaries, associates and joint venture companies and their contribution to the overall performance of the company during the period under report.

8.2.1 Contents of the Board's report [Section 134 (3) r.w. Rule 8]



*NRC = Nomination and Remuneration Committee; **SRC = Stakeholders Relationship Committee

[#] does not apply in case of government company

[#] applicable to listed company and every other public company having paid-up share capital of ₹ 25 crores or more at the end of the preceding F.Y.

According to **Rule 8 of the Companies (Accounts) Rules, 2014**, the Board's report shall also contain

- (i) The financial summary or highlights;
- (ii) The change in nature of business, if any;
- (iii) Details of directors or KMP appointed or resigned during the year;
- (iiia) A statement regarding opinion of the BOD with regard to integrity, expertise and experience (including proficiency) of independent directors,
- (iv) The names of companies which have become or ceased to be its subsidiaries, Joint ventures or associate companies during the year,
- (v) Details relating to the deposits – accepted during year, remaining unpaid at end of year, default in repayment or payment of interest;
- (vi) Details of deposits not in compliance with requirements of Chapter V
- (vii) Details of significant and material orders passed by the regulators or courts or Tribunals impacting the going concern status or operation's in future.
- (viii) Details in respect of adequacy of internal financial controls,
- (ix) Disclosure as to whether maintenance of cost records is required and whether they are maintained,
- (x) A statement that company has complied with the provisions relating to constitution of Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
- (xi) Details of application made or any proceeding pending under Insolvency and Bankruptcy Code, 2016 during the year along with their status as at the end of the F.Y.

- (xii) Details of difference between amount of valuation done at the time of one-time settlement and valuation done while taking loan from the Banks or Financial Institutions along with reasons thereof.

8.2.2 Board's Report in case of OPC [Section 134 (4)]

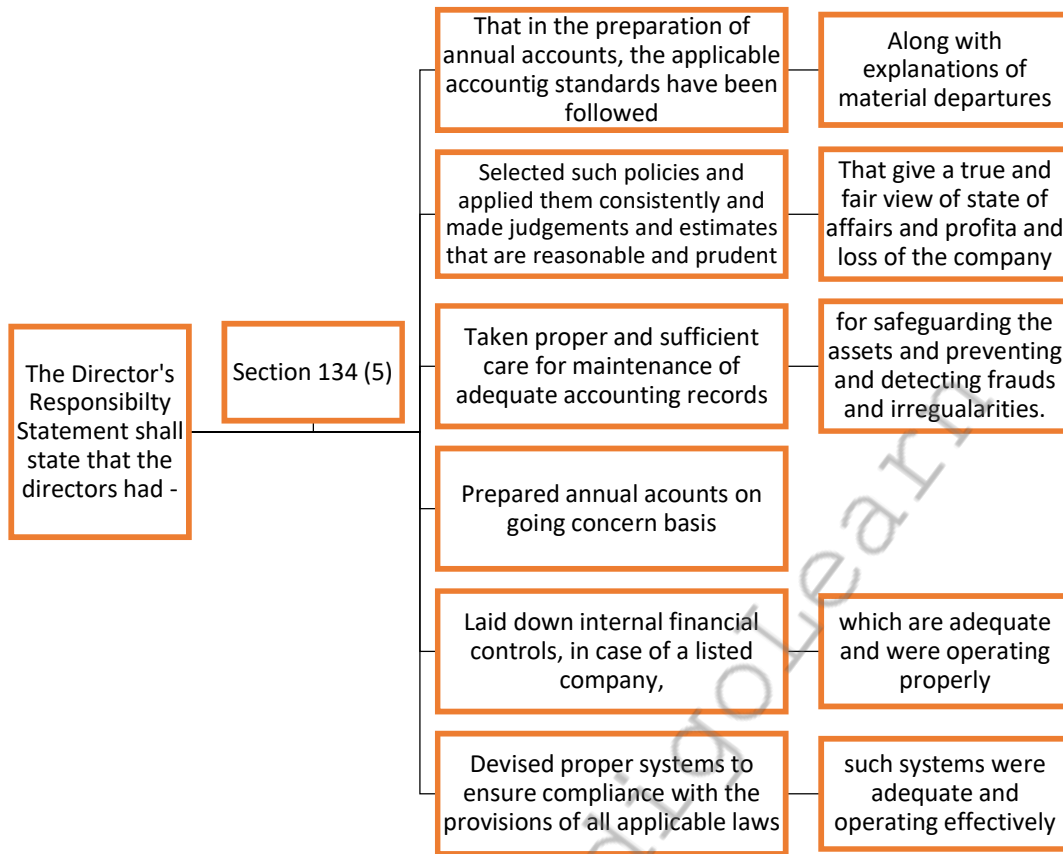
The Board's Report of One Person Company and Small Company shall be prepared based on the stand-alone financial statement of the company, which shall be in abridged form and contain the following;

- a. The web address, if any, where annual return referred to in sub-section (3) of section 92 has been placed;
- b. Number of meetings of the Board;
- c. Directors' Responsibility Statement as referred to in sub-section (5) of section 134;
- d. Details in respect of frauds reported by auditors under sub-section (12) of section 143 other than those which are reportable to the Central Government
- e. Explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report;
- f. The state of the company's affairs;
- g. The financial summary or highlights;
- h. Material changes from the date of closure of the financial year in the nature of business and their effect on the financial position of the company;
- i. The details of directors who were appointed or have resigned during the year;
- j. The details or significant and material orders passed by the regulators or courts or tribunals impacting the going concern status and company's operations in future.
- k. The particulars of contracts or arrangements with related parties referred to in sub-section (1) of section 188 in the Form AOC-2.

Note: Rule 8 shall not be applicable to One person Company or Small Company.

In case of OPC, the Board's Report to be attached to the FS shall mean *a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.*

8.3 Director's Responsibility Statement



8.4 Signing of Board's Report

Board's Report and annexure thereto shall be signed by:

- The chairperson of the company, if he is authorised by the BOD,
- Otherwise, by at least 2 directors, one of whom shall be the MD, or
- The director, where there is one director.

8.5 Punishment for contravention

Persons liable	Liability
Company	Penalty of ₹3L
Every officer of the company who is in default	Penalty of ₹50,000

Sec 135 of Companies Act, 2013 lays down provisions requiring corporates to mandatorily spend a prescribed % of their profits on certain specified areas of social upliftment in discharge of their social responsibilities.

9.1 Constitution of CSR Committee [Section 135 (1) r.w. Companies (CSR) Rules, 2014]

Every company having –

- (1) **Net worth of ₹ 500 crore or more**, or
- (2) **Turnover of ₹ 1000 crore or more**, or
- (3) A **net profit of ₹ 5 crore or more**

during the **immediately preceding F.Y.** shall constitute a Committee. [Sec. 135 (1)]

Every company **including its holding or subsidiary, and foreign company*** having its branch office or project office in India, which fulfils the above criteria shall comply with the provisions of Section 135 of the Act.

*Net worth, turnover or net profit of a foreign company shall be computed in accordance with balance sheet and Profit and loss account prepared in accordance with the provisions Sec 381(1)(a) and Sec 198 of Act.

**Net profit means the net profit of company as per its financial statement prepared in accordance with the applicable provisions of the Act, but shall not include the following, namely: -*

- (i) any profit arising from any overseas branch(es) of the company, whether operated as a separate company or otherwise; and
- (ii) any dividend received from other companies in India, which are covered under and complying with the provisions of section 135.



1. Net worth as defined in Sec 2(57) will be taken.

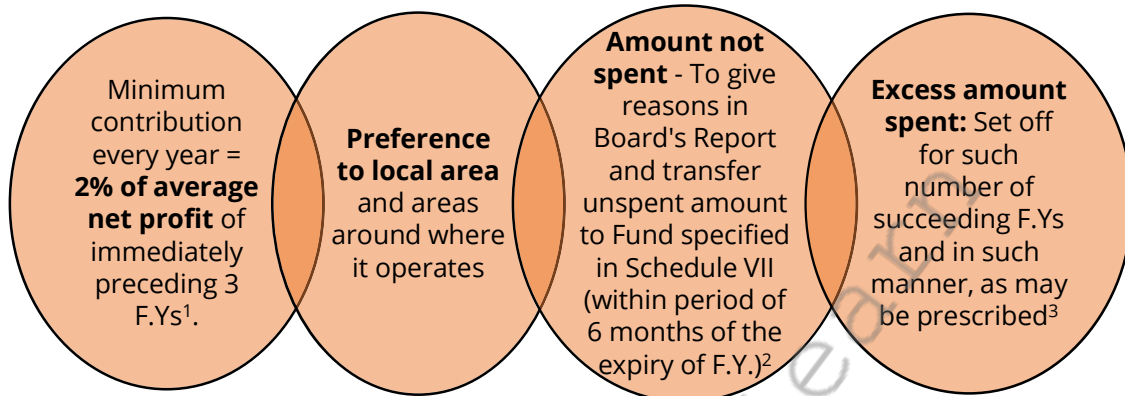
2. Net profit shall not include such sums as **may be prescribed***, and shall be calculated as per Sec 198.

CSR

a

Note: Schedule VII of the Act provides for the list of activities which may be included by Companies in their CSR policies.

9.2 Amount of contribution toward CSR [Sec 135(5)]



1. Where company has not completed period of 3 F.Y.s since its incorporation, net profits during such immediately preceding financial years shall be considered
2. If unspent amount relates to any ongoing project refer Sec 135(6)
3. To immediate succeeding 3 financial years subject to conditions that -
 - (i) excess amount available for set off shall not include surplus arising out of CSR activities,
 - (j) Board shall pass a resolution to that effect.

Ongoing Project means a multi-year project undertaken by Company in fulfilment of its CSR obligation having timelines **not exceeding 3 years** excluding financial year in which it was commenced and **shall include** such project that was initially not approved as a multi-year project but whose duration has been extended beyond one year by the board based on reasonable justification.

9.3 Unspent amount related to ongoing project [Sec 136(6)]

- ✓ **Shall be transferred within a period of thirty days** from end of F.Y. to a **special account**
- ✓ This account is to be opened by company in that behalf for that F.Y. in any scheduled bank to be called **Unspent Corporate Social Responsibility Account**
- ✓ Such **amount shall be spent** by company **within a period of 3 F.Ys** from date of such transfer
- ✓ In case of failure to spend, company shall transfer same to a Fund specified in Schedule VII, within period of 30 days from date of completion of 3rd F.Y.

9.4 Default in compliance of Sec 135(5) and 135(6)

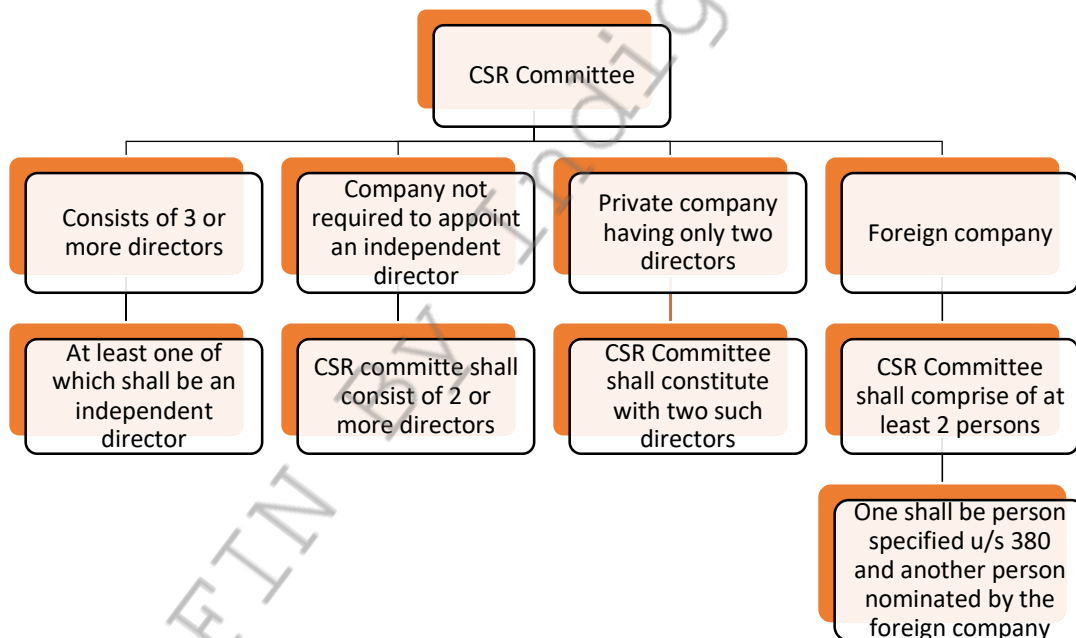
	Penalty
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Company	<ul style="list-style-type: none"> Twice the amount required to be transferred to Fund specified in Schedule VII or Unspent Corporate Social Responsibility Account, or ₹1 crore <p>whichever is less</p>
Every officer in default	<ul style="list-style-type: none"> One-tenth of the amount required to be transferred to Fund specified in Schedule VII or Unspent Corporate Social Responsibility Account, or ₹ 2 lakh <p>whichever is less</p>

9.5 Other provisions of Section 135 & Rules

- CG may give general / special directions to a company or class of companies to ensure compliance of provisions of this section
- Where amount to be spent on CSR by company does not exceed ₹50L, it is not required to constitute CSR Committee
 - Board of Directors of such company shall discharge functions of CSR Committee.
- A company having any amount in its Unspent Corporate Social Responsibility Account as per section 135(6) shall constitute a CSR Committee and comply with the provisions contained in Sec 135(2) to Sec 135(6)

9.6 Composition of CSR Committee



9.7 Duties of CSR Committee

- ✓ **Formulate and recommend** to the BOD, a **CSR policy** which shall indicate the activities to be undertaken by the company,
- ✓ **Recommend the amount of expenditure** to be incurred on the activities, and
- ✓ **Monitor the CSR policy** of the company from time to time.

9.8 Duties of the Board in relation to CSR

- ✓ **BOD**, after taking into account recommendations of CSR Committee, **approve CSR Policy** for the company and disclose contents of such Policy in its report and company's website, if any.
 - **Rule 8** – Board report shall include **annual report on CSR** containing particulars specified in Annexure I or Annexure II
 - **Rule 9** – BOD shall mandatorily disclose composition of CSR Committee, CSR Policy and Projects approved by it on company website, if any, for public access.
- ✓ **BOD shall ensure** that activities as are included in CSR Policy of the company are undertaken by the company

9.9 Meaning CSR Policy and Annual Action Plan

Rule 2 defines **CSR policy** as a statement containing approach and direction given by Board, after recommendations of its CSR Committee, and includes guiding principles for

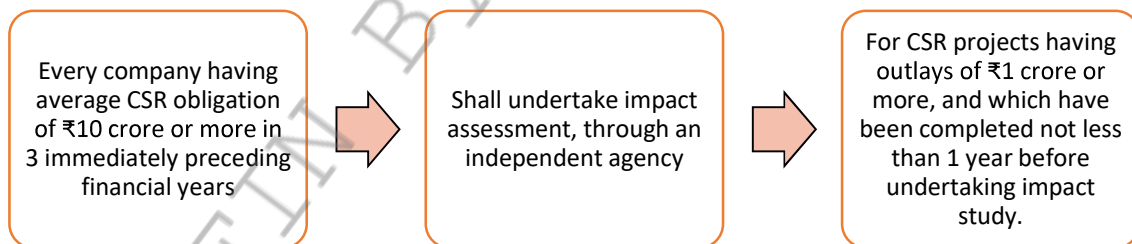
- Selection, Implementation and Monitoring of activities as well as formulation of the **annual action plan**.

Rule 5(2): CSR Committee shall formulate and recommend to the Board, an **annual action plan** in pursuance of its CSR policy.

Contents of Annual Action Plan

- (a) **list of CSR projects** that are approved to be undertaken in areas or subjects specified in Schedule VII
- (b) **manner of execution**
- (c) modalities of **utilisation of funds** and **implementation schedules**
- (d) **monitoring and reporting mechanism**
- (e) details of need and **impact assessment**, if any.

9.10 Impact Assessment – Requirements [Rule 8]



- Impact assessment reports shall be placed before Board and shall be annexed to the annual report on CSR.
- Impact assessment expenditure may be booked towards CSR, but it shall not exceed 2% of total CSR expenditure for that F.Y. or ₹50 lakh, whichever is higher.

9.11 Meaning of Corporate Social Responsibility (CSR)

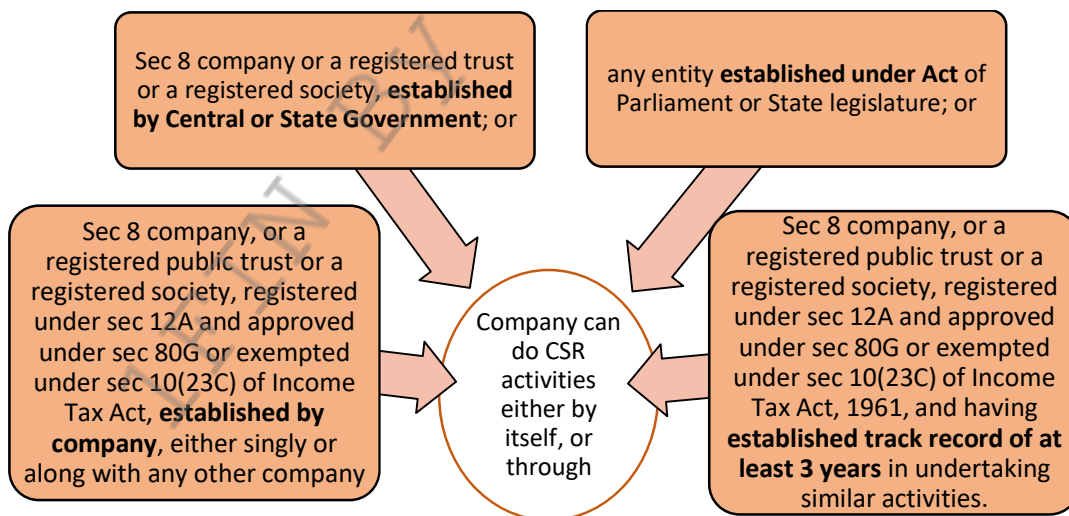
Rule 2 of the Companies (CSR Policy) Rules, 2014 defines **Corporate Social Responsibility (CSR)** which means the **activities undertaken by Company in pursuance of its statutory obligation laid down in section 135** of the Act in accordance with the provisions contained in these rules, but **shall not include the following** –

Activities undertaken in normal course of business of the company [#]
Activity undertaken by company outside India except for training of Indian sports personnel representing any State / UT at national level or India at international level
Contribution of any amount directly or indirectly to any political party under section 182
Activities benefitting employees of company as defined in Sec 2(k) of the Code on Wages, 2019
Activities supported by companies on sponsorship basis for deriving marketing benefits for its products or services;
Activities carried out for fulfilment of any other statutory obligations under any law in force in India

Company engaged in **research and development (R&D)** activity of new vaccine, drugs and medical devices in their normal course of business may undertake R &D activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22, 2022-23 subject to -

- (a) such activities shall be carried out in collaboration with any of the organisations mentioned in item (ix) of Schedule VII to the Act;
- (b) details of such activity shall be disclosed separately in the Annual report on CSR included in the Board's Report;

9.12 CSR Implementation (Rule 4)



- Every entity, who intends to undertake any CSR activity, shall register itself with Central Government by filing **form CSR-1** with Registrar, with effect from 1st April 2021
 - **Form CSR-1** shall be signed and submitted electronically and shall be verified digitally by a CA / CS / Cost Accountant in practice.

- Upon submission, a unique **CSR Registration Number** shall be generated by system automatically.
- Company may engage **international organisations** for designing, monitoring and evaluation of CSR projects as per its CSR policy as well as for capacity building of their own personnel for CSR.
- **Company may collaborate with other companies** for undertaking CSR activities in such manner that CSR committees of respective companies can report separately on such projects in accordance with these rules.

9.13 CSR Expenditure [Rule 7]

Administrative overheads	<ul style="list-style-type: none"> • Shall not exceed 5% of total CSR expenditure for F.Y.
Surplus arising out of CSR activities	<ul style="list-style-type: none"> • Shall not form part of business profit of • Shall be <ul style="list-style-type: none"> - Ploughed back into same project or - Transferred to Unspent CSR Account - Transferred to Fund specified in Schedule VII <p>within 6 months of expiry of F.Y.</p>
Capital Asset for CSR	<ul style="list-style-type: none"> • CSR amount may be spent for creation/ acquisition of a capital asset • Capital asset to be held by – <ul style="list-style-type: none"> (a) Sec 8 company or a Registered Public Trust or Registered Society; or (b) beneficiaries, in the form of self-help groups, collectives, entities; or (c) public authority

9.14 Activities specified under Schedule VII

Eradicating hunger, poverty and malnutrition, promoting health care and sanitation including contribution to Swachh Bharat Kosh
Promoting education, including special education and employment enhancing vocation skills and livelihood enhancement projects
Promoting gender equality, empowering women, setting up homes and hostels for women and orphans, setting up old age homes, day care centres and other facilities for senior citizens and measures for reducing inequalities faced by backward groups
Ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources, and maintaining quality of soil, air and water including contribution to Clean Ganga Fund
Protection of national heritage, art & culture including restoration of buildings & sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts
Measures for the benefit of armed forces veterans, war widows and their dependents, Central Armed Police Forces and Central Para Military Forces veterans, and their dependents
Training to promote rural sports, nationally recognised sports, paralympic sports and Olympic sports
Contribution to Prime Minister's National Relief fund, PM CARES Fund, any other fund set up by the CG for socio economic development and relief and welfare of SC/ST/OBC, minorities and women.
Contributions to incubators or research development projects funded by CG, SG, or any agency or PSU of CG/SG and contributions to public funded Universities, IITs, National Laboratories & autonomus bodies under DAE; DBT; DST; DoP; AYUSH; MeitY and other research bodies
Rural development projects
Slum area development
Disiater management including relief, rehabilitation, and reconstruction activities

MCA has made a clarification via circulars that following shall be eligible CSR activity -

1. Spending of CSR funds for carrying out **awareness campaigns/ programmes or public outreach campaigns on COVID-19 Vaccination programme** relating to promotion of health care, including preventive health care and sanitization, promoting education, and, disaster management.
2. **Setting up makeshift hospitals and temporary COVID Care facilities** relating to promotion of health care, including preventive health care, and, disaster management.
3. Spending of CSR funds for '**creating health infrastructure for COVID care**', '**establishment of medical oxygen generation and storage plants**', '**manufacturing and supply of Oxygen concentrators, ventilators, cylinders and other medical equipment for countering COVID-19**' or similar such activities are eligible CSR activities relating to promotion of health care, including preventive health care, and, disaster management.
4. Reference is also drawn to item no. (ix) of Schedule VII which permits **contribution to specified research and development projects** as well as **contribution to public funded universities and certain Organisations** engaged in conducting research in science, technology, engineering, and medicine as eligible CSR activities
5. Companies including Government companies may undertake activities or projects or programmes using CSR funds, directly by themselves or in collaboration as shared responsibility with other companies, subject to fulfillment of Companies (CSR Policy) Rules, 2014 and the guidelines issued by Ministry from time to time
6. Spending of CSR funds of COVID- 19 **vaccination for persons other than the employees and their families**, is an eligible CSR activity relating to promotion of health care including preventive health care and disaster management.
7. Spending of CSR funds for activities related to **Har Ghar Tiranga campaign**, such as mass scale production and supply of the National Flag, outreach and amplification efforts and other related activities, are eligible CSR activities pertaining to promotion of education relating to culture.

10. RIGHT OF MEMBERS TO COPIES OF AUDITED FINANCIAL STATEMENTS

→ A **copy of FS**, including CFS, if any, auditor's report, and other documents annexed to or attached to the FS,

Section 136 of the Companies Act, 2013 states that copies of audited FS including consolidated FS, if any, auditors report etc. are to be sent to members of the company.

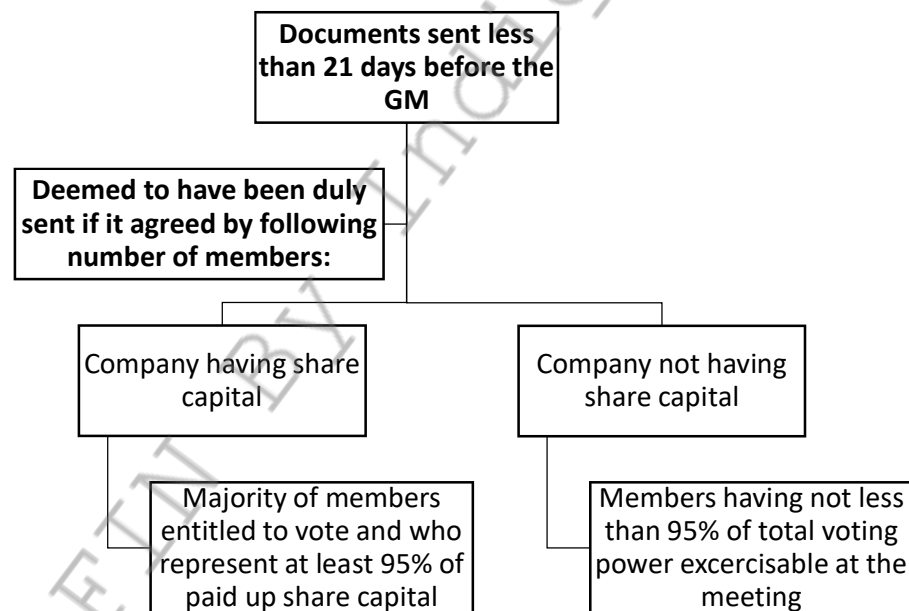
→ Which are to be laid before the company in the GM,

→ **Shall be sent to**

- Every **member** of the company,
- Every **trustee** for the debenture holder, and
- **Other persons** who are entitled

→ **Not less than 21 days** [14 days for Section 8 company] before the date of /the meeting.

10.1 Documents sent less than 21 days before the date of meeting.



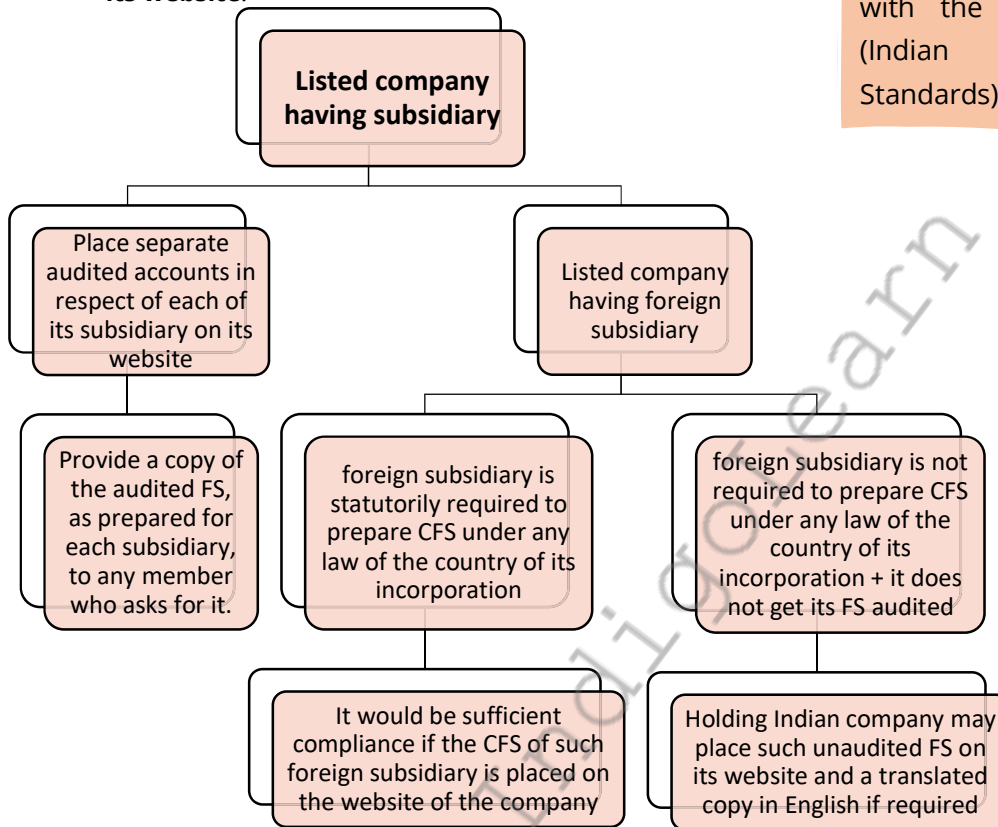
10.2 Applicability to Listed Company

In case of a listed company, the provisions of section 136 (1) shall be deemed to have been complied with if –

- **Copies of documents are made available for inspection** at its registered office during working hours for 21 days before the date of meeting, **and**
- **A statement** containing the salient features of such documents **in Form AOC -3** is sent to

- every member and
 - every trustee for debenture holders
- **not less than 21 days before the date of meeting** unless the shareholders ask for full FS.
- Listed company shall **also place its FS** including CFS, if any, and all other documents required to be attached thereto, **on its website**.

Statement shall be in **Form AOC-3A** for companies which are required to comply with the Companies (Indian Accounting Standards) Rules,

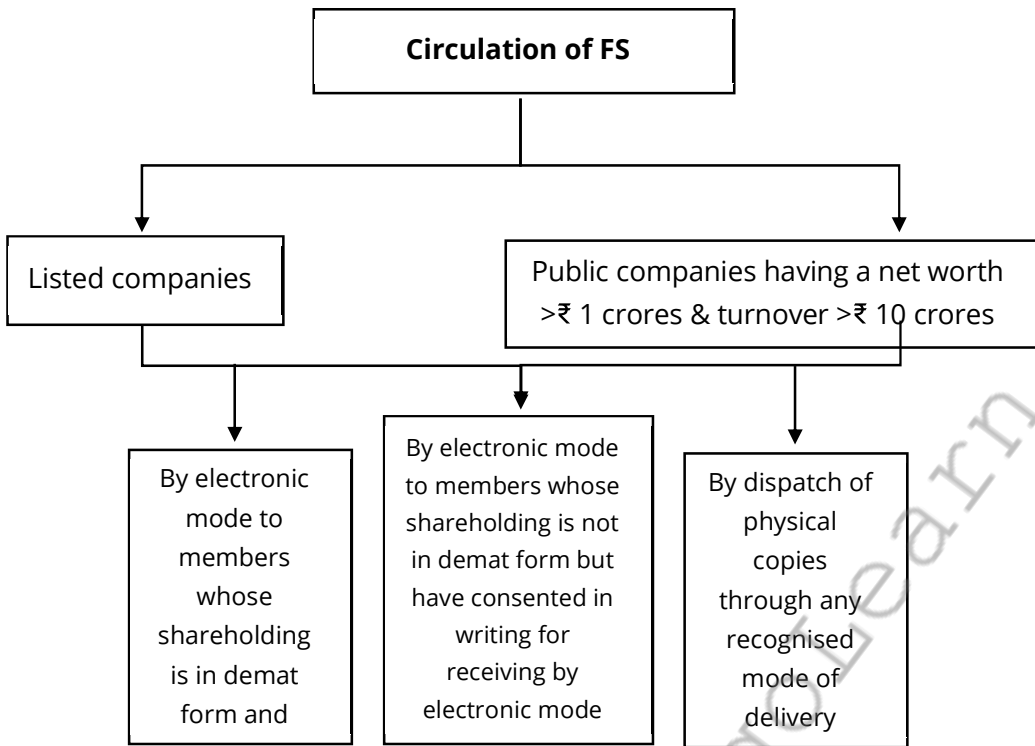


10.3 Applicability to Nidhi Company

In case of a Nidhi company, the provisions of section 136 (1) shall be deemed to have been complied with if, **in case of members who do not individually or jointly hold shares of:**

- *more than ₹ 1000/- or*
 - *more than 1% of total share capital, whichever is less,*
- if an **intimation is sent by public notice in newspaper** circulated in the district in which the registered office is situated, stating
- date, time, and venue of AGM and
 - FS with its enclosures can be inspected at the registered office of the company and
 - FS with enclosures are fixed in notice board of company and
 - a member is entitled to vote in person or through proxy.
- A company shall **also allow** every member or trustee of debenture holder **to inspect the audited FS at its registered office** during business hours.

10.4 Manner of circulation of FS in certain cases

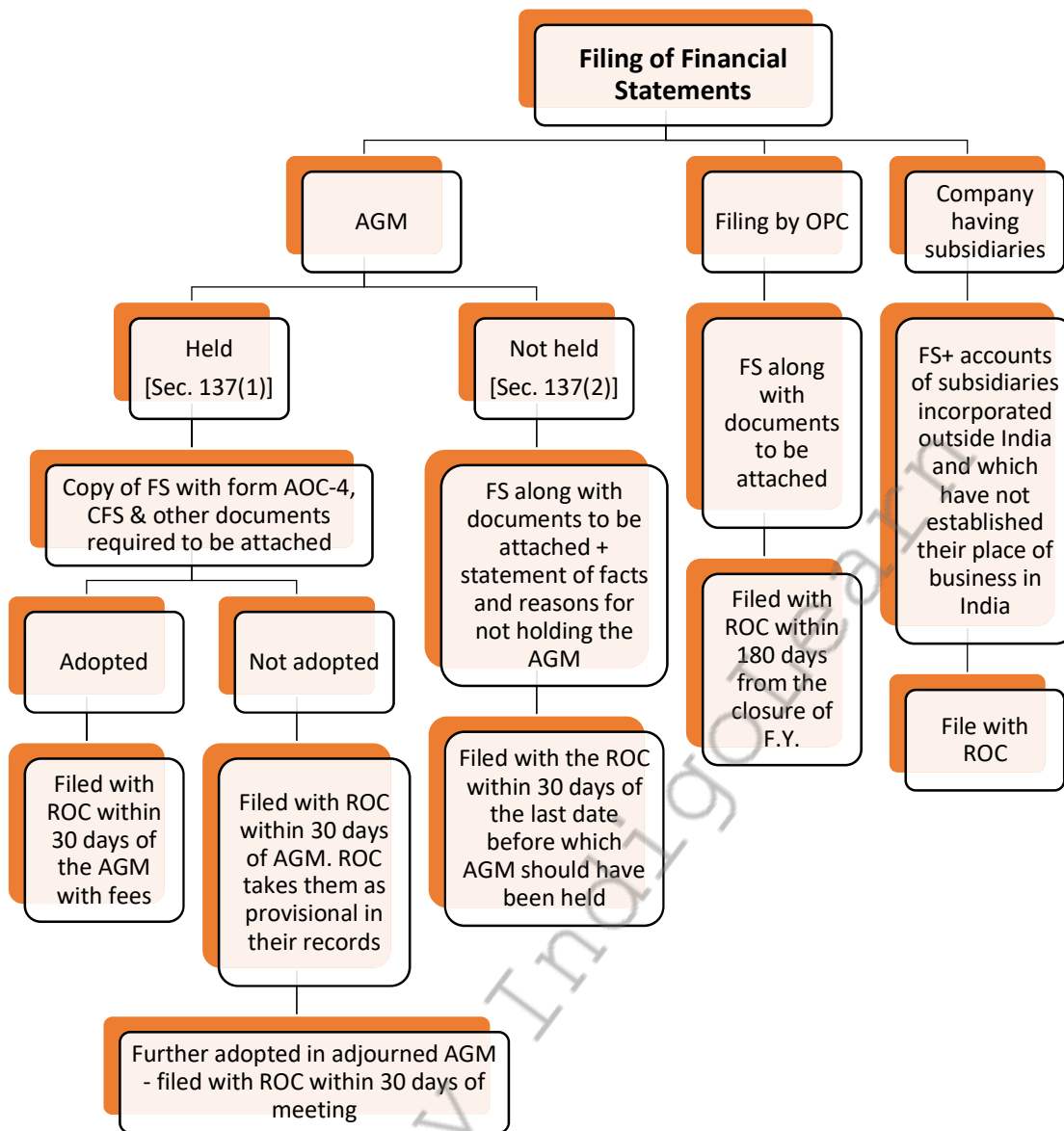


10.5 Punishment for contravention of section 136

Persons liable	Penalty
Company	₹ 25,000
Every officer of the company in default	₹ 5,000

11. COPY OF FINANCIAL STATEMENT TO BE FILED WITH REGISTRAR

Sec 137 of Companies Act, 2013 read along with **Rule 12** of Companies (Accounts Rules), 2014 provides that copies of FS shall be filed with ROC.



Summary of Form and Manner of Filing

Category	Standalone	Consolidated Financial Statement (if any)
<ol style="list-style-type: none"> 1. Companies listed with stock exchanges in India and their Indian subsidiaries; 2. Companies having paid up capital of five crore rupees or above; 3. Companies having turnover of one hundred crore rupees or above; 4. All companies which are required to prepare their financial statements in accordance with the <i>Companies (Indian Accounting Standards) Rules, 2015</i> 	<p>Shall mandatorily file their financial statement in Extensible Business Reporting Language (XBRL) format in e-form AOC-4 XBRL</p> <p>Using the Taxonomy provided in Annexure-II of <i>the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015</i>, if preparing their financial statements as per <i>the Companies (Accounting Standards) Rules, 2021</i></p> <p>Using the Taxonomy provided in Annexure-II A of <i>the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015</i>, if preparing</p>	

Note - Non-banking financial companies, Housing finance companies and Companies engaged in the business of banking and insurance sector are exempted from filing of financial statements under <i>the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015</i> i.e., in XBRL format	their financial statements as per <i>Companies (Indian Accounting Standards) Rules, 2015</i>	
Non-Banking Financial Company that is required to comply with Indian Accounting Standards	AOC-4 NBFC (Ind AS)	AOC-4 CFS NBFC (Ind AS)
Every Other Company not covered above	Form AOC-4	Form AOC-4 CFS
Every company covered under the provisions of sub-section (1) to section 135 i.e., Corporate Social Responsibility (CSR)	Shall furnish a report on CSR in Form CSR-2 as an addendum to the applicable form (out of those stated above, as the case may be).	

11.1 Report on Corporate Social Responsibility [Rule 12(1B)]

- Every company covered under the **provisions of Sec 135(1)** shall furnish a report on Corporate Social Responsibility in **Form CSR-2**
- to Registrar for preceding financial year (2020-2021) and onwards
- as an **addendum** to Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS), as the case may be

- Provided that for **preceding financial year (2020-2021)**, Form CSR-2 shall be filed separately **on or before 30th Jun 2022**, after filing Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS), as the case may be.
- Provided further that for **financial year 2021-2022**, Form CSR-2 shall be filed separately **on or before 31st March, 2023** after filing Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS), as the case may be

Following companies shall file their FS and other documents u/s 137 with the ROC in **e-form AOC-4 XBRL**:

- **Listed companies** and their Indian subsidiaries,
- Companies having **paid-up share capital of ₹ 5 crores** or above,
- Companies having **turnover of ₹ 100 crores or above**,
- All companies required to prepare FS in accordance with *Companies (Indian Accounting Standards) Rules, 2015*.

Companies which have filed their F.S. in XBRL per Rule 3(1) & erstwhile rules **shall continue to file** their F.S. and other docs, though they may not fall under specified class of companies in succeeding years.

Companies preparing their F.S. under Companies (AS) Rules, 2006 shall file the statements using Taxonomy provided in Annexure-II and companies preparing their F.S. under Companies (IndAS) Rules, 2015, shall file the statements using the Taxonomy provided in Annexure-II A

11.3 Non-applicability of Rule 3

The following companies are exempted from filing of FS under these rules:

- ✓ **Non-banking financial companies (NBFC)**
- ✓ **Housing Finance companies**
- ✓ **Banking companies**
- ✓ **Insurance companies**

11.4 Penalty for contravention of Section 137

Person liable	Penalty	Failure continues	Maximum
Company	₹10,000	Further penalty of ₹ 100 for each day after the first during which failure continues.	₹2,00,000
Officers – <ul style="list-style-type: none">• MD and CFO, if any• In their absence, other director charged by BoD with responsibility• In its absence, all the directors			₹50,000

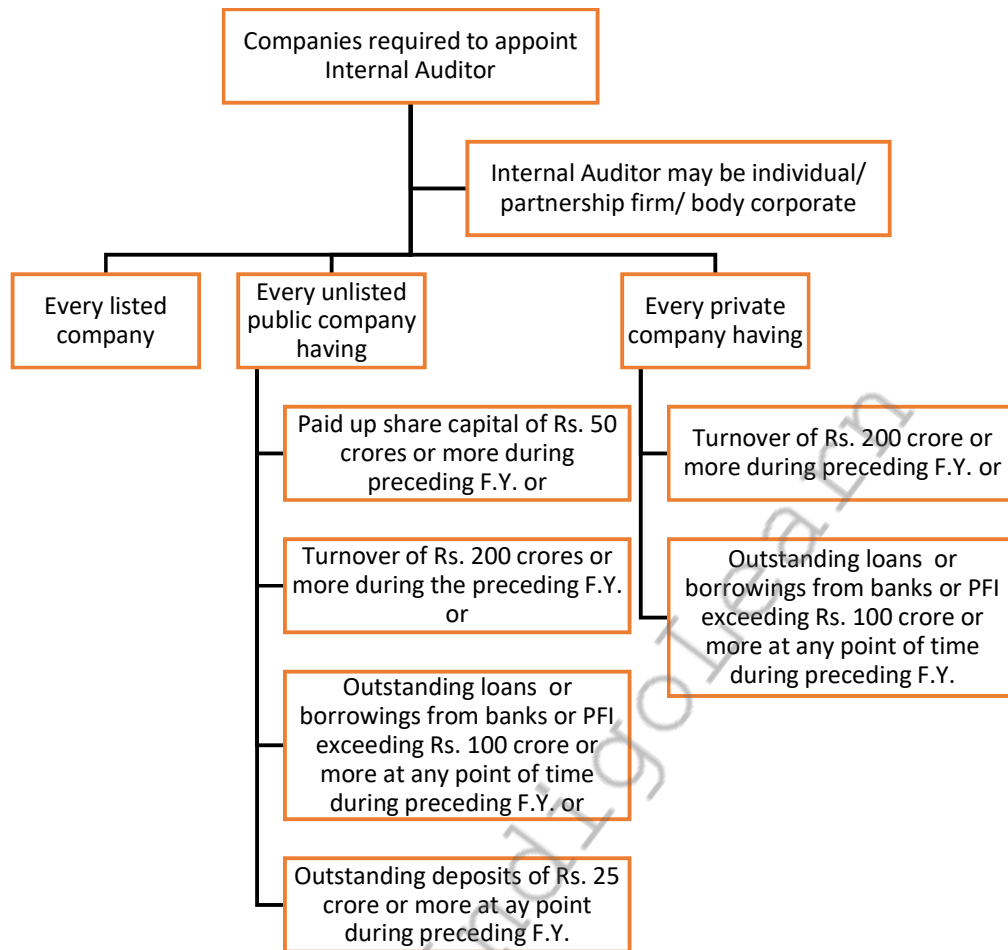
12. INTERNAL AUDIT

Section 138 of the Companies Act, 2013 read with Rule 13 of Companies (Accounts) Rules, 2014 provides for internal audit in a company.

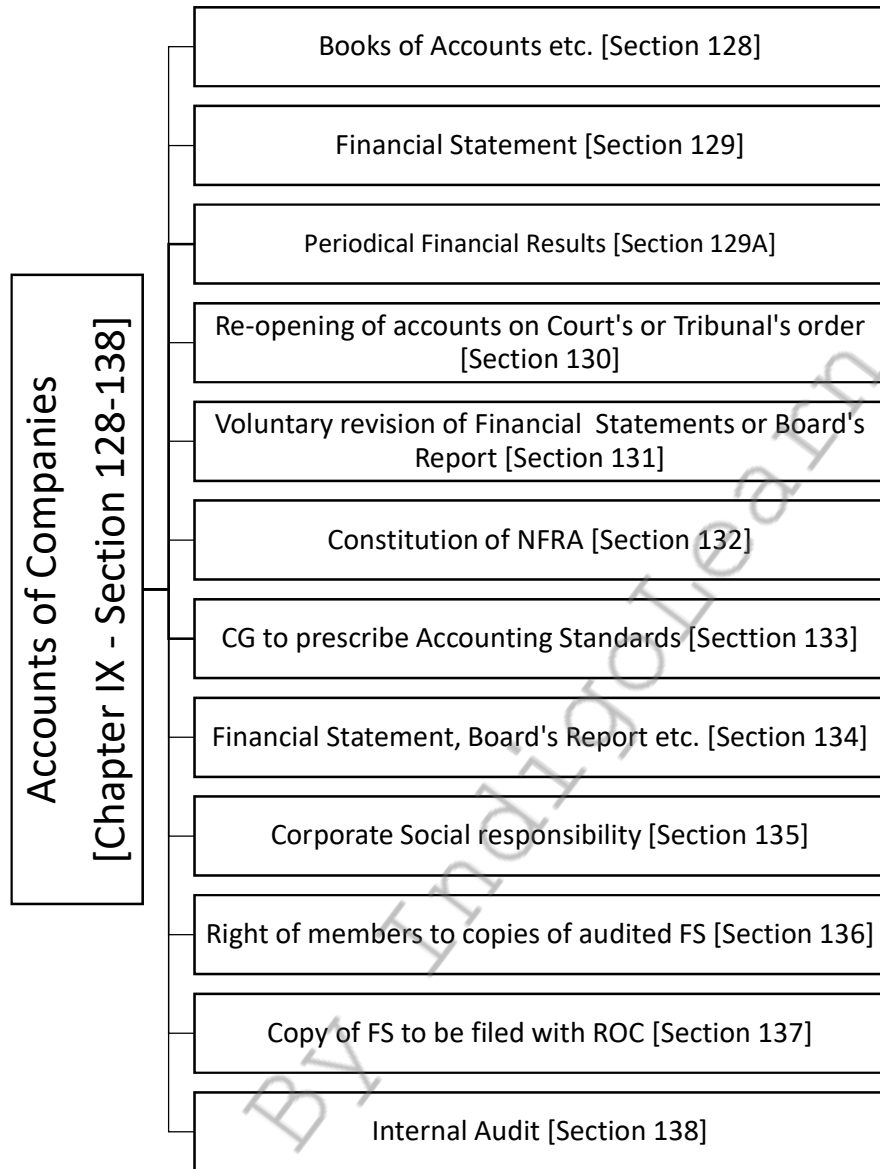
Such **class or classes of companies as may be prescribed** shall be required to **appoint an internal auditor**, who shall either be a **Chartered Accountant or a Cost Accountant or such other professional as may be decided by the BOD** to conduct internal audit of the functions and activities of the company.

The Internal auditor may or may not be an employee of the company.

12.1 Companies required to appoint Internal Auditor [Rule 13]



Audit Committee of the company or the Board shall, in consultation with the Internal Auditor, **formulate** the scope, functioning, periodicity and methodology for conducting the internal audit



Learning Outcomes –

- Understand the procedure for appointment of auditors, their removal, resignation, eligibility, qualifications, disqualifications, and remuneration.
- Know the powers and duties of auditors.
- Know about auditing services and certain services which an auditor cannot render.

1. INTRODUCTION

Large business corporations are managed by the directors who represent the members who are the real owners of the company through BOD. In the absence of any check the directors may mismanage the finances of the organisation. Thus members appoint auditors to look into the true and fair view of the financial affairs of the company.

The provisions relating to audit and auditors of companies have been dealt with under **Chapter X** of the Companies Act, 2013 [**Section 139 to 148**] and the **Companies (Audit and Auditors) Rules, 2014**.

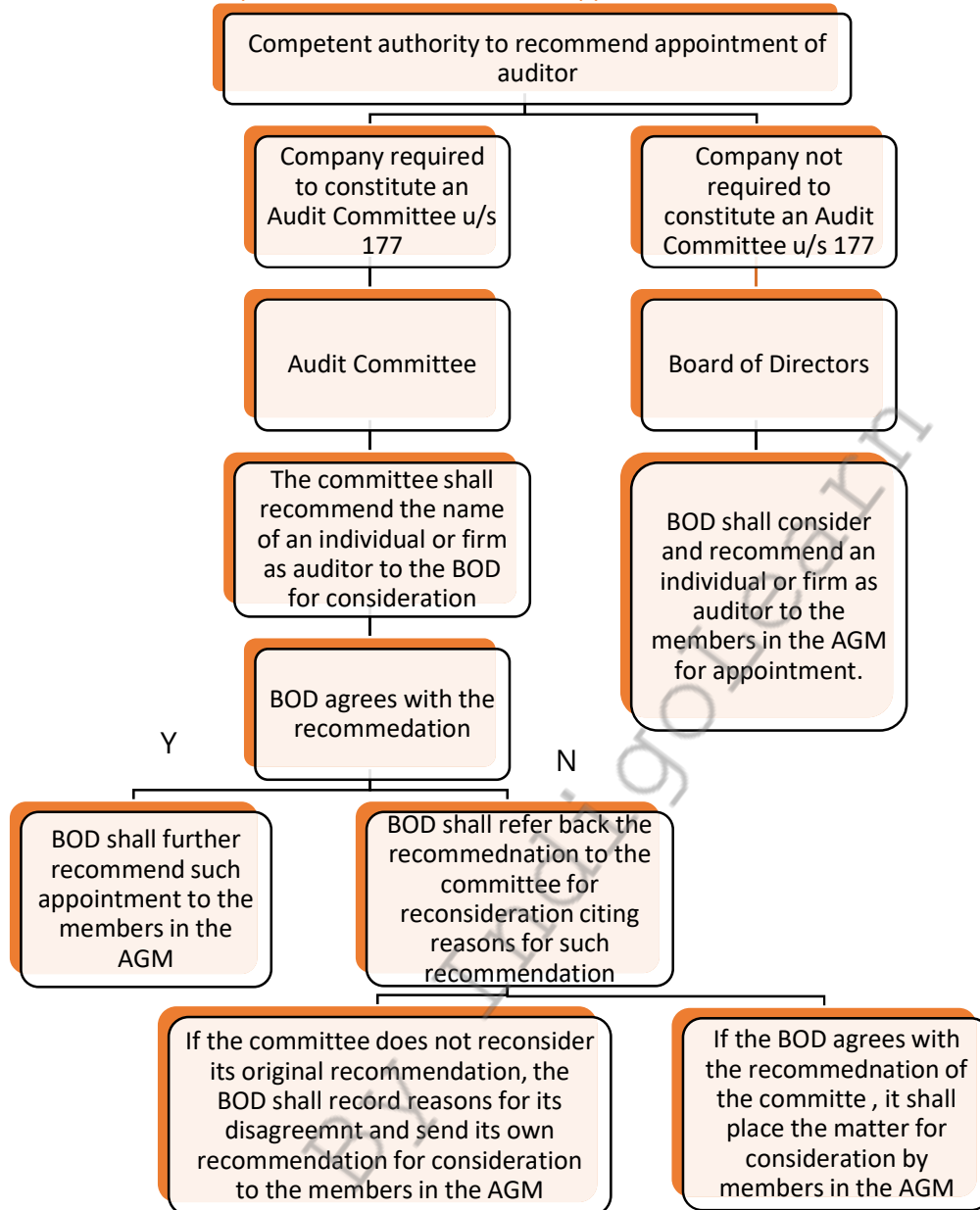
2. APPOINTMENT OF AUDITOR

Section 139 of the Companies Act, 2013 provides provisions for appointment of auditors.

2.1 Appointment of auditor [Sec. 139 (1)]

- Every company shall **appoint an individual or firm** as an auditor of the company **at the first AGM**.
- **Tenure:** The auditor shall hold office from the conclusion of 1st AGM till the conclusion of its 6th AGM and thereafter till the conclusion of every 6th AGM.

2.1.1 Manner and procedure for selection and appointment of auditors



2.1.2 Conditions for appointment and notice to the ROC [Rule 4]

Before the appointment of the auditor, the following shall be obtained:

- ✓ **written consent** of the auditor, and
- ✓ a **certificate** stating that –
 - a) the individual or the firm is **eligible for appointment and is not disqualified** for appointment,
 - b) **The proposed appointment is as per the term** provided under the Act,
 - c) The **proposed appointment is within the limits** laid down by or under the authority of the Act,
 - d) The **list of proceedings against the auditor or audit firm or any partner of the audit firm pending** with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

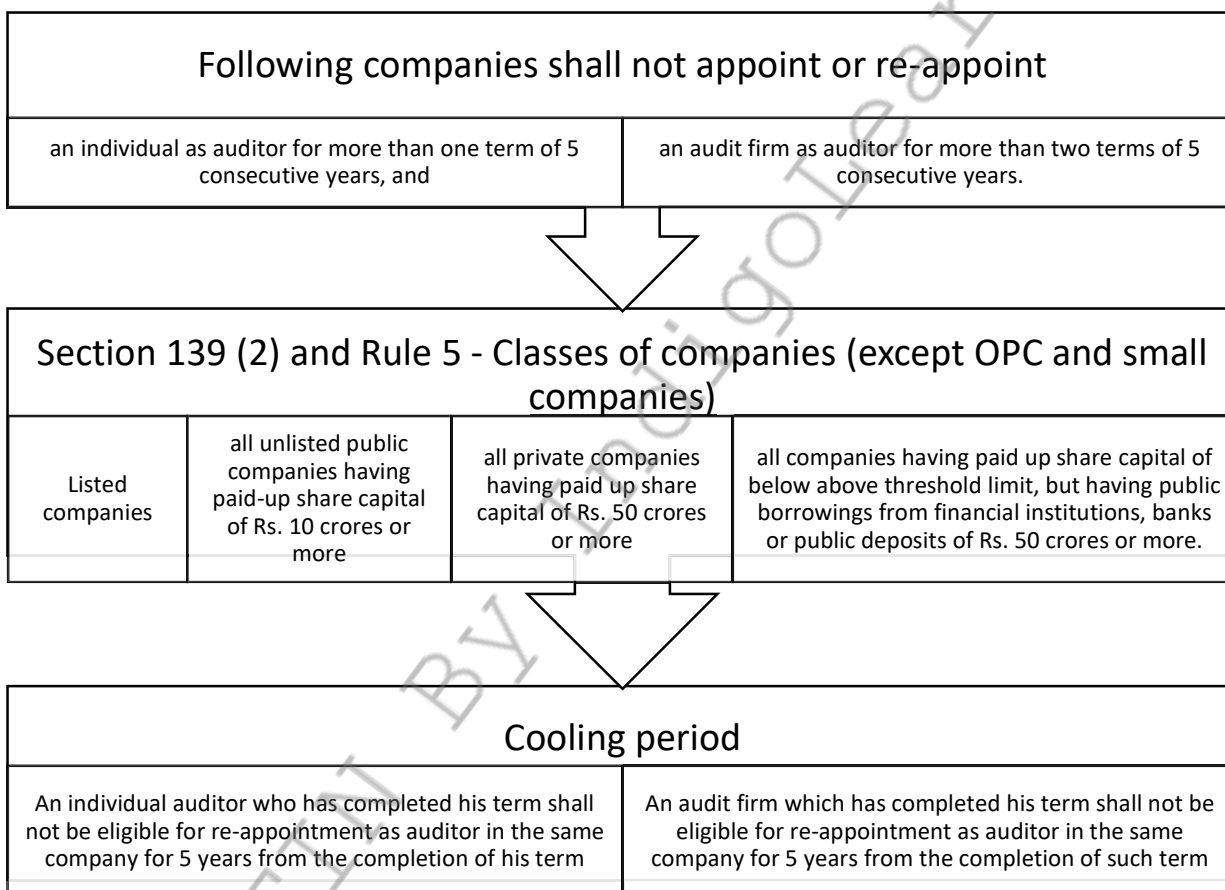
The certificate shall also indicate whether the auditor satisfies the criteria provided in Section 141 of the Act.

The company shall **inform the concerned auditor of his or its appointment** and also **file a notice** (in the form ADT-1) **of such appointment with the ROC within 15 days** of the meeting in which the auditor is appointed.

2.2 Term of Auditor [Sec. 139 (2)]

As on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the F.Y., shall be appointed as auditor of the same company for a period of 5 years.

Note: According to **Rule 3 (3) of the NFRA Rules**, every body corporate, other than a company as defined in section 2(20) of the Act, formed in India, and governed under the NFRA Rules shall, *within 15 days of appointment of an auditor u/s 139 (1), inform the NFRA in Form NFRA-1*, the particulars of the auditor appointed by such body corporate.

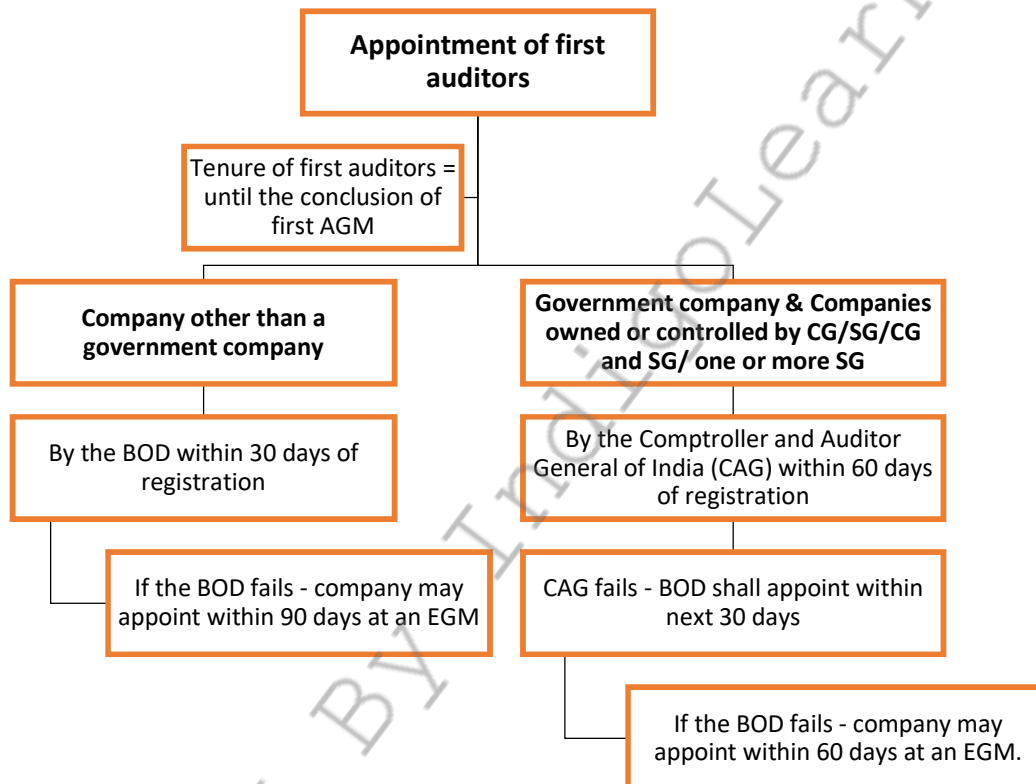


2.3 Rotation of auditor [Sec. 139 (3) and (4)]

- 1) Members of a company may resolve to provide that –
 - a. In the audit firm appointed by them, the auditing partner and his team shall be rotated at such intervals as may be resolved by members, or
 - b. The audit shall be conducted by more than one auditor.
- 2) For the purpose of rotation,
 - a. The **period for which an individual or firm held the office as auditor before the commencement of the Act** shall be considered for calculating the period of 5/10 consecutive years as the case may be.

- b. The incoming auditor or audit firm shall not be eligible if such auditor or audit firm is associated with the outgoing auditor or audit firm under the **same network of audit firms**.
 - c. A **cool off period of 5 consecutive years** shall be considered as fulfilling the requirement of rotation.
 - d. If a partner, who is in charge of an audit firm and also certifies the FS of the company, retires from the said firm, and joins another firm of chartered accountants, such other firm shall also be ineligible to be appointed for 5 years.
- 3) **Company which has appointed joint auditors** – the company may follow the rotation of auditors in such a manner that both or all of the joint auditors do not complete their term in the same year.

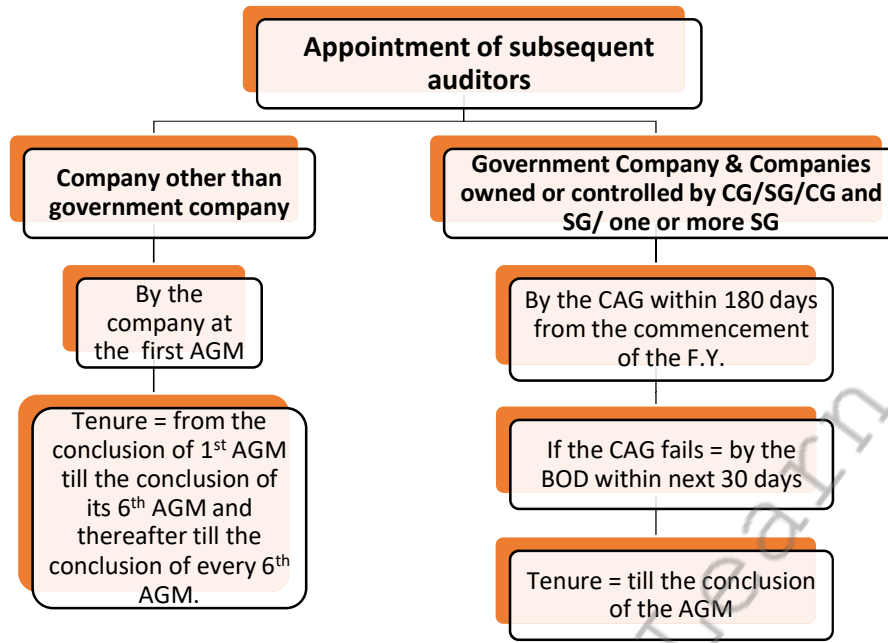
2.4 First auditors [Sec. 139 (6), (7)]



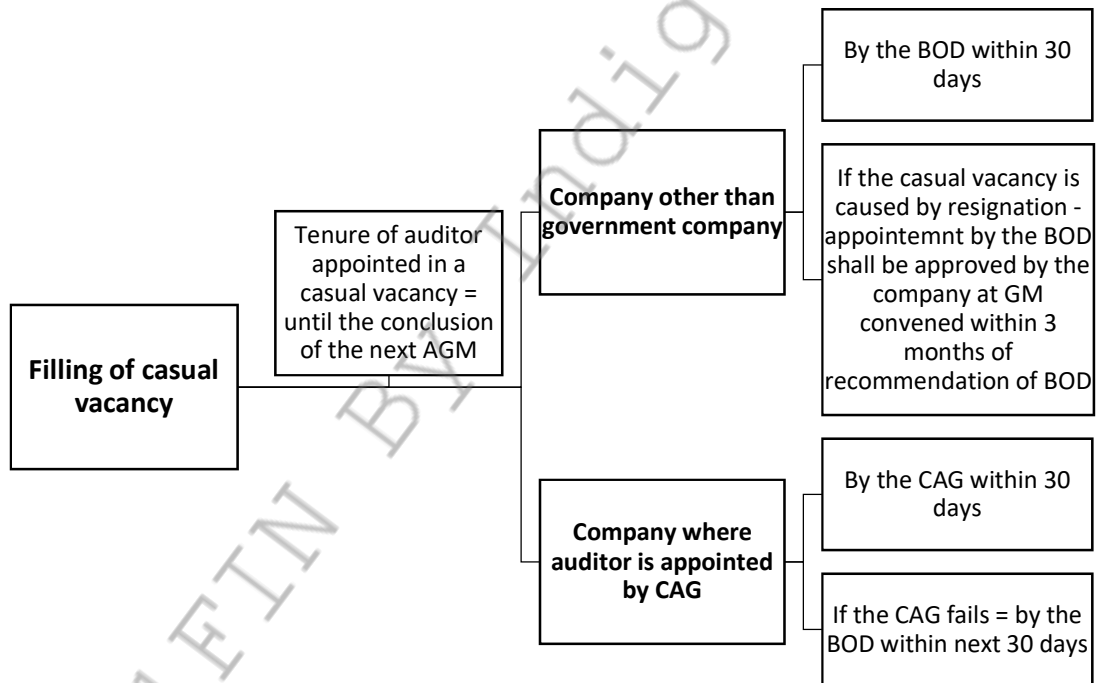
Government company [Sec. 2 (45)] – a company in which not less than 51% of the paid up share capital is held by the CG/any SG/partly by the CG and partly by one or more SG and includes a company which is a subsidiary company of such a government company.

The first auditor shall hold office until the conclusion of the first AGM.

2.5 Subsequent auditors [Sec. 139 (1), (5)]



2.6 Filling up casual vacancy [Sec. 139 (8)]



2.7 Re-appointment of retiring auditor [Sec. 139 (9), (10), (11)]

A retiring auditor shall be re-appointed at an AGM if-

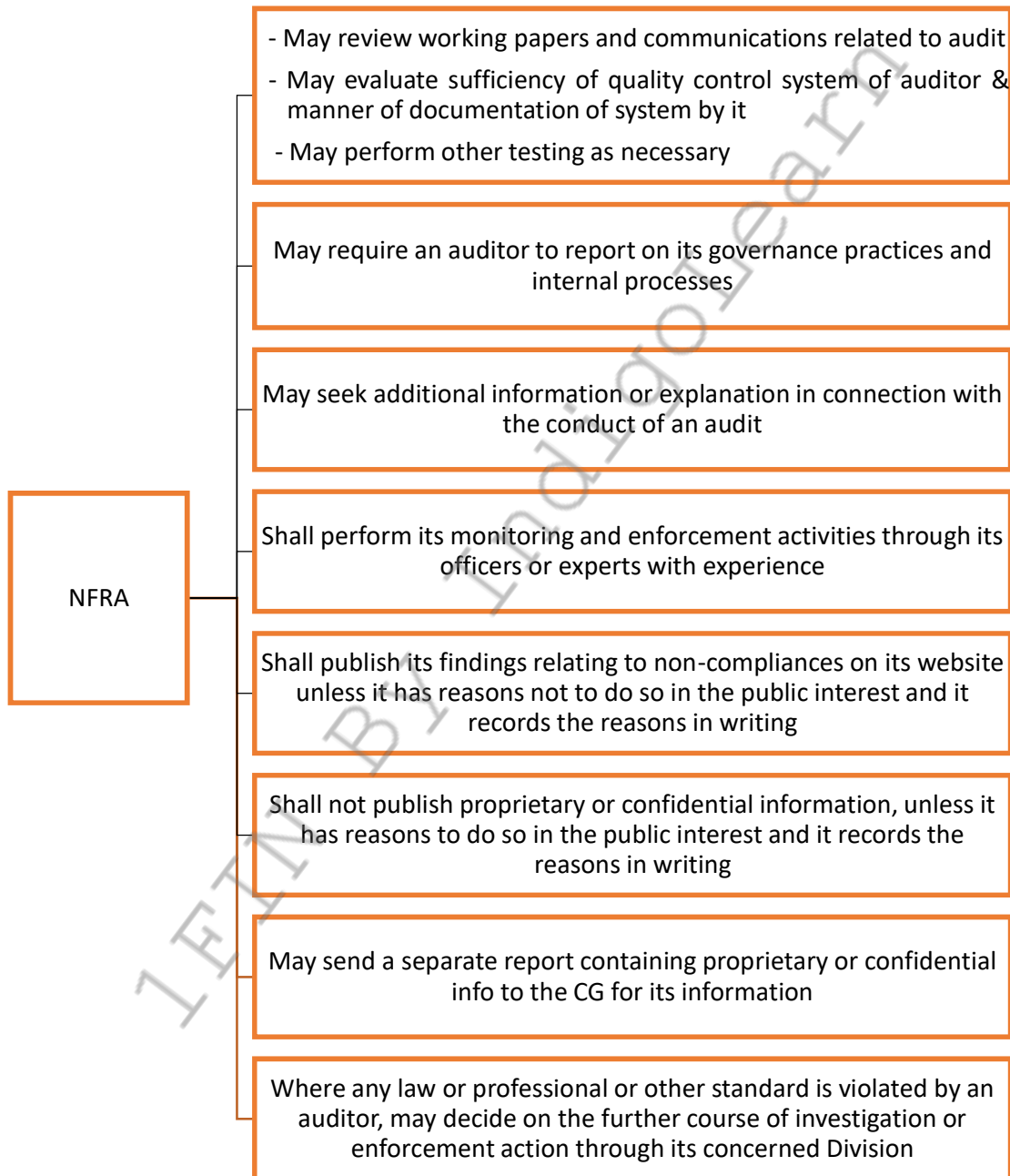
- He is **not disqualified** for re-appointment,
- He has **not given a notice in writing to the company** of his unwillingness to be re-appointed, and
- A **SR has not been passed at that meeting appointing some other** auditor or providing expressly that he shall not be re-appointed.

Where at any AGM, no auditor is appointed or re-appointed, the existing director shall continue to be the auditor of the company.

3. NATIONAL FINANCIAL REPORTING AUTHORITY RULES, 2018

NFRA Rule 8 and Rule 9 are relevant for understanding of the students and included in CA Intermediate Syllabus.

7 3.1 Monitoring and enforcing compliance with auditing standards (Rule 8)



8 3.2 Overseeing the quality of service and suggesting measures for improvement (Rule 9)

On the basis of review, NFRA may direct an auditor to take measures for improvement of audit quality and specify a detailed plan with time-limits

Duty of auditor to make required improvements and send a report to the NFRA explaining how it has complied with the directions

NFRA shall monitor improvements made by auditor and take such action as it deems fit

NFRA may refer cases with regard to overseeing the quality of service of auditors to Quality Review Board or call from any report from such Board

NFRA may take the assistance of experts for its oversight and monitoring activities

FILLING OF RETURN WITH NFRA

Rule 5 requires every auditor of classes of companies and bodies corporate governed by the NFRA, shall file a return with the Authority i.e. NFRA on or before 30th November every year in Form NFRA-2.

4. REMOVAL, RESIGNATION OF AUDITOR AND GIVING OF SPECIAL NOTICE

9 4.1 Removal of auditor before the expiry of his term [Section 140 (1)]

Section 140 of the Companies Act, 2013 provides for removal, resignation of auditor and giving of special notice.

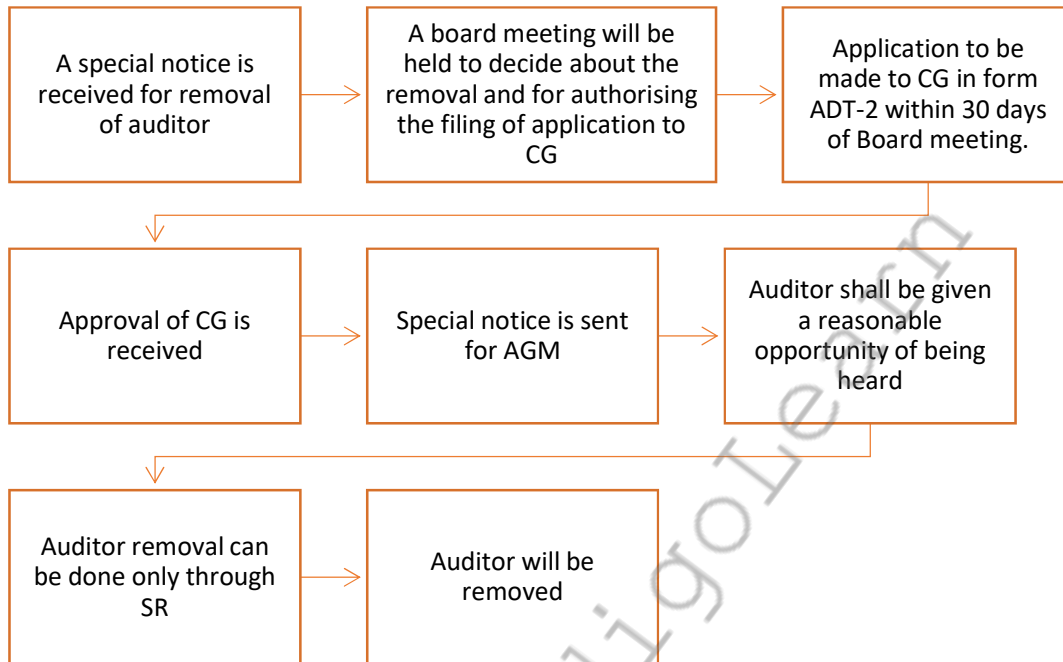
- ✓ The auditor may be removed from his office before the expiry of his term only by –
 - a) A **special resolution** of the company and
 - b) After obtaining the **previous approval of the CG** by making an *application in Form ADT-2 within 30 days* of the resolution passed by the BOD.
- ✓ **Within 60 days of receipt of approval of the CG**, the company shall hold the GM for passing the SR.
- ✓ Before taking any action for the removal of auditor before the expiry of his term, the auditor concerned shall be given an **opportunity of being heard**.

Note:

In case of a Specified IFSC public company⁵ and Specified IFSC private company, where, within a period of sixty days from the date of submission of the application to the Central Government under this sub-section, no decision is communicated by the Central

Government to the company, it would be deemed that the Central Government has approved the application and the company shall appoint new auditor at a general meeting convened within three months from the date of expiry of sixty days period

Steps for removal of auditor



10 4.2 Resignation by auditor [Section 140 (2) & (3)]

If the auditor has resigned from the company, he shall **file a statement in Form ADT-3** with the **company and the ROC** (also with CAG in case of government companies or companies controlled by CG/SG), indicating the reasons and other facts about his resignation, **within 30 days** of resignation.

If the **auditor does not comply with these provisions**, he shall be punishable with **penalty of**

→ ₹ 50,000/-, or

→ An amount equal to the remuneration of the auditor, whichever is less.

→ In case of **continuing failure**, the auditor shall be punishable with a further penalty of ₹ 500/- for each day during which the failure continues, subject to a maximum of ₹2,00,000.

4.3 Appointing auditor other than retiring auditor [Section 140 (4)]

If a retiring auditor has not completed a consecutive tenure of 5 years of 10 years, as the case may be, a special notice is required for passing a resolution in the AGM appointing another person as auditor, or providing expressly that a retiring auditor shall not be re-appointed.

On receipt of such notice company shall forthwith send a copy to the retiring auditor.

The retiring auditor may, upon receipt of such notice, make a representation in writing to the company and request its notification to the members of the company

The company shall, unless the representation is received by it too late to do so, state the fact in any notice given to the members, that representation has been made and also send a copy of such representation to every member to whom notice of meeting is sent. If the representation is not sent because it was received too late, the auditor may require that the representation shall be read at the meeting. Also if copy is not sent, a copy of representation shall be filed with the ROC.

The copy of representation may not be sent and the representation need not be read out at the meeting, if the Tribunal is satisfied on an application either by the company or any aggrieved person that the rights conferred by this subsection are being abused by the auditor.

4.4 Auditor acts in a fraudulent manner or abetted or colluded in any fraud [Section 140 (5)]

The **Tribunal** either –

- Suo moto or
- On an application made to it by –
 - The CG or
 - Any other person,

if it is satisfied that the auditor has, directly or indirectly, acted in a fraudulent manner, or abetted or colluded in any fraud by/ in relation to, the company or its directors or employees, it **may by an order direct the company to change its auditors.**

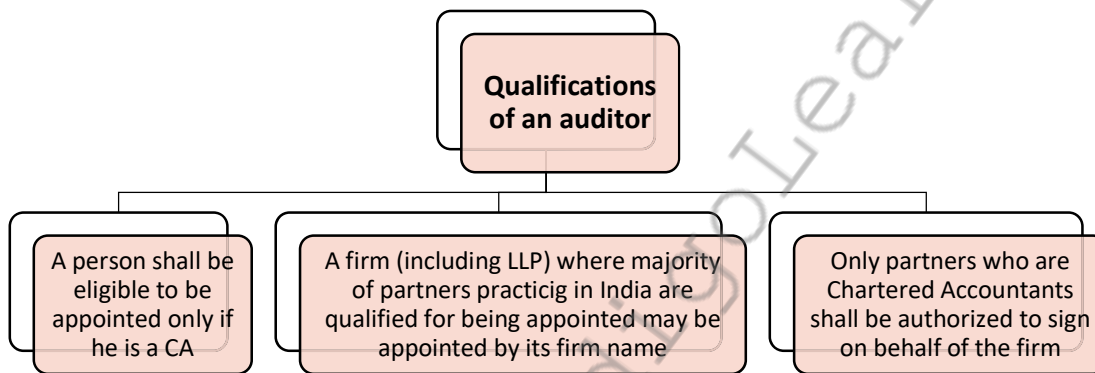
In case of an **application made by the CG**, the **order shall be made within 15 days** of receipt of such application, that the auditors shall not function as auditor and the CG may appoint any other person in his place.

- Such an auditor**, whether individual or firm, against whom an order has been passed
- shall **not be eligible to be appointed** as auditor of any company **for 5 years** from the date of passing the order, **and**
 - shall also be liable for **action u/s 447**.

5. ELIGIBILITY, QUALIFICATIONS AND DISQUALIFICATIONS OF AUDITORS

5.1 Qualifications of an Auditor [Section 141 (1) & (2)]

Section 141 of the Companies Act, 2013 provides eligibility, qualifications, and disqualifications of auditors.



5.2 Disqualifications of an Auditor [Section 141 (3)]

The following persons shall **not be qualified for appointment as auditor** of a company-

- a) A **body corporate other than LLP** registered under the LLP Act, 2008,
- b) An **officer or employee of the company**,
- c) A person who is **partner, or who is in employment, of an officer or employee of the company**,
- d) A **person** who, or his **relative** or **partner** -
 - i. Is **holding any security of or interest** in the company or its subsidiary, or its holding or associate company or subsidiary of such holding company, or
 - ii. Is **indebted** to the company, or its holding or associate company or subsidiary of such holding company, **in excess of ₹5,00,000**, or

Relative may hold security or interest in the company of face value not exceeding ₹1,00,000. If relative acquires such security or interest above the limit prescribed, the auditor shall take corrective actions to maintain the limits within 60 days.

iii. Has **given guarantee or given any security** in connection with the indebtedness of any third person to the company, or its holding or associate company or subsidiary of such holding company, **in excess of ₹ 1,00,000.**

e) A person or a firm who, directly or indirectly, has **business relationship** with the company, or its holding or associate company or subsidiary of such holding company or associate company.

f) A person whose **relative is a director or is in employment** of the company as a director or KMP,

g) A person who is in **full time employment elsewhere** or a person or partner of a firm holding appointment as its auditor, if such persons or partner is at the date of such appointment or reappointment **holding appointment as auditor of more than 20 companies** other than:

- OPC,
- Small companies and
- Private companies having paid up share capital less than ₹100 crores.

h) A person who has been **convicted by a court of an offence involving fraud** and a period of **10 years has not elapsed** from the date of such conviction,

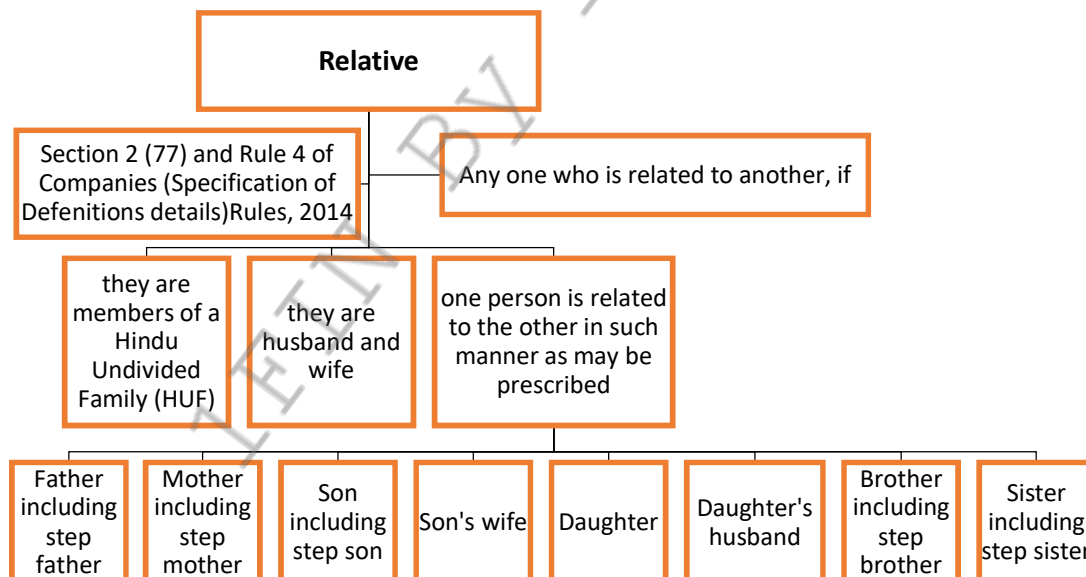
i) A person who directly or indirectly, **renders any service referred to in section 144** to the company or its holding or its subsidiary company.

Business relationship = any transaction entered into for a commercial purpose except transactions which are:

- a) In nature of professional services permitted to be rendered by an auditor or audit firm.
- b) In the ordinary course of business of the company at arm's length price.

Before appointment of the auditor, company shall obtain a certificate from him stating that the appointment will not result in an excess holding by the auditor concerned over the limit laid down u/s 141(3)(g).

5.3 Relative [Section 2 (77)]

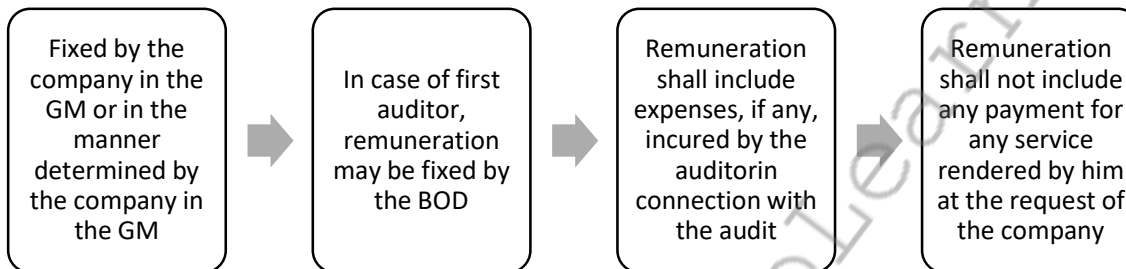


5.4 Vacation of office by an Auditor [Section 141 (4)]

If a person appointed as auditor of a company **incurs any of the disqualifications specified in section 141 (3)**, he shall be **deemed to have vacated his office**. Such vacation shall be **deemed to be a casual vacancy** in the office of the auditor.

6. REMUNERATION OF AUDITORS

Section 142 of the Companies Act, 2013 provides for remuneration of auditors.



7. POWERS AND DUTIES OF AUDITORS AND AUDITING STANDARDS

7.1 Powers of Auditors [Section 143 (1)]

Section 143 of the Companies Act, 2013 provides the powers and duties of the auditors and compliance with the auditing standards.

Access to books of accounts and vouchers

- at all times
- whether kept at the registered office or at any other place.

Entitled to have necessary information and explanation

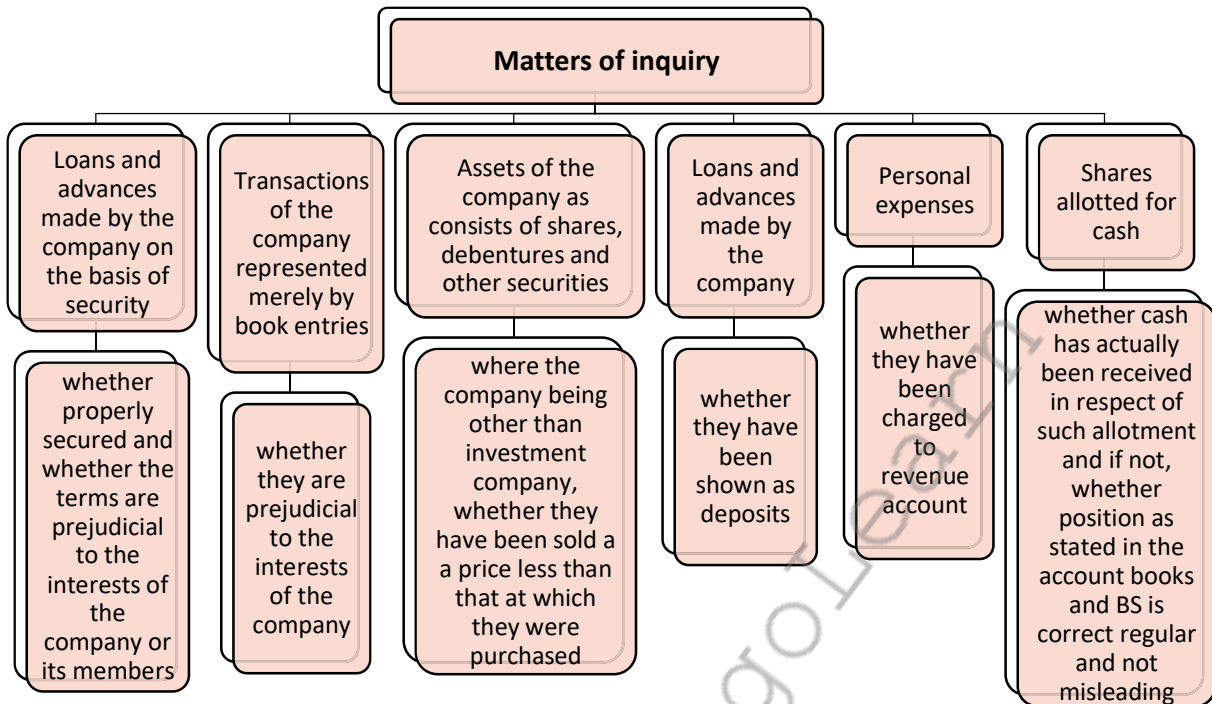
- entitled to require from the officers of the company such information and explanations as the auditor may consider necessary.

Access to record of all its subsidiaries

- in so far as it relates to the consolidation of its FS with that of its subsidiaries and associate companies.

7.2 Duties of Auditors

7.2.1 To inquire into the following matters –



7.2.2 To make report to the members –

- ✓ The auditor shall **make a report to the members** of the company on the following:
 - **On accounts examined** by him, and
 - **On every FS** which are required by or under this Act to be laid before the company in the GM.
- ✓ While preparing the report the auditor **shall consider the provisions of the Act, the accounting and auditing standards** and matters which are required to be included in the audit report.
- ✓ The auditor shall express an opinion, according to him and to the best of his knowledge, **whether the accounts/ FS give a true and fair view** of the state of affairs as at the end of the F.Y. and profit or loss and cash flow for the year and such matters as may be prescribed.

7.2.3 To report on the following matters –

1) Information and explanations	<ul style="list-style-type: none"> • Whether he has sought and obtained all the information and explanation which to the best of his knowledge and belief were necessary for the audit and if not, the details thereof and the effect of such information on the FS.
2) Proper books of account	<ul style="list-style-type: none"> • Whether kept by the company, as appears from his examination. • Whether proper returns adequate for audit have been received from the branches not visited by him.
3) Report on the accounts of the branch office audited by other person	<ul style="list-style-type: none"> • Whether it has been sent to him and • The manner in which he has dealt with it in preparing his report.
4) Company's BS and P&L account	<ul style="list-style-type: none"> • Whether in agreement with the books of account and returns
5) Accounting standards	<ul style="list-style-type: none"> • Whether FS comply with it.
6) Financial transactions or matters which have any adverse effect	<ul style="list-style-type: none"> • The auditor's observations and comments on such matters which have an adverse effect on the functioning of the company.
7) Director	<ul style="list-style-type: none"> • Whether any director is disqualified from being appointed as director u/s 164 (2).
8) Maintenance of accounts and other matters	<ul style="list-style-type: none"> • Any qualification, reservation or adverse remark relating to them
9) Internal Financial controls (IFC) #	<ul style="list-style-type: none"> • Whether company has adequate IFC with reference to FS in place and operating effectiveness of such controls.
10) Other matters as prescribed*	<ul style="list-style-type: none"> • Whether company has disclosed the impact of pending litigations in its FS • Whether adequate provisions has been made for material foreseeable losses • Whether there has been any delay in transferring amounts to IEPF

Where any matter is answered in the negative or with a qualification, the auditor's report shall state the reason for the same.

Does not apply to Private company which is OPC or Small company or has turnover < ₹50cr per latest audited F.S. and aggregate borrowings at any point < ₹25cr AND has not committed default in filing F.S. u/s 137 or Annual return u/s 92.

Amendment in 'Other matters as prescribed' – Following clauses were inserted by Companies (Audit and Auditors) Amendment Rules, 2021:

- Whether management has represented that, to best of its knowledge and belief, other than as disclosed in notes to accounts,
 - i. no funds have been advanced/loaned/invested by company to or in any other person(s) or entity(ies), including foreign entities ("Intermediaries"), with understanding, whether recorded in writing or otherwise, that Intermediary shall, whether, directly or indirectly lend/invest in other persons or entities identified in any manner by or on behalf of company ("Ultimate Beneficiaries") or provide any guarantee, security or like on behalf of Ultimate Beneficiaries;
 - ii. no funds have been received by company from any person(s) or entity(ies), including foreign entities ("Funding Parties"), with understanding, whether recorded in writing or otherwise, that company shall, whether, directly or indirectly, lend/invest in other persons or entities

identified in any manner by or on behalf of Funding Party (“Ultimate Beneficiaries”) or provide any guarantee, security or like on behalf of the Ultimate Beneficiaries; and

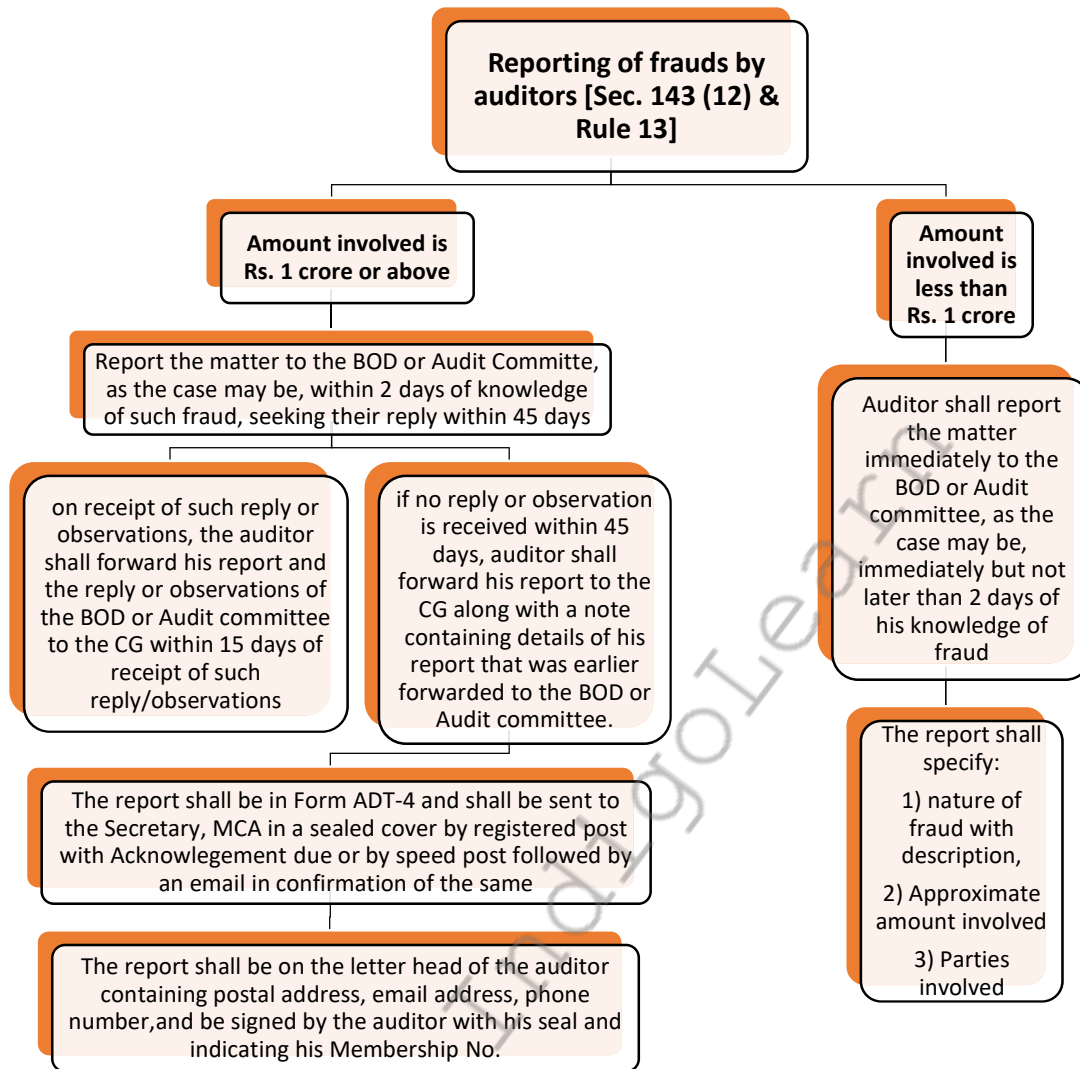
- Based on such audit procedures that auditor has considered reasonable and appropriate in circumstances, nothing has come to their notice that has caused them to believe that above representations contain any material mis-statement.
- Whether dividend declared or paid during the year by company is in compliance with section 123 of the Companies Act, 2013.
- Whether company, in respect of financial years commencing on or after 1st April, 2022, 2023 has used such accounting software for maintaining its books of account which has a feature of recording audit trail (edit log) facility and same has been operated throughout the year for all transactions recorded in software and audit trail feature has not been tampered with and audit trail has been preserved by company as per the statutory requirements for record retention.

7.2.4 To comply with the auditing standards –

Every auditor shall comply with the auditing standards as prescribed by the CG upon recommendation of the ICAI in consultation with and after examination of the recommendations made by the NFRA. Until they are notified, standards of auditing specified by ICAI are deemed to be the auditing standards.

7.2.5 To report the frauds [Sec. 143 (12)] –

If an auditor of a company, in the course of performance of his duties has reasons to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the CG in such manner and within such time as may be prescribed.



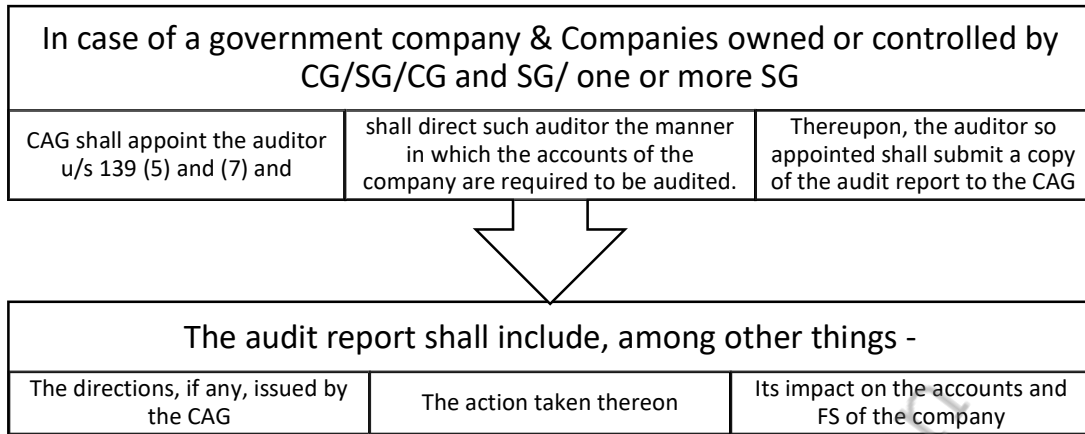
The Board's report shall disclose:

- Nature of the fraud with description,
- Approximate amount involved,
- Parties involved, if remedial action not taken, and
- Remedial actions taken.

Penalty for non-compliance with Section 143 (12):

→ Auditor, cost accountant, or CS in practice shall be liable to penalty of ₹5,00,000 in case of listed company and ₹1,00,000 in case of another company.

7.3 Audit of government companies



7.3.1 Supplementary audit-

The CAG shall within 60 days from the date of receipt of the audit report have a right to-

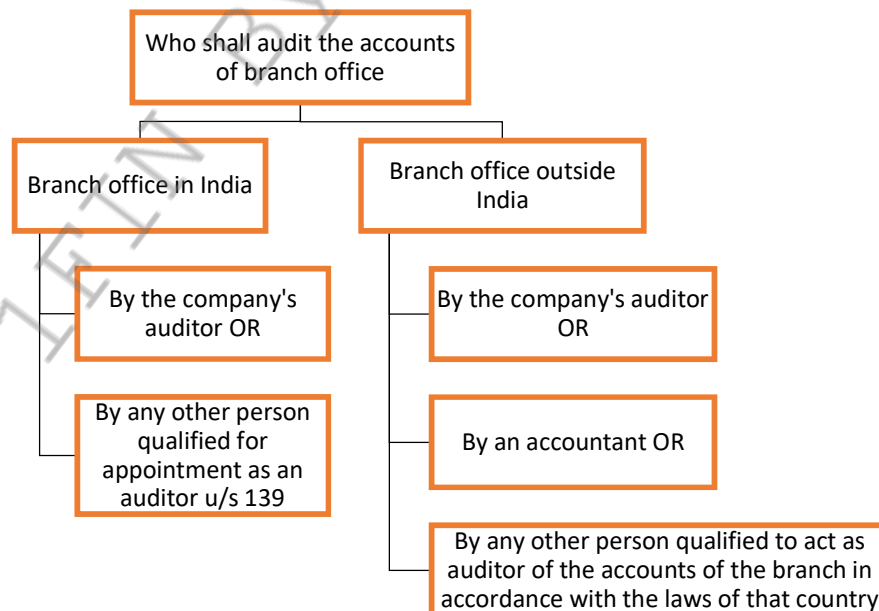
- **Conduct a supplementary audit** of the FS by such person or persons as he may authorize in this behalf, and
 - for the purpose of such audit, require information or additional information to be furnished to any person or persons, so authorized, on such matters, by such persons, and in such form, as CAG may direct, and
- **Comment upon or supplement such audit report.**

Every **comment given by the CAG** upon, or supplement to, the audit report shall be **sent by the company to every person entitled to copies of audited FS** and also be **placed before the AGM** of the company along with the audit report.

7.3.2 Test audit -

For government company and company controlled by SG/CG, the **CAG may, if he considers necessary, by an order, cause test audit to be conducted** of the accounts of such company.

7.4 Audit of accounts of branch office of company [Sec. 143 (8)]

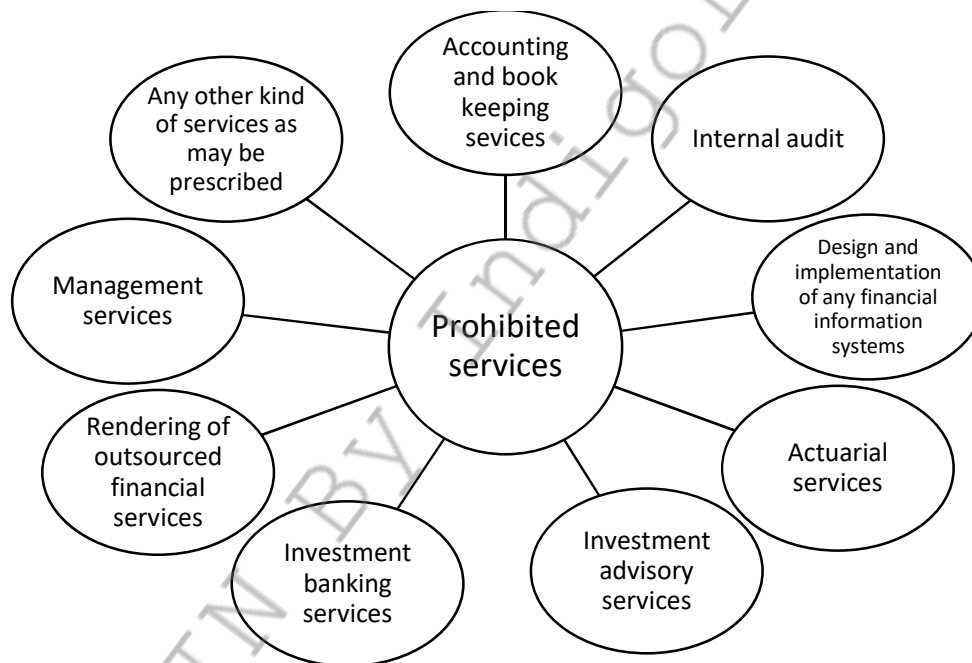


- The branch auditor shall prepare a report on the accounts of the branch examined by him and sent it to the auditor of the company who shall deal with it in his report in such manner as he considers necessary.
- Provisions regarding reporting of fraud by the auditor shall also extend to the branch auditor to the extent that it relates to the concerned branch.

Note: The provisions of this section shall apply mutatis mutandis to a Cost Auditor and a Secretarial Auditor during the performance of his duties u/s 148 and 204 respectively.

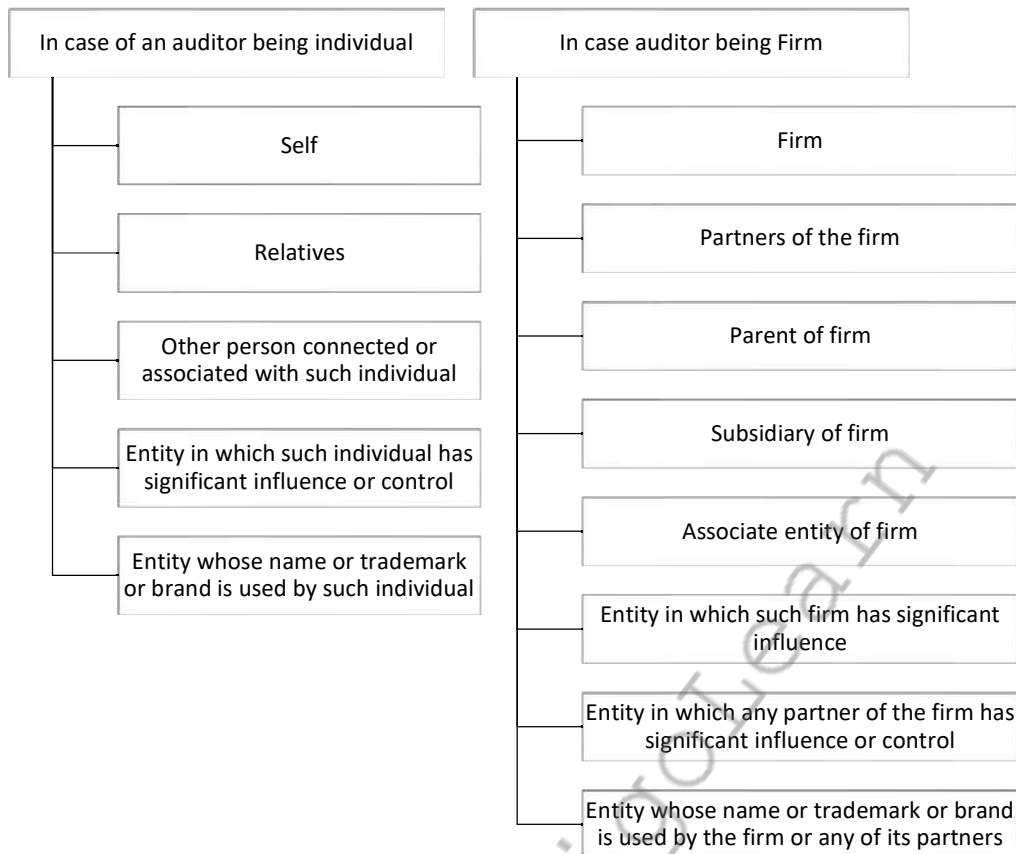
render certain services.

8. AUDITOR NOT TO RENDER CERTAIN SERVICES



The auditor shall not, directly or indirectly, render these services to the company or its subsidiary or holding company.

Meaning of the term 'directly or indirectly'



9. AUDITORS TO SIGN AUDIT REPORTS, ETC.

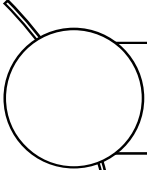
Section 145 of the Companies Act, 2013 provides for auditors to sign audit reports, etc.

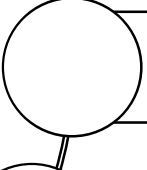
- ✓ The person appointed as an auditor of the company shall **sign the auditor's report or sign or certify any other document of the company.**
- ✓ The **qualifications, observations or comments** on financial transactions or matters, which have any adverse effect on the functioning of the company **mentioned in the auditor's report shall be read before the company in GM** and shall be open for inspection by any member.

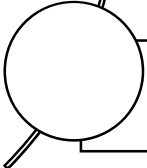
10. AUDITORS TO ATTEND GENERAL MEETING

Section 146 of the Companies Act, 2013 provides for auditors to attend general meeting.

Section 147 of the Companies Act, 2013 provides for punishment for contravention.

- 

All **notices of and other communications** relating to, any GM shall be **forwarded to the auditor** of the company.
- 

The auditor shall unless otherwise exempted by the company, **attend any GM either by himself or through his authorized representatives, who shall also be qualified to be an auditor.**
- 

The auditor shall have a **right to be heard** on any matter which concerns him as the auditor.

11. PUNISHMENT FOR CONTRAVENTION

Sl. No.	Person liable	Nature of contravention	Punishment
1.	Company [Sec. 147(1)]	Contravention of any provisions of sections 139 to 146	Minimum fine = ₹25,000/- Maximum fine = ₹5,00,000/-
2.	Officer of the company in default [Sec. 147(1)]	Contravention of any provisions of sections 139 to 146	<ul style="list-style-type: none"> • Fine not less than ₹10,000/- but which may extend to ₹1,00,000/-
3.	Auditor [Sec. 147(2) & (3)]	Contravention of provisions of section 139, 144 or 145	Minimum fine = ₹25,000/-. Maximum fine = ₹5,00,000/- or 4 times the remuneration of the auditor, whichever is less.
		Contravention of any provisions knowingly or wilfully with the intention to deceive the company or its shareholders or its creditors or tax authorities	<ul style="list-style-type: none"> • Imprisonment which may extend to 1 year AND • Fine not less than ₹50,000 but which may extend to ₹25,00,000 or 8 times the remuneration of the auditor, whichever is less. • Also the auditor shall – <ol style="list-style-type: none"> i. Refund the remuneration received by him to the company, and

			ii. Pay for damages to the company, statutory bodies, or authorities or to members or creditors for the loss arising out incorrect or misleading statements of particulars made in his audit report.
4.	Audit firm [Sec. 147(5)]	The partner or partners of the audit firm has or have acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to or by, the company or its directors or officers.	<p>The liability for such act shall be of the partner or partners concerned of the audit firm and of the firm jointly and severally and shall also be liable u/s 447.</p> <p>In case of criminal liability of an audit firm, liability other than fine shall be the liability of the concerned partner(s) who acted fraudulently or abetted or colluded in any fraud.</p>

12. CG TO SPECIFY AUDIT OF ITEMS OF COST IN RESPECT OF CERTAIN COMPANIES

- The CG may, by order, in respect of **such class or classes of companies engaged in the production of such goods or providing such services as may be prescribed**, direct that

Section 148 of the Companies Act, 2013 provides the provisions for CG to specify the audit of items of cost in respect of certain

particulars relating to the utilisation of material or labour or to other cost items as may be prescribed shall also be included in the books of account kept u/s 128 by that class of companies.

- The CG may, by order, direct that the **audit of cost records** of class of companies, which are covered above and which have a net worth or turnover of such amount as may be prescribed, shall be conducted in the manner specified in the order.
- Cost Audit shall be **conducted by a Cost Accountant** who shall be **appointed by the BOD** on such remuneration as may be determined by the members. **It shall be in addition to audit conducted under Sec 143.**

Applicability for maintenance of Cost Records

Note:

Clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 defines "Cost Accountant". It means a Cost Accountant who holds a valid certificate of practice under sub-section (1) of section 6 of the Cost and Works Accountants Act, 1959 and is in whole-time practice. Cost Accountant includes a Firm of Cost Accountants and a LLP of cost accountants.

Applicable for a domestic or a foreign company engaged in production of goods or providing services listed in table A (Regulated) or B (Non-regulated) of Rule 3, which have a overall turnover from all of its products and services ≥ 35 crore (immediately preceding financial year).

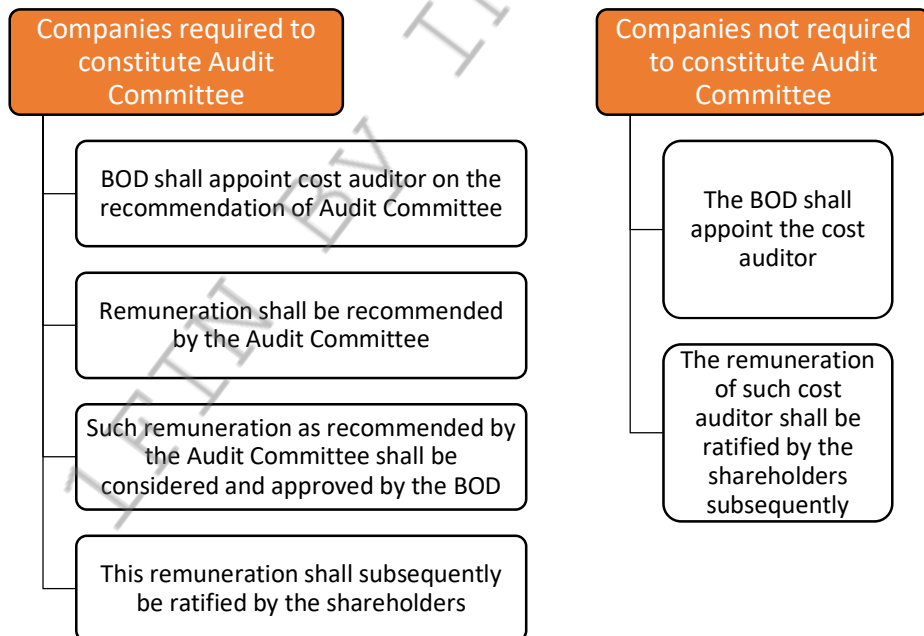
Case	Turnover (Figures in Crore)					Applicability of Cost Records
	Table A Products	Table B Products	Table A+B Products	Other Products	Total	
1	10	10	20	10	30	No
2	10	10	20	20	40	Yes
3	0	10	10	30	40	Yes
4	10	0	10	30	40	Yes
5	20	20	40	0	40	Yes
6	0*	0*	0	40	40	No

Not engaged in the production of the goods or providing services, specified in the Table A (6 Regulated Sectors) and/or Table B (33 Non-Regulated Sector)

Note:

Nothing contained in Rule 3 shall apply to a company which is classified as a micro enterprise or a small enterprise including as per the turnover criteria under sub-section (9) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006.

12.1 Manner of appointing Cost Auditor [Rule 14]



Form and manner of Cost Records [Rule 5]

Every company covered by rule 3 explained above under these rules including all units and branches thereof, shall, in respect of each of its financial year maintain cost records in form CRA-1.

The cost records shall be maintained on regular basis in such manner as to facilitate calculation of per unit cost of production or cost of operations, cost of sales and margin for each of its products and activities for every financial year on monthly or quarterly or half-yearly or annual basis.

The cost records shall be maintained in such manner so as to enable the company to exercise, as far as possible, control over the various operations and costs to achieve optimum economies in utilisation of resources and these records shall also provide necessary data which is required to be furnished under these rules.

12.2 Other conditions

- ✓ **A person appointed as auditor of the company u/s 139 shall not be appointed as cost auditor u/s 148.**
- ✓ The cost auditor shall comply with the **cost auditing standards.**
- ✓ The qualifications, disqualifications, rights, duties and obligations applicable to a company auditor shall apply to a cost auditor u/s 148.

12.3 Companies that require to constitute an audit committee

Section 177 of the Act, read with Companies (Meetings of Board and its Powers) Rules, 2014 provides Audit Committee shall be constituted by Board of directors in case of;

- i. Every listed public companies and
- ii. Those public companies which having:
 - a. Paid up capital of ten crore rupees or more; or
 - b. Turnover of one hundred crore rupees or more; or
- c. Aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

The paid up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited financial statements shall be taken into account for the purposes of this rule.

It is also worth noting that where a company ceases to fulfil any of three conditions laid down above for three consecutive years, it shall not be required to comply with the provisions pertaining to audit committee until such time as it meets any of such conditions.

Applicability of Cost Audit

Note: The provisions of sub-section (12) of section 143 of the Act and the relevant rules made thereunder shall apply mutatis mutandis to a cost auditor during performance of his functions under section 148 of the Act and rule notified thereunder.

Applicability of Cost Audit

Insert Chart on page 10.55 of the new study material

Non applicability of Cost Audit

Further sub-rule 3 to rule 4 provides exception from cost audits. The requirement for cost audit shall not apply to a company which is covered in rule 3, and

- a. Whose revenue from exports, in foreign exchange, exceeds seventy five percent of its total revenue; or
- b. Which is operating from a special economic zone.
- c. Which is engaged in generation of electricity for captive consumption through Captive Generating Plant. For this purpose, the term "Captive Generating Plant" shall have the same meaning as assigned in rule 3 of the Electricity Rules, 2005.

Example:

Case	Turnover (Figures in Crore)					Applicability of	
	Table A Products	Table B Products	Table A+B Products	Other Products	Total	Cost Records	Cost Audit
1	10	10	20	10	30	No	No
2	10	10	20	20	40	Yes	No
3	20	20	40	0	40	Yes	No
4	10	20	30	10	40	Yes	No
5	10	20	30	20	50	Yes	Yes, but only for table A
6	0	20	20	20	40	Yes	No
7	20	10	30	80	110	Yes	Only Table A Product
8	20	20	40	70	110	Yes	Both Tables A& B Products
9	10	10	20	80	100	Yes	No
10	15	15	30	10	40	Yes	No
11	20	20	40	8	48	Yes	No

12.4 Manner and Procedure – Appointment, Removal and Resignation [Rule 6 of Companies (Cost Records and Audit) Rules, 2014]

The manner and procedure of selection of auditors by the members of the company at AGM has been prescribed under the Rule 3 of the *Companies (Audit and Auditors) Rules, 2014*; tabled and stated below.

Categories of Companies	Competent authority	Responsibility of the competent authority
A company which is required to constitute an Audit Committee under section 177	Audit Committee	The competent authority shall take into consideration the qualifications and experience of the individual or the firm proposed to be considered for appointment as auditor and such qualifications and experience are commensurate with the size and requirements of the company It shall have regard to any order or pending proceeding relating to professional matters of conduct against the proposed auditor before the Institute of Chartered Accountants of India (ICAI) or any competent authority or any Court. It may call for such other information from the proposed auditor as it may deem fit.
A company which is not required to constitute an Audit Committee under section 177	Board of Directors	

Where competent authority is audit committee, the committee shall recommend the name of

an individual or a firm as auditor to the Board for consideration; the Board shall consider and recommend an individual or a firm as auditor to the members in the AGM for appointment.

- a. If the **Board agrees** with the recommendation of the Audit Committee - It shall further recommend the appointment of an individual or a firm as auditor to the members in the annual general meeting.
- b. If the **Board disagrees** with the recommendation of the Audit Committee - It shall refer back the recommendation to the committee for reconsideration citing reasons for such disagreement.

Note:

Companies that require to constitute an audit committee

Section 177 of the Act, read with Companies (Meetings of Board and its Powers) Rules, 2014 provides Audit Committee shall be constituted by Board of directors in case of;

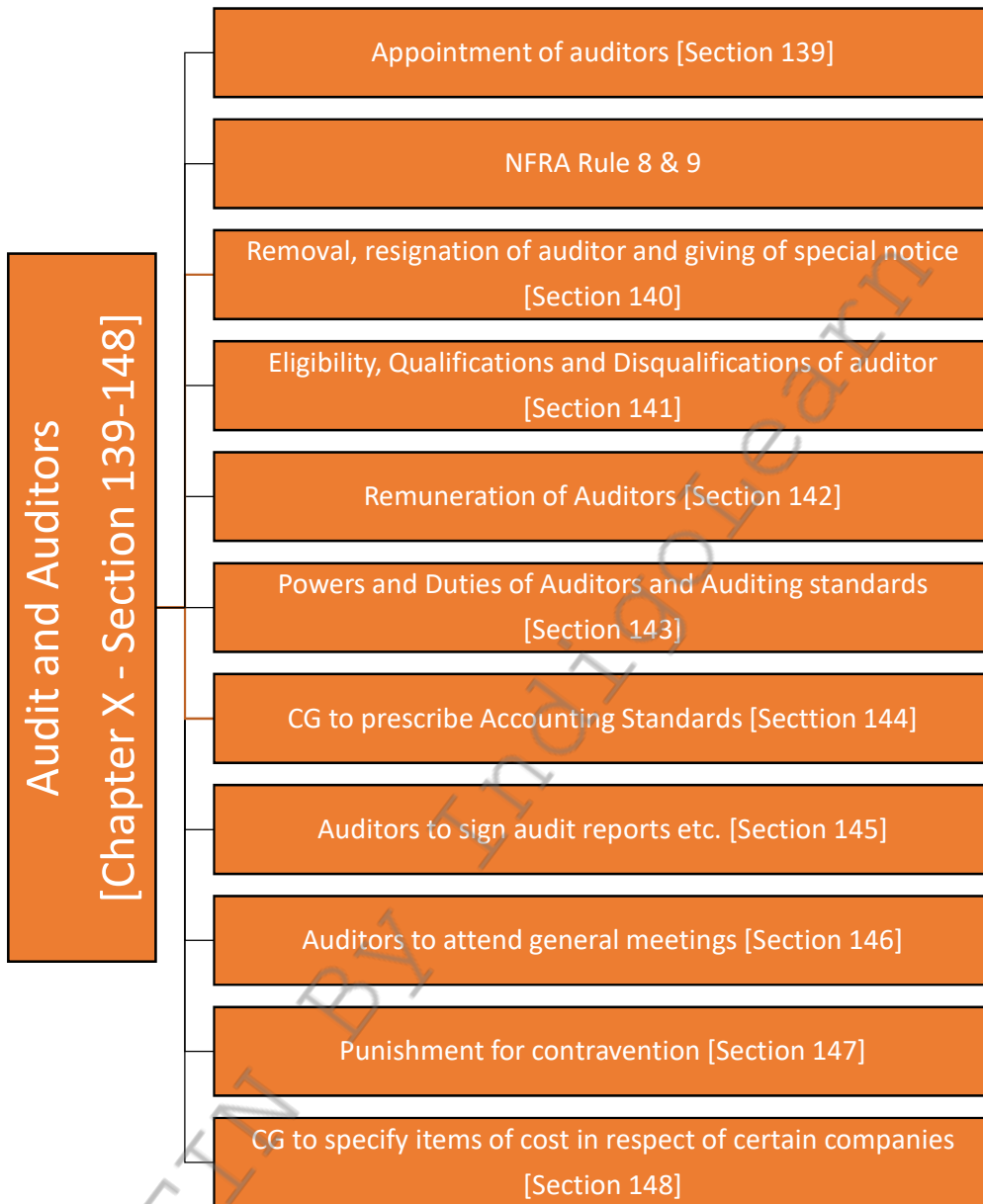
- i. Every **listed public companies** and
- ii. Those **public companies** which having:
 - a. **Paid up capital of ten crore rupees or more;** or
 - b. **Turnover of one hundred crore rupees or more;** or
 - c. Aggregate, **outstanding loans or borrowings or debentures or deposits** exceeding **fifty crore rupees** or more.

The paid up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited financial statements shall be taken into account for the purposes of this rule.

It is also worth noting that where a company ceases to fulfil any of three conditions laid down above for three consecutive years, it shall not be required to comply with the provisions pertaining to audit committee until such time as it meets any of such conditions.

12.5 Punishment for contravention

- **Company and every officer in default** shall be punishable in the manner as provided in Section 147 (1),
- **Cost auditor** in default shall be punishable in the manner as provided u/s 147 (2) & (3).



Companies Incorporated Outside India

Foreign Company [Sec 2(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.

Note: Place of biz includes Share Transfer Office and Share Registration Office

Examples

Incorporate In	POB	Conducts business in India	FC?
India	India	India	No
India	Outside India	Outside India	No
India	Outside India	India	No
India	India	Outside India	No
Outside India	India	India	Yes
Outside India	India	Outside India	No
Outside India	Outside India	India	No

Examples

1. Airline companies registered in US who operate through their booking agents in India - Whether FC? (Hint: Yes)
2. A company incorporated outside India which has no POB in India but is conducting online business through telemarketing in India?- FC? (Hint: Yes)
3. Red Stone Limited is a Company registered in Singapore. The Board of Directors meets and executes business decisions at their Board Meeting held in India. (SM) (Hint: No)

What is “electronic mode” in the definition of foreign co.?

According to the Companies (Registration of Foreign Companies) Rules, 2014, “electronic mode” means carrying out electronically based, whether main server is installed in India or not, including, but not limited to

1. business to business and business to consumer transactions (Eg. Amazon)
2. data interchange and other digital supply transactions (Eg. Netflix)
3. offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India
4. financial settlements (Eg. Razorpay)
5. web based marketing, (Instagram/FB ads, google ads)
6. advisory and transactional services,
7. database services and products, (Amazon DynamoDB)
8. supply chain management; (Eg Oracle)
9. online services such as telemarketing, telecommuting (work from home setup), telemedicine (Eg online doc consultancy), education and information research; and
10. all related data communication services,
11. whether conducted by
e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise

EXAMPLE

- a. Alibaba is an Ecommerce Co. incorporated in China having its main server in China. It sells goods to India. – FC?
- b. A company is registered in Singapore and it has issued deposits in India to raise funds. – FC? (Assume business activity in India)
- c. An American Co. Meta Platforms has its main server in America. It owns a social media platform called Instagram which provides web based marketing services in India. – FC?
- d. Zampak Ltd. is a shipping company incorporated in Japan. The Company has set up a branch office in India after obtaining necessary approvals from RBI- FC?
- e. An Indian citizen incorporated a co. in Singapore for biz in Singapore. Is it a FC? – No. The fact that founder/promotor/owner of a co./BC is Indian would not impact the decision whether it is a FC or not.

- f. A co. is incorporated in India having 100% Foreign Shareholding. Is it a FC? – No. Co. incorporated in India is a Co. and not FC.
- g. If a co. incorporate o/s India authorizes Mr. X in India to find customers and enter into contract on behalf of co., Is such co. a FC?– Yes. Such arrangement establishes POB in India through agent
- h. Co. Registered in Moscow, Russia and having mains server in Moscow for maintaining office automation software by cloud computing for its clients in India (Jan 2021). Is it a FC?
- i. Co. registered abroad employing agents in India but has no POB in India? Is it FC?
- j. Co. registered abroad employing Mr. x in India to source customers and subsequently enter contracts with them on behalf of company Is it FC?

Explanation- For the purposes of this clause, electronic based offering of securities, subscription thereof or listing of securities in the International Financial Services Centres set up under section 18 of the Special Economic Zones Act, 2005 shall not be construed as 'electronic mode' for the purpose of clause (42) of section 2 of the Act.

APPLICATION OF ACT TO FOREIGN COMPANIES [SECTION 379]

1. Sec 380-386 and 392/393 shall apply to FOREIGN COMPANIES
2. Where not less than 50% of the paid-up share capital (equity/pref.) of Foreign co. is held (singly/aggregate) by:
 - a. one or more citizens of India; or
 - b. by one or more companies or bodies corporate incorporated in India; or
 - c. by one or more citizens of India and one or more companies or bodies corporate incorporated in India,

Shall comply with Chapter XXII and other provisions of this Act prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

Example

1. The shareholding of Emaar Company LLC, incorporated in Dubai and having a place of business in India, is as follows:
 - a. Hinduja Company Limited (Indian Company): 26%
 - b. Vaishali Company Limited (Indian Company): 25%
 - c. Citizens of Dubai: Remaining holding
 Which provisions of Co. Act should be complied by Emaar Co. LLC?
2. A company is registered in Singapore and it has POB in India. 20% shareholders of the company are Indian Citizens. Which provisions of Co. Act should it follow?

DOCUMENTS, ETC., TO BE DELIVERED TO REGISTRAR BY FOREIGN COMPANIES [SECTION 380]

1. Every foreign company shall, within 30 days of the establishment of its place of business in India, deliver to the Registrar for registration
2. Certified Charter Docs – MoA/AoA or any other inst. defining constitution [Certified translation in English language]

3. Full Address of Reg./principle office of co. (not in India)
4. Full Address of office of co. deemed to be principal POB in India
5. names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process/ notices/other documents served on the company;
6. Particulars of opening and closing of a place of business in India on earlier occasions
7. List of the directors and secretary of the company with prescribed details (Companies (Registration of Foreign Companies) Rules, 2014):
 - (1) personal name and surname in full;
 - (2) any former name or names and surname or surnames in full;
 - (3) father's name or mother's name or spouse's name;
 - (4) date of birth;
 - (5) residential address;
 - (6) nationality;
 - (7) if the present nationality is not the nationality of origin, his nationality of origin;
 - (8) passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)
 - (9) income-tax permanent account number (PAN), if applicable;
 - (10) occupation, if any;
 - (11) whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship);
 - (12) other directorship or directorships held by him;
 - (13) Membership Number (for Secretary only); and
 - (14) e-mail ID.
8. declaration that none of the directors/authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad;
9. any other information as may be prescribed.

EXAMPLE

1. Jackson Communications LLC, incorporated in Arizona, USA, has established a principal place of business at Kolkata, West Bengal. It is required to deliver requisite documents to the specified authority in India within how many days?. (SM MCQ)
2. DEJY is a Company Limited incorporated in Singapore desires to establish a branch office at Mumbai. You being a practicing Chartered Accountant have been appointed by the company as a liaison officer for compliance of legal formalities on behalf of the company. Examining the provisions of the Companies Act, 2013, answer the following: (SM)
 - a) Whether branch office will be considered as a company incorporated outside India.
 - b) If yes, state the documents you are required to furnish on behalf of the company, on the establishment of a branch office at Mumbai.

Document shall be delivered to the Registrar having jurisdiction over New Delhi.

Companies (Registration of Foreign Co.) Rules, 2014:

1. Above info. to be filed with RoC in Form FC – 1
2. Above application to be supported with an attested copy of:
 - a. approval of RBI under FEMA and approval from other regulators if required or
 - b. declaration from AR that no such approval is reqd.
3. If a FC ceases to have POB in India, it shall forthwith give notice to RoC and from date of such notice, obligation to file docs with RoC ceases, provided no other POB.

Any alteration to docs already submitted to RoC – Inform RoC within 30 days of alteration (in Form FC-2)

Example: Swift Pharmaceuticals, a Company registered in Singapore, has started its business in India during the financial year 2016. The Company has submitted all the required documents with registrar within the due date. On March 1, 2023, Swift Pharmaceuticals has shifted its principal office in Singapore. Does the Company required to undertake any steps due to change in address of principal office. (SM)

within 30 days file FC-2 to Registrar in New Delhi

Foreign company existing at the commencement of the Companies Act 2013, which has not delivered to the Registrar the documents and particulars specified in section 592(1) of the Companies Act, 1956, it shall continue to be subject to the obligation to deliver those documents and particulars in accordance with the Companies Act, 1956.

Example

Search & Find Pte. Ltd., incorporated in Singapore. The Company sells its goods through electronic mode on the e-commerce platforms in India, however, it does not have any branch or office in India. Is the Company required to submit the documents as required under Section 380 of the Companies Act, 2013. (SM Illustration 1)

A FC has POB in West Bengal. To which RoC will it file necessary docs to? – New Delhi RoC

ACCOUNTS OF FOREIGN COMPANY [SECTION 381]

1. Every foreign company shall, in every CALENDAR YEAR (FY in Rules. Rules will override),
 - a. Make balance sheet and profit and loss account in prescribed forms, including attachments prescribed (Schedule III)
 - b. deliver a copy of those documents to the Registrar

Within 6 months from end of FY (Extension 3 months – ROC) (Rules)
2. CG may exempt FC from applicability of this.
3. If not in English – Certified Translation thereof in English to be annexed
4. Documents to Attach
(Companies (Registration of FC) Rules, 2014):
5. Documents as per Chapter of Accounts of companies

6. Doc relating to consolidated Financial Statement of parent foreign Co. as submitted to prescribed authority in country of Incorporation - also to be submitted (if not in English, certified translation)
7. Statement of Related Party Transactions
8. Statement of Repatriation of Profits
9. Statement of Transfer of Funds (incl Dividend if any)
10. List of all POB in India as at the date with reference to which the balance sheet is made in Form FC-3
11. Audit of books of Indian Business operations- Mandatory - By practicing CA or Firm/LLP of CAs
12. Provision of Chap X (Sec 139-148) i.e., Audit and Auditors shall apply mutatis mutandis
13. Provided that where a company or body corporate, which is a holding company or a subsidiary or associate company of company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Central Government may, on an application made by that company or body corporate in such form and manner as may be prescribed, allow any period as its financial year, whether or not that period is a year.

Example

ROK Limited, is a company incorporated outside India having a place of business in India. ROK Limited is a subsidiary of HOK Limited (Holding company), registered in Australia and is required to consolidate its accounts with HOK Limited. Accordingly, if HOK Limited is required to follow financial year other than 31st day of March every year, Can ROK do so too? -

ROK can make an application to Central Government to follow the financial year as per HOK Limited (SM Example 5)

Who can authenticate the translations of docs to be submitted to RoC?

1. Where a translation is to be made within India, it shall be authenticated by:
 - a. an advocate, attorney or pleader entitled to appear before any High Court; or
 - b. an affidavit, of a competent person having, in the opinion of the Registrar, an adequate knowledge of the language of the original and of English.

DISPLAY OF NAME, ETC., OF FOREIGN COMPANY [SECTION 382] SERVICE ON FOREIGN COMPANY [SECTION 383]

1. Any process, notice, or other document required to be served on a foreign company
2. deemed to be sufficiently served, if

addressed to any person whose name and address have been delivered to the Registrar under section 380

and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode

DEBENTURES, ANNUAL RETURN, REGISTRATION OF CHARGES, BOOKS OF ACCOUNT AND THEIR INSPECTION [SECTION 384]

Following provision of Companies Act shall apply to Foreign Co.:

Filing of annual return of the Indian operations of the foreign company:

According to Cos. (Registration of FC) Rules, 2014, every FC shall prepare and file annual return in Form FC-4 + presc. fees, within 60 days from last day of FY i.e., by 30th May, to RoC containing particulars as on close of FY.

FEE FOR REGISTRATION OF DOCUMENTS [SECTION 385]

There shall be paid to the Registrar for registering any document required by the provisions of this Chapter to be registered by him, such fee, as may be prescribed.

According to the Companies (Registration of Foreign Companies) Rules, 2014, the fees shall be such as provided in the Companies (Registration Offices and Fees) Rules, 2014.

INTERPRETATION [SECTION 386]

For the purposes of the foregoing provisions of this Chapter, the expression:

- (a) "Certified" means certified in the prescribed manner to be a true copy or a correct translation;
- (b) "Director", in relation to a foreign company, includes any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act; and
- (c) "Place of business" includes a share transfer or registration office

Example:

Examine with reference to the provisions of the Companies Act, 2013 whether the following companies can be treated as foreign companies:

- (i) A company incorporated outside India having a share registration office at Mumbai.
- (ii) Indian citizens incorporated a company in Singapore for the purpose of carrying on business there. (SM Illustration 2)

DATING OF PROSPECTUS AND PARTICULARS TO BE CONTAINED THEREIN [SECTION 387]

1. No person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of
 - i. a company incorporated or to be incorporated outside India,
 - ii. whether the company
 - a. has or has not established, or
 - b. when formed will or will not establish, a place of business in India, unless
 - c. the prospectus is dated and signed, and
2. contains particulars with respect to the following matters, namely:
 - (1) the instrument constituting or defining the **constitution** of the company;
 - (2) the **enactments** or provisions by or under which the incorporation of the company was effected;

(3) **address in India** where the **said instrument, enactments or provisions**, or copies thereof, and if the same are not in the English language, a certified translation thereof in the English language can be **inspected**;

(4) the **date** on which and the **country** in which the company would be or was **incorporated**; and

(5) whether the company has established a **place of business in India** and, if so, the **address of its principal office in India**; and

states the matters specified under **section 26 (Matters)** to be stated in prospectus)

Exception:

- points **(1), (2) and (3)** of point (a) above shall **not apply** in the case of a prospectus issued **more than 2 years after the date at which the company is entitled to commence business**.
- Example (SM): Mir Company LLC, a company incorporated in Dubai, on 28th April 2017. Mir Company LLC has established a place of Business in Mumbai in the year 2020. Now the place of business in India proposes to offer subscription to securities of Mir Company LLC. What particulars need to be filed in prospectus?
- (HINT: not be required to contain the particulars mentioned in points (1), (2) and (3) of point (a) above as the prospectus will be getting issued after a period of more than 2 years since the Mir Company LLC has commenced its business.)
- **No waiver of compliance in prospectus [Section 387(2)]:** Any condition requiring or binding an applicant for securities to waive compliance with any requirement imposed by virtue of section 387(1) or purporting to impute him with notice of any contract, documents or matter not specifically referred to in the prospectus, shall be **void**.

Example:

- **Form of application for securities to be issued along with prospectus [Section 387(3)]:** No person shall issue to any person in India a form of application for securities of such a company or intended company as is mentioned in section 387(1), unless the form is issued with a prospectus which complies with the provisions of this Chapter (Chapter XXII) and such issue does not contravene the provisions of section 388v(experts consent & allotment):
- **Exception:** If it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to securities.
- **To Investor: Form with prospectus (Compliant to Ch XXII)**
- **To Broker/Underwriter: Only Form is enough**
- The provisions of section 387 shall NOT APPLY-

1. to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to securities of the company, whether an applicant for securities will or will not have the right to renounce in favour of other persons

Example:

Mr A- Member, Mr. B – Non Member.

FC issue to Mr A (Sec 387 NA) → renounce or not to Mr B (Sec 387 NA)

FC issue to Mr B (Sec 387 Applicable)

2. to the issue of a prospectus relating to securities which are or are to be in all respects uniform with securities previously issued and for the time being dealt in or quoted on a recognised stock exchange - except in so far as it requires a prospectus to be dated,

Example:

FC issued 12% Non Convertible Debentures on RSE in 2019. Similar NCD to be issued in 2023. → S 387 NA (Except Dating)

Nothing in Section 387 shall limit or diminish any liability which any person may incur under any law for the time being in force in India or under the Companies Act, 2013 apart from Section 387

Example:

Co listing its securities → gets listing □ doesn't follow sebi disclosure requirements □ claims relief based on section 387

EXPERT'S CONSENT AND ALLOTMENT [SECTION 388]

1. No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not been established, or when formed will or will not establish, a place of business in India if:
 - i. prospectus includes a statement purporting to be made by an expert
 - he has not given or
 - or has before delivery of the prospectus for registration withdrawn, his written consent
 - or there does not appear in the prospectus a statement that he has given and has not withdrawn his consent as aforesaid;
2. Prospectus does not have the effect, where an application is made in pursuance thereof, of rendering all persons concerned bound by all the provisions of section 33 (Issue of application forms for securities) and section 40 (Securities to be dealt with in stock exchanges), so far as applicable.

For the purposes of this section, a statement shall be deemed to be included in a prospectus, if it is contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

REGISTRATION OF PROSPECTUS [SECTION 389]

Conditions to follow before the issue, circulation or distribution of the prospectus in India by company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India:

1. a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar
2. the prospectus states on the face of it that a copy has been so delivered, and

3. there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by section 388 and such documents as may be prescribed.

According to the Companies (Registration of Foreign Companies) Rules, 2014, the following documents shall be annexed to the prospectus, namely:

- (a) any consent to the issue of the prospectus required from any person as an expert;
- (b) a copy of contracts for appointment of managing director or manager and in case of a contract not reduced into writing, a memorandum giving full particulars thereof;
- (c) a copy of any other material contracts, not entered in the ordinary course of business, but entered within preceding 2 years
- (d) a copy of underwriting agreement; and
- (e) a copy of power of attorney, if prospectus is signed through duly authorized agent of directors.

OFFER OF INDIAN DEPOSITORY RECEIPTS [SECTION 390]

Indian Depository Receipts (IDR) means any instrument in the form of a depository receipt created by a Domestic Depository in India and authorized by a company incorporated outside India making an issue of such depository receipts

According to section 390, notwithstanding anything contained in any other law for the time being in force, the Central Government may make rules applicable for—

- i. the offer of Indian Depository Receipts (IDR);
- ii. the requirement of disclosures in prospectus or letter of offer issued in connection with IDR;
- iii. the manner in which the IDR shall be dealt with in a depository mode and by custodian and underwriters; and
- iv. the manner of sale, transfer or transmission of IDR

by a company incorporated or to be incorporated outside India, whether the company has or has not established, or will or will not establish, any place of business in India

According to Rule 13 of the Companies (Registration of Foreign Companies) Rules, 2014, following compliances are mandatory:

- a. Companies (Registration of Foreign Companies) Rules, 2014 & CG Rules made in above section
- b. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 and
- c. any directions issued by the Reserve Bank of India

Application of Chapter XV (Compromises, Arrangements and Amalgamations): Section 234

1. Chapter XV unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes or mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government
2. Provided that the Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section
3. subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging

company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

Explanation: For the purposes of sub-section (2) above, the expression “foreign company” means any company or body corporate incorporated outside India whether having a place of business in India or not

APPLICATION OF SECTIONS 34 TO 36 AND CHAPTER XX (Winding up) [SECTION 391]

1. provisions of sections 34 to 36 (both inclusive) shall apply to—
 - (i) the issue of a prospectus by a company incorporated outside India under section 389 as they apply to prospectus issued by an Indian company;
 - (ii) the issue of IDR by a foreign company.
 - Section 34 deals with criminal liability for mis-statements in prospectus.
 - Section 35 deals with Civil Liability for mis-statement in prospectus.
 - Section 36 deals with punishment for fraudulently inducing persons to invest money.
2. Chapter XX (i.e. Chapter on Winding up) shall apply mutatis mutandis for closure of the place of business of a foreign company in India as if it were a company incorporated in India in case such foreign company has raised monies through offer or issue of securities under this Chapter which have not been repaid or redeemed
3. subject to the provisions of section 376 (Power to wind up Foreign companies although dissolved)

PUNISHMENT FOR CONTRAVENTION [SECTION 392]

1. Without prejudice to the provisions of section 391, if a foreign company contravenes the provisions of Chapter XXII
2. Fine on defaulting foreign company
 - 1 lac rupees to 3 lac rupees.
 - In case of continuing default - an additional of 50,000 rupees per day after the first during which the contravention continues.
3. Punishment for every officer of the foreign company who is in default-
 - minimum amount of 25,000 rupees, but which may extend to 5,00,000 rupees.

COMPANY'S FAILURE TO COMPLY WITH PROVISIONS OF THIS CHAPTER NOT TO AFFECT VALIDITY OF CONTRACTS, ETC [SECTION 393]

Any failure by a company to comply with the provisions of Chapter XXII of the Companies Act, 2013, shall not affect the validity of any contract, dealing or transaction entered into by the company

- Company shall be **liable to be sued** in respect thereof
- However, the **company shall not be entitled to**
 - bring any suit,
 - claim any set-off,
 - make any counter-claim or

- institute any legal proceeding in respect of any such contract, dealing or transaction, **until the company has complied** with the provisions of the Companies Act, 2013, applicable to it.

EXEMPTIONS UNDER THIS CHAPTER (Sec 393A)

1. Central Government may, by notification, exempt any class of-
 - (a) foreign companies;
 - (b) companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India,
2. as may be specified in the notification, from any of the provisions of this Chapter and a copy of every such notification shall, as soon as may be after it is made, be laid before both Houses of Parliament
3. Notified u/s 393A
4. Central Government hereby exempts, **from the provisions of sections 387 to 392** (both inclusive), the following:-
 - (a) foreign companies;
 - (b) companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India,
5. insofar as they relate to the **offering for subscription in the securities, requirements related to the prospectus, and all matters incidental thereto in the International Financial Services Centres set up under section 18 of the Special Economic Zones Act, 2005 (28 of 2005)**
6. Action for Improper Use or Description as Foreign Company

RULE 12 OF COMPANIES (REGISTRATION OF FOREIGN COMPANIES) RULES, 2014

If any person or persons trade or carry on business in any manner under any name or title or description as a foreign company registered under the Act or the rules made thereunder, that person or each of those persons shall, unless duly registered as foreign company under the Act and rules made thereunder, shall be liable for investigation under section 210 of the Act and action consequent upon that investigation shall be taken against that person

The Limited Liability Partnership Act 2008

Learning Outcomes –

- Meaning and characteristics of Limited Liability Partnership
- Incorporation of LLP
- Partners and their relations
- Financial Disclosures
- Conversion into LLP
- Winding up and Dissolution of LLP
- Difference with other forms of organisations

Introduction

9th January 2007

The Ministry of Law and Justice notified the LLP Act, 2008

7th January 2009

President of India has assented the LLP Bill

12th December 2008

The LLP Bill was passed in the Parliament

- **The Limited Liability Partnership Act, 2008 is applicable to the whole of India.**
- The LLP Act, 2008 has **81 sections and 4 schedules.**

First Schedule	Mutual rights and duties of partners, as well limited liability partnership and its partners where there is absence of a formal agreement with respect to them.
Second Schedule	Conversion of a firm into LLP.
Third Schedule	Conversion of a private company into LLP.
Fourth Schedule	Conversion of unlisted public company into LLP.

- The **Ministry of Corporate Affairs and the Registrar of Companies (ROC)** are entrusted with the task of **administrating the LLP Act, 2008.**
- The **Central Government** has the authority to **frame the Rules** with regard to the LLP Act, 2008, and can **amend** them by notifications in the Official Gazette, from time to time.

The Indian Partnership Act, 1932 is not applicable to LLPs

- **Need for new form of Limited Liability Partnership**

In order to meet the **contemporary growth** of the Indian Economy, the lawmakers contemplated the need for bringing out the new legislation for creation of LLP.

LLP is an alternative corporate business form that **gives the benefits of limited liability company and the flexibility of partnership**. In order to enable professional expertise and entrepreneurial initiative and combine, organize and operate in flexible, innovative and efficient manner, the LLP Act, 2008 was enacted.

LLP as a form of business organization is an **alternative corporate business vehicle**. LLPs allow for a partnership structure where each partner's liability is limited to the amount they put in the business. Owing to **flexibility in its structure and operation**, LLP is a suitable vehicle for small enterprises and for investment by venture capital. LLPs are common in professional business like law firms, accounting firms, and wealth managers.

Limited Liability Partnership – Meaning and Concept

Section 2(n) of the Limited Liability Partnership Act, 2008 defines **Limited Liability Partnership –**

“Limited Liability Partnership means a partnership formed and registered under this Act”.

The LLP is a separate legal entity and, while the **LLP itself will be liable for the full extent of its assets**, the liability of the partners will be limited.

Since LLP contains elements of both ‘a corporate structure’ as well as ‘a partnership firm structure’ LLP is called a **hybrid between a company and a partnership**.

Limited Liability Partnership

New form of legal business entity with limited liability	Alternative corporate business vehicle	Allows the partners flexibility of organising their internal structure	LLP itself will be liable for the full extent of its assets	Liability of partners will be limited
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Small Limited Liability Partnership – Section 2(1)(ta)

It means a limited liability partnership –

- (i) Contribution of which does not exceed ₹ **25 lakh** or such higher amount, not exceeding ₹ **5 crore**, as may be prescribed; and
- (ii) Turnover of which as per Statement of Accounts and Solvency for immediately preceding financial year, does not exceed ₹ **40 lakh** or such higher amount, not exceeding ₹ **50 crore**, as may be prescribed; or
- (iii) Which meets other requirements as may be prescribed, and fulfils such terms and conditions as may be prescribed.

2.1 Partners [Section 5]

Section 2(1)(q) of the LLP Act, 2008 defines **Partner** –
“Partner, in relation to a LLP, means **any person who becomes a partner in the LLP in accordance with the LLP agreement**”.

- Any **individual or body corporate may be a partner** in a LLP.
- However, an individual shall **not be capable of becoming a partner** of a LLP, if –
 - a) he has been found to be of **unsound mind** by a Court of competent jurisdiction and the finding is in force,
 - b) he is an **undischarged insolvent**, or
 - c) he has **applied to be adjudicated as an insolvent** and his application is pending.

2.2 Minimum number of partners [Section 6]

- Every LLP shall have **at least 2 partners**.
- **Person carrying on business with less than 2 partners** –

If at any time the number of partners of a LLP is reduced below 2 and the **LLP carries on business for more than 6 months while the number is so reduced**, the person, who is the **only partner of the LLP** during such time and has the knowledge of the fact that it is carrying on business with him alone, **shall be liable personally for the obligations of the LLP incurred during that period**.

Section 2(1)(e) of the Limited Liability Partnership Act, 2008 defines **business**–
“Business” includes every trade, profession, service and occupation except any activity which the Central Government may, by notification, exclude.

2.3 Designated partners [Section 7]

Section 2(1)(j) of the Limited Liability Partnership Act, 2008 defines **Designated Partner**–
Any partner designated as such pursuant to section 7.

- Every LLP shall have **at least 2 designated partners** who are **individuals** and **at least one of them shall be a resident in India**. [Section 7(1)]
- If in LLP, all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, **at least 2 individuals who are partners of such LLP or nominees of such bodies corporate shall act as designated partners**.
- **Resident in India** – A person who has stayed in India for a period of not less than 120 days during the financial year.

Example: There is an LLP by the name Indian Helicopters LLP having 5 partners namely Mr. A (Non-resident), Mr. B (Non-resident), Ms. C (resident), Ms. D (resident) and Ms. E (resident).

In this case, at least 2 should be named as Designated Partner out of which 1 should be resident. Hence, if Mr. A and Mr. B are designated then it will not serve the purpose. One of the designated partners should be there out of Ms. C, Ms. D and Ms. E.

- Subject to the provisions of Sub-section(1),
 - **If the incorporation document,**
 - Specifies who are to be designated partners, such persons shall be designated partners on incorporation; or
 - States that each of the partners from time to time of LLP is to be designated partner, every partner shall be a designated partner.
 - Any partner may become a designated partner by and in accordance with the **LLP Agreement** and a partner may cease to be a designated partner in accordance with LLP agreement.
- An individual shall not become a designated partner in any limited liability partnership unless he has given his **prior consent** to act as such to the limited liability partnership in such form and manner as may be prescribed.
- Every limited liability partnership shall file with the Registrar the **particulars of every individual who has given his consent** to act as designated partner in such form and manner as may be prescribed within thirty days of his appointment.
- An individual eligible to be a designated partner shall **satisfy such conditions** and requirements as may be prescribed.
- Every designated partner of a limited liability partnership shall obtain a **Designated Partners Identification Number (DPIN)** from the Central Government and the provisions of sections 153 to 159 (both inclusive) of the Companies Act, 2013 shall apply mutatis mutandis for the said purpose.

Liabilities of Designated Partners [Section 8]

Unless expressly provided otherwise in this Act, a designated partner shall be

- (a) responsible for the doing of all acts, matters and things as are required to be done by the limited liability partnership in respect of compliance of the provisions of this Act including filing of any document, return, statement and the like report pursuant to the provisions of this Act and as may be specified in the limited liability partnership agreement; and
- (b) liable to all penalties imposed on the limited liability partnership for any contravention of those provisions.

Changes in Designated Partners [Section 9]

A limited liability partnership may appoint a designated partner within 30 days of a vacancy arising for any reason and provisions of sub-section (4) and sub-section (5) of section 7 shall apply in respect of such new designated partner, provided that if no designated partner is appointed, or if at any time there is only one designated partner, each partner shall be deemed to be a designated partner.

Punishment for contravention of sections 7 and 9 [Section 10]

1. If the LLP contravenes the provisions of sub-section (1) of section 7 (meaning that the number of designated partners are less than two or none of the designated partner is a resident in India), the LLP and its every partner shall be liable to a penalty of 10,000

- and in case of continuing contravention, with further penalty of 100 per day subject to maximum 1,00,000 for LLP and 50,000 for every partner of such LLP.
2. If the LLP contravenes the provisions of sub-section (4) of section 7 (failure to file the consent of appointment of designated partner within 30 days of his appointment), the LLP and its every designated partner shall be liable to a penalty of `5,000 and in case of continuing contravention, with further penalty of 100 per day subject to maximum 50,000 for LLP and 25,000 for every designated partner.
 3. If the LLP contravenes the provisions of sub-section (5) of section 7 or section 9, the LLP and its every partner shall be liable to a penalty of 10,000 and in case of continuing contravention, with further penalty of 100 per day subject to maximum 1,00,000 for LLP and 50,000 for every partner of such LLP.

2.4 Characteristic of LLP

2.4.1 LLP is a body corporate

Section 3 of LLP Act provides that a LLP is a **body corporate** formed and incorporated under this Act and is a legal entity separate from that of its partners.

Section 2(1)(d) of the LLP Act states that **Body Corporate means –**
“**A company** as defined in clause (20) of Section 2 of the Companies Act, 2013 and **includes –**

- i) a LLP registered under this Act,
- ii) a LLP incorporated outside India, and
- iii) a company incorporated outside India,

but **does not include –**

- i) a corporation sole,
- ii) a co-operative society registered under any law for the time being in force, and
- iii) any other body corporate (not being a company as defined in Section 2(20) of the Companies Act, 2013 or LLP as defined in this Act) which the Central Government may, by notification in the Official Gazette, specify in this behalf”.

2.4.2 Perpetual Succession

The LLP can continue its existence irrespective of changes in partners. Death, insanity, retirement or insolvency of partners has no impact on the existence of LLP.

2.4.3 Separate Legal Entity

The LLP as a separate legal entity, **is liable to the full extent of its assets but liability of the partners is limited** to their agreed contribution in the LLP. Creditors of LLP shall be the creditors of LLP alone.

2.4.4 Mutual Agency

Partners act as agents of the LLP but not of the other partners. **No partner is liable on account of the independent or un-authorized actions of other partners.** Thus, all partners will be the agents of the LLP alone. No one partner can bind the other partner by his acts.

2.4.5 LLP Agreement

- **Mutual rights and duties** of the partners within a LLP are governed by an agreement between the partners.
- In the **absence of any such agreement**, the mutual rights and duties shall be **governed by the provisions of the LLP Act, 2008**.

Section 2(1)(o) of the Limited Liability Partnership Act, 2008 defines **Limited Liability partnership agreement** as –
“Any **written agreement** between the partners of the LLP or between the LLP and its partners which **determines the mutual rights and duties** of the partners and their rights and duties in relation to that LLP”

2.4.6 Artificial Legal Person

- A LLP is an artificial legal person because it is **created by a legal process** and is **clothed with all rights of an individual**.
- It can do everything which any natural person can do, except of course that, it cannot be sent to jail, cannot take an oath, cannot marry or get divorce nor can it practice a learned profession like CA or Medicine.
- A LLP is invisible, intangible, immortal (can be dissolved by law alone) but **not fictitious** because it really exists.

2.4.7 Common Seal

- **The LLP may have a common seal if it decides to have one [Section 14(c)]**. Thus, it is not mandatory for a LLP to have a common seal.
- It shall remain under the custody of some responsible official and it shall be **affixed in the presence of at least 2 designated partners** of the LLP.

2.4.8 Limited Liability

Liability of the partners will be limited to their agreed contribution in LLP. Such contribution may be of tangible or intangible nature or both.

This feature has encouraged professionals like Engineering consultants, Legal Advisors and Accounting Professionals to set up LLPs.

2.4.9 Management of Business

The partners in the LLP are entitled to manage the business of LLP. But **only the designated partners are responsible for legal compliances**.

2.4.10 Minimum and Maximum number of Partners

- Every LLP shall have **at least 2 partners** and shall also have **at least 2 individuals as designated partners**, of whom at least one shall be resident in India.
- There is **no maximum limit** on the partners in LLP.

2.4.11 Business for Profit Only

The essential requirement for forming LLP is carrying on a lawful business with a view to earn profit. Thus, **LLP cannot be formed for charitable or non-economic purpose**.

2.4.12 Investigation

The **Central Government** shall have powers to investigate the affairs of an LLP by appointment of competence authority for the purpose.

2.4.13 Compromise or Arrangement

Any compromise or agreements including merger and amalgamation of LLPs shall be **in accordance with the provisions of the LLP Act, 2008**.

2.4.14 Conversion into LLP

A firm, private company, or an unlisted public company are allowed to be converted into LLP in accordance with the provisions of LLP Act, 2008.

2.4.15 E-Filing of Documents

Every form or application of document required to be filed or delivered under the act and rules made thereunder, shall be filed in computer readable electronic form on its **website www.mca.gov.in** and **authenticated by a partner or designated partner** of LLP by the use of electronic or digital signature.

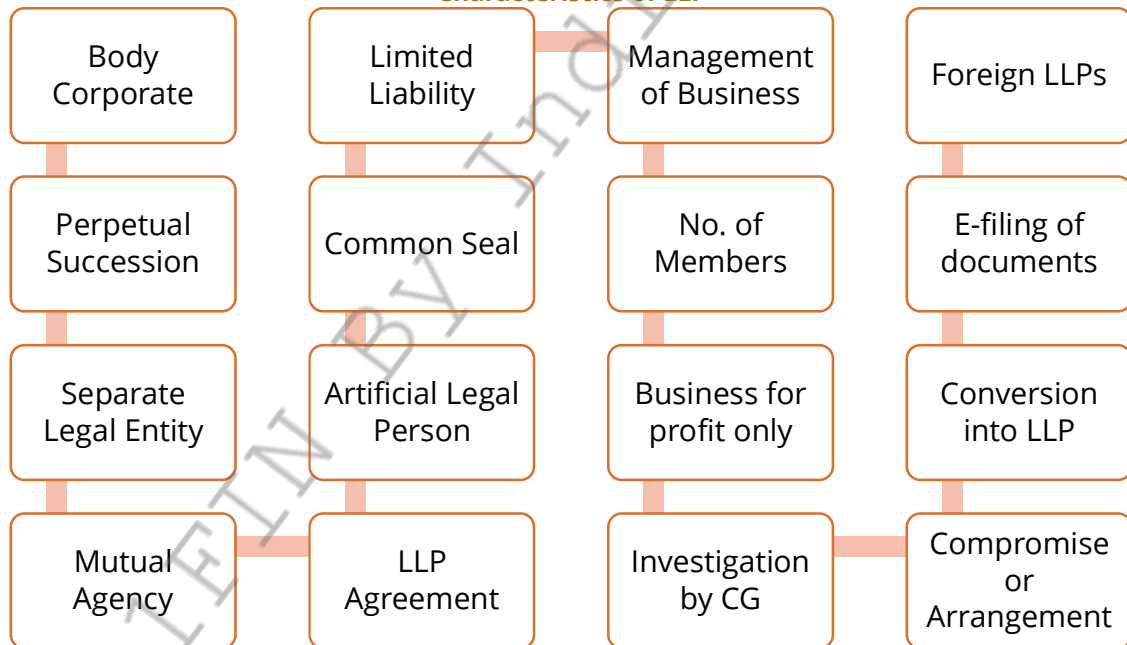
2.4.16 Foreign LLPs

As per section 2(1)(m), "foreign limited liability partnership" means –

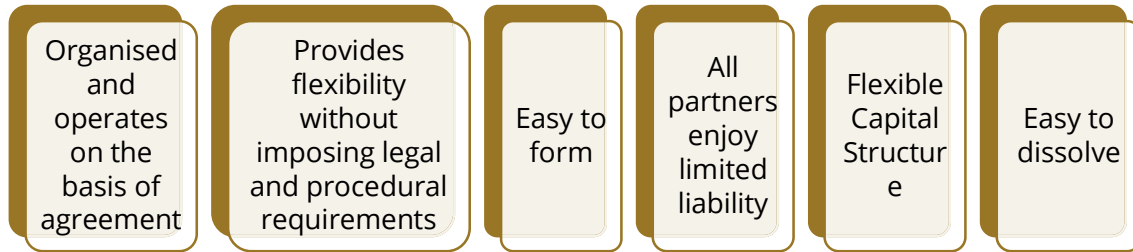
a limited liability partnership **formed**, incorporated, or registered **outside India** which establishes a **place of business within India**.

- **Foreign LLP can become a partner in an Indian LLP.**

Characteristics of LLP



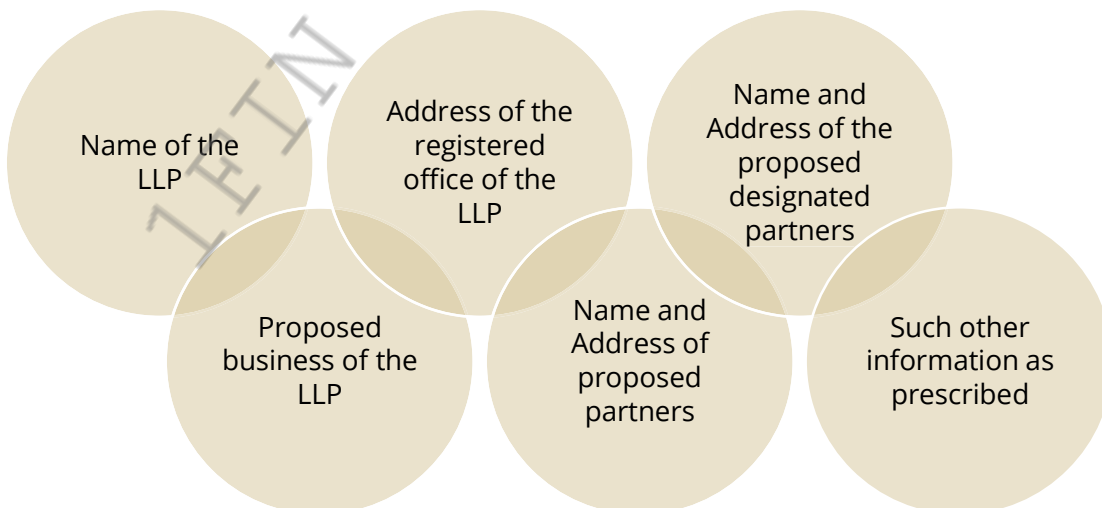
2.5 Advantages of LLP form



Incorporation of LLP

3.1 Incorporation document [Section 11]

1. For a LLP to be incorporated **two or more persons associated** for carrying on a **lawful business** with a view to **earn profit** shall **subscribe their names to an incorporation document**. [Sub-section 1(a)]
2. It shall be **filed** in such manner and with such fees, as may be prescribed **with the Registrar of the State in which the registered office of the LLP is to be situated**. [Sub-section 1(b)]
3. **Statement to be filed -**
 - Along with the incorporation document a statement in the prescribed form shall be filed **that all the requirements of this Act and the rules made thereunder have been complied with in respect of incorporation** and matters precedent and incidental thereto.
 - The statement shall be **made by -**
 - Either an advocate, or a Company Secretary or a Chartered Accountant or a Cost Accountant, who is engaged in the formation of the LLP and
 - By anyone who subscribed his name to the incorporation document. [Sub-section 1(c)]
4. The incorporation document shall be **in a form as may be prescribed**.
5. **Contents of the Incorporation Document -**



6. **Penalty for false statement -**

If a person makes a statement which he knows to be false or does not believe to be true, shall be punishable with –

- **Imprisonment** for a term which **may extend to 2 years** and
- **Fine** which shall **not be less than ₹ 10,000** but which **may extend to ₹ 5 lakhs**.

3.2 Incorporation by registration [Section 12]

- Where the Incorporation Document has been filed and complies with the requirements of Section 11 the **Registrar shall** retain the incorporation document and, he shall, **within a period of 14 days** –
 - a) **Register the incorporation document;** and
 - b) Give a **certificate**, signed by the Registrar and authenticated by his seal, that the LLP is incorporated by the name specified therein.
- The Registrar may accept the **statement delivered u/s 11(1)(c)** as **sufficient evidence** that the requirement imposed by clause (a) of that sub-section has been complied with.
- The **certificate shall be conclusive evidence** that the LLP is incorporated by the name specified therein.

3.3 Registered office of LLP and change therein [Section 13]

1. Every LLP shall have a **registered office** to which **all communications and notices may be addressed** and where they shall be received.
2. **Serving documents on LLP or its partner or designated partner** – A document may be served on a LLP or a partner or designated partner thereof –
 - **by sending it by post under a certificate of posting or by registered post** or by any other manner, as may be prescribed,
 - **at the registered office** and any other address specifically declared by the LLP for the purpose in such form and manner as may be prescribed.
3. **Change of Registered Office** – A LLP may change the place of its registered office and **file the notice of such change with the Registrar** in such form and manner and subject to such conditions as may be prescribed and any such **change shall take effect only upon such filing**.
4. **Punishment for contravention** – If the LLP contravenes any provisions of this section, **the LLP and its every partner** shall be liable to a penalty of **₹ 500 per day** during which the default continues, subject to maximum of **₹ 50,000**.

3.4 Effect of registration [Section 14]

On registration the LLP shall, by its name, be capable of -

Suing and being sued

Acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible

Having a common seal, if it decides to have one

Doing and suffering such acts and things as bodies corporate may lawfully do and suffer

3.5 Name [Section 15]

- Every LLP shall have either the **words “Limited Liability Partnership” or the acronym “LLP”** as the **last words of its name**.
- **No LLP shall be registered by a name which**, in the opinion of the Central Government is—
 - ✓ **Undesirable**, or
 - ✓ **Identical** or too nearly resembles to that of any other LLP or company or a registered trademark of any other person under the Trade Marks Act, 1999.

3.6 Reservation of name [Section 16]

- A person may **apply in such form (e-Form 1)** 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 –
 - a) The name of a proposed LLP; or
 - b) The name to which a LLP proposes to change its name.
- Upon receipt of an application and on payment of the prescribed fee, the **Registrar** may, if he is **satisfied that the name to be reserved is not one which may be rejected** on any ground referred to in section 15, **reserve the name for a period of 3 months** from the date of intimation by the Registrar.

3.7 Rectification of name of LLP [Section 17]

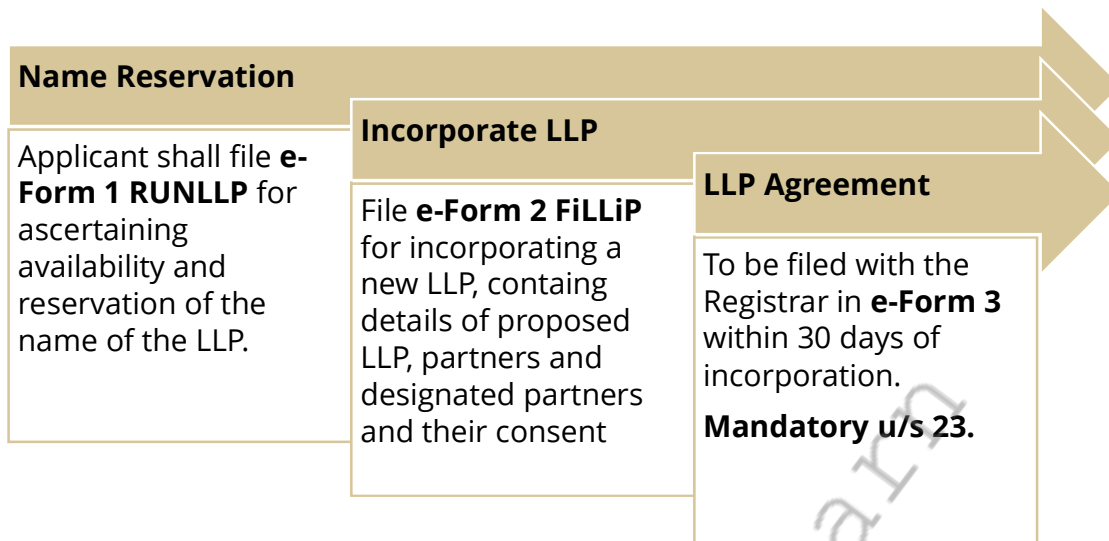
- If through inadvertence or otherwise, a LLP on its first registration or on its registration by a new body corporate, is registered by a name—
 - Identical** with or too nearly resembles
 - ➔ name of any other LLP or company, or
 - ➔ a registered trade mark of a proprietor under the Trade Marks Act, 1999, as is likely to be mistaken for it,

then on an application of such LLP or proprietor or a company,

the Central Government (CG) may direct such LLP to change its name.

- The LLP shall **comply** with such direction **within 3 months from the date of issue of such direction**.
- An application of the proprietor of the registered trade mark shall be maintainable within a period of 3 years from the date of incorporation or registration or change of name of the LLP under this Act.
- Where LLP 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 Registrar** along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and within **30 days** of such change in the **certificate of incorporation**, such LLP shall change its name in the LLP agreement.
- If the LLP defaults in complying with direction of the CG, the **CG shall allot a new name to the LLP** in such manner as may be prescribed and Registrar shall enter the new name in the register of LLP and issue a fresh Certificate of Incorporation.
- The LLP can subsequently change its name in accordance with the provisions of Section 16.

3.8 Steps to incorporate LLP

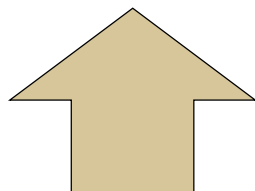


Partners and their Relations

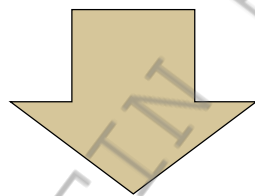
4.1 Eligibility to be partners [Section 22]

- **On the incorporation** of a LLP, the **persons who subscribed their names** to the incorporation document **shall be its partners**.
- **Any other person may become a partner** of the LLP by and in accordance with the **LLP agreement**.

4.2 Relationship of partners [Section 23]



The mutual rights and duties of partners of LLP and that of LLP and its partners shall be governed by the LLP Agreement.



In the absence of agreement as to any matter, such mutual rights and duties shall be determined according to the provisions of the First Schedule.

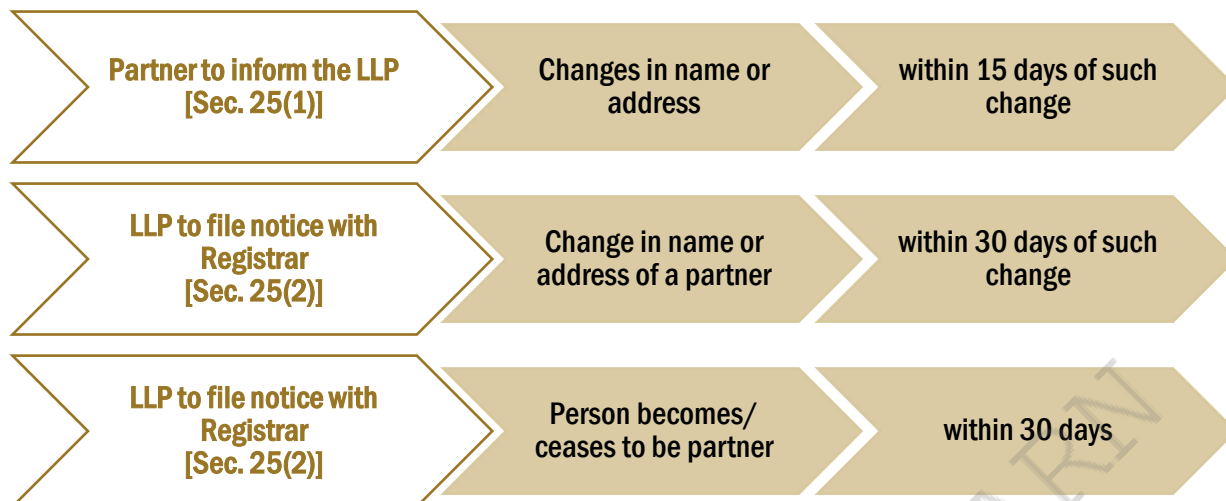
- The **LLP agreement and any changes**, if any, made therein shall be **filed with the Registrar** in such form, manner and accompanied by such fees as may be prescribed.
- **An agreement in writing** made before the incorporation of a LLP between the persons who subscribe their names to the incorporation document **may impose obligations on the LLP**. However, such agreement **should be ratified by all the partners after the incorporation of the LLP**.

4.3 Cessation of partnership interest [Section 24]

1. A person may cease to be a partner of a LLP –
 - **In accordance with an agreement** with the other partners **or**,

- **In the absence of agreement** with the other partners as to cessation of being a partner, **by giving a notice in writing of not less than 30 days** to the other partners of his intention to resign as partner.
2. A person shall **cease to be a partner** of a LLP –
- a. **On his death or dissolution** of the LLP; or
 - b. If he is declared to be of **unsound mind** by a competent court; or
 - c. If he has applied to be adjudged as an **insolvent** or declared as an insolvent.
3. Where a person has ceased to be a partner of a LLP such partner (to be called 'former partner') shall be **regarded by a person dealing with the LLP as still being a partner of the LLP unless** –
- ✓ The **person has notice** that the former partner has ceased to be a partner of the LLP; or
 - ✓ **Notice** that the former partner has ceased to be a partner of the LLP has been **delivered to the Registrar.**
4. **Rights and liabilities of former partner –**
- The cessation of a partner from the LLP **does not by itself discharge the partner from any obligation** to the LLP or to the other partners or to any other person which he **incurred while being a partner.**
 - The former partner or a person entitled to his share in consequence of the death or insolvency of the former partner, shall be **entitled to receive from the LLP –**
 - ✓ An amount equal to the **capital contribution** of the former partner actually made to the LLP; and
 - ✓ **His right to share in the accumulated profits** of the LLP, after the deduction of accumulated losses, **determined as at the date the former partner ceased to be a partner.**
 - A former partner or a person entitled to his share in consequence of the death or insolvency of the former partner shall **not have any right to interfere in the management of the LLP.**

4.1 Registration of changes in partners [Section 25]



- A notice filed with the Registrar –
 - Shall be **in such form and accompanied by such fees** as may be prescribed,
 - Shall be **signed by the designated partner** of the LLP and authenticated in a manner as may be prescribed, and
 - If it relates to an **incoming partner**, shall **contain a statement by such partner that he consents to becoming a partner**, signed by him and authenticated in the manner as may be prescribed.

- **Punishment for contravention –**

	Penalty
Contravention of Sec 25(2) – LLP & Designated Partner	₹ 10,000
Contravention of Sec 25(1) – Partner	₹ 10,000

- Any **person who ceases to be a partner of a LLP may himself file the notice with the Registrar –**
 - If he has **reasonable cause to believe that the LLP may not file the notice with the Registrar** and
 - In case of any such notice filed by a partner, the **Registrar shall obtain a confirmation to this effect from the LLP** unless the LLP has also filed such notice.

However, where **no confirmation is given by the LLP within 15 days**, the **registrar shall register the notice made by a person ceasing to be a partner** under this section.

Extent and Limitation of Liability of LLP and Partner

5.1 Partner as agent [Section 26]

Every partner of a LLP is, for the purpose of the business of the LLP, the **agent of the LLP, but not of other partners.**

5.2 Extent of liability of LLP [Section 27]

LLP is not bound by anything done by a partner in dealing with a person if -

- Partner is acting without authority
- The person knows that he has no authority or does not know or believe him to be a partner [Sub-section (1)]

LLP is liable if a partner is liable to any person -

- As a result of wrongful act or omission in the course of business, or
- Acting with its authority. [Sub-section (2)]

- ✓ An obligation of the LLP whether arising in contract or otherwise, shall be **solely the obligation of the LLP [Sub-section (3)]**.
- ✓ The liabilities of the LLP shall be **met out of the property of the LLP. [Sub-section (4)]**

5.3 Extent of liability of partner [Section 28]

- A **partner is not personally liable**, directly or indirectly for an obligation referred to in section 27(3) solely by reason of being a partner of the LLP.
- **A partner shall be personally liable for his own wrongful act or omission, but a partner shall not be personally liable for the wrongful act or omission of any other partner of the LLP.**

5.4 Holding out [Section 29]

- Any person,**
 - who by words spoken or written or by conduct,
 - **represents himself**, or knowingly permits himself to be represented **to be a partner in a LLP**
 - **is liable to any person**
 - **who has on the faith of any such representation**
 - **given credit to the LLP**, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.
- ii) However, **where any credit is received by the LLP as a result of such representation, LLP shall**, without prejudice to the liability of person so representing himself or represented to be a partner, **be liable to extent of credit received by it or any financial benefit derived thereon.**
- iii) Where after a partner's death the business is continued in the same LLP name, the **continued use of that name or of the deceased partner's name** as a part thereof **shall not of itself**

make his legal representative or his estate liable for any act of the LLP done after his death.

5.5 Unlimited liability in case of fraud [Section 30]

- Where the LLP or any of its partners act with the intent to defraud creditors of the LLP or any other person, or for any fraudulent purpose, **the liability of the LLP and partners who acted with intent to defraud** creditors or for any fraudulent purpose shall be **unlimited** for all or any of the debts or other liabilities of the LLP.
- However, in case any such **act is carried out by a partner**, the **LLP is liable to the same extent as the partner** unless it is established by the LLP that such act was without the knowledge or the authority of the LLP.
- **Punishment –**
 1. Every **person who was knowingly a party** to the carrying on of the business in the fraudulent manner or with the intention to defraud shall be **punishable with**
 - ✓ **Imprisonment** for a term which may extend to **5 years and**
 - ✓ **Fine** which shall not be less than **₹ 50,000** but which may extend to **₹ 5 lakhs.**
 2. **Apart from the criminal proceedings which may arise**, the LLP and any such partner or designated partner or employee shall be **liable to pay compensation to any person who has suffered any loss or damage by reason of such conduct.**

However, such LLP shall not be liable if any such partner or designated partner or employee has acted fraudulently without knowledge of LLP.

5.6 Whistle blowing [Section 31]

1. Reduced Penalty –

The Court or Tribunal may reduce or waive any penalty **leviable against any partner or employee of a LLP**, if it is satisfied that –

- Such **partner or employee of a LLP has provided useful information** during investigation of such LLP; **or**
- When **any information given by any partner or employee** (whether or not during investigation) **leads to LLP or any partner or employee of such LLP being convicted** under this Act or any other Act.

2. Protection for partner/ employee –

No partner or employee of any LLP may be discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against the terms and conditions of his LLP or employment merely because of his providing information or causing information to be provided.

CONTRIBUTIONS

Form of contribution [Section 32]

- (1) A contribution of a partner may consist of tangible, movable or immovable or intangible property or other benefit to the limited liability partnership, including money, promissory notes, other agreements to contribute cash or property, and contracts for services performed or to be performed.
- (2) The monetary value of contribution of each partner shall be accounted for and disclosed

in the accounts of the limited liability partnership in the manner as may be prescribed.

Obligation to contribute [Section 33]

- (1) The obligation of a partner to contribute money or other property or other benefit or to perform services for a limited liability partnership shall be as per the limited liability partnership agreement.
- (2) A creditor of a limited liability partnership, which extends credit or otherwise acts in reliance on an obligation described in that agreement, without notice of any compromise between partners, may enforce the original obligation against such partner.

Financial Disclosures

6.1 Maintenance of books of account, other records and audit, etc. [Section 34]

Proper Books of Account			
LLP to maintain proper books as prescribed relating to its affairs for each year of its existence.	On cash basis or accrual basis.	According to double entry system of accounting	To be kept at the registered office for such period as prescribed.
↓			
Statement of Account and Solvency			
As at the last day of each F.Y.	To be prepared within 6 months of the end of the F.Y. in such form as prescribed.	To be signed by the designated partners of the LLP.	To be filed with the Registrar every year within prescribed time
↓			
Audit of Accounts			
To be audited in accordance with the prescribed rules.	CG may, by notification in the Official Gazette, exempt any class or classes of LLP		
↓			
Failure to comply with Sec. 34			
LLP - Fine not less than ₹25,000/- but which may extend to ₹5 lakhs		Designated Partner - Fine not less than ₹10,000/- but which may extend to ₹ 1 lakh.	

→ Penalty for failure to file Statement of Solvency with the Registrar-

LLP and Designated Partners - ₹ 100 per day during which the default continues subject to maximum of ₹ 1,00,000 for LLP and ₹ 50,000 for designated partners.

→ Fine in case of non-compliance with provisions of Sec 34(1), 34(2) and 34(4) -

LLP – Minimum Rs. 25,000 and Maximum – Rs. 5,00,000
 Designated Partner – Minimum Rs. 10,000 and Maximum – Rs. 1,00,000

6.2 Accounting and auditing standards [Section 34A]

The Central Government may, in consultation with the National Financial Reporting Authority constituted under section 132 of the Companies Act, 2013,—

- (a) prescribe the standards of accounting; and
- (b) prescribe the standards of auditing,

as recommended by the Institute of Chartered Accountants of India constituted under section 3 of the Chartered Accountants Act, 1949, for a class or classes of limited liability partnerships.

6.3 Annual return [Section 35]

- Every LLP shall **file an annual return duly authenticated** with the **Registrar within 60 days closure of its financial year** in such form and manner and accompanied by such fee as may be prescribed.
- **Punishment for failure to comply –**

The LLP contra-
 distinct from **of**
 Partnership Act,
 1932 has
 prescribed the

	Minimum fine	Maximum Fine
LLP	₹ 100/day	₹ 1 lakh
Designated Partner	₹ 100/day	₹50,000

As per section 2(1)(l), “Financial Year” in relation to LLP means – the period from the **1st day of April of a year to the 31st day of March** of the following year.

Provided that in the case of a limited liability partnership incorporated after the 30th day of September of a year, the financial year may end on the 31st day of March of the year next following that year.

Example: If a LLP has been incorporated on 15th October, 2020, then its financial year may be from 15th October, 2020 to 31st March, 2022.

In keeping with the Income tax law, the financial year for LLP should be from 1st April to 31st March each year.

INSPECTION OF DOCUMENTS KEPT BY REGISTRAR [SECTION 36]

The incorporation document, name of partners and changes, if any, made therein, Statement of

Account and Solvency and annual return filed by each LLP with the Registrar shall be available for inspection by any person in such manner and on payment of such fee as may be prescribed.

PENALTY FOR FALSE STATEMENT [SECTION 37]

If in any return, statement or other document required by or for the purposes of any of the provisions of this Act, any person makes a statement—

- (a) which is false in any material particular, knowing it to be false; or
 - (b) which omits any material fact knowing it to be material,
1. Punishable with imprisonment for a term which may extend to 2 years
 2. Shall also be liable to fine which may extend to 5 Lakh but shall not be less than 1 Lakh rupees.

POWER OF REGISTRAR TO OBTAIN INFORMATION [SECTION 38]

- (1) In order to obtain such information as the Registrar may consider necessary for the purposes of carrying out the provisions of this Act, the Registrar may require any person including any present or former partner or designated partner or employee of a limited liability partnership to answer any question or make any declaration or supply any details or particulars in writing to him within a reasonable period.
- (2) In case any person referred to in sub-section (1) does not answer such question or make such declaration or supply such details or particulars asked for by the Registrar within a reasonable time or time given by the Registrar or when the Registrar is not satisfied with the reply or declaration or details or particulars provided by such person,
 - the Registrar shall have power to summon that person to appear before him or an inspector or
 - any other public officerwhom the Registrar may designate, to answer any such question or make such declaration or supply such details.
- (3) Any person who, without lawful excuse, fails to comply with any summons or requisition of the Registrar under this section shall be punishable with fine which shall not be less than 2,000 rupees but which may extend to 25,000 rupees.

COMPOUNDING OF OFFENCES [SECTION 39]

- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Regional Director or any other officer not below the rank of Regional Director authorised by the Central Government may compound any offence under this Act which is punishable with fine only.
- (2) Nothing contained in sub-section (1) shall apply to an offence committed by a limited liability partnership or its partner or its designated partner within a period of three years from the date on which similar offence committed by it or him was compounded under this section.
- (3) Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon, to the Regional Director or any other officer not below the rank of Regional Director authorised by the Central Government.
- (4) Where any offence is compounded under this section, whether before or after the

institution of any prosecution, intimation thereof shall be given to the Registrar within a period of seven days from the date on which the offence is so compounded.

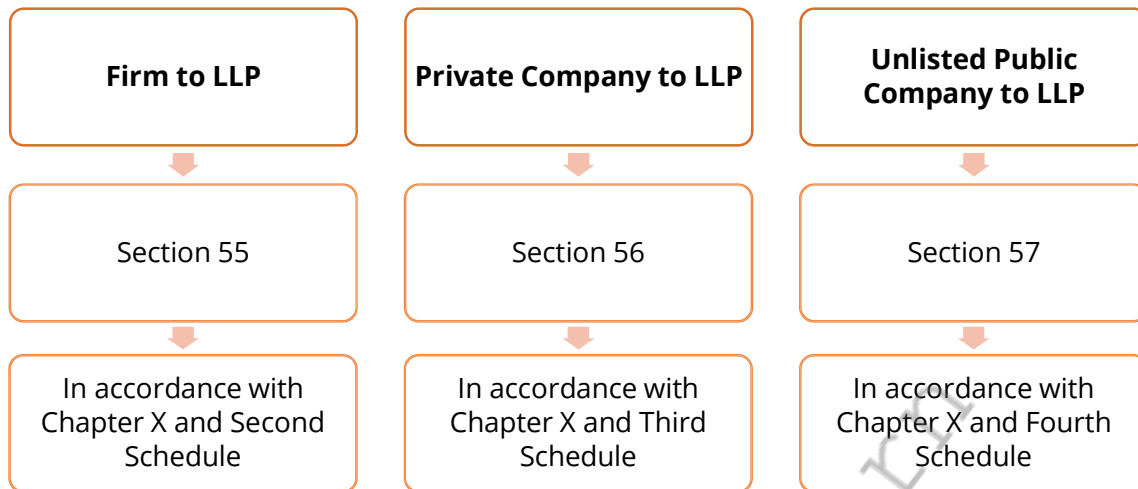
- (5) Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence.
- (6) Where the compounding of any offence is made after the institution of any prosecution, such compounding shall be brought by the Registrar in writing, to the notice of the court in which prosecution is pending and on such notice of the compounding of the offence being given, the offender in relation to which the offence is so compounded shall be discharged.
- (7) The Regional Director or any other officer not below the rank of Regional Director authorised by the Central Government, while dealing with the proposal for compounding of an offence may, by an order, direct any partner, designated partner or other employee of the LLP to file or register, or on payment of fee or additional fee as required to be paid under this Act, such return, account or other document within such time as may be specified in the order.
- (8) Notwithstanding anything contained in this section, if any partner or designated partner or other employee of the LLP who fails to comply with any order made by the Regional Director or any other officer not below the rank of Regional Director authorised by the Central Government, under sub-section (7), the maximum amount of fine for the offence, which was under consideration Regional Director or such authorised officer for compounding under this section shall be twice the amount provided in the corresponding section in which punishment for such offence is provided.

Assignment and Transfer of Partnership Rights

PARTNER'S TRANSFERABLE INTEREST [SECTION 42]

- (1) The rights of a partner to a share of the profits and losses of the LLP and to receive distributions in accordance with the LLP agreement are transferable either wholly or in part.
- (2) The transfer of any right by any partner pursuant to sub-section (1) does not by itself cause the disassociation of the partner or a dissolution and winding up of the LLP.
- (3) The transfer of right pursuant to this section does not, by itself, entitle the transferee or assignee to participate in the management or conduct of the activities of the limited liability partnership, or access information concerning the transactions of the LLP.

Conversion into LLP



1. Certificate of Registration -

The **Registrar**, on satisfying that a firm, private company, or an unlisted public company, as the case may be, has complied with the provisions of the various Schedules, provisions of this Act and the rules made thereunder, **register the documents** and **issue a certificate of registration** in such form as the Registrar may determine stating that the LLP is, on and from the date specified in the certificate, registered under this Act.

2. LLP to inform the Registrar -

The LLP shall, **within 15 days of the date of registration, inform the concerned Registrar of Firms or Registrar of Companies**, as the case may be, with which it was registered under the provisions of the Indian Partnership Act, 1932 or the Companies Act, 2013 **about the conversion** and of the particulars of the LLP in such form and manner as may be prescribed.

3. Effects of conversion -

- Upon such conversion, the **partners** of the firm, the **shareholders** of private company or unlisted public company, as the case may be, the **LLP** to which such firm or such company has converted, and the **partners of the LLP** shall be **bound by the provisions of the various Schedules**, as the case may be, applicable to them.
- On and from the date of certificate of registration, the effects of the conversion shall be such as specified in the various schedules, as the case may be.

4. Effect of Registration -

- i) There shall be a LLP by the name specified in the certificate of registration registered under this Act.
- ii) **All tangible and intangible property** vested in the firm or the company, **all assets, interests, rights, privileges, liabilities, obligations** relating to the firm or the company, as the case may be, **and the whole of the undertaking** of the firm or the company, as the case may be, shall be **transferred to and shall vest in the LLP** without further assurance, act or deed.
- iii) **The firm or the company**, as the case may be, shall be **deemed to be dissolved** and removed from the records of the Registrar of Firms or Registrar of Companies, as the case may be.

Foreign LLP [Section 59]

The **Central Government may make rules** for provisions in relation to -

- **Establishment of place of business** by foreign LLP within India **and**
- **Carrying on their business** therein by applying or incorporating, with such modifications, as appear appropriate, the provisions of the Companies Act, 2013 or such regulatory mechanism with such composition as may be prescribed.

Compromise, Arrangement or Reconstruction of LLP [Section 60]

- (2) Where a compromise or arrangement is proposed –
- (a) Between a LLP and its creditors or
 - (b) Between a LLP and its partners

The Tribunal may, on the application of the LLP or of any creditor or partner of the LLP or in the case of a LLP which is being wound up, of the liquidator, order a meeting of the creditors or of the partners, as the case may be, to be called, held and conducted in such manner as may be prescribed or as the Tribunal directs.

- (3) If a majority representing three-fourths in value of the creditors, or partners, as the case may be, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Tribunal, by order be binding on all the creditors or all the partners, as the case may be, and also on the LLP.

In the case of a limited liability partnership which is being wound up, on the liquidator and contributories of the limited liability partnership:

Provided that no order sanctioning any compromise or arrangement shall be made by the tribunal unless the Tribunal is satisfied that the LLP or any other person by whom an application has been made under sub-section (1) has disclosed to the Tribunal by affidavit or otherwise

- (a) All material facts relating to the LLP
 - (b) Latest Financial position of LLP
 - (c) Pendency of any investigation proceedings in relation to LLP
- (4) An order made by the Tribunal under sub-section (2) shall be filed by the limited liability partnership with the Registrar within thirty days after making such an order and shall have effect only after it is so filed.
- (5) If default is made in complying with the provisions of sub-section (3), the LLP and its every designated partner shall be liable to a penalty of 10,000 and in case of continuing default, with further penalty of 100 for each day after the first during which such default continues, subject to maximum 1,00,000 for LLP and 50,000 for every designated partner.
- (6) The Tribunal may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the LLP on such terms as the Tribunal thinks fit, until the application is finally disposed of.

Power of Tribunal to Enforce Compromise or Arrangement (Section 61)

12. Where the tribunal makes an order under Sec 60
1. Shall have power to supervise the carrying out of the compromise or an arrangement and
 2. May, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modification in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.
13. If the Tribunal aforesaid is satisfied that a compromise or an arrangement sanctioned under section 60 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the LLP,

make an order for winding up the LLP, and such an order shall be deemed to be an order made under section 64 of this Act.

Provisions for Facilitating Reconstruction or Amalgamation of LLP [Section 62]

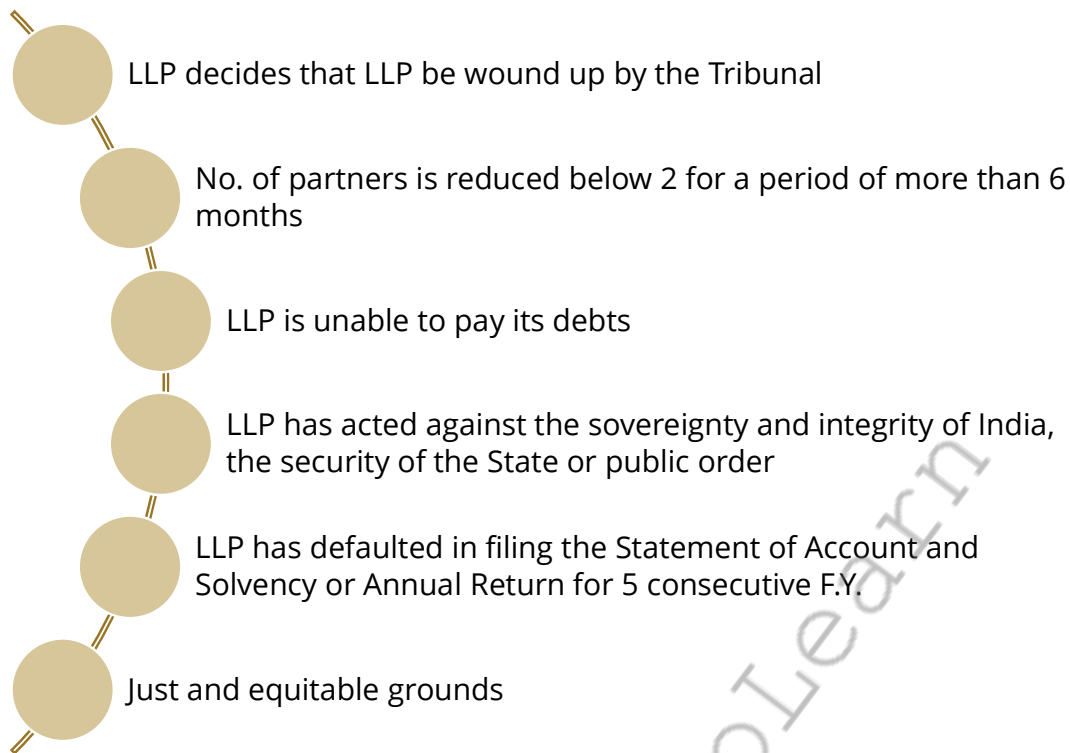
1. Where an application is made to the Tribunal under section 60 for sanctioning of a compromise or arrangement proposed between a limited liability partnership and any such persons as are mentioned in that section, and it is shown to the Tribunal that—
 - a. Compromise or arrangement has been proposed for the purpose of, or in connection with, a scheme for the reconstruction of any LLP's or the amalgamation of two or more LLPs and
 - b. Under the scheme the whole or any part of the undertaking, property or liabilities of any LLP concerned in the scheme is to be transferred to another LLP, the tribunal may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provisions for all or any of the following matters-
 - (ii) The transfer to the transferee limited liability partnership of the whole or any part of the undertaking, property or liabilities of any transferor limited liability partnership;
 - (iii) The contribution by or against the transferee LLP of any legal proceedings pending by or against any transferor LLP
 - (iv) The dissolution, without winding up, of any transferor LLP
 - (v) The provisions to be made for any person who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement
 - (vi) Such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.
2. Where an order for the transfer of any property or liabilities, then by virtue of the order, the property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee LLP
3. Within 30 days after making of an order, every LLP in relation to which the order is shall cause a certified copy thereof to be filed with the Registrar for registration.
4. If default is made in complying with the provisions of sub-section (3), the LLP and its every designated partner shall be liable to a penalty of 10,000 and in case of continuing contravention, with further penalty of 100 for each day after the first during which such default continues, subject to maximum 1,00,000 for LLP and 50,000 for every designated partner'.

(vii) In this section 'property' includes property, rights and powers of every description and 'liabilities' includes duties of every description

(ii) A LLP shall not be amalgamated with a company.

Winding Up and Dissolution

- The winding up of a LLP may be **either voluntary or by the Tribunal** and
- LLP, so wound up may be **dissolved [Section 63]**.
- **Circumstances in which LLP may be wound up by Tribunal [Section 64]**



- The **Central Government may make rules** for the provisions in relation to winding up and dissolution of LLP [Section 65].

Miscellaneous

10.1 Business transactions of partner with LLP [Section 66]

A partner may lend money to and transact other business with the LLP and has the **same rights and obligations with respect to the loan or other transactions as a person who is not a partner.**

10.2 Application of the provisions of the Companies Act [Section 67]

- The **Central Government** may, by **notification in the Official Gazette**, direct that any of the provisions of the Companies Act, 2013 specified in the notification –
 - shall apply to any LLP, or
 - shall apply to any LLP with such exception, modification and adaptation, as may be specified, in the notification.
- A **copy** of every notification proposed to be issued under sub-section (1)
 - Shall be **laid in draft before each House of Parliament**, while it is in session, **for a total period of 30 days** which may be comprised in one session or in two or more successive sessions, **and**
 - **If both Houses agree in disapproving** the issue of the notification **or both Houses agree in making any modification** in the notification, **the notification shall not be issued or, as the case may be, shall be issued only in such modified form** as may be agreed upon by both the Houses.

10.3 Payment of additional fee [Section 69]

If any document or return required to be filed or registered under this Act with the Registrar is **not filed or registered in time** provided therein –

- ✓ It may be filed or registered after that time on **payment of such additional fee as may be prescribed** in addition to any fee as is payable for filing of such document or return,
- ✓ Such document or return shall be filed after due date of filing, without prejudice to any other action or liability under this Act.
- ✓ A different fee or additional fee may be prescribed for different classes of LLP or for different documents or returns required to be filed under this Act or rules made thereunder.

10.4 Enhanced Punishment

In case a LLP or any partner or designated partner of such LLP commits any offence, the LLP or any partner or designated partner shall, for the second or subsequent offence, be punishable with imprisonment as provided, but in case of offences for which fine is prescribed either along with or exclusive of imprisonment, with fine which shall be twice the amount of fine for such offence.

Differences with other Forms of Organisation

11.1 Distinction between LLP and Partnership Firm

Basis	LLP	Partnership firm
Regulating Act	The Limited Liability Partnership Act, 2008.	The Indian Partnership Act, 1932.
Body corporate	It is a body corporate.	It is not a body corporate
Separate legal entity	It is a legal entity separate from its members.	It is a group of persons with no separate legal entity.
Creation	By a legal process called registration under the LLP Act, 2008.	By an agreement between the partners.
Registration	Registration is mandatory.	Registration is voluntary.
Perpetual succession	The death, insanity, retirement or insolvency of the partner(s) does not affect existence of LLP.	Death, insanity, retirement or insolvency of the partner(s) may affect its existence. It has no perpetual succession.
Name	Name of the LLP to contain the word limited liability partners (LLP) as suffix.	No guidelines. The partners can have any name as per their choice.
Liability	Liability of each partner limited to the extent to agreed contribution except in case of willful fraud.	Liability of each partner is unlimited. It can be extended up to the personal assets of the partners.
Mutual agency	Each partner can bind the LLP by his own acts but not the other partners.	Each partner can bind the firm as well as other partners by his own acts.
Designated partners	At least 2 designated partners and at least one of them shall be resident in India.	There is no provision for such partners under the Partnership Act, 1932.
Common seal	It may have its common seal as its official signatures.	There is no such concept in partnership

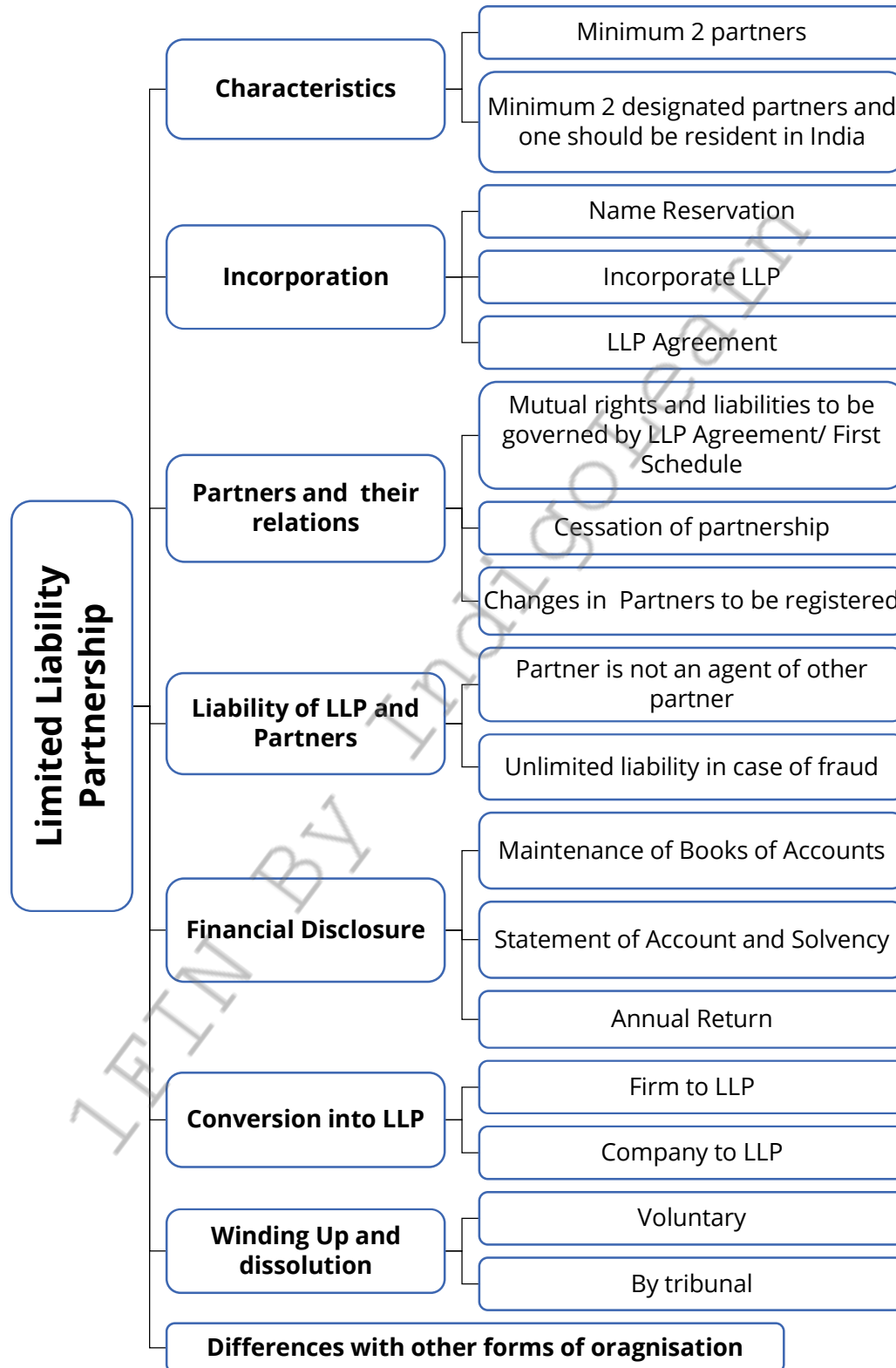
Legal compliances	Only designated partners are responsible for all the compliances and penalties under this Act.	All partners are responsible for all the compliances and penalties under the Act.
Annual filing of documents	LLP is required to file: i) Annual statement of accounts ii) Statement of solvency iii) Annual return every year.	Partnership firm is not required to file any annual document with the registrar of firms.
Foreign partnership	Foreign nationals can become a partner in a LLP.	Foreign nationals cannot become a partner in a partnership firm.
Minor as partner	Minor cannot be admitted to the benefits of LLP.	Minor can be admitted to the benefits of the partnership with the prior consent of the existing partners.

11.2 Distinction between LLP and Limited Liability Company

Basis	LLP	Limited Liability Company
Regulating Act	The Limited Liability Partnership Act, 2008.	The Companies Act, 2013.
Members/ Partners	The persons who contribute to LLP are known as partners of the LLP.	The persons who invest the money in the shares are known as members of the company.
Internal governance structure	Governed by contract agreement between the partners.	Regulated by statute (i.e., Companies Act, 2013).
Name	To contain word "Limited Liability partnership" or "LLP" as suffix.	To contain word "limited" and Pvt. Co. to contain the word "Private limited" as suffix.
No. of members/ partners	Minimum – 2 members Maximum – No such limit on the members in the Act.	<ul style="list-style-type: none"> • Private company: Minimum – 2 members Maximum 200 members • Public company: Minimum – 7 members Maximum – No such limit on the members. • OPC – One member
Members	Members of the LLP can be individuals/or body corporate through the nominees.	Members can be organizations, trusts, another business form or individuals.
Liability of members/ partners	Limited to the extent of agreed contribution in except in case intention is fraud.	Limited to the amount unpaid on the shares held by them.
Management	Managed by the partners including the designated partners authorized in the agreement.	Managed by the partners including the designated partners authorized in the agreement.

Minimum number of directors/ designated partners	Minimum 2 designated partners.	Pvt. Co. – 2 directors Public co. – 3 directors
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Overview



THE GENERAL CLAUSES ACT, 1897

Learning Outcomes –

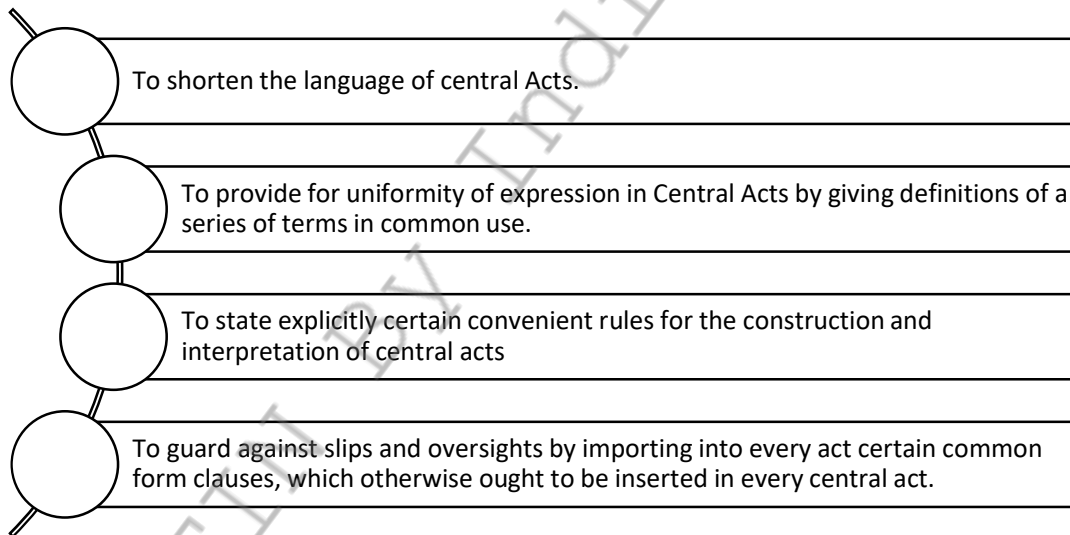
- Explain the purpose of General Clauses Act.
- Acquire some basic understanding of the legislation.
- Know the general definitions under the Act.
- Identify general rules of construction.
- Know powers and functionalities
- Explain powers as to orders, rules etc. made under enactments.
- Know other miscellaneous provisions.

1. INTRODUCTION

- The General Clauses Act, 1897 (the Act) was enacted on **11th March 1897**.
- This act contains **definitions of certain terms and general principles of interpretation**.
- The general definitions provided are **applicable to all the Central Acts and Regulations in the absence of definition of a particular word in any act or regulation** unless there is anything repugnant in the subject or context.

2. OBJECT, PURPOSE AND IMPORTANCE OF GENERAL CLAUSES ACT

2.1 Objects of the Act



2.2 Purpose and Importance of the Act

- The purpose of the General Clauses Act is **to place in one single statute different provisions as regards interpretation of words and legal principles** which would otherwise have to be specified separately in different Acts and regulations.
- The Act **helps to avoid superfluity** (i.e., excess) **of language in statutes** wherever it is possible to do so.

3. APPLICATION OF THE GENERAL CLAUSES ACT

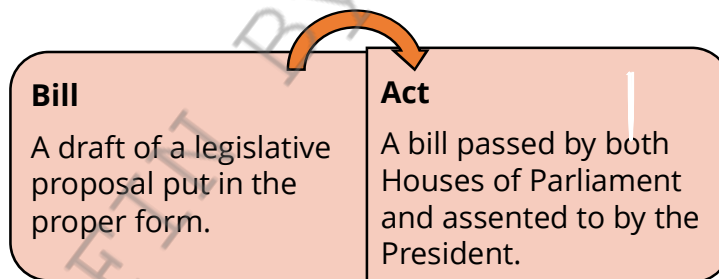
- 1) GCA, 1897 is **used with reference to all Central legislation** and also to rules and regulations made under a Central Act, i.e.,
 - a. **Acts of the Indian Parliament** (central act) along with the rules and regulations made under the central act,
 - b. **Acts of the Dominion Legislature** passed between 15th August 1947 and 26th January 1950,
 - c. **Acts passed before the commencement of the Constitution** by the Governor-General in Council or the Governor-General acting in a legislative capacity. The Act does not define any "territorial extent" clause.
- 2) Act also serves as a **model for State General Clauses Act**. We can say that the state legislature shall also be interpreted with reference to this act.
- 3) **Article 367** of the Constitution of India authorises the use of General Clauses Act for the **interpretation of the constitution**.

4. SOME BASIC UNDERSTANDING OF LEGISLATION

4.1 Preamble

Every Act has a preamble which **expresses the scope, object, and purpose of the Act**. The Preamble to an Act **discloses the primary intention** of the legislature but can only be brought in as an aid to construction if the language of the statute is not clear. **However, it cannot override the provisions of the enactment.**

Example: Preamble of the Companies Act, 2013 states – **An Act to consolidate and amend the law relating to companies.**



4.2 Definitions

- The object of the **definition clause is to avoid the necessity of frequent repetitions in describing all the subject matter** to which the word or expression so defined is intended to apply.
- They are **usually contained in section 2 or 3** of an act.

- However, if there may be **words which are not defined in the definitions** of that Act, the meaning of such words **may be taken from other relevant Acts or the General Clauses Act, 1897.**

4.3 "Means" and/or "include"

Example 1: Word 'Security' used in the Companies Act, is not defined in the respective Act. It has been defined under section 2(h) of the Securities Contracts (Regulations) Act, 1956.

Example 2: The word 'Affidavit' used in Sec. 7 during the incorporation of company, in the Companies Act, 2013, shall derive its meaning from the word 'Affidavit' as defined in the General Clauses Act, 1897.

- ✓ **"Means"**- makes a definition **exhaustive in nature**, i.e., no other words can be added to the definition other than mentioned words.

Example: Definition of 'Company' as given in section 2(20) of the Companies Act, 2013. It states, "Company" means a company incorporated under this Act or under any previous company law.

- ✓ **"Includes"** - Some definitions use the word "include". Such definitions are **inclusive in nature**. The word defined is not restricted to the meaning.
- ✓ **"Means and includes"** - Here the definition would be **exhaustive**. No new terms can form part of the definition other than those mentioned therein.
- ✓ **"to apply to and include"** - Here the definition is extensive i.e., the term can include more

Example: Word 'debenture' defined in Section 2 (30) of the Companies Act, 2013 states that 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.

similar items.

4.4 "Shall" and "May" -

- ✓ **'Shall'** is used to raise a presumption of something which is mandatory

Example: Word 'share' defined in Section 2 (84) of the Companies Act, 2013 states that share means a share in the share capital of a company and includes stock.

- ✓ **'May'** is used to connote some provision is only directory or enabling or optional.

- ✓ However, in certain cases, 'may' is read as 'shall' and vice versa.

Example: Section 3 of the Companies Act, 2013 states that "A company may be formed for any lawful purpose by". Here the word used "may" shall be read as "shall".

- ✓ Use of word **shall** with respect to one matter and use of word **may** with respect to another matter in the same section of a statute, will normally lead to the conclusion that the word **shall** imposes an obligation, whereas word **may** confers a discretionary power (Labour Commr., M.P.V. Burhanpur Tapti Mill, AIR, 1964 SC1687)

5. DEFINITIONS

Section 3 of the General Clauses Act, 1897 seeks to define 67 phrases and terms commonly used in enactments and are intended to serve as a dictionary for the phrases.

Sections	Definitions	Notes
Sec 3(2)	'Act', used with reference to an offence or a civil wrong, shall include a series of acts, and words which refer to acts done extend also to illegal omissions	<ul style="list-style-type: none"> • Includes positive act and abstaining from doing an act • Included civil wrongs, criminal wrongs (E.g.: murder/beating) and illegal omissions (E.g.: wrongfully neglecting or refusing to supply him with food at proper times) • Not Include - omission which is legal.
Sec 3(3)	'Affidavit' shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing.	<ul style="list-style-type: none"> • Affidavit is a written statement confirmed by oath or affirmation for use as evidence in Court or before any authority. • Include affirmation and declarations
Sec 3(7)	'Central Act' shall mean an Act of Parliament, and shall include- (a) An Act of the Dominion Legislature or of the Indian Legislature passed before the commencement of the Constitution, and (b) An Act made before such commencement by the Governor General in Council or the Governor General, acting in a legislative capacity;	The date of the commencement of the Constitution is 26th January 1950.

<p>Sec 3(8)</p>	<p>'Central Government' shall-</p> <p>(a) In relation to anything done before the commencement of the Constitution, mean the Governor General in Council, as the case may be and shall include,-</p> <p>i) In relation to functions entrusted to the Government of a Province,</p> <p>ii) In relation to the administration of a Chief Commissioner's Province, and</p> <p>(b) In relation to anything done or to be done after the commencement of the constitution of the Constitution, mean the President; and shall include-</p> <p>i) In relation to function entrusted under the Constitution, to the Government of a state, the State Government acting within the scope of the authority given to it under that clause,</p> <p>ii) In relation to the administration before the commencement of the Constitution, the Chief Commissioner or the Lieutenant Governor or the Government of a neighbouring State or other authority acting within the scope of the authority given to him and in relation to the administration of a Union territory, the administrator thereof acting within the scope of the authority given to him.</p>	<ul style="list-style-type: none"> • Crux → CG has been divided in two parts. Pre constitutional (before 26 Jan 1950) and post constitution. • Authorities governing states/provinces during that times shall constitute CG. • Before 1950, states were divided into provinces and ruled by British governors & Rajpramukhs. • After 1950, states and union territories were governed by their governors & ministers. And president had power over all Indian constituencies. Thus they all form part of CG.
<p>Sec 3(13)</p>	<p>'Commencement' used with reference to an Act or Regulation, shall mean the day on which the Act or Regulation comes into force.</p>	<p>coming into force or entry into force (also called commencement) refers to the process by which legislation; regulations, treaties and other legal instruments come to have legal force and effect.</p>
<p>Sec 3(18)</p>	<p>'Document' shall include any matter written, expressed, or described upon any substance by means of letters, figures, or marks or by more than one of those means which is intended to be used or which may be used, for the purpose or recording that matter.</p>	<ul style="list-style-type: none"> • Must be in writing • Includes substance on which matter is written • Purpose: Recording matter
<p>Sec 3(19)</p>	<p>'Enactment' shall include a Regulation or any Act (or a provision contained therein) made by the Union Parliament or the State Legislature</p>	<ul style="list-style-type: none"> • Includes any Act (or a provision contained therein) made by the Union Parliament or the State Legislature • Includes Rules & Regulations, notifications (as they are enacted by the those delegated with power of legislature)

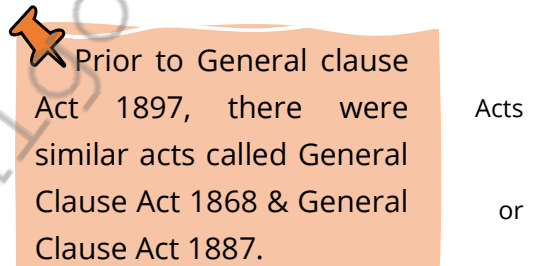
Sec 3(21)	Financial year shall mean the year commencing on the first day of April.	<ul style="list-style-type: none"> • Difference between Financial Year and Calendar Year: Financial year starts from first day of April, but Calendar Year starts from first day of January.
Sec 3(22)	'Good faith' -A thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not.	<ul style="list-style-type: none"> • Anything done with due care and attention, which is not malafide is presumed to have been done in good faith • definition of the good faith does not apply to that enactment which contains a special definition of the term "good faith"
Sec 3(23)	'Government' or 'the Government' shall include both the Central Government and State Government.	<ul style="list-style-type: none"> • Includes → CG & SG • Government generally connotes three wings, the Legislature, the Executive and the Judiciary; but in a narrow sense it is used to connote the Executive only
Sec 3(24)	'Government securities' shall mean securities of the Central Government or of any State Government, but in any Act or Regulation made before the commencement of the Constitution.	<ul style="list-style-type: none"> • Includes → CG & SG securities • Not include → those govt. securities issued before constitution was made
Sec 3(26)	'Immovable Property' shall include: <ul style="list-style-type: none"> i) Land, ii) Benefits to arise out of land, and iii) Things attached to the earth, or iv) Permanently fastened to anything attached to the earth. 	<ul style="list-style-type: none"> • It is an inclusive definition • E.g.: right to build on and occupy the land, right to grow new trees and to get leaves from trees, right of way to access from one place, machinery fixed to the soil → Immovable property • Where, in any enactment, the definition of immovable property is in the negative (stating what it does not include), the definition as given in the General Clauses Act will apply • In Shantabai v. State of Bombay, the SC pointed out that trees must be regarded as immovable property because they are attached to or rooted in the earth
Sec 3(27)	'Imprisonment' shall mean imprisonment of either description as defined in the Indian Penal Code (45 of 1860)	<ul style="list-style-type: none"> • By section 53 of the Indian Penal Code, the imprisonment is of two descriptions, namely, rigorous, that is with hard labour and simple.
Sec 3(29)	'Indian law' shall mean any Act, Ordinance, Regulation, rule, order, bye law or other instrument which before the commencement of the Constitution, had the force of law in any Province of India or part thereof.	<ul style="list-style-type: none"> • Laws applicable before commencement of constitution. • Not include → orders made under that law by any authorities

Sec 3(35)	'Month' shall mean a month reckoned according to the British calendar;	<ul style="list-style-type: none"> • However where there is specific definition given in any enactment, such definition shall prevail • E.g.: The word "month" occurring in s.271 (l)(a)(i) of the Income-tax Act, 1961, was construed to mean a period of thirty days and not a month as defined in the General Clauses Act;
Sec 3(36)	'Movable Property' shall mean property of every description, except immovable property.	<ul style="list-style-type: none"> • E.g.: Debts, share, electricity are moveable property
Sec 3(37)	'Oath' shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing.	
Sec 3(38)	'Offence' shall mean any act or omission made punishable by any law for the time being in force.	<ul style="list-style-type: none"> • Include Act or omission +punishable by any law
Sec 3(39)	'Official Gazette' or 'Gazette' shall mean: <ul style="list-style-type: none"> i) The Gazette of India, or ii) The Official Gazette of a state. 	<ul style="list-style-type: none"> • It is a public journal and an authorised legal document of the Government of India. • published weekly by the Department of Publication, Ministry of Housing and Urban Affairs. (Government of India Press) • As a public journal, the Gazette prints official notices from the government. It is authentic in content, accurate and strictly in accordance with the Government policies and decisions.
Sec 3(42)	'Person' shall include: <ul style="list-style-type: none"> i) any company, or ii) association, or iii) body of individuals, whether incorporated or not 	
Sec 3(49)	'Registered' used with reference to a document, shall mean registered in India under the law for the time being force for the registration of documents.	
Sec 3(51)	'Rule' shall mean a rule made in exercise of a power conferred by any enactment and shall include a Regulation made as a rule under any enactment.	
Sec 3(52)	'Schedule' shall mean a schedule to the Act or Regulation in which the word occurs.	

Sec 3(54)	'Section' shall mean a section of the Act or Regulation in which the word occurs.	
Sec 3(61)	'Sub-section' shall mean a sub-section of the section in which the word occurs;	
Sec 3(62)	'Swear' , with its grammatical variations and cognate expressions, shall include affirming and declaring in the case of persons by law allowed to affirm or declare instead of swearing.	<ul style="list-style-type: none"> The terms "Affidavit", "Oath" and "Swear" have the same definitions in the Act.
Sec 3(65)	'writing' shall be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form;	
Sec 3(66)	'Year' shall mean a year reckoned according to the British calendar.	

5.1 Application to foregoing definitions to previous enactments [Section 4]

1) Definition of 'affidavit', 'immovable property', 'imprisonment', 'month', 'movable property', 'oath', 'person', 'section', 'and 'year' under General clause Act 1897 shall apply to all Central made after 3rd January 1868, and to all Regulations made on or after 14th January 1887 unless there is anything repugnant in the subject context.

 Prior to General clause Act 1897, there were Acts similar acts called General Clause Act 1868 & General Clause Act 1887. or

2) Definition of 'commencement', 'financial year', 'offence', 'registered', 'schedule', 'sub-section' and 'writing' under General clause Act 1897 shall apply to all Central Acts and Regulations made on or after 14th January 1887 unless there is anything repugnant in the subject or context.

5.2 Application of certain definitions to Indian Laws [Section 4A]

Definitions in section 3 of the expressions '**Central Act**', '**Central Government**', '**Gazette**', '**Government**', '**Government Securities**', '**Indian Law**', and '**Official Gazette**', shall apply to all Indian laws unless there is anything repugnant in the subject or context.

6. GENERAL RULES OF CONSTRUCTION

6.1 Coming into operation of enactment [Section 5]

Sections 5 to 13 of the General Clauses Act, 1897 lays down the general rules of construction of an Act.

Specific date of enforcement is prescribed in the Official Gazette

- Act shall come into effect on such date
- Court cannot pass any order against such date. It can, however, request the government to reconsider such date.



No date of commencement is specified for any Central Act

- Act shall be implemented from the date on which it received assent from -
 - a) Governor general for Central Acts, or
 - b) President for Act of Parliamentand published in the Official Gazette



Presumption against retrospectivity

- All laws shall be deemed prospective and not retrospective unless specified so in the notification.

In the case of *State of Uttar Pradesh v. Mahesh Narain*, Supreme Court held that **effective date of Rules** would be when the Rules are published vide Gazette notification and not from date when the Rules were under preparation.

Example 1: The Companies Act, 2013 received assent of President of India on 29th August 2013 and was notified in Official Gazette on 30th August, 2013 with the enforcement of section 1 of the Act. Accordingly, the Companies Act, 2013 came into enforcement on the date of its publication in the Official Gazette.

Example 2: SEBI (Issue of Capital and Disclosure Requirements) (Fifth Amendment) Regulations, 2015 was issued by SEBI vide Notification dated 14th August, 2015 with effect from 1 January, 2016. Here, this regulation shall come into force on 1st January, 2016 rather than the date of its notification in the gazette.

6.2 Effect of repeal [Section 6]

- ✓ **'Repeal' means cancel**, i.e., as if it never existed and it shall have no effect to anything prior of after such cancellation. E.g.: VAT is repealed.
- ✓ However, repealing any Act **does not change anything done as per the act in the past** when it was prevalent.
- ✓ Repealing is different from deletion. **'Deletion' means such provision/act existed till the date of deletion.** But does not exist on situation after deletion.

Where any Central legislation repeals any Act, unless another purpose exists, the repeal shall not:

Revive (bring back) anything not enforced or prevailed during the period at which repeal is effected

Affect the prior management of any legislation that is repealed or anything performed or undergone

Affect any claim, privilege, responsibility or debt obtained, ensued or sustained under any legislation so repealed

Affect any punishment, forfeiture or penalty sustained with regard to any offence committed as opposed to any legislation

Affect any inquiry, litigation or remedy with regard to such claim, privilege, debt or responsibility or any inquiry, litigation or remedy may be initiated, continued or insisted.

In *Kolhapur Canesugar Works Ltd. V, Union of India*, AIR 2000, SC 811, Supreme Court **held that Section 6 only applies to repeal** and not to omissions and applies when the repeal is of a Central Act or Regulation and not of a Rule.

6.3 Repeal of Act making textual amendment in Act or Regulation [Sec 6A]

Where an enactment was useful for the purpose of any provision of another enactment and the first enactment is repealed by government



It shall not affect the relevant provision in the second enactment and shall be amended to fit such repeal unless a different intention appears

6.4 Revival of repealed enactments [Section 7]

- To revive a repealed statute, it is **necessary to state an intention to do so.**
- This section applies also to all Central Acts made after 3rd January 1968 and to all Regulations made on or after 14th January 1887.

6.5 Construction of references to repealed enactments [Section 8]

Where part of the repealed enactment is revived with/without modification, then **references in any other enactment/instrument to the provision so repealed shall be construed as references to the provision so re-enacted** unless a different intention appears.

6.6 Commencement and termination of time [Section 9]

Example: In section 115 JB of the Income Tax Act, 1961, for calculation of book profits, the Companies Act, 1956 are required to be referred. With the advent of Companies Act, 2013, the corresponding change has not been made in section 115 JB of the Income Tax Act, 1961. On referring of section 8 of the General Clauses Act, book profits to be calculated under section 115 JB of the Income Tax Act will be as per the Companies Act, 2013.

For the purpose of calculating time:

- **First day in a series of days** or any other period of time shall be **excluded**,
- **Last day in a series of days** or any other period of time shall be **included**

Example: A company declares dividend for its shareholder in its Annual General Meeting held on 30/09/2016. Under the provisions of the Companies Act, 2013, company is required to pay declared dividend within 30 days from the date of declaration i.e. from 01/10/2016 to 30/10/2016. In this series of 30 days, 30/09/2016 will be excluded and last 30th day i.e., 30/10/2016 will be included.

6.7 Computation of time [Section 10]

Where any **legislation or regulation, any act or proceeding is to be done in any court or office on a certain day** or within a prescribed period and if the **Court or office is closed on that day or last day** of the prescribed period –

- the act or proceeding shall **done or taken in due time on the next day on which the Court or office is open.**

In *K. Soosalrathnam v. Div. Engineer, N.H.C. Tirunelveli*, it was held by Madras High Court that since the last date of the prescribed period was subsequent to the date of notification, declared to be a holiday on the basis of the principles laid down in this section the last date of prescribed period for obtaining the tender schedules was extended to the next working day.

6.8 Measurement of Distances [Section 11]

In the measurement of any distance, for the purposes of any Central Act or Regulation made after the commencement of this Act, that distance shall, unless a different intention appears, be **measured in a straight line on a horizontal plane.**

6.9 Duty to be taken pro rata in enactments [Section 12]

Any duty/tax leviable on any given quantity, by weight, measure or value of any goods or merchandise, **same duty shall be applicable on higher/lower quantity in proportionate basis.**

6.10 Gender and number [Section 13]

Example: Act says ₹ 100 duty leviable on goods of value ₹ 10,000. Then on value of goods equal to ₹ 20,000, duty shall be ₹ 200.

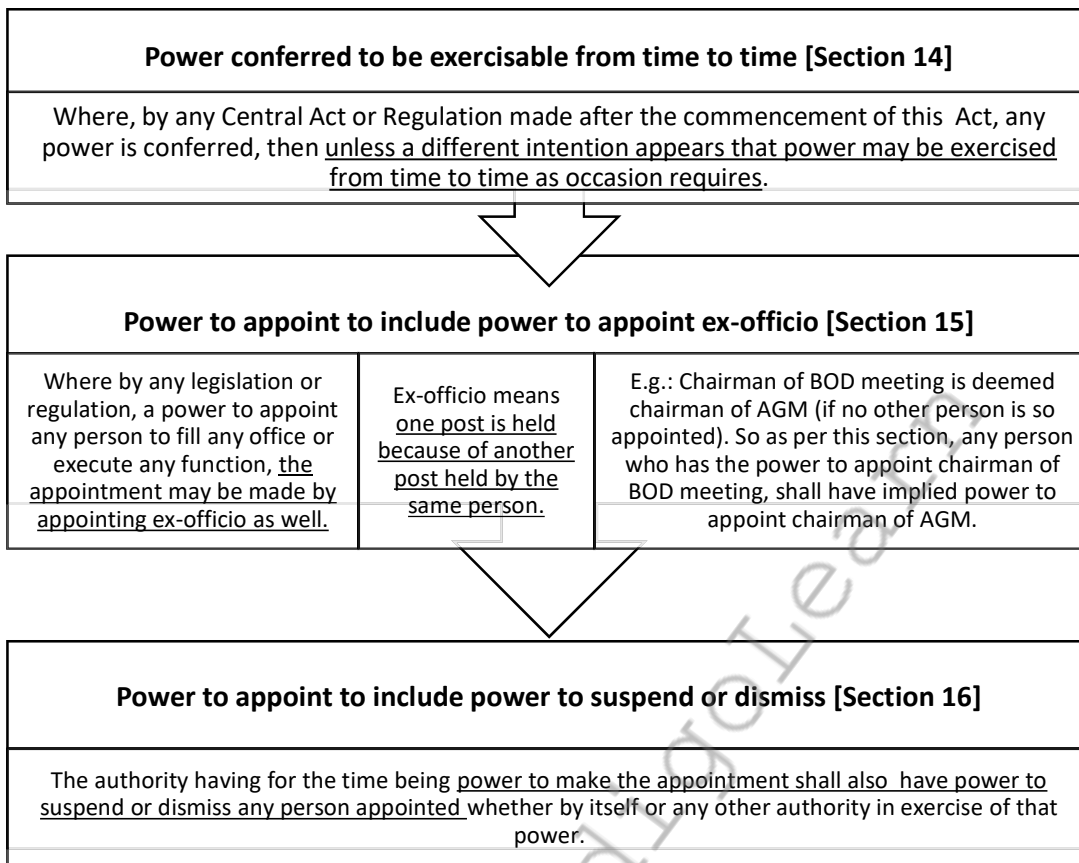
In all legislations and regulations, unless there is anything repugnant in the subject or context-

- masculine gender shall be taken to include females,
- singular shall include the plural and vice versa.

7. POWER AND FUNCTIONARIES

Sections 14 to 19 of the General Clauses Act, 1897 lays down the provisions relating to effect of powers conferred under any Act and functionaries under such Acts.

7.1 Powers



7.2 Functionaries

7.2.1 Substitution of functionaries [Section 17]

Where any persons, for the time being, are executing the functions of an office, it shall be **sufficient for them to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.**

7.2.2 Successors [Section 18]:

Example: Where minutes of general meeting are signed by the vice chairman instead of the chairman, he shall specify his position along

Example: Companies enjoy perpetual succession. Hence, the bye laws of the companies must specify who shall succeed in case of death of existing members/management.

In any **functionaries/corporations having perpetual succession**, the law of successors should be specified.

7.2.3 "Official Chiefs and subordinates" [Section 19]:

A law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior, to prescribe the duty of the superior.

In K.G. Krishnayya v. State, AIR 1959 it was held that it is not essential that same statutory authority that initiated a scheme under the Road Transport Corporation Act 1950, should also implement it. It is open to the successor authority to implement or continue the same.

8. PROVISION AS TO ORDERS, RULES ETC. MADE UNDER ENACTMENTS

8.1 Construction of orders, etc., issued under enactments [Section 20]

Sections 20 to 24 of the General Clauses Act, 1897 lays down the provisions as to orders, rules etc. made under enactments.

In Subhash Ram Kumar v. State of Maharashtra, it was held that **Notification** in common English acceptance mean and imply a formal announcement of a legally relevant fact and **notification publish in Official Gazette** means notification published by the authority of law. It is a formal declaration and should be in accordance with the declared policies or statute. Notification cannot be substituted by administrative instructions.

Any expression used in the notification, order, scheme, rule, form, or bye-law, shall, unless there is anything repugnant in the subject or context, **have the same respective meaning as in the Act or regulation conferring power.**

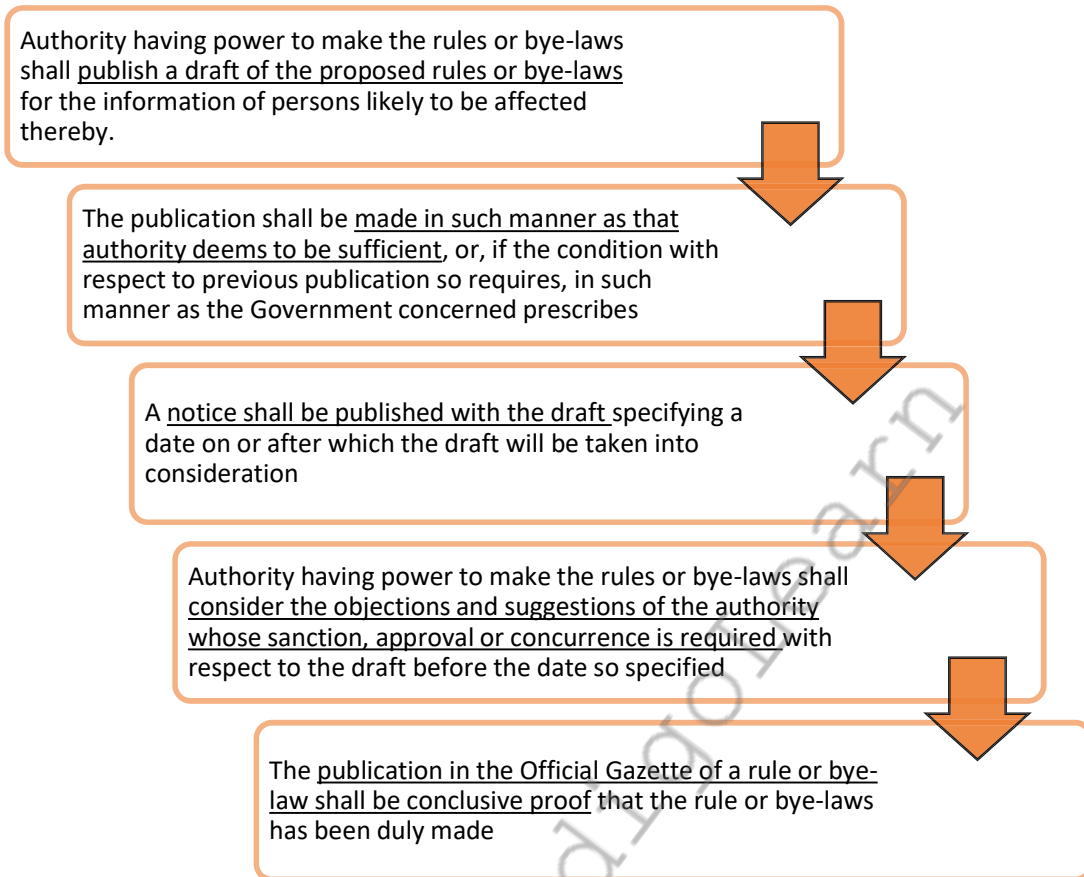
8.2 Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws [Section 21]

Where any legislations or regulations gives a power to issue notifications, orders, rules, or bye-laws is conferred, then that power, shall include power to add, to amend, vary or rescind any notifications, orders, rules, or bye laws so issued.

8.3 Making of rules or bye-laws and issuing of orders between passing and commencement of enactment [Section 22]

Rules, bye-laws, or orders made or issued between the date of passing the law (assent given by president) and enforcement date (date of applicability of law) shall not take effect till the commencement of the Act or Regulation.

8.4 Provisions applicable to making of rules or bye-laws after previous publications [Section 23]



8.5 Continuation of orders etc., issued under enactments repealed and re-enacted [Section 24]

Any appointment notification, order, scheme, rule, form, or bye-law, made or issued under the repealed Act, shall continue in force, and be deemed to have been made or issued under the notification, order, scheme, rule, form, or bye-law, made or issued under the provisions/Act that are re-enacted

9. MISCELLANEOUS

In State of Punjab v. Harnek Singh, it was held that investigation conducted by Inspectors of Police, under authorization of notification issued under Prevention of Corruption Act, of 1947 will be proper and will not be quashed under new notification taking the above power, till the aforesaid notification is specifically superseded or withdrawn or modified under the new notification.

9.1 Recovery of fines [Section 25]

Section 63 to 70 of the Indian Penal Code and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy

of fines shall apply to all fines imposed under any Act, Regulation, rule, or bye-laws, unless the Act, Regulation, rule, or bye-law contains an express provision to the contrary.

9.2 Provision as to offence punishable under two or more enactments [Section 26]

Where an act or omission constitutes an offence under two or more enactments, then the **offender shall be liable to be prosecuted and punished under either or any of those enactments** but shall not be punished twice for the same offence.

9.3 Meaning of Service by post [Section 27]

In State of M.P. v. V.R. Agnihotri, it was held that **when there are two alternative charges in the same trial**, e.g., Sec 409 of Indian Penal Code and Sec 5(2) of the Prevention of Corruption Act, the fact that the accused is acquitted of one of the charges will not bar his conviction on the other.

Where any legislation or regulation requires any document to be served by post, then unless a different intention appears, **the service shall be deemed to be effected by:**


- **Properly addressing**
- **Pre-paying, and**
- **Posting by registered post.**

In United Commercial Bank v. Bhim Sain Makhija: A notice when required under the statutory rules to be sent by **registered post acknowledgement due** is instead sent by **registered post** only, the protection of presumption regarding serving of notice under 'registered post' under this section of the Act neither tenable not based upon sound exposition of law.

In Jagdish Singh.v Natthu Singh, it was held that where a notice is sent to the landlord by registered post and the same is returned by the tenant with an endorsement of refusal, **it will be presumed that notice has been served.**

9.4 Citation of enactments [Section 28]

- A description or citation of a portion of another enactment shall, unless a different intention appears, be **construed as including the word, section or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description of that other provision.**
- The whole enactment shall not be included. Only that part of the citation shall be taken in the form it has been written.

 Citation means referring / quoting another provision to explain the existing provision.

Note: 'Securities' have been defined under companies act using the reference of the Securities contracts (Regulations) Act, 1956.

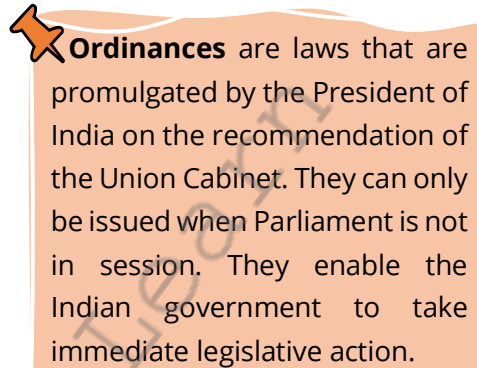
9.5 Saving for previous enactments, rules and bye laws [Section 29]

The construction of Acts, Regulations, rules, or bye-laws made after commencement of this Act shall not affect the construction of any Act, Regulation, rule, or bye-law is continued or amended by an Act, Regulation, rule, or bye-law made after the commencement of this Act.

In simple words, any new amendment shall be added in continuation of previous laws. The old laws, unless changed/repealed shall continue to exist with new laws.

9.6 Application of Act to Ordinances [Section 30]

In this Act the expression **Central Act, shall be deemed to include Ordinance made and promulgated** by the Governor General under section 23 of the Indian Councils Act, 1861 or section 72 of the Government of India Act, 1915, or section 42 of the Government of India Act, 1935 and an Ordinance promulgated by the President under Article 123 of the Constitution.



Ordinances are laws that are promulgated by the President of India on the recommendation of the Union Cabinet. They can only be issued when Parliament is not in session. They enable the Indian government to take immediate legislative action.

1FIN BY INDIGOLEARN

INTERPRETATION OF STATUTES

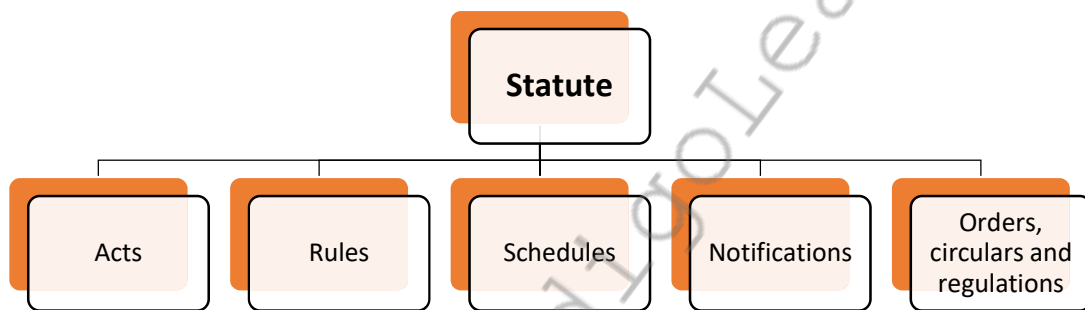
Learning Outcomes –

- Know the need for interpretation of statutes.
- Understand and explain the various Rules of Interpretation of Statutes.
- Learn about the various internal and external aids to interpretation.
- Understand the Rules of Interpretation of Deeds and Documents.

1. INTRODUCTION

1.1 Statute

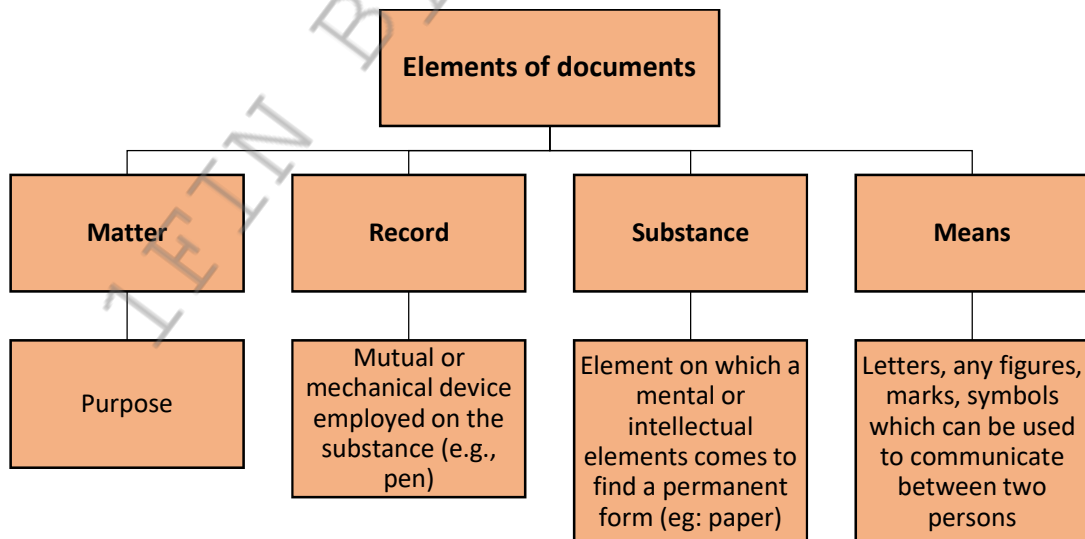
- The term **Statute** generally means laws and regulations of various kinds irrespective of the source from which they emanate.
- It signifies **written law** as against unwritten law.



1.2 Document

Section 3 of the Indian Evidence Act, 1872 states that **document** means –

- **matter expressed or described** upon any substance
- **by means of letters, figures, or marks**, or by more than one of those means,
- **intended to be used** or, which may be used, **for recording this matter**.



1.3 Instrument

- Instrument means a **formal legal document** which creates or confirms a right or records a fact.
- **Examples** of instruments are – agreement, deed, charter or record etc.
- It **creates, transfers, extends, extinguishes, or records any right or liability.**

1.4 Deed

In India, it has the **same meaning as 'instrument'** above.

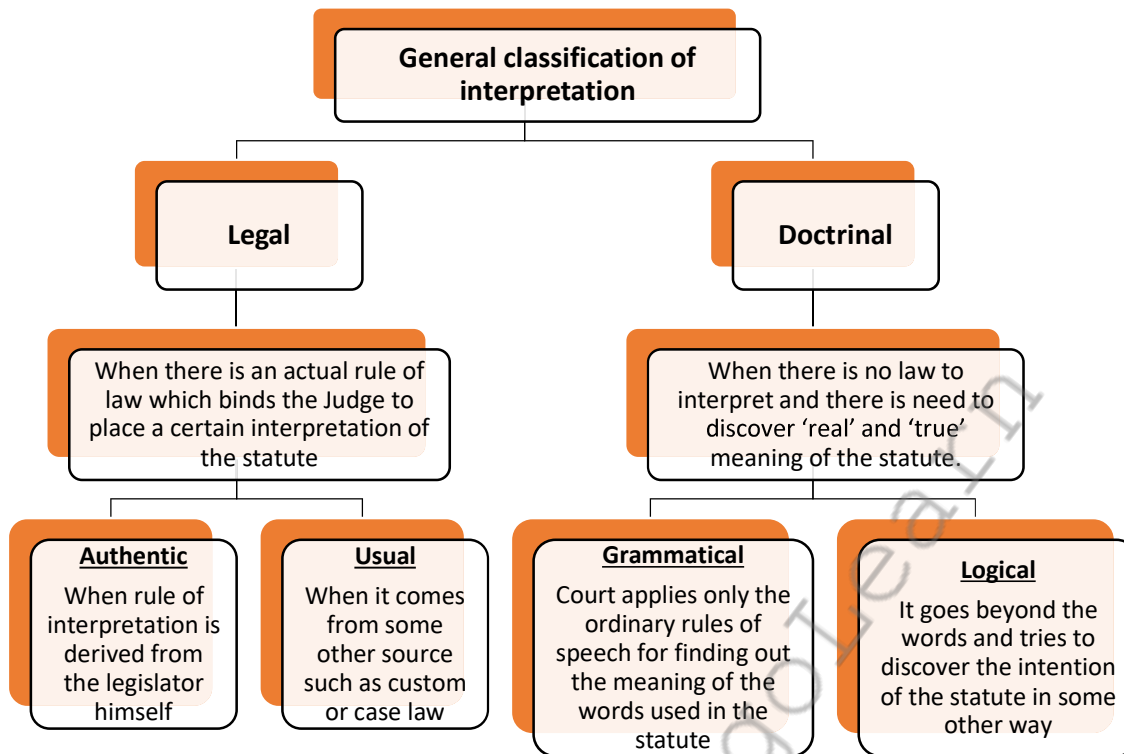
1.5 Interpretation

Process by which **real meanings of act/ legal language & intention behind legislature** is ascertained.

1.5.1 Importance of interpretation

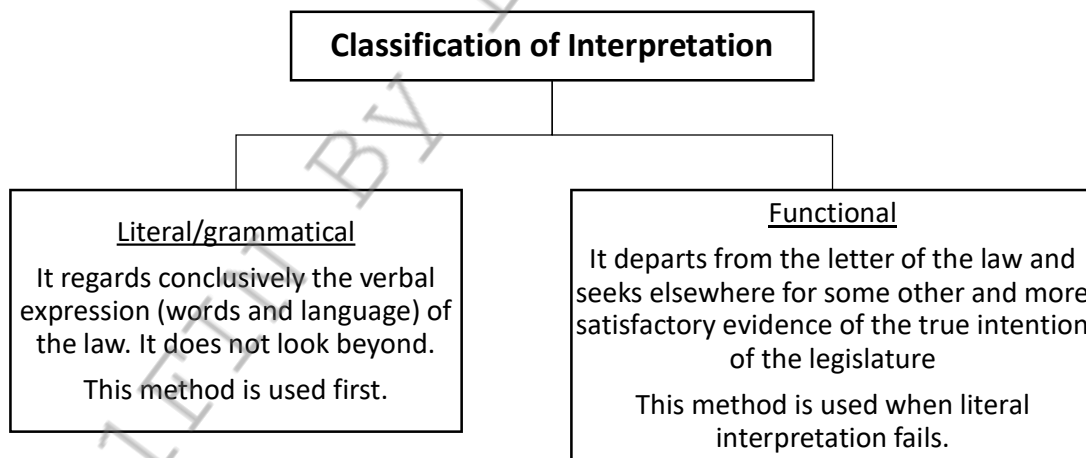
- ✓ Two different set of people create legislature and use/interpret it. There may be **bridge in understanding.**
- ✓ **Times** in which legislature is prepared and interpreted may be different.
- ✓ Process of interpretation **makes use of technical legal jargon** and methods as compared to common law rules
- ✓ **No language is so perfect** as to leave no ambiguities. It can be interpreted to mean many things.
- ✓ **True intention of law** at the time of its writing need to be considered
- ✓ **Social conditions** are different over time leading to different interpretations vs. intention with which law was written
- ✓ **Statute is enforceable at law;** howsoever unreasonable it may be. Until it is altered or modified or amended, the court has no choice but to enforce the law as it is.

1.5.2 Classification of interpretation according to Jolowicz



Normally, grammatical interpretation is the only approach to be adopted. This is based on the principle of *absoluta sententia expositore non indeget* meaning **clear words need no explanation**.

1.5.3 Classification of interpretation according to Fitzgerald



1.5.4 When does court consider logical interpretation instead of grammatical?

- **Letter of the law is logically defective** on account of ambiguity, inconsistency, or incompleteness.
- **Text leads to a result which is so unreasonable** that it is self-evident that the legislature could not mean what it says.

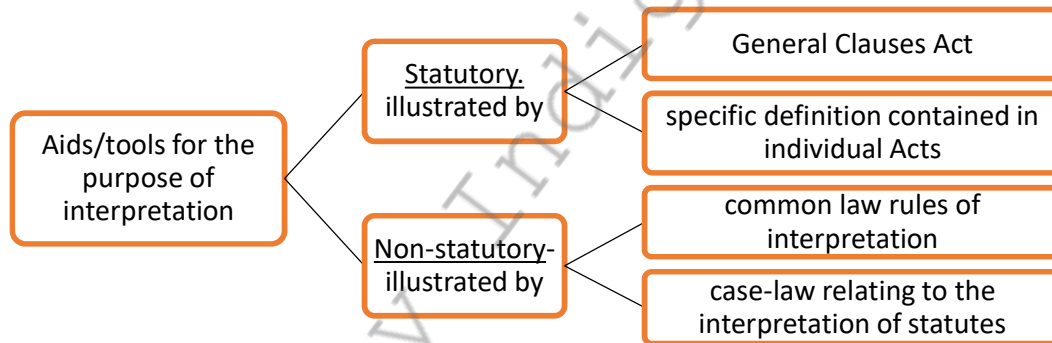
1.5.5 Difference between Interpretation and Construction

Interpretation	Construction
Where the language is simple and unambiguous, it is to be read with the clear intention of the legislation giving to the words used by the legislature their ordinary, natural, and grammatical meaning. This is called interpretation.	If such reading leads to absurdity and the words are susceptible of another meaning, same has to be read as a whole. Drawing of conclusion beyond the direct expression of the text. This is called construction.

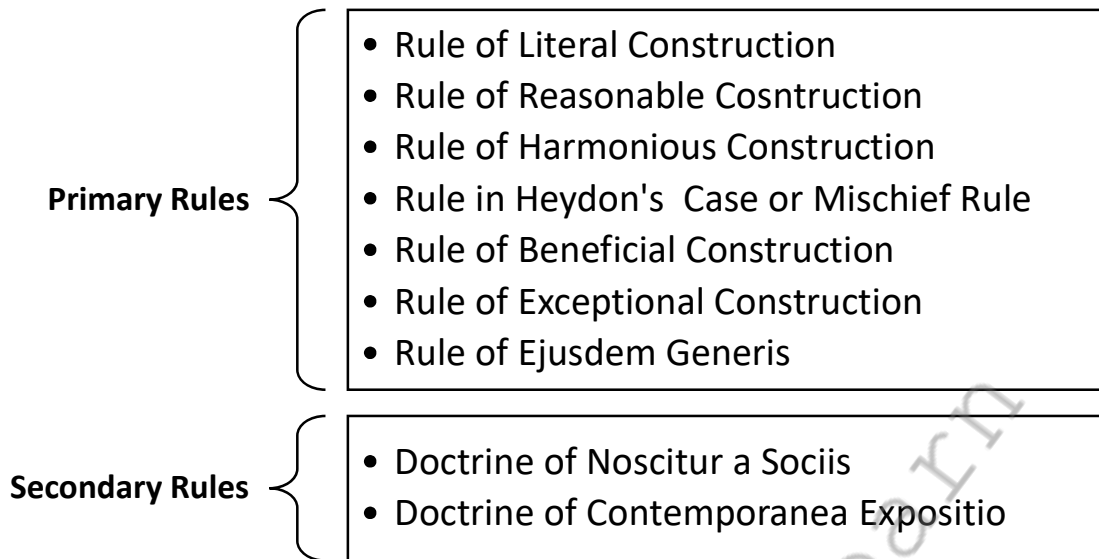
In practice construction includes interpretation and the terms are frequently used synonymously.

1.5.6 Process of Interpretation

It is the duty of the courts to give effect to the meaning of an Act when meaning can be equitably gathered from the words used. Words of legal import occurring in a statute which have acquired a definite & precise sense, must be understood in that sense. (State of Madras v. Gannon Dunkerly Co.)



2. RULES OF INTERPRETATION/ CONSTRUCTION



2.1 Primary Rules

2.1.1 Rule of Literal Construction

- ✓ Words, sentences, and phrases of a statute **should be read in their ordinary, natural, and grammatical meaning** so that they may have effect in their widest amplitude.
- ✓ A **word which has a definite and clear meaning should be interpreted with that meaning only**, irrespective of its consequences.
- ✓ Sometimes, occasions may arise when a choice has to be made between two interpretations – one narrower and the other wider or bolder. **Narrower interpretation must be considered** unless it would fail to achieve the manifest purpose of the legislation
- ✓ This principle is contained in the **Latin maxim 'absoluta sententia expositore non indiget'**

Example: When we talk of disclosure of the nature of concern or interest, financial or otherwise' of a director or the manager of a company in the subject we have to interpret in its broader sense that any concern or interest containing any information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon. Even facts known to family shall be disclosed

which means a simple preposition needs no expositor i.e., when you have plain words capable of only one interpretation, no explanation to them is required.

- ✓ When a **matter has not been provided for in a statute**, it cannot be supplied by courts as to do so would amount to legislation and would not be construction.
- ✓ **Nothing is to be added to or taken away from a statute** unless there are some adequate grounds to justify the inference
- ✓ A **construction should suffice all parts of statute**. If it renders ineffective any part of the language of a statute it shall be rejected.

Rule of literal interpretation can be read and understood under the following headings:

• **Natural and grammatical meaning -**

- Statute are to be first understood in their natural, ordinary, or popular sense & according to their plain, literal and grammatical meaning. Only if it involves any absurdity, repugnancy, inconsistency, then it must be further constructed using other principles. [State of HP v. Pawan Kumar]

• **Technical words are to be understood in technical sense only.**

2.1.2 Rule of Reasonable Construction

- The words of the statute must be construed '*ut res magis valeat quam pereat*' meaning thereby that words of statute must be construed so as to lead to a sensible meaning.
- While interpreting a law, two meanings are possible, one making the statute absolutely vague and meaningless and other leading to **certainty and a meaningful interpretation**, in such case the later interpretation **should be followed**.
- If giving a plain meaning to the words will not be a fair or reasonable construction, it becomes the **duty of the court to depart from the dictionary meaning and adopt the construction which will advance the remedy and suppress the mischief**.

Example 1: In order to determine whether a transaction is intra vires the objects of a company, the objects clause should be reasonably construed neither with rigidity nor with laxity.

Example 2: 'plant and machinery' 'plant' does not relate to trees. But it is part of machinery.

2.1.3 Rule of Harmonious Construction

- ✓ Every statute has a purpose/object. Such **purpose should be kept in mind while interpreting** all parts of a statute.
- ✓ Where there are **two interpretations possible** for any statute, **the one which is falling in alignment with the object of the statute must be used**.
- ✓ Where there are in an enactment **two or more provisions which cannot be reconciled with each other**, they should be so interpreted, wherever possible, as to give effect to all of them.
- ✓ The **sections and sub-sections must be read as parts of an integral whole and being inter-dependent**. Importance should not be attached to a single clause over others.

- ✓ In **case of inconsistency** between provisions, the **one enacted or amended later in point of time must prevail**.
- ✓ A **specific rule will override a general rule**.

Example: Company law may specify minimum quorum as 15 while AOA may state the same as 20, then the provision that satisfies both provisions shall be followed.

This principle is usually expressed by the maxim "**generalia specialibus non derogant**".

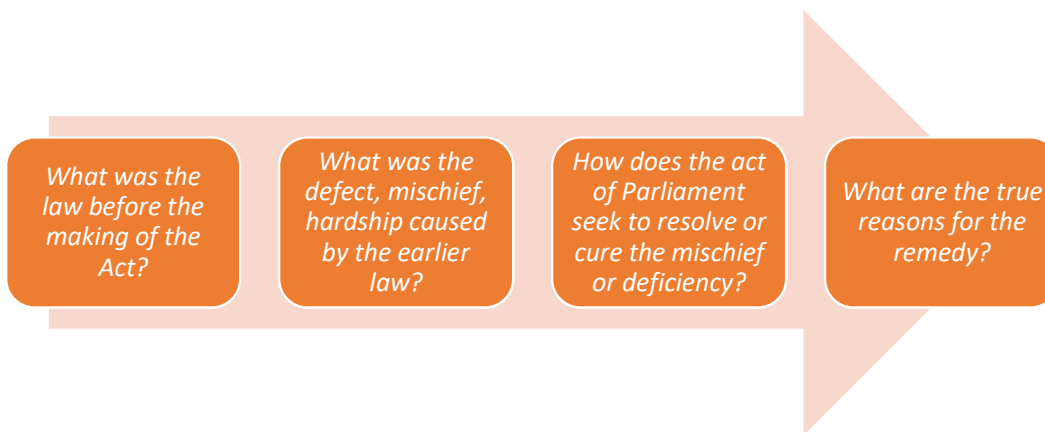
- ✓ In some cases, the **statute may give a clear indication** as to which provision is subservient (i.e., subordinate) and which overrides. This is done by **using terms like, "subject to", "notwithstanding" and "without prejudice"**.
 - **Subject to** - the effect of these words is that when the same subject matter is covered by that provision and by another provision or enactment subject to which it operates and there is conflict between them, then the latter will prevail over the former. Thus, **a clause that uses the words "subject to" is subservient to another**.
 - **Notwithstanding** - A clause which begins with the words "notwithstanding anything contained" is called a **non-obstante clause**.

A notwithstanding clause can operate at four levels -		
Clause	Effect	Example
(1) Notwithstanding anything contained in another section or sub-section of that statute.	This clause will override such other section(s) /sub- section(s)	Notwithstanding anything contained in sub-sections (1) & (2)....
(2) Notwithstanding anything contained in a statute	This clause will override the entire enactment.	Notwithstanding anything contained in this Act,
(3) Notwithstanding anything contained in specific sections(s) or sub-sections(s) or all the provisions contained in another statute.	The clause will prevail over the other enactment.the rules approved shall be deemed to have been validly made notwithstanding anything contained in the Act.
(4) Notwithstanding anything contained in any other law for the time being in force.	The clause will override all other laws.the rules so made are amended shall, notwithstanding anything to the contrary contained in this Act or any other law for the time being in force...

- **Without prejudice** - when certain particular provisions follow general provisions & when it is stated that **particular provisions are without prejudice to those general provisions** -
 - *the particular provisions shall operate in addition to and not in derogation of the general provisions.*

2.1.4 Rule in Heydon's case or Mischief Rule

- ✓ In Heydon's case it was laid down that "**for the true and sure interpretation of all statutes in general, four things are to be discerned and considered.**"



- ✓ The rule then directs that the **courts must adopt that construction which 'shall suppress the mischief prevalent in the time when law was framed**, and suitable remedy should be advanced.
- ✓ This method should be used as the **last resort for interpretation**.
- ✓ Heydon's Rule is **applicable only when the plain meaning of statute is not reasonable**.

Example 1: Where a statute requires something to be done by a person, it would generally be sufficient compliance with it if the thing is done by another person on his behalf. Maxim : '**quo facit per alium facit per se**' (he who acts though another is deemed to act in person).

Example 2: Prize Competition Act, 1955 was applicable on games similar to gambling or based on skills also? Court looked into the history of the enactment and held that Act is applicable only to those competitions in which success does not depend on any substantial degree of skill. [RMD Chamarbaugwalla V. Union of India]

2.1.5 Rule of Beneficial Construction


Beneficial construction will be **given to a statute, which brings into effect provisions for improving the conditions of certain classes of people** who are under privileged or who have been treated unfairly in the past. If the object of a statute is public safety then its working must be interpreted widely to give effect to that object.

2.1.6 Rule of Exceptional Construction

- ✓ Certain words in the statute are not purposeful. This rule stands for the elimination of such words in a statute which defeat the real objective of the statute or make no sense. If the removal of the words is not feasible, then they should be interpreted to remove hindrances caused by them.
- ✓ It also stands for construction of words 'and', 'or', 'may', 'shall' & 'must'.
- ✓ This rule has several aspects, viz. :
 - a) **The Common-sense Rule** : statute must be so construed as to give a sensible meaning to the statute, if at all possible. '**utres magis valeat quam pereat**' meaning thereby that it is better for a thing to have effect than to be made void.

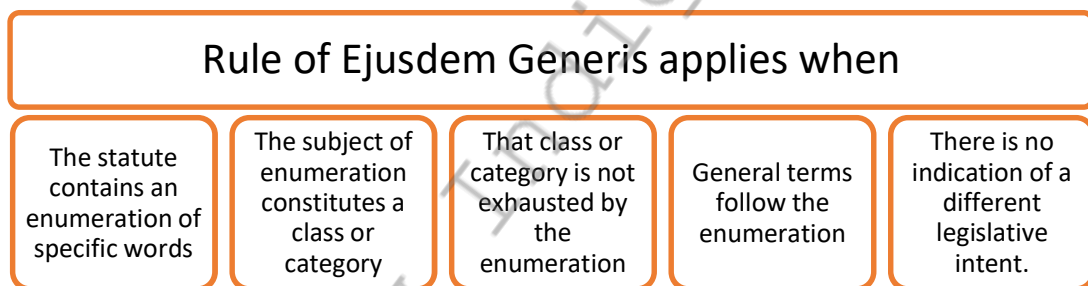
- b) **Conjunctive and Disjunctive Words 'or' 'and'** : Generally, the word '**or**' is normally disjunctive and '**and**' is normally conjunctive. Where the literal reading of the words produces an unintelligible or absurd result, then 'and' may be read for 'or' and 'or' for 'and', provided that the intention of the legislature is otherwise quite clear.
- c) '**May**', '**must**' and '**shall**': certain provision are '**mandatory**' while others are '**directory**'. Mandatory means it must be strictly observed; whereas 'directory' means it would be sufficient that it is substantially complied with.

- '**May**': Generally these words are directory in nature. However in some cases, the legislature may use the word 'may' as a matter of pure conventional courtesy and yet intend a mandatory force.
- '**Shall/must**': Generally these words are mandatory in nature. But it is sometimes not so interpreted if the context or intention of the legislature otherwise demands.

 Where a discretion is conferred upon a public authority coupled with an obligation, the word 'may' should be construed to mean a command.

2.1.7 Rule of Ejusdem Generis

- ✓ The term 'ejusdem generis' means "of the same kind and species".
- ✓ The rule states that – **where specific words pertaining to a class or category or genus are followed by general words, the general words shall be construed as limited to the things of the same kind as those specified.**



- ✓ **Exceptions:**
 - The preceding term is general.
 - The particular word exhaust the whole genus.
 - Specific objects enumerated are essentially diverse in character.
 - There is an express intention of legislature that the general term shall not be read ejusdem generis the specific terms.

2.2 Secondary Rules

2.2.1 Doctrine of *Noscitur a Sociis*

Noscitur a Sociis means that when 2 or more words that are susceptible of analogous meaning, are coupled together they are understood to be used in their cognate sense.

Example: While dealing with a Purchase Tax Act, which used the expression “manufactured beverages including fruit-juices and bottled waters and syrups,”. It was held that the description ‘fruit juices’ as occurring therein should be construed in the context of the preceding words and that orange-juice unsweetened and freshly pressed was not within the description. (Commissioners. Vs. Savoy Hotel)

2.2.2 Doctrine of *Contemporanea Expositio*

- This doctrine is based on the concept that a statute or document is to be interpreted by referring to the exposition it has received from contemporary authority.
- The maxim “*Contempranea expositoest optima et fortissima in lege*” means that the best way to interpret a document is to read it as it would have been read when made. This means that the **meaning of words in a document are to be understood in the sense which they bore at the time of the document.**
- The maxim “*optima legume intrpres est consuetude*” means that, “Custom is the best interpreter of law”.

3. INTERNAL AIDS TO INTERPRETATION/ CONSTRUCTION

The **various parts of an enactment** may be **referred to while interpreting or construing** an enactment. They are referred to as internal aids to interpretation.

Internal aids to Interpretation

- Long title
- Preamble
- Heading
- Marginal Notes
- Definitional Sections
- Illustrations
- Proviso
- Explanation
- Schedules
- Read the statute as a whole

3.1 Long title

- Defines purpose of the enactment
- Impresses readers
- Provides significance of the law

3.2 Preamble

- It is not part of the law, but it **defines the objective** of the particular law. Every enactment has its preamble.
- Defines motive of law.
 - Why was it drafted?
 - Which problems it was trying to solve?

3.3 Heading and Title of a Chapter & Sections:

- The headings **help in understanding the law better.**

- Company law has 29 chapters with different headings. Each chapter has many sections which have their own headings.
- May sometimes be referred to **know the scope of a section**. But heading shall not override a section.

3.4 Marginal Notes:

- These are additional notes **stating opinion of the law makers**.
- These should be **used as last resort only** when other tools fail to help

3.5 Definitional Sections/Interpretation Clauses:

- Usually section 2 or 3 is covering different definitions in different statutes. These definitions shall be used for **interpreting particular technical words** used in statute. General meanings shall not be used.
- The definitions are framed by law makers keeping in mind the need and objective of that particular enactment.

Purpose of Definition clause

- To provide a key to the proper interpretation of the enactment.
- To shorten the language of the enacting part by avoiding repetition of the same words contained in the definition part.

Construction of definitions may understood under the following headings:

- **(i) Restrictive and extensive definitions** - Expression in the definition section may either be restricting of its ordinary meaning or may be extensive
 - **Mean:** definition is restrictive and exhaustive
 - **Include:** definition is extensive
 - **Means and includes:** definition is exhaustive
 - **to apply to and include:** definition is as extensive
 - **is deemed to include:** inclusive or extensive definition
- **(ii) Ambiguous definitions** - Such definition is not to be read in isolation. It must be read in the context of the phrase which it defines.
- **(iii) Definitions subject to a contrary context** - Sense in which the word is used must be ascertained from the context of scheme of the Act, language of the provision and the object intended to be served thereby.

Sec. 2(m) of the Consumer Protection Act, 1986 contains an inclusive definition of 'person'. It has been held to include a company although it is not specifically named therein [*Karnataka Power Transmission Corporation v. Ashok Iron Works Pvt. Ltd.*]

Termination of service of a seasonal worker after the work was over **does not amount to retrenchment** as per the Industrial Disputes Act, 1947. [*Anil Bapurao Karase v. Krishna Sahkari Sakhar Karkhana*]

3.6 Illustrations

- These are **examples included in law to elaborate its usage**.
- It is part of statute.

3.7 Proviso

- It **starts with word 'provided that'**. These are part of the relevant sections and mentioned after the section. Law is incomplete without them.
- **They mention**
 - **Further explanation** of the section including terms and conditions,
 - **Exception** to any section, or
 - **The condition without which such law shall not be applicable** to the particular situation.

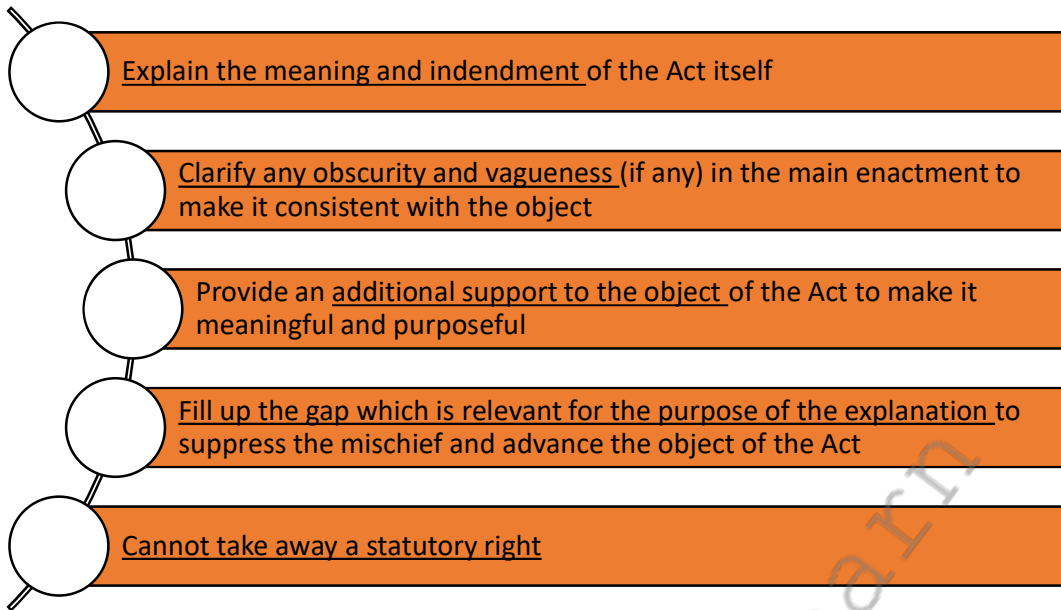
Example: F.Y. for every company ends on 31st march, provided that any company which has foreign subsidiary or holding company may seek permission to change its F.Y.

Distinction		
Exception	Proviso	Saving clause
Intended to restrain enacting clause to particular cases.	Used to remove special cases from general enactment and provide for them specially	Used to preserve from destruction certain rights, remedies or privileges already existing

3.8 Explanation

- The words most repetitively used in statute are defined in the definition section. However, there are some **words that are used in only a few sections**. Hence, their meaning is **defined under those sections** by way of explanation.
- **Objects of an explanation** to a statutory provision:

Example: 'Office or place of profit' u/s 188 of the Companies Act, 2013 is defined by way of explanation under the section.



3.9 Schedules

- They are part of law. They shall be read together with provisions of law.
- They often **contain details and forms for working out the policy underlying the sections** of the statute.

Example: Formats of MOA and AOA have been specified in Schedule I. CSR Activities have been stated in schedule VII.

3.10 Read the Statute as a Whole

- Construction of a statute is to be made of all its parts taken together and not of one part only.
- Each clause should be so interpreted as to bring them into harmony with other provisions.

Example: Where part of the act requires written notice, other parts of the same act cannot be interpreted to mean that oral notice would suffice.

External aids to Interpretation

- Historical setting
- Consolidating Statutes & Previous Law
- Usage
- Earlier & Later Acts and Analogous Acts
- Dictionary Definitions
- Use of Foreign Decisions

4.1 Historical Setting

- Reason of framing a law, committee discussions, parliamentary history while passing any bill and bill considered prior to such act **provide useful insights in interpreting current law.**
- We also have to **consider whether the statute in question was intended to alter the law or leave it where it stood** before.

4.2 Consolidating Statutes & Previous Law:

- Prior to any act, there may be **previous laws which may be studied** to find the defects which were improvised in the current law.
- Moreover, **foreign laws** based on which Indian law was enacted may also be studied.

4.3 Usage

- Use of **language for the purpose of drafting law** is relevant to interpret it.
- The interpretation of a statute that has been in practice for long time is generally not changed by court and considered correct unless there are cogent (i.e., strong) reasons.

4.4 Earlier & Later Acts and Analogous Acts

Where **certain meanings are unclear in one act**, other **related acts can be used** for interpretation.

Example: Minimum number of partners is given in Partnership Act, but maximum partners can be derived from Companies Act, 2013.

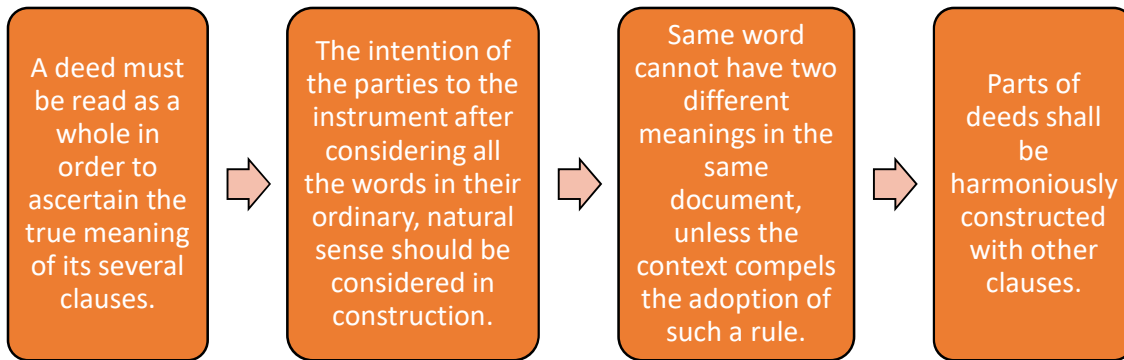
4.5 Dictionary Definitions

Meanings of **certain words that cannot be understood** from within the statute can be seen from dictionary.

4.6 Use of Foreign Decisions

Judicial decisions taken outside India on similar cases are sometimes used for interpretation of Indian statute/cases.

5. RULES OF INTERPRETATION/ CONSTRUCTION OF DEEDS AND DOCUMENTS



1FIN BY IndigoLearn

Foreign Exchange Management Act, 1999

This increased the flow of foreign exchange to India and consequently foreign exchange reserves increased substantially. The Act has been made effective from 1st June, 2000. This Act enables management of foreign exchange reserves for the country.

FEMA, 1999 extends to the whole of India. It also applies to :-

- All branches, offices and agencies outside India owned and controlled by a person resident in India; and
- Any contravention committed outside India by any person to whom this Act applies.

Objectives of the Act

This Act aims to **consolidate and amend the law relating to foreign exchange** with the objective of —

- **facilitating external trade** and payments and
- for promoting the orderly development and **maintenance of foreign exchange market** in India.

Definitions [Section 2]

Adjudicating Authority [Section 2(a)] means an officer authorised under sub-section (1) of section 16(1);

Appellate Tribunal [Section 2(b)] means the Appellate Tribunal for Foreign Exchange established under section 18;

Authorised person [Section 2(c)] means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under section 10(1) to deal in foreign exchange or foreign securities;

Capital Account Transaction [Section 2(e)] means a transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liability in India of persons resident outside India, and includes transactions referred to in Section 6(3);

Currency [Section 2(h)] includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travelers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank.

Currency Notes [Section 2(i)] means and includes cash in the form of coins and bank notes;

Current Account Transaction [Section 2(j)] means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,

(i) payments due in connection with **foreign trade**, other current business, services, and short-term banking and credit facilities in the ordinary course of business.

(ii) payments due as **interest** on loans and as net income from investments.

(iii) **remittances** for living expenses of parents, spouse and children residing abroad, and

(iv) **expenses** in connection with foreign travel, education and medical care of parents, spouse and children;

Export [Section 2(l)], with its grammatical variations and cognate expressions means;

- (i) the taking out of India to a place outside India any goods.
- (ii) provision of services from India to any person outside India;

Foreign Currency [Section 2(m)] means any currency other than Indian currency;

Foreign Exchange [Section 2(n)] means foreign currency and includes:

- (i) deposits, credits and balances payable in any foreign currency,
- (ii) drafts, travelers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
- (iii) drafts, travelers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;

Foreign Security [Section 2(o)] means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency;

Import [Section 2(p)], with its grammatical variations and cognate expressions, means bringing into India any goods or services;

Person [Section 2(u)] includes:

- (i) an individual,
- (ii) a Hindu undivided family,
- (iii) a company,
- (iv) a firm,
- (v) an association of persons or a body of individuals, whether incorporated or not,
- (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and;
- (vii) any agency, office or branch owned or controlled by such person;

Person resident in India [Section 2(v)] means:

(i) a person residing in India for **more than 182 days** during the course of the **preceding financial year** but does **not include—**

(A) a person who has gone out of India or who stays outside India, in either case—

- (a) for or on taking up **employment outside India**, or
- (b) for carrying on **outside India a business or vocation** outside India, or
- (c) for any **other purpose**, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than:

- (a) for or on taking up **employment in India**, or
 - (b) for carrying on in India a **business or vocation** in India, or
 - (c) for any **other purpose**, in such circumstances as would indicate his intention to stay in India for an uncertain period;
- (ii) any person or **body corporate** registered or incorporated in India,

(iii) an office, branch or agency in India **owned or controlled** by a person **resident outside India**,

(iv) an **office, branch or agency** outside India owned or controlled by a person resident in India;

Person Resident Outside India [Section 2(w)] means a person who is not resident in India;

Repatriate to India [Section 2(y)] means bringing into India the realised foreign exchange and

(i) the selling of such foreign exchange to an authorised person in India in exchange for rupees, or

(ii) the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank.

It includes use of the realised amount for discharge of a debt or liability denominated in foreign exchange and the expression “repatriation” shall be construed accordingly;

Transfer [Section 2(ze)] includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

Restrictions on Foreign Exchange – Section 3

All restrictions mentioned may be relaxed by making provisions in Act, Rules, Regulations and by permission of the Reserve Bank.

No person shall—

(a) **deal in** or transfer any **foreign exchange** or foreign security to any person **not being** an **authorised person**;

(b) **make** any **payment to** or for the credit of any **person resident outside India** in any manner

(c) **receive otherwise than through** an **authorised person, any payment** by order or **on behalf of** any **person resident outside India** in any manner.

(d) **enter into** any **financial transaction** in India as consideration for or in association **with acquisition** or creation or transfer of a right to acquire, **any asset outside India by any person**

The above transactions may be carried on

a. as otherwise provided in this Act; or

b. with the general or special permission of the Reserve Bank.

Explanation.— For the purpose of this clause, “**financial transaction**” means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

General Permissions

Prohibitions shall **not apply to** any **transaction** entered into in Indian **Rupees** by or with-

a) a **person** who is a **citizen of India, Nepal or Bhutan resident in Nepal or Bhutan.**

b) A **branch situated in Nepal or Bhutan** of any business **carried on by** a company or a **corporation incorporated in India, Nepal or Bhutan**; and

c) A **branch situated in Nepal or Bhutan** of any business **carried on** as a partnership firm or **otherwise by a citizen of India, Nepal or Bhutan**

Restriction on holding of Foreign Currency – Section 4

No person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

Current Account Transaction – Section 5

The term 'Current Account Transaction' is defined negatively by Section 2(j) of the Act. It means a transaction **other than a capital account transaction** and includes the following types of transactions:

- (i) Payments in the course of ordinary course of foreign trade, other services such as short-term banking and credit facilities in the ordinary course of business etc.
- (ii) Payments in the form of interest on loans or income from investments.
- (iii) Remittances for living expenses of parents, spouse, or children living abroad
- (iv) Expenses in connection with foreign travel, education etc

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction. Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions.

Hence, **such transactions are freely available if it is not prohibited and it is within limit or permission obtained**

As per rules, drawal of foreign exchange for certain current account transactions is prohibited, a few need permission of appropriate Govt. of India authority and some other transactions would require RBI permission if they exceed a certain ceiling.

The three categories are:

✓ Transactions which are prohibited

✓ Transactions for which foreign exchange can be drawn subject to prior approval of CG

✓ Transactions for which foreign exchange can be drawn subject to prior approval of Reserve Bank of India

No approval of the Reserve Bank is required where payment is made out of funds held in Resident Foreign Currency Account of the remitter.

Schedule I

Transactions for which drawal of foreign exchange is prohibited:

(i) Remittance out of lottery winnings.

(ii) Remittance of income from racing/riding, etc., or any other hobby.

- (iii) Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
- (iv) Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
- (v) Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
- (vi) Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
- (vii) Payment related to "Call Back Services" of telephones.
- (viii) Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.

Schedule II

Prior approval of the Government of India for drawal of foreign exchange is required for following transactions:

- ✓ Cultural Tours
- ✓ Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding US\$ 10,000) by a State Government and its Public Sector Undertakings.
- ✓ Remittance of freight of vessel chartered by a PSU
- ✓ Payment of import through ocean transport by a Govt. Department or a PSU on c.i.f. basis
- ✓ Multi-modal transport operators making remittance to their agents abroad
- ✓ Remittance of hiring charges of transponders by TV Channels & Internet service providers
- ✓ Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping
- ✓ Remittance of prize money/sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies, if the amount involved exceeds US \$ 100,000
- ✓ Remittance for membership of P & I Club

Rule 5 Read with Schedule III

Facilities for individuals

Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2,50,000 only. Any **additional remittance** in excess of the said limit for the following purposes shall **require prior approval of the Reserve Bank of India.**

- ✓ Private visits to any country (except Nepal and Bhutan)
- ✓ Gift or donation.

- ✓ Going abroad for employment
- ✓ Emigration
- ✓ Maintenance of close relatives abroad
- ✓ Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
- ✓ Expenses in connection with medical treatment abroad
- ✓ Studies abroad
- ✓ Any other current account transaction

For the following purposes from above:

- ✓ Emigration
- ✓ Medical treatment
- ✓ Studies abroad

the individual may avail of exchange facility for an amount in excess of the limit prescribed under the **Liberalised Remittance Scheme**, if it is so required by a country of emigration, medical institute offering treatment or the university, respectively.

Further, if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from **USD 250,000** (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted

A person who is resident but not permanently resident in India and-

(a) is a citizen of a foreign State other than Pakistan; or

(b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company, may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Meaning Of Person Resident but not Permanently Resident

A person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which **does not exceed three years**, is a resident but not permanently resident.

Further, a person other than an individual may also avail of foreign exchange facility, mutatis mutandis, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above.

Facilities for Persons Other than Individual

The **following remittances by persons other than individuals** shall **require prior approval of the Reserve Bank of India**.

- ✓ Donations exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less,
 - creation of Chairs in reputed educational institutes,
 - contribution to funds (not being an investment fund) promoted by educational institutes; and

- contribution to a technical institution or body or association in the field of activity of the donor Company.

- ✓ Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.

- ✓ Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

Capital Account Transaction – Section 6

“Capital Account Transaction” means a **transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liability in India of persons resident outside India**

In simple terms, cross border transactions pertaining to investments, loans, immovable property, transfer of assets are Capital Account Transactions.

Any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.

The Reserve Bank may, by regulations, prohibit, restrict or regulate Capital Account transactions as specified in section 6(3).

The Reserve Bank may, in consultation with the Central Government, specify

- ✓ any class or classes of capital account transactions, which are permissible
- ✓ the limit up to which foreign exchange shall be admissible for such transactions

Capital account transaction is basically split into the following categories:

- ✓ transaction, which are permissible in respect of persons resident in India and outside India.
- ✓ transaction on which restrictions cannot be imposed; and
- ✓ transactions, which are prohibited.

The Central Government may, in consultation with the Reserve Bank, prescribe— (a) any class or classes of capital account transactions, not involving debt instruments, which are permissible; (b) the limit up to which foreign exchange shall be admissible for such transactions; and (c) any conditions which may be placed on such transactions

A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was **acquired, held or owned** by such person **when he was resident outside India** or **inherited from a person who was resident outside India.**

This circular clarifies that section 6(4) of the Act covers the following transactions:

(i) Foreign currency accounts opened and maintained by such a person when he was resident outside India;

(ii) Income earned through employment or business or vocation outside India taken up or commenced which such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India;

(iii) Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India.

(iv) A person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transactions is not in contravention to extant FEMA provisions.

(5) A **person resident outside India may hold, own, transfer or invest** in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by a such person when **he was resident in India or inherited from a person who was resident in India**

Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000

The Regulations specify the list of transaction, which are permissible in respect of persons resident in India in Schedule-I and the classes of capital account transactions of persons resident outside India in Schedule-II.

Further, subject to the provisions of the Act or the rules or regulations or direction or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction specified in the Schedules; provided that the transaction is within the limit, if any, specified in the regulations relevant to the transaction.

Schedule I

The list of permissible classes of transactions made by **persons resident in India** is:

- (a) Investment by a person resident in India in foreign securities.
- (b) Foreign currency loans raised in India and abroad by a person resident in India.
- (c) Transfer of immovable property outside India by a person resident in India.
- (d) Guarantees issued by a person resident in India in favour of a person resident outside India.
- (e) Export, import and holding of currency/currency notes.

- (f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India.
- (g) Maintenance of foreign currency accounts in India and outside India by a person resident in India.
- (h) Taking out of insurance policy by a person resident in India from an insurance company outside India.
- (i) Loans and overdrafts by a person resident in India to a person resident outside India.
- (j) Remittance outside India of capital assets of a person resident in India.
- (k) Undertake derivative contracts

Schedule II

The list of permissible classes of transactions made by **persons resident outside India** is:

- (a) Investment in India by a person resident outside India, that is to say,
 - (i) issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
 - (ii) investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of a person in India.
- (b) Acquisition and transfer of immovable property in India by a person resident outside India.
- (c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
- (d) Import and export of currency/currency notes into/from India by a person resident outside India.
- (e) Deposits between a person resident in India and a person resident outside India.
- (f) Foreign currency accounts in India of a person resident outside India.
- (g) Remittance outside India of capital assets in India of a person resident outside India.
- (h) Undertake derivative contracts

Transactions with no restriction

They are:

- (1) For amortisation of loan and
- (2) For depreciation of direct investments in ordinary course of business.

Also, restrictions cannot be imposed when drawal is of the purpose of repayments of loan installments.

Prohibited Transactions

On certain transactions, the Reserve Bank of India imposes prohibition.

(a) no person shall **undertake or sell or draw foreign exchange to or from an authorised person** for any capital account transaction, provided that-

(i) subject to the provisions of the Act or the rules or regulations or directions or orders made or issued thereunder, **a resident individual may, draw from an authorized person foreign exchange not exceeding USD 250,000 per financial year or such amount as decided by Reserve Bank** from time to time for a capital account transaction specified in Schedule I.

Explanation: Drawal of foreign exchange as per item number 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Rules, 2000 dated 3rd May 2000 as amended from time to time, shall be subsumed within the limit under proviso (a) above.

(ii) Where the **drawal of foreign exchange** by a resident individual for any capital account transaction specified in Schedule I **exceeds USD 250,000 per financial year, or as decided by Reserve Bank** from time to time as the case may be, the limit specified in the regulations relevant to the transaction shall apply with respect to such drawal.

Provided further that no part of the foreign exchange of USD 250,000, drawn under proviso (a) shall be used for remittance directly or indirectly to countries notified as non-co-operative countries and territories by Financial Action Task Force (FATF) from time to time and communicated by the Reserve Bank of India to all concerned.

(b) The **person resident outside India is prohibited from making investments in India** in any form, in any company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage:

(i) In **the business of chit fund**; 16[Registrar of Chits or an officer authorised by the state government in this behalf, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians. Non- resident Indians shall be eligible to subscribe, through banking channel and on non- repatriation basis, to such chit funds, without limit subject to the conditions stipulated by the Reserve Bank of India from time to time]

(ii) As **Nidhi company**;

(iii) In **agricultural or plantation activities**;

(iv) In **real estate business**, or **construction of farm houses** or

Explanation: In "real estate business" the term shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.; or

(v) In **trading in Transferable Development Rights (TDRs)**.

'Transferable Development Rights' means certificates issued in respect of category of land acquired for public purpose either by Central or State Government in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole;

(c) **No person resident in India shall undertake** any capital account transaction which is not permissible in terms of Order S.O. 1549(E) dated April 21, 2017, as amended from time to time, of the Government of India, Ministry of External Affairs, **with any person who is, a citizen of or a resident of Democratic People's Republic of Korea, or an entity incorporated or**

otherwise, in Democratic People's Republic of Korea, until further orders, unless there is specific approval from the Central Government to carry on any transaction.

(d) The **existing investment transactions, with any person** who is, a citizen of or resident of Democratic People's Republic of Korea, or an entity incorporated or otherwise in Democratic People's Republic of Korea, or any existing representative office or other assets possessed in Democratic People's Republic of Korea, **by a person resident in India**, which is not permissible in terms of Order S.O. 1549(E) dated April 21, 2017, as amended from time to time, of the Government of India, Ministry of External Affairs **shall be closed/ liquidated/disposed/settled within a period of 180 days from the date of issue of this Notification**, unless there is specific approval from the Central Government to continue beyond that period."]

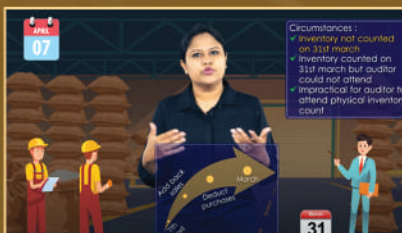
Thus, a capital account transaction is permitted only if it is specifically permitted under the regulations. If the transaction is not stated as generally permitted, a prior specific approval is required.

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