Chapter 2 Incorporation of Company and Matters incidental thereto.

Summary of Forms:

<u>Junimar y 01 Torms.</u>							
Form No.	Sec.	RUSE					
INC-03	3	Consent of nominee while formation of OPC					
INC-04	3	OPC to inform ROC within 30 days of replacement of nominee or withdrawal					
INC-08	7	Declaration of compliance of Act or Rules during incorporation of co.					
INC-09	7	Declaration by subscribers to MoA and First Directors					
INC-11	7	CoI issued on registration of company					
INC-13	8	MoA of Section 8 company					
INC-14	8	Declaration by CA/CS/Cost account w.r.t compliance at incorporation					
INC-15	8	Declaration by person making application for incorporation of sec 8 co.					
INC-18	8	Application to RD for conversion of Section 8 Co. to any other kind					
INC-19	8	Notice to be published within a week of application in INC-18					
INC-20A	10 <i>A</i>	Declaration by director that every subscriber has paid the due amount					
INC-22	12	Notice of change in situation of RO to be verified					
INC-23	13	Application for change of RO from one state to another					
INC-24	13	Application for change in name to ROC u/s 13					
INC-25	13	Fresh COI issued after change in name on application in INC-25					
INC-26	13	Form for advertisement regarding application to CG for change of RO					
INC-27	14	Altered AoA to be filed with RoC for registration					
INC-28	13	CG's approval for change of RO (state) to be filed with ROC of each state					
INC-31	8	AoA for Section 8 company.					
INC-32	7	SPICe+ Form to incorporate a company					
INC-33	7	E-MoA to be furnished to RoC at the time of incorporation					
INC-34	7	E-AoA to be furnished to RoC at the time of incorporation					

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Introduction to the Chapter:

- > A person who initiates promotion of a company is called as Promoter [as defined u/s 2(69)]
- In this chapter we are going to read about Incorporation of company, constitutional documents (MoA and AoA) and various other key provisions.
- > Types of company on the basis of Liability:

Limited by	Limited by	Limited by		Unlimited	Unlimited
Shares	Guarantee with	Guarantee without		company with	company without
	Share Capital	Share Capital	- 1	Share Capital	Share Capital

Note - Specified IFSC company shall be formed only as company limited by shares.



Understanding the concept of Promotor:

- > A promoter is one who undertakes to form a company w.r.t. a given project, and to set it going, and who takes the necessary steps to accomplish that purpose.
- > To be a promoter, one need not necessarily be associated with the initial formation of the company; one who subsequently helps to arrange floating of its capital will equally be regarded as a promoter.
- > Hence, "promoter" denotes any individual, association, partnership or a company that takes all the necessary steps to incorporate (create and mould) a company and set it going, in a fiduciary position.



Section 3 - Formation of Company:

A company may be formed for any lawful purpose by:

- (a) > = 7 persons in case of a public company;
- (b) > = 2 persons in case of a private company; or
- (c) 1 person, where the company to be formed is to be OPC that is to say, a private company, by subscribing to a memorandum and complying with the requirements of this Act.

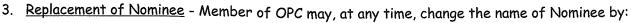
In case of OPC, MoA to specify nominee:

- 1. Nominate a person: In case of OPC, the MoA shall indicate:
 - > the name of the other person,
 - > with his prior written consent in the prescribed form,
 - \triangleright who shall, in the event of the subscriber's death or his incapacity to contract
 - > become the member of the company

The written consent so obtained shall also be filed with the Registrar at the time of incorporation of the OPC along with its MoA and AoA

2. Withdrawal:

- \succ Nominee may withdraw consent by giving a notice in writing to the sole member and to OPC.
- > Sole member shall nominate another person within 15 days of such withdrawal.
- > Send intimation of such nomination + written consent (Form INC 3)
- \triangleright OPC to inform RoC in Form INC-4 within 30 days of withdrawal of nomination.



- > Member to obtain written consent of new nominee (INC-3)
- > Intimate the company about such change.
- > OPC to inform RoC in Form INC-4 within 30 days of intimate of change of nominee from member.
- > Change of such name shall NOT be deemed as Alteration of MoA



Section 3A - Members severally liable in certain cases:

If at any time, the no. of members is reduced below prescribed limit i.e., 7 (public) or 2 (private)



Company carries on business for > 6 months while no. of members is so reduced

Every person who is a member during the time that it so carries on business after those 6m and is cognizant of the fact that business is carried on by reduced member, such members shall be severally liable for payment of whole debts contracted during that time, and may be severally sued therefor.



Section 4 - Memorandum of Association: [As defined u/s 2(56)]

Basics of MoA:

- \triangleright Base document for the formation of the company (MoA + AoA = Constitutional Document)
- Content of MoA need to be in compliance with Companies Act, 2013
- > MoA contains object for formation of co. beyond which its actions cannot go.
- A memorandum is a public document u/s 399 of the Companies Act, 2013. Consequently, every person entering into a contract with the company is presumed to have knowledge of conditions contained therein.
- Shareholders must know the purposes for which his money can be used by the company and what risks he is taking in making the investment.
- > Co. cannot depart from provisions contained in MoA Otherwise, ultra vires Act.

Legal provision:

1. The MoA of a company shall state: [NR SOLO]

the Name of co. with last word "Limited" (public) or "Private Limited" (Pvt co.); (Not applicable to Sec 8 Co.)

the <u>state</u> in which the <u>Registered</u> office of the company is to be situated

Objects for which the company is proposed to be incorporated and any matter incidental thereto

the <u>Liability</u> of members of company, whether limited or unlimited** In case of company having SC:

a. Amount of registered <u>SC</u> (divided into amt and no. of shares)

b. the no. of shares each subscriber intends to take opposite to his name

in case of <u>OPC</u> → Name of person who, in event of death of subscriber, shall become the member of OPC (nominee).

** Liability clause: State that liability is limited to unpaid amt of shares (in case of co. limited by shares) or amt upto which member undertake to contribute in event of winding up (in case of ltd. by Guarantee). List A and List B is to be prepared (to be discussed in accounts).

- 2. Name Clause: The name stated in the memorandum shall:
 - (a) NOT be identical with or resemble too nearly to name of an existing co. under this/previous

- (b) NOT be such that its use by the company:
 - (i) will constitute an offence under any law for the time being in force; or
 - (ii) is undesirable in the opinion of the CG (power delegated to RoC).

A name is said to "resemble" when difference is only of:

Plural or Singular Spacing between letter or punctuation marks

Use of different tenses

Slight variation of spelling (Disc Ltd vs Disk Ltd.)

Different phonetic spellings (Jay Kay Ltd. and JK Ltd) Complete translation in Hindi or English (National Service Ltd vs. Rashtriya Seva Ltd)

Use of <u>www.</u> or ".net" etc. (SS Ltd vs SS.com Ltd) Order of words is similar (Ravi Builders and Teacher Ltd. vs Ravi Teacher and Builder Ltd)

Addition of name of place

Addition or deletion of numerals (unless numerals represent brand)

- 3. Without prejudice to provision u/ss (2), a co. shall not be registered with a name which contains:
 - a. any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the CG, any SG, or any local authority, corporation or body constituted by the CG/SG under any law for the time being in force; or
 - b. such word or expression, as may be prescribed, unless the previous approval of ${\it CG}$ has been obtained for the use of any such word or expression.

Rule 8B of Companies (Incorporation) Rules, 2014:

Following words and combinations thereof shall not be used in the name of a company in English or any of the languages depicting the same meaning unless the previous approval of the CG has been obtained:

- Development Forest Authority; > National; Board: Authority; corporation; > Municipal; ➤ Union: Republic; > Small Scale > Development > Panchayat; > President Nation: Industries: > Commission: Scheme: > Minister; > Central: > Financial > Court or > Undertaking; > Governor; > Federal; Corporation and Judiciary; Rashtrapati; ➤ Bureau the like: > Statute or PM or CM; > Khadi and Village Statutory; Industries Corporation;
- > The use of word of Scheme with the name of Government (s), State, India, Bharat or any Government authority or in any manner resembling with the schemes launched by CG/SG or local Governments/auth

Approval of Regulator:

If the proposed name include words such as 'Insurance', 'Bank', 'Stock Exchange', 'Venture Capital', 'Asset Management', 'Nidhi', 'Mutual fund' etc., unless a declaration is submitted by the applicant that the requirements mandated by the respective regulator, such as IRDA, RBI, SEBI, MCA etc. have been complied with by the applicant;

Bonus Points:

- a. In case of Govt co., the suffix "Pvt Ltd" or "Ltd" is not required provided 92 + 137
- b. In case of OPC, add the suffix (OPC) Private Limited
- 4. A person may make an application (SPICe+/RUN form) to Registrar for reservation of a name as:
 - (a) the name of the proposed company; or
 - (b) the name to which the company proposes to change its name.

Resubmission may be allowed within 15 days, in case of any defect.

5. Reservation of Name:

a. Upon receipt of appln u/ss (4), the Registrar may, on the basis of info. and docs furnished with application, reserve the name:

For 20 days	From approval or such other prescribed period in case of New Company
For 60 days	From approval in case of Existing Company.

Rule 9A: Application for extension of time can be made before expiry of 20 days as follows:

Another 20 days (Total 40 days)	Fees Rs. 1,000
Further 20 days (Total 60 days)	Fees Rs. 2,000
40 days in one go (Total 60 days)	Fees Rs. 3,000

b. Where after reservation, it is found that name was applied by furnishing wrong or incorrect info, then:

If co. is not yet	Cancel reserved name + Applicant liable for penalty upto Rs. 1L			
incorporated				
If company is	Registrar may, after giving the company an OOBH,:			
incorporated	a. direct co. to change name within 3m, after passing an OR;			
	b. take action for striking off name of co. from register; or			
	c. make a petition for winding up of the company.			

General Circular No. 29/2014 dated 11th of July, 2014:

CG directed Registrar that while allotting names to Cos./LLPs, the RoC concerned should exercise due care to ensure that the names are not in contravention of the provisions of the "Emblems and Names (Prevention of Improper Use) Act, 1950. It is necessary that Registrars are fully familiar with the provisions of the said Act.

6. MoA shall be in respective forms specified in Tables A, B, C, D and E in Sch I as may be applicable.

7. In case of co. limited by guarantee and not having a share capital - Any provision in MoA/AoA purporting to give any person a right to participate in divisible profits of co. otherwise than as a member, shall be void.

- > Whatever is not stated in MoA as objects of co. is prohibited by doctrine of ultra vires.
- An act which is ultra vires is void and does not bind the <u>company</u>.
- Neither the company nor the contracting party can sue on it.
- > The co. cannot make it valid, even if every member assents to it (i.e., such act cannot be ratified)

Important Case Laws:

Rajendra Nath Dutta v. Shailendra Nath Mukherjee, 1982

An act which is intra vires the company but outside the authority of the directors may be ratified by the company in proper form.

<u> House of Lords in - Ashbury Railway Carriage and Iron Co. Ltd. v. Riche</u>

- MoA defined its objects as "The objects for which the company is established are to make and Facts of the case: sell, or lend or hire, railway plants to carry on the business of mechanical engineers and general
- The company entered into a contract with M/s. Riche, a firm of railway contractors to finance the construction of a railway line in Belgium.
- On subsequent repudiation of this contract by the company on the ground of its being ultra vires, Riche brought a case for damages on the ground of breach of contract, as according to him the words "general contractors" in the objects clause gave power to the company to enter into such a finance contract and, therefore, it was within the powers of the company.
- More so because the contract was ratified by a majority of shareholders, it is a valid contract.

Decision by The House of Lords:

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

<u>Author's Note</u> - The purpose of doctrine of ultra vires has been defeated as now the object clause can be easily altered, by passing just a special resolution by the shareholders.



Section 5 - Article of Association: [Defined u/s 2(5)]

[Nothing in this sec shall apply to articles of a company registered under previous act]

- 1. AoA shall contain the <u>regulations for management</u> of the company (internal rules and regulations)
- AoA to include such matters, as may be prescribed.
 Provided that co. may include additional matters in AoA as considered necessary for management.

Entrenchment Provision:

- 3. AoA may contain <u>provisions for entrenchment</u>

 <u>Effect of such provision</u> AoA may be altered only if conditions or procedures as that are more restrictive than those applicable in case of special resolution, are met or complied with.
- 4. Provisions for entrenchment shall only be made:
 - > either on formation of a company, or
 - > by an amendment in AoA agreed to by:
 - i) all members (in case of private company) or
 - ii) by a special resolution (in case of public company)
- 5. Where AoA contain prov. for entrenchment \rightarrow Co. shall give notice to Registrar of such provision in SPICe+ (new companies) or MGT-14 (within 30 days of entrenchment provision)
- 6. AoA shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as applicable to such co.
- 7. A co. may adopt all or any of the regulations contained in model articles applicable to such co.
- 8. Where registered AoA do not exclude or modify regulation contained in model AoA applicable to such co., the regulations (in model AoA) shall be deemed to be regulation of such co. as if they were contained in duly registered AoA of the co.

Doctrine of Indoor Management:

- > Persons dealing with the co. cannot be assumed to have knowledge of internal problems of co.
- Stakeholders need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to take it for granted that it is all done.
- > The doctrine helps protect external members from the company and states that the people are entitled to presume that internal proceedings are as per documents submitted with the RoC.

Doctrine of Indoor Management (DIM) vs Doctrine of Constructive Notice (DCN)

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

Basis for Doctrine of Indoor Management

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

Exceptions to DIM (i.e., Applicability of DCN):

- a. Knowledge of irregularity: In case this 'outsider' has actual knowledge of irregularity within the company, the benefit under DIM would no longer be available. In fact, he/she may well be considered part of the irregularity.
- b. <u>Negligence:</u> If with a minimum of effort, the irregularities within a company could be discovered, the benefit of the DIM would not apply. The protection of the rule is also not available where the circumstances surrounding the contract are so suspicious as to invite inquiry, and the outsider dealing with the company does not make proper inquiry.
- c. Forgery: The rule does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. A company can never be held bound for forgeries committed by its officers.
- Where the question is in regard to the very existence of an agency.
- e. Where the act is ultra vires to the company itself.

Section 6 - Act to Override Memorandum, Articles, etc.

Save as otherwise expressly provided in this Act-

- the provisions of this Act shall have effect notwithstanding anything to the contrary contained in: BoD resolution or SH resolution (MoA/AoA) (any agreement executed by co.
- b. any provision contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be.



Section 7 - Incorporation of Company:

1. File the following documents and information with the Registrar within whose jurisdiction the Registered Office (RO) of a company is proposed to be situated:

MoA (eMOA in INC-33) & AoA (eAOA in INC-34)

- duly signed by Subscribers*

Declaration (Form INC-8), that requirement of act w.r.t., incorporation is complied with, by:

- 1. Advocate, CA, Cost Accountant, CS in practice engaged in formation of co., AND
- 2. Person named in AoA (director, manager or secretary of co.)

Address for correspondence till RO is estb.

Particulars (name, residential address, nationality and others) of every subscriber + Proof of identity

Particulars of first directors -Names, DIN, residential address, nationality and other particulars + Proof of identity

Related to first directors - Interest in other firms/ BC + Consent to act as directors (DIR -2) filed

with ROC in DIR-12

Declaration from each Subscribers and First Directors (in Form INC 9) that:

- (a) he is not convicted of offence w.r.t., promotion, formation or mgt. of any co., or
- (b) that he has not been found guilty of any fraud/misfeasance or breach of duty to any co. during preceding 5 years AND
- (c) all docs filed with RoC for registration contain correct, complete and true information to best of his knowledge and belief

Such documents shall be filed along with application for incorporation in SPICE+ Form INC 32



Rule 13: Steps of Incorporation

Generally -	Each subscriber to add - Name, address, description,
	occupation (himself and at least 1 witness)
Illiterate Subscriber	Affix thumb impression
Body corporate Subscriber	Director, officer/employee authorized (not himself a
	subscriber)
LLP Subscriber	Duly authorized partner (not himself a subscriber)
Foreign national	Signature to be notarized by Notary
Subscriber	
Foreign national visiting	Valid Business Visa required. However, Business visa N.A.
India to incorporate a co.	for Person of Indian Origin or Overseas Citizen of India

Add on - In case of OPC, file the written consent of nominee in addition to above documents!

- 2. Issue of Certificate of incorporation ("COI") RoC shall, on basis of above doc and info, register and issue a COI in Form INC -11.
- 3. Allotment of Corporate Identity Number (CIN) RoC shall allot to the co. a CIN, which shall be a distinct identity for the company and which shall also be included in the COI

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7	Decoding CIN of Infosys Limited is <u>L85110KA1981PLC013115</u> :
″	
•	こうしょう カキト・モ てんたんかん しゅいせんか はし ガリコリス かしろひょうしししょフェント
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Decoding	Decoding CIN of Infosys Limited is <u>L8311UKA1981FLC013113.</u>					
i i	Status - Listed or Unlisted	1981	Year of Inc.			
		PLC	Public/Private etc. (NPL - Not for profit)			
	Serial No.	013115	Registration no. with ROC			
KA	State of inc.	1013113	Registration no. with NOO			

- 4. Company shall maintain & preserve at its RO copies of all docs & info. as originally filed u/ss (1) till dissolution.
- 5. If person furnishes any false/incorrect particulars of info. or suppresses any material info., of which he is aware in any of docs filed with RoC above \rightarrow Such person shall be liable u/s 447
- 6. If after incorporation, it is proved that co. is incorporated by furnishing false/incorrect info. or representation or by suppressing any material info. for incorporating such co., or by any fraudulent action:
 - a. promoters, first directors & persons making declaration u/s 7(1)(b) shall each be liable u/s 447
 - b. Tribunal may, on an application made to it [MR. LOW]:
 - pass orders for regulation of Management of the co. including changes, if any, in its MoA/ AoA, in public interest or in the interest of company and its members and creditors; or
 - ii. direct that \underline{L} iability of the members shall be unlimited; or
 - iii. direct Removal of the name of the company from the register of companies; or
 - iv. pass an order for the \underline{W} inding up of the company; or
 - v. pass such Other orders as it may deem fit

Prior to such orders - Reasonable OOBH to Co. + take into consideration transaction entered into by co.

Simplified Proforma for Incorporating Company Electronically (SPICe) - For ease of doing business, MCA has now simplified the process of filing forms for incorporation of company though SPICe.

Summary of Incorporation of a Company

3. Drafting and signing of 2. Reservation of name by 1. Determine the nature of MOA & AOA filing an application company (private or public) 4. Submission of MOA and 5. Consent of persons 6. Submission of statutory AOA to ROC nominated as directors declaration of compliances 9 File declaration about 8. Obtain certificate of 7. Pay fees & amount of address of Registered office

Additional points related to incorporation:

stamp duty

If objects of co. require prior approval of sectorial regulators such as RBI/SEBI, obtain such approval prior to pursuing the objects & declaration in this behalf to be submitted at incorporation.

incorporation

> In case of Nidhi co., declaration by CG u/s 406 is to be obtained prior to commencement of business + Declaration to the ROC

Formation of One Person Company (OPC):

- > MoA of OPC to indicate name of other person (nominee) who becomes member of the OPC in case of death/incapacity of subscriber.
- When such nominee becomes a member, he shall appoint a new nominee within 15 days of becoming member. OPC to inform RoC in Form INC-4 within 30 days of becoming member.
- > Nominee to give his prior written consent in Form INC-3.
- > Such written consent to be filed with RoC along with MoA/AoA
- > Nominee may withdraw consent any time in prescribed form
- > Member of OPC may, at any time, change the name of Nominee by:
 - a. Giving notice in prescribed form
 - b. Intimating the company about such change
 - c. On receipt of such intimation, company to inform Registrar.
 - d. Change of such name shall NOT be deemed as Alteration of MoA
- > Only a natural person who is an Indian citizen whether resident in India or otherwise:
 - shall be eligible to incorporate OPC;
 - · shall be a nominee for the sole member of OPC.
 - "Resident in India" means a person who has stayed in India for > = 120 days during immediately preceding FY.
- > A natural person shall not be member of > 1 OPC at any point of time and the said person shall not be a nominee of > 1 OPC.
- Where a natural person being member in OPC becomes member in another such company by virtue of his being a nominee in that OPC, such person shall meet eligibility criteria (as given in point above) within 180 days.
- > No minor shall become member or nominee of the OPC or can hold share with beneficial interest.
- Such Company cannot be incorporated or converted into a section 8 company. OPC may be converted to private/public companies in certain cases. The procedure of conversion is given in the Rules 6 & 7 of Chapter II of the Companies Act, 2013.
- > OPC cannot carry out Non-Banking Financial Investment activities including investment in securities of any BC.

Section 8 - Formation of companies with charitable objects, etc:

- Where CG (power delegated to RoC) is satisfied that a person/AOP proposed to be registered as Limited co.:
 - a. Has its objects to promote -

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Commerce	and the second s	Other Object
Religion Charity Prote	ection of envirnoment	A CONTRACTOR OF THE PROPERTY O
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- b. intends to apply its profits, if any, or other income in promoting its objects; and
- c. intends to prohibit the payment of any dividend to its members,

CG may issue a license and thereupon the RoC shall register such company as Limited Company. [Without addition of the word "Limited" or "Pvt. Ltd" as the case may be]

- 2. Sec 8 co = Privileges and obligation of Limited company.
- 3. Can a Firm become member of Section 8 company Yes!
- 4. Additional points relating to Section 8 co.:
 - a. Not alter provision of MoA or AoA w/o prior approval of CG (RoC)
 - b. May be converted to any other kind of company Subject to passing SR at GM approving such conversion and approval of CG (RD)
- CG (ROC) may suo motu also issue license u/s 8 to an existing public or private co.
- 6. Revocation of License and conversion to normal company: Where the company:
 - a. contravenes any requirements of this section or
 - b. contravenes any conditions subject to which a license is issued or
 - c. the affairs of co. are conducted fraudulently or in manner violative of objects of co. to public interest,

CG (RD) may, by order (after reasonable OOBH):

- > revoke license
- direct the company to Convert its status and
- change its name to add the word" Limited" or the words "Private Limited", as the case may be, to its <u>name</u> and thereupon the Registrar shall register the company accordingly:
- Where license is revoked, CG may, in public interest, order (reasonable OOBH),:
 - > winding up under this Act, or
 - > amalgamate such co. with other company registered under this section and having similar objects, constitution, powers, rights, etc. to be defined by CG

- 8. If on winding up/dissolution, there remains, after satisfaction of its liabilities, any asset, it may be:
 - a. transfer to another sec 8 co. having similar objects subject to T&C imposed by Tribunal, or
 - b. sold & proceeds thereof credited to Insolvency and Bankruptcy Fund formed u/s 224 of IBC
- 9. Section 8 co. shall amalgamate only with another Sec 8 co. having similar objectives

10. Punishment for default in complying with this section:

If a co. makes any default in complying with requirements of this section, the co. shall be punishable with fine which shall not be less than Rs. 10 lakhs but which may extend to Rs. 1 crores AND the directors and every officer of the company who is in default shall be punishable with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 25 lakhs [Amendment]

Provided that when it is proved that affairs of co. were conducted fraudulently, every OID liable u/s 447.

	Company	Directors and OID
Minimum fine	Rs. 10 lakhs	Rs. 25,000
Maximum fine	Rs. 1 crore	Rs. 25 lakhs
Affairs of co fraudulent	-	Sec 447

Steps to incorporate a section 8 company:

- 1. Application to ROC in SPICe + (INC 32)
- 2. Documents to be attached to such application:
 - a. MoA (INC -13) and AoA (INC 31)
 - b. Estimated for income and expense Future 3 years
 - c. Declaration by advocate, CA, CS, Cost Acc. in practice (in INC-14) and by each person making application (in INC-15) that:
 - i. MoA/AoA is in conformity with provision of section 8
 - ii. All requirements of act w.r.t. registration of section 8 co. is complied with.

Conversion of Section 8 company into other kind [Rule 21 and 22]:

- > Pass SR at GM. Explanatory statement of such notice to set out details of conversion.
- > The company should have filed FS and AR upto last FY.

 Additional FS Where application is made after 3m from end of last FY, attach a FS made upto date not > 30 days of filing such application duly signed by CA.
- > Serve a notice of such conversion to the following for representation, if any:

Income Tax	Charity	Cheif Secretary of State	CG/SG department
Auth.	Commissioner	where RO is situated	having jurisdiction

Above authorities may make representations to RD within 60 days after OOBH to company.

- > Apply to RD (INC-18) with fee + certified copy of resolution + proof of delivery of above notice.
- > Forward a copy of the above application to ROC.
- Within a week of such application to RD, publish a notice (Form INC-19) at its own expense in 2 newspaper (vernacular + english) and its website.
- > If RD is satisfied, approve conversion subject to terms and conditions imposed.



- Before rejecting application or imposing conditions RD to give OOBH to such co.
- > On receipt of such approval Pass SR at GM for alteration of AoA/MoA.
- > Copy of altered AoA/MoA to be filed with RoC. RoC to issue fresh CoI.

Examples of exceptions to Sec 8 companies:

- Call for GM by giving clear 14 days' notice (instead of 21)
- b. Requirement of min. no. of director, ID, does not apply.
- c. Need not constitute NRC or SRC

Concept clarity check:

- 1. Can a Sec 8 co. be incorporated with unlimited liability? No. Sec 8 co. only be a limited co.
- 2. Can an existing co. seek license u/s 8? Yes. In such case, it will drop the suffix Ltd or pvt ltd.
- 3. Can a Firm become member in a normal public co.- No. Partnership firm is not separate legal entity.



Section 9 - Effect of Registration:

From the date of incorporation mentioned in COI, such subscribers to MoA and all other persons, as 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, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.



Section 10 - Effect of Memorandum and Articles

- Subject to the provisions of this Act, the MoA and AoA shall, when registered bind the company and the members thereof to the same extent as respectively signed by them and contained covenants on its and his part to observe all the provisions of the MoA/AoA.
- 2. All monies payable by any member to the co. under MoA/AoA shall be a debt due from him to co. (i.e., co. can recover calls in arrears from members as if it a loan recovery)

Note - Company is liable to members and vice-versa. But members are not liable to each other.



Section 10A: Commencement of business etc.

A company having a share capital shall not commence any business or exercise any borrowing 1. powers unless:

declaration by a director, within 180 days of incorp. is filed with RoC that - As on date of declaration, every subscriber has paid the value of shares agreed to be taken

The co. has filed with RoC a verification of RO provided u/s 12(2)

2. If any default under this section \rightarrow Co. - Rs. 50,000 and every OID - Rs. 1,000/day upto Rs. 1 L

3. If no declaration within 180 days + RoC has RGTB that co. is not carrying on any business or operations \rightarrow RoC may initiate action for the removal of the name of the company from register of companies

As per the Companies (Incorporation) Rules, 2014:

- > Declaration u/s 10A by a director shall be in Form INC-20A and contents of the said form shall be verified by a CS/CA or a Cost Accountant, in practice.
- > In case of a co. pursuing objects requiring registration/approval from any sectoral regulators such as RBI, SEBI, etc., the regt./approval from such regulator shall also be obtained and attached with the declaration



Section 12: Registered Office of Company

- 1. Co. shall, within 30 days of incorporation and at all times, thereafter, have a RO, capable of receiving communications.
- 2. Co. to furnish to RoC verification of RO within 30 days of incorporation.
- 3. Every company shall:
 - a. paint or affix its name, address of its RO on the outside of every office or place in which its business is carried on, in a conspicuous position, in legible letters in languages in general use in that locality.
 - b. have its name engraved in legible characters on its seal; if any
 - c. get its name, address of its RO and the CIN along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications; and
 - d. have its name printed on hundies, promissory notes, bills of exchange and such other docs as prescribed.

Provided that, in case name change during the last 2 years, print or affix former name as well. In case of OPC - The words "One Person Company" to be mentioned in bracket below such name.

Change in RO:

- Notice of change in situation of RO, verified in Form INC22, shall be sent to RoC within 30 days properties of change.
- 5. Except by passing a SR, the RO shall NOT be changed:
 - a. in the case of an <u>existing company</u>, outside the local limits of any city, town or village where such office is situated at commencement of this Act or where it may be situated later by virtue of SR passed by co.;
 - b. in the case of any other company, outside the local limits of any city, town or village where such office is first situated or where it may be situated later by virtue of a SR passed by the company:

Provided that no company shall change RO from jurisdiction of one RoC to another RoC within the same State unless confirmed by Regional Director (RD) on appln made in this behalf by co. in prescribed manner.

- 6. On application u/ss 5, RD to communicate confirmation within 30 days from date of receipt of application.
 - On such confirmation, co. to file the same with RoC within 60 days of date of confirmation RoC shall register the same and certify the registration within 30 days from filing such confirmation.
- 7. The certificate referred u/ss (6) shall be conclusive evidence that all the requirements of this Act w.r.t, change of RO have been complied with and the change shall take effect from the date of the certificate.
- 8. If any default is made in complying with this section \rightarrow Company and every OID shall be liable to penalty of Rs. 1,000/day during which the default continues but not > Rs. 1 lakhs.
- 9. If RoC has RGTB that co. is not carrying on any business or operations, he may cause a physical verification of the RO in prescribed manner and if any default is found to be made in complying with requirements of sub-section (1) \Rightarrow Initiate action for the removal of the name of the company from register of companies.

Can RO be different from Head Office or Corporate office? - Yes!

Concept clarity check:

A Ltd. has current Registered office at Dadar, Mumbai, Maharashtra under Mumbai RoC. It is considering changing the location of RO. Help A Ltd. with the approvals required.

considering changing the location of RO. Help A Ltd. with the approvals reguli ed.						
Proposed RO RoC		Sec	Board	SR	CG (RD) approval	
			Resolution			
Bandra, Mumbai	Mumbai	12	Yes	No	No	
(within local limits)					(Notice to RoC - 30 days)	
Thane District	Mumbai	12	Yes	Yes	No (Notice to RoC - 30 days)	
Pune, MH	Pune	12	Yes	Yes	Yes	
i dile, mi i	1 4.10		·		(RD to approve in 30 days of	
					application. Co. to submit RD's approval	
					to ROC in 60 days.	
				ľ	Post that, RoC to register & certify in	
					30 days)	
Ahmedabad,	Gujarat	13	Yes	Yes	Yes	
Gujarat	J Gujar ar				(RD to approval within 60 days and then	
Gujarai	ļ				ROC to register within 30 days of	
					application)	



Section 13 - Alteration of Memorandum [Alteration = Addition, Omission or substitution]

1. Co. may alter provisions of MoA by a SR + by complying with procedure of this section

 $\underline{\text{Filing with RoC:}}$ A company shall, in relation to any alteration of its memorandum, file with the Registrar:

- (a) the SR passed by the company u/ss (1);
- (b) the approval of CG u/ss (2), if alteration involves any change in the name of the company.
- 2. Change in Name Effective only with approval of CG in writing (power delegated to RoC) in Form INC-24 + Fee.

Note - No approval if the only change is addition/deletion of word "Private" on conversion.

- 3. On change of name RoC shall enter the new name in register of cos. and issue new COI. Name change effective from issue of CoI in Form INC -25.
- 4. Alteration of registered office from one state to another Effective only on approval of CG (delegated to RD) on application in Form INC-23:
 - > Certified copy of the order of CG approving such change File with RoC of each of the States.
 - > Such RoCs shall register the same, and
 - Registrar of the State where the RO is being shifted to, shall issue a fresh CoI

Such application to CG (RD) shall be accompanied with:

- > Copy of MoA with proposed alteration
- > Copy of minutes of GM at which resolution authorizing such alteration was passed
- > Copy of board resolution
- > List of creditor and debenture holder
- > Acknowledgement of service of copy of application to RoC, Chief secretary of RO state.

Advertisement - Within 30 days before such application, advertise in Form INC-26 in 2 de newspapers.

- 5. On application to CG u/s 13(4) for approval of change in state where RO is situated:
 - a. CG to dispose application within 60 days.
 - b. Before passing order, may satisfy itself that:
 - i. Alteration has the consent of creditors, DH and other persons concerned with company, or
 - ii. sufficient provision has been made by co. for due discharge of all its debts & obligations or
 - iii. adequate security has been provided for such discharge.

Note - Where RO is shifted from one state to another, file CG's approval with ROC of each state in Form INC -28 within 30 days of receipt of order of CG.

- 6. Change in object for which money raised from Public:
 - Co., which has raised money from public through prospectus + still has any unutilised amount, shall not change its objects for which it raised such money unless a special resolution is passed
 - a. prescribed details (discussed in sec 27) f such resolution shall be:
 - > published in newspapers (English + vernacular which is in circulation at place where RO is situated) and
 - > placed on website of the company, if any, indicating the justification for such change;
 - b. the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the SEBI.
- Alteration of Object clause of MoA:

The RoC shall register any alteration of MoA w.r.t, the objects of the company and certify the registration within 30 days from the date of filing of the SR u/ss (6)(a) of this section.

- 8. No alteration made under this section shall have any effect until it has been registered as per this section.
- 9. Any alteration of the MoA of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in divisible profits of the company otherwise than as a member, shall be void.

Summary of provision related to Amendment of MoA:

Summary of provision related to Amendment of MoA:				Outcome
	MOA	SH	External	Outcome
	clause	Resolution	approvals	
90200	Name	SR	. 11	Change effective from date of issue of Fresh CoI
			(ROC) + Sec 4 &	by ROC
			16	N.A. where only word "Pvt" is added/deleted on
				conversion
-	Domicile	SR	Approval of CG (RD)	CG shall dispose appln within 60 days and before approving, may satisfy itself that consent of
	(State)		(only when RO is	crs, DH, etc. or that sufficient provision is made
l	•		changed from one	ا من بطنور مصاحد الناب الن
			state to another)	provided for discharge of debts.
	Objects	SR	-	Co., which has raised money from public through prospectus + still has any unutilised amount, shall
				not change its objects for which it raised such
				money unless a <u>SR</u> is passed and:

	the details of SR - published in newspapers + Placed on website of co. indicating justification for such change; the dissenting SH shall be given an opportunity to exit by the promoters and SH having control as per SEBI regulatn
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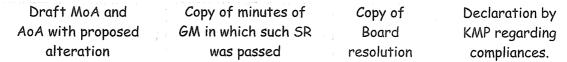


Section 14 - Alteration of articles

- 1. Company may, by SR, alter its AoA.

 Alteration of AoA includes conversion of:
 - a. Pvt co. to public co.
 - b. Public co. to Private co. (subject to approval of CG as given below)

An alteration having effect of converting public co. to private shall not have effect unless approved by CG on appln. within 30 days from passing SR to RD in Form RD-1 with following docs:



<u>Provided that</u> - Where a private co. alters its article such that it does not include restriction/ limitation which a Pvt. co. is required to include in AoA as per Act, such Pvt. co. shall cease to be private from date of alteration.

- 2. Following shall be filed in Form INC 27 with RoC, within 15 days of alteration of AoA, for the registration:
 - Every Alteration of AoA
 - > Approval of CG for such alteration
 - > Printed copy of the altered articles,
- 3. Any alteration of AoA registered u/ss (2) shall be valid as if it were originally in the articles.

<u>Andrews vs Gas Meter Co.</u> - The power to alter articles vests with the Company by virtue of Companies Act, 2013. A company cannot divest itself of these power.



Section 15: Alteration of MoA/AoA to be noted in every copy.

- (1) Every alteration in MoA/AoA shall be noted in every copy of the MoA/AoA, as the case may be.
- (2) Default → Co. + OID Liable to penalty of Rs. 1,000 for every copy issued without alteration.



Section 16: Rectification of Name of Company:

- 1. If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which:
 - a. in opinion of CG, is identical with or too nearly resembles the name by which a company in existence had been previously registered, it may:
 - > direct the co. to change its name and
 - the co. shall change its name within 3m from such direction, after adopting an OR;
 - b. on an application:
 - > by a registered proprietor of a trade mark
 - > made to CG within 3 years of incorporation or registration or change of name of the co.
 - that the name is identical with or too nearly resembles to a registered trade mark of such proprietor under the Trade Marks Act, 1999,
 - > in the opinion of CG, is identical with or too nearly resembles to an existing trade mark,
 - > CG may:
 - i) direct the co. to change its name and
 - ii) the co. shall change its name within 3m from such direction, after adopting an OR;
- 2. Where a co. changes its name or obtains a new name u/ss (1), it shall, within 15 days from date of such change, give notice of the change to Registrar along with the order of CG, who shall carry out necessary changes in the CoI and memorandum.
- 3. If a co. is in default in complying with any direction given u/ss (1), the CG shall allot a new name to the co. in prescribed manner and Registrar shall enter the new name in register of companies in place of the old name and issue a fresh CoI with the new name, which the company shall use thereafter [Amendment]

Provided that nothing here shall prevent a company from subsequently changing its name as per Sec 13



Section 17: Copies of memorandum, articles, etc., to be given to members.

- 1. Co. shall, on being so requested by a member, send to him within 7 days of the request and subject to the payment of such fees as may be prescribed, a copy of each of the following documents, namely:
 - Memorandum Articles agreement and resolutions u/s 117(1) not so included in MoA/AoA
- 2. If default u/s 17 \rightarrow Co. + Every OID Liable for each default Rs. 1,000/day or Rs. 1 lakh WEL



Section 18: Conversion of Companies Already Registered:

Alter MoA/AoA \rightarrow Application to RoC \rightarrow RoC to issue fresh \rightarrow No affect on debts/ liabilities

 A co. of any class registered under this Act may convert itself as a company of other class under this Act by alteration of MoA and AoA of the co. as per the provisions of this Chapter.

2. Application to RoC for fresh CoI:

- > Where conversion is required to be done under this section,
- > the RoC shall, on an application made by co, after satisfying himself that provisions of this Chapter is complied with,
- > close the former registration of the co. and
- > after registering docs referred u/ss (1), issue a CoI in same manner as its first registration.
- 3. The registration of a co. under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done.



Section 19: Subsidiary Company not to hold Shares in its Holding Company

1. Restriction:

- > No co. shall (itself/nominees) hold any shares in its holding co., and
- > No holding co. shall allot/trf its shares to any of its subsy co. and
- > any such allot/trf of shares of a co. to its subsy. shall be void

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

- a. where subsy co. holds such shares as legal representative of a deceased member of holding co.;
- b. where the subsy co. holds such shares as a trustee; or
- c. where subsy company is a SH even before it became a subsidiary co. of the holding co.

Provided further that subsy co. referred to in the above proviso shall have a right to vote at a meeting of holding co. only w.r.t., the shares held by it as a LR/trustee, as referred to in said proviso.

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

<u>Note</u> - A subsidiary can buy shares of holding where it is a part of scheme of amalgamation sanctioned by court/Tribunal.

Concept clarity check:

As on April'22 - A Ltd holds 5% shares in B Ltd.

As on June'22 - Due to some transactions, A Ltd. becomes subsidiary of B Ltd.

As on July'22 - A Ltd calls for AGM.

Question 1 - Can B Ltd. vote in such AGM as A Ltd. is a subsidiary of B Ltd?

<u>Answer</u> - No! The exception of right to vote at a meeting is only in case shares as held as a LR/Trustee. It is not applicable in the third exception that is "where subsy co. is SH even before it became a subsy of holding company"

Question 2 - Can B Ltd. issue bonus shares to A Ltd (say, in the ratio 1:1) Answer - Yes, as this transaction is under purview of exemption, such bonus shares can be issued.

Section 20: Service of Documents

A document may be served on a co. or an officer thereof by sending it at the RO of the co. by: means of such electronic or other mode leaving it courier speed registered as may be prescribed at its RO service post post

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

2. A document may be served on Registrar or any member by sending it to him by:

means of such e-mode or delivering at his courier registered speed other prescribed mode Post office or address service post post

Provided that member may request delivery through a particular mode by paying fees as determined in AGM.

<u>Author's Note</u> - Law only provides for an option to pay extra fees and decide an alternate mode for receiving notice. However, the notice will still be sent at the registered address of the member only. Company is not responsible for sending the notice to any other address (even if extra fees is paid)

Exception to Nidhi Co.

In case of Nidhi Company, u/s 20 (2), docs may be served only on members who hold shares more than:

Rs. 1,000 in face value or 1% of the total PUSC whichever is less.

For other SHs, docs may be served by a public notice in newspaper circulated in the district where the RO of Nidhi is situated; and publication of the same on the notice board of the Nidhi.

Rule 35 of Companies (Incorporation) Rules,2014

Electronic transmission means a communication that creates a record that is capable of retention, retrieval and review (RRR), and which may thereafter be rendered into clearly legible tangible form. It includes:

fax

email

posting of electronic message board or network

other mode capable of verifying the sender

- > In case of delivery by post, such service shall be deemed to have been effected:
 - (i) in case of notice of a meeting, at expiration of 48 hours after letter containing the same is posted; and

(ii) in any other case, at time at which the letter would be delivered in the ordinary course of post



Section 21: Authentication of documents, proceedings and contracts

Save as otherwise provided in this Act,

- (a) a document or proceeding requiring authentication by a company; or
- (b) contracts made by or on behalf of a company,

may be signed by any KMP or an officer or employee of the company duly authorised by the Board in this behalf.



Section 22: Execution of bills of exchange (BOE), etc.

- 1. A BOE, hundi or promissory note shall be deemed to have been made, accepted, drawn or endorsed on behalf of co. if it is made or drawn by any person acting under its authority, express or implied.
- 2. <u>Company having seal</u>: A company may, by writing under its common seal, if any, authorise any person as its attorney to execute other deeds on its behalf in any place (India/outside India)

<u>Company not having seal</u>: Provided that in case if no common seal, the authorisation under this subsection shall be made by 2 directors or by director + CS, wherever the company has appointed a CS.

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

	The	End	• •	• •
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Chapter 3 Prospectus and Allotment of Securities

Form	Section No	Purpose
PAS - 1	27	Advt. providing details of notice of SR for varying terms of contracts
		referred to in Prospectus or Objects for which Prospectus was issued
PAS - 2	31	Information Memorandum
PAS - 3	39 & 42	Return of allotment of securities
PAS - 4	42	Private placements offer cum application letter
PAS - 5	42	Record of Private placement offers
PAS - 6	29	Unlisted Public company to file with RoC within 60 days of each half year

Sec No.	Section Name		
23	Public Offer and Private Placement		
24 Power of Securities and Exchange Board to Regulate Issue and Tr			
	Securities, etc.		
25	Document Containing Offer of Securities for Sale to be Deemed Prospectus		
26	Matters to be Stated in Prospectus		
27	Variation in Terms of Contract or Objects in Prospectus		
28	Offer of Sale of Shares by Certain Members of Company		
29	Public Offer of Securities to be in Dematerialised Form		
30	Advertisement of Prospectus		
31	31 Shelf Prospectus		
32	Red Herring Prospectus		
33	Issue of Application Forms for Securities		
34	Criminal Liability for Misstatements in Prospectus		
35	Civil Liability for Misstatements in Prospectus		
36	Punishment for Fraudulently Inducing Persons to Invest Money		
37	Action by Affected Persons		
38	Punishment for Personation for Acquisition, etc., of Securities		
39	Allotment of Securities by Company		
40	Securities to be Dealt with in Stock Exchanges		
41	Global Depository Receipt		
42	42 Offer or Invitation for Subscription of Securities on Private Placement		



Overview

This Chapter is divided in two parts:

Part I - Provisions relating to issue of securities through Public Offer (Sec 23 - 41)

Part II - Provisions relating to issue of securities through Private Placement (Sec 42)



Section 23 - Public Offer (PO) and Private Placement (PP)

Public co. may issue securities:

through prospectus to public (PO)

Private Placement Right issue and Bonus issue as per this Act (and SEBI in case of listed co./co. intending to get listed)

2. Private co. may issue securities:

through prospectus to public

Private Placement Right issue and Bonus issue as per this Act (and SEBI in case of listed co./co. intending to get listed)

Note - Public offer includes IPO, FPO and OFS

3. Notified class of public companies can issue securities for the purpose of listing on stock exchanges in permissible foreign jurisdiction. (Overseas direct listing)



Important Definitions:

Securities [Sec 2(81)] - As defined in Section 2(h) of SCRA, 1956. Security is a wider term and includes - shares, bonds, debentures, derivatives, units of collective investment scheme, security receipts, units of mutual fund, government securities, etc.

Note - Security shall not include units of Unit Linked Insurance Policy (ULIP)

- Prospectus [Sec 2(70)] Any document described or issued as a prospectus and includes:
 - Red Herring Prospectus (RHP) as per Sec 32 and
 - ii. Shelf Prospectus (SP) as per sec 31
 - iii. Notice, circular, advt. /other doc inviting offers from public for subscription or purchase of any securities of BC.



Section 24: Power of SEBI to regulate issue and transfer of securities:

SEBI is empowered to regulate issue and transfer of securities or non-payment of dividend by listed companies or companies intending to get listed on Recognised Stock Exchange (RSE) in India.



Section 25 - Document Containing Offer of Securities for Sale to be Deemed Prospectus

Document = Public at large Issue House Company Deemed Prospectus

Meaning - Where a company (A) allots or agrees to allot any securities of the co. (A) with a view that those securities shall be offered for sale to public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus.

Effect of deeming provision-

- 1. Law relating to content of prospectus and liabilities u/s 34,35 shall apply
- 2. Person making offer were person named as director in the co.

<u>Presumptions</u>: Unless the contrary is proved, it shall be evidence that an allotment of securities was made with a view to the securities being offered for sale to the public if it is shown:

- a. that offer for sale to the public was made within 6m after the allotment or agreement to allot; or
- b. that at the date when offer was made, whole consideration had not been received by the co.

In addition to matter stated u/s 26, following additional matter is to be included in the document:

- a. Net amt. of consideration received/to be received by the co.
- b. time and place at which contract for allotment of said securities may be inspected

Signature of document:

In case of co. - 2 directors; In case of Partners - At least $\frac{1}{2}$ of Partners

Note - Where a rights issue is made to existing members with a right to renounce in favour of others, if the number of such others . 50, it also becomes a deemed prospectus. [SEBI v Kunnamkulam Paper Mills Ltd]



Section 26 - Matters to be Stated in Prospectus

Dated and Copy to RoC for Signed by dir./ RoC not to register unless consent in Signed Registration proposed dir. writing of all person named received

1. Every prospectus issued by/on behalf of public co. shall be dated and signed.

Prospectus shall state information and set out such reports on financial information as specified by SEBI + CG. Unless specified by SEBI, the regulations already made by SEBI shall apply.

Prospectus to include:

- a. declaration about compliance with this Act, and
- b. statement that nothing in prospectus is contrary to this Act, SEBI and SCRA.
- 2. Nothing u/ss (1) shall apply to the issue of prospectus/form of application for:
 - a. Issue of shares/debentures to existing members or DH, whether or not there is right to renounce u/s 62(1)
 - b. Issue of shares/debentures which are, in all respects, uniform with shares/debentures previously issued and are currently quoted on RSE.
- 3. Provision of 26(1) shall apply to prospectus or form of application issued on formation of co. or subsequently.

Explanation - Date indicated in prospectus shall be deemed to be the date of publication.



- 4. File prospectus with RoC: No prospectus shall be issued unless, on or before its publication, a copy thereof has been delivered to RoC for filing, signed by:
 - > every person who is named therein as a director or proposed director of the co. or
 - > by his duly authorised attorney.
- Prospectus shall not include a statement purporting to be made by expert, unless:
 - > expert is a person who is not engaged/interested in formation/promotion/mgt. of co., and
 - > has given his written consent to the issue of the prospectus and has not withdrawn such consent before filing of such prospectus with RoC and a statement to that effect shall be

included in the prospectus.

Read definition of Expert - Sec 2(38) [Chapter 1]

- 6. Every prospectus shall, on the face of it,:
 - (a) state that a copy has been delivered to RoC u/ss (4); and
 - (b) specify docs attached to the copy so delivered
- 8. Prospectus not valid if issued more than 90 days after date of delivery of copy thereof to RoC
- 9. Issue of prospectus in contravention of this section Co. and every person who is knowingly a party - Rs. 50,000 to Rs. 3 lakhs

Section 27 - Variation in Terms of Contract or Objects in Prospectus

- Co. shall not vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued, except with:
- Prior approval by way of special resolution in GM and:
- b. prescribed details of such resolution shall be:
 - > published in newspapers (English + vernacular which is in circulation at place where RO is situated) and
 - placed on the website of the company, if any, indicating the justification for such change;
- Amt so raised cannot be used for buying, trading or otherwise dealing in Eq. shares of listed cos.
- d. the dissenting shareholders shall be given an exit offer by the promoters and controlling shareholders in accordance with regulations to be specified by the SEBI.

Rule 7 of The Companies (Prospectus and Allotment of Securities) Rules, 2014:

SR u/s 27 shall be passed through Postal Ballot. Notice of proposed SR to contain following info:

extent (%) of achievement of money utilised for Original purpose/ total money proposed obj. stated objects raised object reason and justification risk factors pertaining to particulars of the unutilised the new objects for variation proposed variation amount

proposed time limit within which the proposed varied objects would be achieved

other relevant info

- 2. Advertisement of the notice Form PAS-1 (published simultaneously with dispatch of 🛃 notice)
- 3. Place notice on website of co.
- 4. The dissenting shareholders shall be given an exit offer by the promoters and controlling shareholders in accordance with regulations to be specified by the SEBI. (repeated in rule)



Section 28 - Offer of Sale of Shares by Certain Members of Company

- Authorise the co.
 - > Where certain members (indv./BC) of a co. propose in consultation with BoD
 - > To offer whole/part of their holding to public
 - > the members shall then collectively authorize the co. to take necessary action for OFS and
 - > then they shall reimburse the company of all expense incurred.
- 2. Document by which such OFS is made to public shall be deemed to be a prospectus issued by the company and all provisions related to content and mis-statement shall apply.



Rule 8: Exception to certain matters

The following provision of this chapter shall not be applicable in case of OFS:

- a. the provisions relating to minimum subscription;
- b. the provisions for minimum application value;
- c. the provisions requiring any statement to be made by BoD in respect of utilization of money; and
- d. any other provision/information which cannot be compiled or gathered by the offeror, with detailed justifications for not being able to comply with such provisions.

Note: Prospectus to disclose name of the person(s)/entity bearing cost of making the OFS + reasons.



Section 29 - Public Offer of Securities to be in Dematerialized Form (Demat Form)

- Notwithstanding anything contained in any other provisions of this Act:
 - a. every company making public offer; and
 - b. such other class or classes of public companies as may be prescribed, shall issue the securities only in dematerialised form by complying with the provisions of the Depositories Act, 1996 and the regulations made thereunder.



Rule 9 of Companies (Prospectus and Allotment of Securities) Rules, 2014:

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

Provided that the entire holding of convertible securities of the co. by promoters held in physical form (up to the date of IPO) shall be converted into demat form before such offer is made.

Example - Vijay Shekhar sharma OFS in Paytm - Has to be in demat form first



2. In case of prescribed class of <u>unlisted</u> companies, the securities shall be held or transferred only in Demat form in the manner laid down in the Depositories Act, 1996 and regulations made thereunder.

Rule 9A of Companies (Prospectus and Allotment of Securities) Rules, 2014:

Issue of securities in demat form by UNLISTED Public Company (UPC):

- Every UPC shall:
 - a. Issue securities in demat form, and
 - b. Facilitate dematerialisation of all existing sec.
 as per the Depository Act, 1996 and regulations made thereunder.
- 2. For UPC intending to make offer for:

issue of securities

buyback

issue of bonus shares

right shares

shall ensure that, before making such offer, entire holding of securities of:

promoter

directors

KMPs

has been dematerialized as per the Depository Act, 1996 and regulations made thereunder

- 3. On or after 2nd October 2018, every holder of securities of UPC:
 - a. who intends to transfer such securities, shall get such sec. dematerialised before transfer
 - b. who subscribe to any sec. of UPC Ensure existing securities are held in demat form.
- 4. Every UPC shall:
 - a. Facilitate dematerialisation of existing securities by making necessary application to Depository (as defined u/s 2(1)(e) of the Depository Act), and
 - b. Secure International security Identification Number (ISIN) for each type of securities,
 - c. Inform existing security holder about such facility.
- 5. Every UPC shall ensure:
 - a. Timely payment of fees to Depository, Registrar to Issue & Share Transfer Agent (DRS) as per the respective agreement
 - b. It maintains security deposit of >= 2 years of fees with DRS as per agreement
 - c. Complies with regulations of SEBI or Depository w.r.t, dematerialisation of shares
- 6. No UPC which has defaulted in above payment, shall make offer of issue of any securities or buyback or bonus/right issue till payment to DRS has been made.
- 7. Provision of Depositories Act, SEBI (Depositories and Participants) Regulations, 2018 and SEBI (RTI and STA) Regulations, 1993 Apply Mutatis Mutandis

- 8. Every UPC shall submit Form PAS-6 + Fees with ROC within 60 days of conclusion of each #whalf year (FY). Such form shall be certified by a CA/CS/CMA in practice
- 8A. Any diff. b/w issued capital and capital in demat form Co to bring to notice of Depository
- 9. Grievances of securities holders of UPC File with IEPF Authority. IEPF authority shall initiate action against DRS after consultation with SEBI
- 10. This rule shall N.A. to an UPC which is Nidhi, Govt. company or a WOS
- 3. Any co., other than above, may convert its securities into demat form or issue its securities in physical form in accordance with the provisions of this Act or the Depositories Act, 1996 and the regulations made thereunder.



Section 30 - Advertisement of Prospectus

Where an advertisement of prospectus of a co. is published in any manner, it is necessary to specify therein the contents of MoA as regards to:

Objects

Liability

Amount of SC of Co. (ASC)

names of the signatories

No. of shares

Capital

subscribed by them Structure



Section 31 - Shelf Prospectus (SP)

Meaning

- > SP means a prospectus in respect of which
- > the securities or class of securities included therein
- > are issued for subscription in one or more issues over a certain period
- > without the issue of a further prospectus.

Provision:

- > Any class(es) of cos., as the SEBI may provide by regulations in this behalf, may file SP with RoC
- > at the stage of the first offer of securities included therein
- which shall indicate the period of validity of such prospectus, not exceeding 1 year
- validity shall commence from date of opening of first offer of securities under that prospectus.
- > w.r.t., second/subsequent offer of such securities issued, no further prospectus is required.

<u>Information Memorandum (IM)</u>: (Form PAS-2)

- Within 1 month prior to second/subsequent offer., co. to file IM with RoC
- > IM to contain material facts relating to:

New charges created Changes in financial position of co. between previous offer and subsequent offer

Other changes as prescribed



Intimation of Changes:

- Where a co. has received applications for the allotment of securities along with advance payments of subscription before making of any such change.
- Co. to intimate such changes to applicant.
- > If they desire to withdraw application Refund payment within 15 days of subscription

Note: IM together with shelf prospectus shall be deemed to be prospectus.



Section 32 - Red Herring Prospectus (RHP)

Meaning - Prospectus which does not include complete particulars of quantum/price of securities included therein.

- 1. Co. proposing to make an offer of securities may issue a RHP prior to prospectus
- 2. RHP to be filed with RoC at least 3 days prior to opening of subscription list and the offer
- RHP to have same obligation as prospectus.
 Variation b/w RHP and prospectus to be highlighted as variation in prospectus
- 4. Upon closing of offer Prospectus (not RHP) stating therein the total capital raised and closing price and any other details as are not included in RHP shall be filed with the RoC and the SEBI.

Read section 2(1) - Abridged prospectus.



Section 33 - Issue of Application Forms for Securities

 Every form of application for purchase of any securities of a co. shall be accompanied by an abridged prospectus.

This sub-section shall N.A. if it is shown that the form of application was issued in connection with:

- a. a bona fide invitation to a person to enter into an underwriting agreement w.r.t. such sec.; or
- b. in relation to securities which were not offered to the public (Example Private placement)
- c. where offer is made to existing members of the company
- 2. Copy of the prospectus shall, on a request being made by any person before the closing of the subscription list and the offer, be furnished to him.
- 3. Default in this section Co. liable for Rs. 50,000 for each default

Self-Notes!		



Section 34 and Section 35 - Liability for Misstatement

Note: A contract of shares in a co. 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.

Section 34 - Criminal Liability

If prospectus includes any statement - untrue or misleading, every person who authorizes the issue of such prospectus shall be liable under section 447.

Section N.A. if a person proves that:

- a. such statement/omission was immaterial or
- b. that he had RGTB that statement was true or the inclusion or omission was necessary.

Section 35 - Civil Liability

Applicability:

- Where a person has subscribed for securities of a co +
- Acting on any statement included/omitted in prospectus which is misleading, and has sustained loss or damage as a consequence thereof

Person Liable: Company and every person who is:

- 1. Director at the time of issue of prospectus or authorized himself to be named as director
- 2. Agreed to become director in future
- 3. Promotor of co.
- 4. Authorized the issue of prospectus
- 5. Expert u/s 26(5)

Above person shall be liable to pay compensation to every person who has sustained such loss or damage.

No person shall be liable if he proves that:

- a. Having consent to become director, withdrew the consent and prospectus was issued w/o consent.
- b. Prospectus issued w/o knowledge or consent + on becoming aware gave reasonable public notice
- c. Such statement was made on basis of expert's report + such statement was true and fair representation of expert's statement + such person had RGTB that expert is competent + expert has given consent + not withdrawn consent.

If proven that prospectus issued with intent to defraud - every person u/ss (1) shall be personally responsible - without any limitation of liability

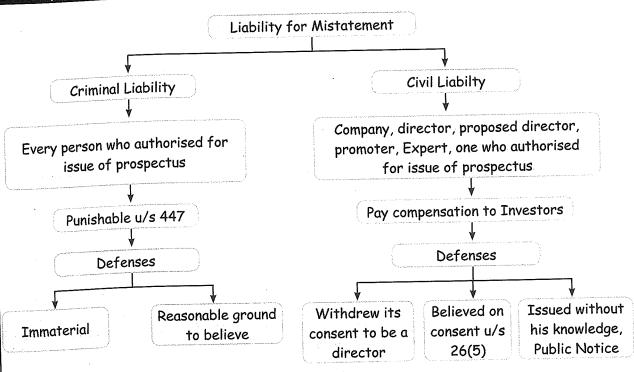
Peek Vs. Gurney (not covered in ICAI material but was included in past paper question)

The remedy u/s 35 by way of damage will not be available to a person if he has not purchased the shares on the basis of prospectus. (for example, a person bought shares from open market, in such case, it can't be said that he relied on the information of prospectus and hence, no remedy available)

Remedies for misrepresentation in Prospectus under Indian Contract Act:

	Rescission of contract	Damages
Rights When to seek?	Where a person has subscribed to shares on basis of prospectus containing misleading	Person acted on a statement which is fraudulent and sustained damages
	Statement Contract to purchase shares becomes	sustained damages
Effect	voidable at option of purchaser	
Exception	 Right not available to subsequent purchaser from market Subscriber to MoA cannot seek relief. 	

Summary of Liability





Sec 447: Punishment for Fraud

Without prejudice to any liability including repayment of any debt under this Act or any other law in force, any person guilty of fraud shall be liable as follows:

Amount involved in the fraud	At least Lower of: a. Rs. 10 lakhs b. 1% of T/O		<u>Less than</u> Lower of: a. Rs. 10 lakhs b. 1% of T/O
Whether public interest involved?	No	Yes	No
	6m - 10 years	3 years - 10 years	Upto 5 years
Jail	AND	AND	OR
And/or Fine	Up to 3x amt involved	Up to 3x amt involved	Upto Rs. 50 lakhs or both



Fraud bole toh?:

Act

Ommission

Concealment of Fact

Abuse of position

Committed with:

Intent to decieve

Gain undue advantage

Injure interest. of co/SH/crs/others

whether or not there is a wrongful gain/loss.



Sec 36: Punishment for Fraudulently Inducing Persons to Invest Money

Any person who:

- > either knowingly/recklessly makes any statement, promise or forecast
- > which is false, deceptive/misleading or
- > deliberately conceals any material fact,
- > to induce another person to enter into any agreement:

for Subscribing, Acquiring, Disposing or Underwriting securities the purpose of which is to secure a profit to any of the parties from such securities for obtaining credit facilities from any bank or financial institution

shall be liable for action u/s 447.



Section 37: Action by Affected Persons

A suit may be filed, or any other action may be taken u/s 34,35 or 36 by any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the prospectus.

Note - If Mr. M had purchased the shares based on statement in the prospectus, only Mr. M can initiate a suit against the co. and not Mr. X (to whom shares are transferred post allotment)



Allotment means appropriation of previously un-appropriated capital of the company.

[Issue of Prospectus - Invitation to offer; Receiving Application - Offer; Allotment - Acceptance]



Section 39: Allotment of Securities by Company

- 1. Co. can allot share to public only when:
 - a. amount stated in prospectus as min. amount has been subscribed and
 - b. sums payable on application have been paid to and received by co. by cheque/other instrument.
- 2. Application money shall not be <5% of nominal amt. of securities (or other amt. specified by SEBI)
- 3. If stated min. amount has not been subscribed <u>and</u> application money is not received within 30 days /other period by SEBI from <u>date of issue of prospectus</u> Return amount in pres. time & manner

Rule 11 of Cos (Prospectus and Allotment of Securities) Rules, 2014 – Refund of Appln Money:

a. If min. amt not subscribed + Application money not received within prescribed time - Application money to be repaid within 15 days from close of issue.

If not repaid - Directors who are OID - Jointly & severally liable to repay with intt. @15% p.a.

- b. Refund shall be credited only to the bank account from which the subscription was remitted.
- 4. When a co. having SC makes any allotment of sec.- File with RoC <u>Return of allotment</u> (Form PAS-3)

🔁 Rule 12 - Return of Allotment:

- a. Return of allotment to be filed in Form PAS 3 within 30 days of allotment of securities.
- b. Along with the Return of allotment, attach List of allottees stating name, address, occupation and no. of securities allotted.

In case of issue of:	Attach to Form PAS-3:
Securities (not being bonus shares) allotted as fully or partly paid up for consideration other than cash	 A copy of contract duly stamped together with any contract of sale if relating to a property or an asset, or a contract for services or other consideration. If such above contract is not reduced to writing, complete particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing A report of registered valuer w.r.t. valuation of the consideration to be attached
Bonus securities	Copy of resolution passed in GM authorizing such issue
Shares u/s 62(1)(c) by	Valuation report of registered valuer
co. other than listed co.	

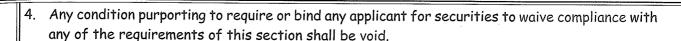
5. Default u/ss (3) and (4) - Co. and its OID - Liable - Rs. 1,000/day or Rs. 1 lakh WEL <u>for each</u> <u>default</u>

Section 40: Securities to be Dealt with in Stock Exchanges

- 1. Before Public Offer Co. to make an application to one or more RSE(s) and obtain permission for securities to be dealt with in such RSE.
- 2. Where prospectus states application u/ss (1) has been made Also state the name(s) of RSE in which the securities shall be dealt with.
- 3. Application money shall be kept in a separate bank account in a scheduled bank + Not to be utilised for any purpose other than:
 - a. Adjustment against allotment If sec. have been permitted to be dealt with on RSE
 - b. Repayment within the time specified by SEBI If co. is unable to allot securities







5. Default in complying with this section:

	Company	OID
Minimum	Rs. 5 lakhs	Rs. 50,000
Maximum	Rs. 50 lakhs	Rs. 3 lakhs

6. Co. may pay commission to any person w.r.t, subscription to its sec. subject to conditions prescribed.

Rule 13 of Companies (Prospectus and Allotment of Sec) Rules, 2014 - Payment of Commission: Commission can be paid subject to following conditions:

- a. Such payments to be authorized by AOA
- b. Comm. may be paid out of (a) Proceeds of issue, or (b) Profit of co., or both
- c. Rate of comm.

In case of sec. issue being:	Commission shall NOT exceed
Shares	Lower of:
	a. 5% of price of share issue or
	b. Rate auth by AOA
Debentures	Lower of:
	a. 2.5% of price at which debenture issued or
	b. Rate auth. by AoA

d. <u>Prospectus to disclose:</u>

name of underwriters

rate and amount of commission payable to u/w

no. of sec. underwritten or

subsc. by u/w

- e. No commission to be paid if securities are not issued to public.
- f. Copy of contract for payment of comm. File with RoC along with prospectus for registration

Concept clarity check:

- 1. A Ltd. applies in BSE and NSE for obtaining permission prior to IPO. Of them, NSE rejected the application and BSE approved such application. Can A Ltd. issue IPO? No. All the RSE where application has been made has to approve such application
- 2. Can underwriting commission be paid in kind (say, in forms of flats) Yes, there is no such restriction in law that commission has to be paid only in cash.

7=0

Section 41: Global Depository Receipt (DR):

A co. may, after passing a SR in its GM, issue depository receipts in any foreign country in prescribed manner.

Steps to issue DR (as per Rule 4):

1. BoD intending to issue DR shall pass a resolutions authorizing company to do so. (Board resolution)

- 2. Co. shall take prior approval of SH by a SR at GM. Note - SR passed u/s 62 for issue of shares underlying DR shall be deemed SR for section 41.
- 3. DR shall be issued by an overseas depository bank (ODB) appointed by the company and underlying shares shall be kept in custody of domestic custodian bank.
- 4. Comply with scheme and guidelines of RBI in this regard.
- 5. Co. shall appoint merchant banker or practicing CA, CS or cost accountant to oversee all compliances w.r.t. DR. Such a compliance report shall be placed in BoD meeting held immediately after closure of all formalities.

Additional Points:

- 1. DRs can be issued by public offering or private placement in line with jurisdiction rules, and traded on local platforms.
- 2. DRs can be based on new or existing shares, as per CG or RBI conditions.
- 3. Underlying shares allocated to overseas depository & against such shares, DRs issued by such Overseas Depository Bank.
- 4. DR holders can be company members, vote after DR-to-share conversion, per Scheme and Act.
- 5. Overseas depository votes for DR holders until conversion.



Section 42: Offer or Invitation for Subscription of Securities on Private Placement (PP)

Definition:

- "Private placement" means any offer or invitation to subscribe
- to a select group of persons by a company (other than by way of public offer)
- through private placement offer-cum-application ("PPOCA"), which
- satisfies the conditions specified in this section.

Provision:

- Subject to this section, a company may make private placement (PP) of securities
- 2. Private placement:
 - > PP to be made only to select group of person identified by BoD ("Identified Persons" (IPs)).
 - > No. of IPs shall not exceed 50 or higher no. prescribed (200 members in aggregate in FY)
 - > Above limit of 200 not to include QIBs and employees being offered securities under ESOP u/s 62 [N.A. - NBFC and HFC if Regulation by RBI/NHB complied with)

Explanation- It is hereby clarified that restrictions of 200 members would be reckoned individually for each kind of security that is equity share, preference share or debenture.

Rule 14: Private Placement:

The proposal to make PP has to be previously approved by SH of co. by a <u>SR</u> for each such PP.

ES annexed to notice for SH approval shall made following disclosure:

- a. particulars of the offer including date of passing of Board resolution;
- b. kinds of securities offered and the price at which security is being offered:

- c. basis or justification for the price (incl. premium, if any) at which offer/invitation is made;
- d. name and address of valuer who performed valuation;
- e. amount which the company intends to raise by way of such securities;
- f. material terms of raising such securities

<u>Provided that</u> this sub-rule shall not apply (i.e., SR not required) in case of offer for NCD if amount raised \leftarrow Limit u/s 180(1)(C) and in such case, BoD resoln is adequate.

Provided also that, if amount raised exceed limit u/s 180(1)(c) - It shall be sufficient if co. passes a previous SR only once in a year for all such offers during the year.

<u>Provided also that:</u> In case of offer to QIBs, if co. passes previous SR only in a year for all such allotments during the year

<u>Provided also that</u> 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 have obtained Government approval under FEM (Non-debt Instruments) Rules, 2019 & such approval is attached with PPOCA.". [Amendment]

3. Co. making PP shall issue PPOCA in Form PAS-4 to IPs whose names and addresses are recorded 🕏 by co. in prescribed manner.

Note - PPOs shall NOT carry right of renunciation.

Note: Deemed Public Offer:

- > If a co. makes an offer to allot securities to > prescribed no. of IPs,
- > the same shall be deemed to be an offer to public and
- > shall accordingly be governed by the provisions of Part I of this Chapter
- > irrespective of whether or not the payment for securities has been received or
- > whether the company intends to list its securities or not on any RSE in or outside India

4. Mode of payment of subscription money:

IPs willing to subscribe to PP issue shall apply in the PP and application issued to such person along with subscription money paid either by cheque/DD or other banking channel & not by cash.

Application money not to be utilized unless allotment made and return of allotment filed with RoC.

5. Prohibition on Fresh offer:

No fresh offer unless:

- a. allotments w.r.t, any offer or invitation made earlier have been completed or
- b. that offer or invitation has been withdrawn or abandoned by the co.

Concept clarity check:

The prohibition applies for different kind of securities also i.e., if PP of Equity is yet to finish, you cannot start PP of debentures also unless PP of equity is completed or withdrawn.

Allotment:

- > Co. shall allot its securities within 60 days from receipt of application money
- > If co. fails to allot securities in 60 days Repay same within 15 days from expiry of 60 days
- > If co. fails to repay It shall be liable to repay that money + Intt. @ 12% p.a. from expiry of 60th day (read again, from which day?)

Application money shall be kept in a separate bank account in a scheduled bank + Not to be utilized for any purpose other than:

- a. Adjustment against allotment
- b. Repayment If co. unable to allot sec.
- 7. Co. making PP shall NOT release any public advertisements or utilise any media, marketing or distribution channels or agents to inform the public at large about such an issue.
- 8. Return of Allotment to be filed with RoC within 15 days from allotment date Co. making PP to file with RoC a "Return of Allotment" in Form PAS-3 within 15 days from the date of the allotment. (Incl. a complete list of all allottees, with their full names, addresses, no. of sec. allotted, etc.)

Rule 14: Private Placement (Continued)

Return of allotment in Form PAS - 3 shall include the following details:

> the full name, address, permanent Account Number and E-mail ID of such security holder;

- > the class of security held;
- the date of allotment of security;
- > no. of securities held, nominal value and amount paid on such securities; and particulars of consideration received if entire securities were issued for consideration other than cash.
- 9. Default in filing Return of allotment u/ss (8) Co., its promoters and directors Fine Rs. 1,000/ day for each default upto Rs. 25 lakhs
- 10. If co. makes PP in contravention of this section Company, its promoters and directors Fine which may extend to amount raised through the PP or Rs. 2 crores, whichever is lower, and the company shall also refund all monies with interest (12%) within 30 days of order imposing the penalty.

"Qualified Institutional Buyer" means the QIB as defined in SEBI (ICDR) Regulations, 2009.



Rule 14: Private Placement (Continued)

- ▶ PP offer cum application letter shall be in Form PAS-4 serially numbered and addressed specifically to the person to whom the offer is made and shall be sent to him, either in writing or in e-mode, within 30 days of recording the name of such person u/s 42(3).
- > Co. to maintain complete record of PP offers in Form PAS-5
- > Co. shall issue PP offer only after relevant SR/BR filed with RoC

Note - Any offer or invitation which is not in compliance with the provision of Sec 42 shall be treated as public offer and relevant provisions shall apply accordingly.

——···· The End ····



Chapter 5 Acceptance of Deposits

Form	Section	Purpose
DPT 1	73 & 76	Circular or advertisement in a newspaper inviting deposits
DPT 2	76	Deposit trust deed
DPT 3	73 & 76	Return of deposits
DPT 4	74	Statement on existing deposits as on date of commencement of Co. Act



Overview of the chapter

A	Acceptance of Deposits	Prohibition on Acceptance of Deposits	Repayment of Deposits	Acceptance of deposits from public	Punishment for Non-Compliance / Contravention
AA	Definition Related terms	> Section 73	➤ Section 74	➤ Section 76	➤ Section 76A



Let's understand what Deposit is:

Deposits [Sec 2(31)] - "Deposit":

- includes any receipt of money by way of deposit or loan or in any other form by a co.,
- but does not include such categories of amt. as may be prescribed in consultation with the RBI

Note:

- 1. Repayment of 'deposit' is time-bound.
- 2. It can be secured (by creating charge on tangible asset) or unsecured (no security).
- 3. Private co. can accept deposits from its members only.
- 4. Public co. can accept deposits from members and public subject to certain parameters

Rule 2 of the Companies (Acceptance of Deposit by Company) Rules, 2014:

Deposits shall not include the following:

SN	From	Amount received from:	
1	Government	> CG/SG/Local Authority	
	·	Stat. Auth. constituted under any Act of Parliament or State Leg.	
		Any other source where repayment is guaranteed by CG/SG	
2	Foreign Source	➤ Foreign Govt.,	
	(subject to	Foreign or international banks,	
	FEMA)	Multilateral financial institutions (such as international bank)	
3	Banks and PFIs	Amt. received as a loan or facility from	
	r	> any banking company or SBI or subsidiary or co-operative bank	
	-	> public financial institutions	
4	Issue of CPs	Amt. received against issue of Commercial Papers (CPs) or other	
		Instruments as per RBI Guidelines	

5	Inter-	Any amount received by a company from any other company;
		They difficult to contour by a company from any critical company.
	corporate	Any amount received pursuant to an offer made towards subscription
6	Application	
	Money	to any securities, including share application money or advance towards
		allotment of securities pending allotment.
i l		
		Explanation - If securities for which appln. money was received is not
		allotted within 60 days from receipt thereof or is not refunded within
		15 days from completion of 60 days, such amount to be treated as a
		deposit as per these rules.
		Any adjustment, other than what is allowed of such application money,
		will NOT be considered as refund.
7	Director	Amount received from person – who at the time of such receipt, was:
	3	a. Director of the co. (public or private), or
		b. Relative of the director of the co. (only in case of private co.)
		Following conditions are to be met:
		> At the time of giving such money, director or relative to furnish
		a declaration to co. that such amt. is not being given out of loans/
		borrowings from others
8	Bonds or	Co. to disclose money so accepted - In Board's Report.Amount raised by issue of:
0	Debentures	la de la contraction de la con
	ł	bonds/Debentures secured by a first charge or Pari Passu with first charge on any assets referred to in Sch III, excluding intangible
	[Secured or	,
İ	Convertible or	asset (provided, amount of such bond/debt <= Market value of such
1.	Listed]	asset as assessed by RV)
		Bonds/Debentures compulsorily convertible into shares of co. within
	4	10 years
4		Non-convertible bond/debenture unsecured and listed on RSE as
	·	per SEBI
9	Sec. Deposit	Amt. received from Employee of co. <= Annual Salary in nature of non-
	from Employee	interest-bearing security deposit.
10	Trust	Any non-interest-bearing amount received and held in trust
11	In course of	Any amount received in course of business of co:
	business	i. As an advance for supply of goods/services provided that such
		advance is appropriated against supply of goods/services within
		365 days of acceptance of such advance (except where advance is
		subject matter of any legal proceeding)
		ii. as advance received towards consideration for an immovable property
		as per an agreement provided that such advance is adjusted against
		such property as per the terms of agreement
		iii. as security deposit for performance of contract for supply of
		goods/services
L		

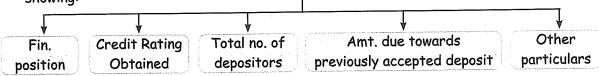
		 iv. as advance received under long term projects for supply of capital goods except those covered under item (b) above v. as an advance towards consideration for providing future services in form of a warranty/maintenance contract as per written agreement, provided that period for providing such services is not > 5 years or period as per common business practice whichever is less; vi. as advance received and as allowed by sectoral regulator or as per CG/SG vii. as an advance for subscription towards publication, whether in print or in electronic to be adjusted against receipt of such publications; Provided that if amount received under (a), (b) and (d) above becomes refundable (with or w/o interest) due to reasons that the co. does not have necessary permission to deal in goods or properties or services for which advance is received On expiry of 15 days from date they become due for refund, it shall be deemed to be a deposit.
12	Promoters	Any amount brought in by promoters of Co. by way of unsecured loan subject to following conditions that the: a. loan is brought in pursuance of stipulation imposed by lending institutions/banks on promoters to contribute such finance b. loan is provided by promoters themselves or their relatives or both; & c. exemption under this sub-clause shall be available only till the loans of financial institution or bank are repaid and not thereafter
13	Nidhi Co. or	Amt. accepted by a Nidhi co. u/s 406 and Rules made thereunder or amt
14	subs. to Chit	received by way of subscription of a chit under the Chit Fund Act, 1982. any amount received under any collective investment scheme as per SEBI
15	Start-Up Convertible Note	An amount of >= Rs. 25 lakhs received by a start-up company, by way of a convertible note (convertible into equity shares or repayable within period not > 10 years from date of issue in a single tranche) from a person. Explanation: For this sub-clause: a. Start-up co. means a Pvt. co. and recognized as per notification issued by Department for Promotion of Industry and Internal Trade (DPIIT); b. Convertible Note means an instrument: > evidencing receipt of money initially as a debt, > which is repayable at the option of holder, or > which is convertible into such number of Eq. shares of start-up company upon occurrence of specified events and as per the other T&C agreed to and indicated in the instrument.
16	Amt. received from AIF	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 SEBI

<u>"Depositor"</u> means:

- i. any member of company (public or private) who has made a deposit as per Sec 73(2), or
- ii. any person who has made a deposit with a public company as per Sec 76;

Section 73: Prohibition on Acceptance of Deposits from Public

- On and after the commencement of this Act, no company shall <u>invite</u>, <u>accept</u> or renew deposits under this Act from the <u>public</u> except in a manner provided under this Chapter: Provided that nothing in this sub-section shall apply to:
 - > Banking company and NBFC as per RBI Act and
 - > Housing Finance Company
 - > Such other company as CG + RBI may specify in this behalf.
- 2. A company may, subject to passing a resolution (ordinary) in GM, accept deposit from its members after complying with the following conditions:
 - a. Issuance of a circular to members (Form DPT -1) authorized by BoD including statement showing:

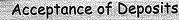


Rules relating to Circulars:

Rules relating to on c	
Manner of issuance	Issue to all members by RPAD or Speed post or e-mode
	Publish in newspaper - English + Vernacular.
	> Place on website of the co.
Attachments to	Certificate from Stat. Auditor stating that:
Form DPT-1	Co. has not defaulted in repayment of deposit + interest or
	> Default, if any, has been made good and 5 years have lapsed from
	the date such default was made good.
Register with RoC	Co. to send to RoC - Copy of circular signed by majority of the directors
	- At least 30 days prior to issue for registration
Validity of Circular	Earliest of:
in form of Advt	Until 6m from date of closure of FY in which it is issued, or
	> Date on which Fin. Statement is laid in AGM
	> If AGM not held - Last date for holding AGM
Fresh Circulars	To be issued, in each succeeding FY for inviting deposits during that FY.

- b. Filing copy of circular + Such Statement with RoC within 30 days before issue of the circular;
- c. <u>Deposit Repayment Reserve</u> Refer common points after Sec 76
- d. Co. to certify that no default in repayment of deposits + Interest and where default had occurred, it was made good, and 5 years have lapsed since date of making the default good.
- e. Providing security, if any, for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company.





Provided that in case where a co. does not secure the deposits or secures partially, then, the deposits shall be termed as "unsecured deposits" and shall be so quoted in every circular, form, advertisement or in any doc. related to invitation or acceptance of deposits.

Note:

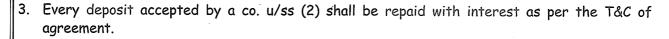
- 1. Partly secured deposits are termed as unsecured.
- 2. Where a co. issues secured deposit, it shall appoint a trustee for depositors (provision discussed in detail in Sec 76)

Exemption to Private Companies:

The above provision of Sec 73(2) clause (a) to (d) shall not apply to a Pvt. co. which:

- a. accepts from its member's monies not > 100% of PUSC + FR + SPA; or
- b. is a start-up For 5 years from the date of its incorporation; or
- c. Fulfils ALL the following conditions:
 - > Not an associate or subsidiary of any other co.
 - > Borrowings from banks/FI or BC is < Lower of 2x PUSC or Rs. 50 crores, AND
 - > Co. has no subsisting default in repayment of borrowing at time of accepting deposit.

However, the above cos. will have to file details of deposit accepted with RoC (Form DPT-3).



4. Where co. fails to repay the deposit or part thereof or any interest thereon - Depositor concerned may apply to the Tribunal for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non-payment and for such other orders as the Tribunal may deem fit.

Other provisions relating to Deposits (from Rules):

Max. amount of deposit from Members (existing + new): 35% of (PUSC + FR + SPA)

Exception - Specified IFSC Public Co. or Private Companies - 100% of (PUSC + FR + SPA)The above maximum limit will not apply to a Private co. which is:

- a. is a Start-up For 10 years from the date of its incorporation; or
- b. Fulfils ALL the following conditions:
 - > Not an associate or subsidiary of any other co.
 - > Borrowings from banks/FI or BC is < Lower of 2x PUSC or Rs. 50 crores, AND
 - > Co. has no subsisting default in repayment of borrowing at time of accepting deposit

However, the above cos. will have to file details of deposit accepted with RoC (Form DPT-3).





Section 76: Acceptance of Deposits from Public by Certain Companies

- "Eligible Company" means a public co. as referred u/s 76 (1), having
- a net worth of not less than Rs. 100 crores or
- ii. a turnover of not less than Rs. 500 crores and
- iii. which has obtained the prior consent in general meeting by means of a SR* and
- iv. filed the said resolution with RoC before any invitation to public for acceptance of deposits

*Eligible co. accepting deposits within limits u/s 180 (1) (c), may accept it by means of an OR (not SR)

Eligible companies may accept deposits from persons other than its members subject to:

- Passing SR (or ordinary resolution) and filing the same with RoC
- > Compliance with requirements u/s 73(2) and
- > Rules as CG + RBI may prescribe.

Provided that such eligible companies shall obtain credit rating from recognised credit rating agency (as approved for NBFCs) and inform such rating to public.



RULE 3:

- Rating shall be obtained every year during the tenure of deposits.
- > Copy of credit rating
- > RoC along with Return of Deposits in Form DPT-3.
- > Rating shall not be below min. investment grade rating or other specified rating for FDs.

Other relevant points:

a. Maximum amount of Deposit:

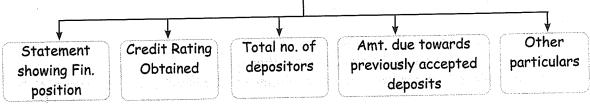
Eligible companies other than Eligible Govt co.:

From Members - 10% of PUSC + FR + SPA

From person other than Members - 25% of PUSC + FR + SPA

Eligible Govt. co. - 35% of PUSC + FR + SPA

b. Issuance of a circular (in Form DPT -1) in the name of BoD of co. to the members including:



As per Rules relating to Circulars:

AS DEL Rules I elating to on calars.				
Manner of issuance	> Issue to all members by RPAD or Speed post or e-mode			
	Publish in newspaper - English + Vernacular.			
	Place on website of the co.			
Circular to	Co. to send to RoC - Copy of circular signed by majority of the directors			
be signed and	- At least 30 days prior to issue for registration			
Registered				

Validity of Circular	Earliest of:	
in form of Advt	> Until 6m from date of closure of FY in which it is issued, or	
	> Date on which Fin. Statement is laid in AGM	
	> If AGM not held - Last date for holding AGM	
Fresh Circulars	To be issued, in each succeeding FY for inviting deposits during that FY.	
Effective Date	Date of issue of advertisement =Date on which advt. appeared in newspaper	
	Date of issue of circular = Date on which the circular was dispatched.	

Common Points of Deposits u/s 73 and 76 [Companies (Acceptance of Deposit) Rules 2014]:

1. <u>Deposit Repayment Reserve A/C:</u>

Co. to deposit, on or before 30th April each year, sum >= 20% of amt. of deposit maturing during following FY & keep in a scheduled bank in separated bank a/c called - DRR A/C

<u>Purpose</u> - The amt. so deposited shall not be utilised for purpose other than repayment of deposit.

Minimum Balance - 20% of amount maturing in CURRENT FY

- 2. Tenure of deposit A company cannot accept deposit which is:
 - > Repayable on demand
 - Repayable within 6m* (see exception below)
 - > Max. period > 36 months (3 years)
 - *Exception: Co. may accept deposit repayable within 6m for short term fund requirement if:
 - > Deposit <= 10% of PUSC + FR + SPA, AND
 - > Deposit repayable on or after 3m from date of such deposit.

3. <u>Creating of Charge in case of Secured Deposits:</u>

- Within 30 days of acceptance.
- > In favor of deposit holders or trustee for the depositor as per prescribed rules
- > Amt. of charge (value of security) shall >= Amt. of deposits accepted (& intt. payable thereon)
- > Market value of such asset to be determined by RV.
- > Charge to be created only on its tangible assets. (Rule 6)

4. Appointment of Trustee for Depositors:

- \succ 1/more trustees for depositors to be appointed by the co. for creating security for deposits.
- > Obtain written consent of trustee prior to appointment.
- > Statement that the trustees have given their written consent shall appear in the circular.
- > Co. to execute a deposit trust deed (DTD) at least 7 days before issuing circular (DPT-2).

Qualification of Trustee [DR. DGP]:

Person (incl. a company) shall NOT be appointed as a trustee if such person:

- a. is a Director, KMP or any other officer/employee of CASH or a depositor in the company;
- b. is inDebted to CASH or a subsidiary of such holding company;

- c. has any material Pecuniary relationship with the company;
- d. has entered into any Guarantee arrangement w.r.t, principal debts secured by the deposits or interest thereon;
- e. is Related to any person specified in clause (a) above.

Removal of Trustee: Procedure to remove:

- > Consent of all the directors present at a meeting of the board.
- > In case Co. is required to have Independent Dir. At least 1 ID present in such meeting

Rule 9: Meeting of deposit holders:

Meeting of all the deposit holders shall be convened by the trustee on:

- (a) requisition in writing signed by deposit holders having >= 1/10th in value of outstanding deposits;
- (b) happening of any event, which constitutes default or which in the opinion of the trustee affects interest of depositors.

Concept clarity check:

- 1. Can a company be appointed as Trustee? Yes. Law says "Person".
- 2. Is it necessary to have depositor trustee even when the deposits are unsecured? No!
- 5. <u>Register of Deposits:</u> Co. accepting deposits shall maintain one/more separate registers for deposits accepted or renewed at its RO. Following particulars shall be entered in the case of each depositor:

name, address & PAN		due date for payt. of interest;
particulars of the guardian (In case of minor)		mandate & instructions for payment of interest and for non-deduction of tax
particulars of the nominee;	>	at source
deposit receipt number;		date on which the payment of interest shall be made;
date & amt of each deposit;	>	charge created for repayment of
duration & Repayment date		deposits
rate of interest	>	any other relevant particulars

Entries in Register to be made $\underline{\text{within 7 days}}$ from issuance of $\underline{\text{receipt}}$ + Authenticated by dir./CS.

Preserve in good order for >= 8 years from FY in which the latest entry is made in the register.

- 6. Premature Repayment of Deposits:
 - > After 6m but before expiry of actual date of maturity,
 - > if depositor requests for premature repayment
 - > RoI shall be 1% less than what would be payable for period for which deposit has actually run Note Where deposit had run contains any part of a year, then, if such part is <6m Exclude. If such part is >=6m, it shall be reckoned as 1 year.

Reduction of rate of interest (i.e., 1%) is not applicable in the following cases:

Where the deposit is prematurely repaid in order to:

- > Comply with Rule 3 i.e., tenure of deposit under this new act; or
- > provide for war risk or other related benefits to the personnel of naval, military or air forces or to their families during emergency declared under Article 352 of the constitution.
- 7. <u>Premature Closure of Deposit by Holder to Earn Higher Rate of Interest:</u>
 In case a depositor desires to avail higher rate of interest by renewing the deposit before its actual maturity date, the company shall pay him the higher rate of interest only if the deposit is renewed for a period longer than the unexpired period of deposit.
- 8. <u>Ceiling on Rate of Interest and Brokerage Payable on Deposits</u> Maximum As prescribed by RBI in case of NBFC for acceptance of deposit.

Brokerage payable only to those who are auth. by co. to solicit deposit. Otherwise deemed violation of brokerage rules.

- 9. <u>Depositor to file application form and declaration:</u>
 Co. can accept deposit only when application is submitted by intending depositor
 Along with application Declaration that money is not borrowed from any other person.
- 10. <u>Deposit in Joint Names</u> Not > 3.
 A joint deposit may be accepted with or without any of the clauses, namely, "Jointly", "Either or Survivor", "First named or Survivor", "Anyone or Survivor". These clauses operate on maturity.
- 11. Depositor may nominate a person at any time.
- 12. <u>Deposit Receipt</u>: Within 21 days from date of receipt of money/realization of cheque/date of renewal Co. to furnish receipt to depositor/agent Deposit Receipt Signed by duly authorized officer and state date, name & address, amount, rate of interest & maturity date.
- 13. Filing of Return of Deposit with RoC A duly audited return in Form DPT-3 containing info upto \$\mathbb{E}\$ 31st March of that year to be filed on or before 30th June and declaration to that effect shall be submitted by the auditor in DPT-3.

 Note DPT-3 shall include particulars of deposits or transactions not considered as deposits or both
- 14. No right to alter T&C After circular is issued and deposits are accepted, Co. has no right to alter any T&C of deposit, deposit trust deed & deposit insurance which may prove detrimental to interest of depositors
- 15. Disclosure in FS by way of a note -
 - > Public co. shall disclose about money received from its directors/relatives
 - Pvt. company shall disclose about the money received from directors/relatives thereof

- 16. <u>Penal Rate of Interest:</u> In case co. fails to repay deposits (both secured and unsecured) on maturity, after they are claimed, it shall pay penal rate of interest of 18% per annum for the overdue period.
- 17. <u>Punishment for Contravention</u>: If co. inviting deposits or any other person contravenes any of the 'deposit rules' for which no punishment is provided in Act, the co. and OID shall be liable as under:
 - > With fine extendable to Rs. 5,000; and
 - > Continuing one Further fine up to Rs. 500 /day after first during which the contravention continues.



Section 76A - Punishment for Contravention of Section 73 or Section 76

- > Where company, accepts or invites or causes any other person to accept any deposit in contravention of provision,
- > if co. fails to repay deposit or any interest due thereon within the time specified u/s 73 or 76:

Penalty:

- a. Co. shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine From (Rs. 1 crore or 2x Amt. of deposit whichever is lower) to Rs. 10 crores: and
- b. OID Jail upto 7 years AND with fine Rs. 25 lakhs to Rs. 2 crores.

Provided that if it is proved that the officer of the company who is in default, has contravened such provisions knowingly or willfully with the intention to deceive the company or its shareholders or depositors or creditors or tax authorities, he shall be liable for action u/s 447.



Section 74: Repayment of Deposits, etc., Accepted Before Commencement of this Act

1. Filing of Statement of Deposits with RoC and Repayment thereafter:

Where deposit was accepted before commencement of this Act (i.e., before 1.4.2014), and remains unpaid as on 1.4.2014 or becomes due at any time thereafter, the company shall take the following steps:

- a. file, within 3 months from such commencement, with RoC Statement of all deposits accepted by co. & sums remaining unpaid on such amt. with interest
- b. Repay within 3 years from such commencement or maturity date, whichever is earlier.

Note - If co. has been repaying such deposits and interest thereon $\underline{without}$ any $\underline{default}$ on due dates for the remaining period of such deposit as per the T&C, point (b) above shall be deemed to have been complied with.

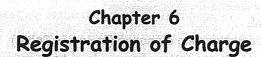
2. Extension of time for repayment by Tribunal:

Tribunal may, on an application made by the company, after considering the <u>financial condition</u> of the co., amt. of deposit and interest payable thereon & such other matters, allow further time as considered reasonable to the company to repay the deposit.

3. Punishment for Non-Repayment of Deposits:

Company - Fine Min. of Rs. 1 crores and Max. of Rs. 10 crore; and OID - Jail upto 7 years or with fine Rs. 25 lakhs to Rs. 2 crores or with both.

	The	End	• • • •
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Form	Sec	Purpose
CHG-1	77	Application to register the creation or modification of charge (other than
		debentures)
CHG-2	77	Certificate of registration of charge
CHG-3	77 & 79	Certificate of modification of charge
CHG-4	82	Intimation to the Registrar regarding particulars for the satisfaction of
		charge
CHG-5	82 & 83	Certificate of registration of satisfaction of the charge
CHG-6	84	notice of appointment or cessation of a receiver or a manager
CHG-7		Register of charges created, modified and satisfaction by the company
CHG-8	87	Application to CG requesting an extension of time to file details of
		registration of creation or modification or satisfaction of charge as well as
		rectification any omission or misstatement of any details
CHG-9	77	Application for registering creation/modification of charge for debentures
		including rectification



Section 2(16) - Charge means:

- > an interest or lien
- > created on the property or assets of a company or any of its undertakings or both
- > as security (for repayment of loan) and
- > includes a mortgage;

Fixed Charge vs Floating Charge

rixed charge vs ribating charge	
Fixed Charge	Floating Charge
Charge on specific asset of borrowing company	Charge on assets which are of fluctuating nature
	or changing in nature
Examples – Land and Building, office premises,	Examples - Raw material, stock-in-trade,
machinery, etc.	debtor, etc.
Usually, mortgage or deposit of title deeds	
Not allowed to sell (except with permission of	Permitted to use for trading or producing final
charge holder). But can use.	goods for sale.
Vacated when money repaid in full	Crystallization of floating charge - Enforce
	security or company goes into liquidation

 $\underline{\textit{Conceptual check}}$ - Is charge passed on to the buyer in case of sale of goods which is under floating charge? - No!



Section 77: Duty to Register Charges, etc.

- Charge to be registered:
 - > Duty of every company creating a charge (in or o/s India)
 - > To register the particulars of the charge signed by co. and charge holder together with instrument creating such charge in prescribed manner. [Form CHG-1 (for other than debentures) or Form CHG-9 (for debentures)]
 - > within 30 days of creation such charge

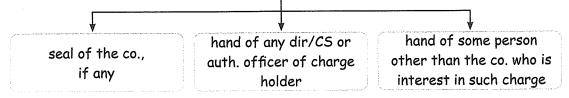
Note: All the following charges need to be registered:

- a. Charge created within India or outside India
- b. Charge created on property or asset which is situated within India or outside India
- c. Charge on tangible asset, intangible asset, or financial asset

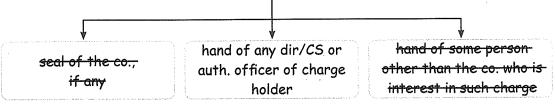
Rule 3 of Company (Registration of Charges) Rule, 2014:

Verification of instruments of charge filed with RoC:

a. Where underlying property is situated outside India - Verify by a certificate issued under:



b. Where underlying property is situated in India - Verify by a certificate issued under:



Nothing contained in this rule shall apply to charge required to be created/modified by banking co. u/s 77 in favour of RBI when any loan/advance has been made to it under RBI Act, 1934.

[Amendment]

Extension of Time Limit: (Effective From 2nd November 2018)

- > On application by the Company (showing sufficient cause),
- > RoC may allow such registration of charge to be made
- > Within 60 days of such creation (i.e., extension of 30 days only) Pay Additional Fee

Further Extension:

- Where co. fails to register charge within 60 days,
- > ROC is empowered to allow such registration within further 60 days Pay ad valorem fees

Application for extension - Make in Form CHG -1 or 9 as the case may be + Declaration by company CS or director that belated filings shall not affect right of any creditors.



2. <u>Issuance of Certificate of Registration (CoR)</u>:

On registration u/ss (1), RoC to issue a CoR of such charge in Form CHG-2 (fresh registration) or CHG-3 (modification of charge) to charge holder and the company.

CoR = Conclusive evidence that requirements of this Act w.r.t, charge have been complied with.

- 3. Consequence of non-registration (Charge becomes void):
 - > Notwithstanding anything contained in any other law for the time being in force,
 - > Such charge shall NOT be taken into account by:
 - · Liquidator (appointed under this Act or IBC, 2016) or
 - · any other creditor
 - > unless it is duly registered u/ss (1) and CoR is issued u/ss (2).

However, nothing u/ss (3) to prejudice any contract/obligation for repayment of money secured by a charge.

Important consequence of non-registration or delayed registration - Charge-holder loses priority.



Section 78: Application for Registration of Charge (by Charge holder)

Charge-holder may apply for Registration:

- Where a company fails to register the charge within 30 days u/s 77,
- without prejudice to its liability w.r.t., any offence under this Chapter,
- person in whose favor charge is created may apply to Registrar for registration (along with instruments),
- > within such time and in such form and manner as may be prescribed and
- > the Registrar may, on such application, within 14 days after giving notice to the company, allow such registration on payment of such fees, as may be prescribed, unless
 - · the company itself registers the charge or
 - · shows sufficient cause why such charge should not be registered,

<u>Recovery of Fees</u> - Entitled to recover from company the amount of any fees or additional fees paid by him to the Registrar for the purpose of registration of charge.



Section 79: Section 77 to Apply in Certain Matters.

Section 79: Section 77 to Apply in Certain Matters.

The provisions of section 77 relating to registration of charges shall, so far as may be, apply to:

- a. a company acquiring any property subject to a charge; or
- b. any modification in T&C or the extent or operation of any charge registered under that section.

 $\underline{Modification}$ includes change in T&C of the underlying borrowing (including change in rate of interest)

Rule 6 Where the particulars of modification of charge is registered under Section 79, the Registrar shall issue Certificate of Modification in Form CHG 3





Section 80: Registration to act as Constructive Notice (deemed knowledge)

Where any charge is registered u/s 77,

- (a) any person acquiring such property, assets, undertakings or part thereof
- (b) shall be deemed to have notice of the charge from the date of such registration.



Section 81: Register of Charges by Registrar

- ROC shall, in respect of every company, maintain register of charges registered with ROC in prescribed manner.
- Rule 7 Particulars of charges maintained on MCA Portal Deemed register u/s 81
- 2. The register shall be open to inspection by any person on payment of fee as may be prescribed.

Read sec 85 along with this.



Section 82: Company to Report Satisfaction of Charge

On payment or satisfaction of any charge registered under this chapter:

- a. Co. to intimate RoC in Form CHG-4 within 30 days of such payment/satisfaction. Provided that - On application by the company or charge holder, RoC may allow such intimation within 300 days of payment/satisfaction with additional fees.
- b. Notice to Charge Holder:

On receipt of intimation u/ss (1), Registrar shall cause a notice to be sent to charge holder calling upon him to show cause within time specified in notice (not > 14 days), as to why payment or satisfaction in full should NOT be recorded.

Notice to CH not required - If intimation u/ss (1) is signed by CH.

If no cause is shown - RoC shall order that a memorandum | If cause is shown - RoC shall record of satisfaction shall be entered in register maintained | a note to that effect in the register u/s 81 and shall inform the co. (in Form CHG -5)

of charges and shall inform the co.

c. Preserve instrument creating charge/modification - 8 years from satisfaction of charge.



Section 83: Power of Registrar to Make Entries of Satisfaction & Release in Absence of Intimation from Co.:

Suo moto change in Register of Charges by RoC:

RoC may, on evidence being given to his satisfaction w.r.t. any registered charge that:

- a. the debt for which the charge was given has been paid or satisfied; or
- b. part of property or undertaking charged has been released or ceased to form part thereof, it may enter in register of charges:
 - > memorandum of satisfaction in whole or in part, or
 - > fact that part of the prop/undertaking has been released or ceased to form part, notwithstanding the fact that no intimation has been received by him from the company. The Registrar shall inform the affected parties within 30 days of making such entry. (and issue Certificate of Registration of satisfaction of charge in Form CHG-5)







Section 84: Intimation of Appointment of Receiver or Manager

If any person appoints a receiver or manager, to manage the property subject to charge, by virtue of:

- > order of court or
- > any power contained in any instrument creating charge.

he shall, within 30 days from date of the passing of order or of the making of the appointment, give notice of such appointment to company and Registrar along with a copy of the order or instrument and the Registrar shall, on payment of the prescribed fees, register particulars of the receiver, person or instrument in the register of charges.

Any person appointed above shall, on ceasing to hold such appointment, give to the company and the Registrar a notice to that effect and the Registrar shall register such notice. (Form CHG - 6)



Section 85: Company's Register of Charges

1. Every co. shall keep at its RO, a register of charges in Form CHG-7 in prescribed manner including therein all charges affecting assets of the co. or any of its undertaking.

Provided that copy of instrument creating charge shall also be kept at RO along with such register.

- 2. Above register and instrument shall be open for inspection during business hours:
 - (a) by any member or creditor w/o fees
 - (b) other person on payment of prescribed fees subject to restrictions as co. may impose by its articles.

Rule 10: Company's Register of Charges

- 1. Every co. shall maintain such register in Form CHG-7 and enter therein the following particulars:
 - > all charges registered with ROC
 - > property acquired which is subject to charge
 - > any modification of charge and satisfaction of charge
- 2. Entries above shall be made forthwith.
- 3. Entries to be authenticated by Directors, CS or any other person authorised by Board
- 4. Preserve such Register Permanently and Instrument 8 years from satisfaction.



Section 86: Punishment for Contravention:

If co. is in default under this Chapter, penalty:

Co. - Rs. 5 lakhs and OID - Rs. 50,000

If willfully furnishes any false or incorrect info. - Liable for action u/s 447



Section 87: Rectification by CG in Register of Charge (or Extension of Time Limit)

The CG on being satisfied that:

Omission to give intimation to RoC of satisfaction of charge within required time

Omission or misstatement of any particular in any filing made with RoC w.r.t. creation, modification of satisfaction of charge

- · Was accidental or due to inadvertence, or
- · It is not of a nature to prejudice creditors/SH of co.

it may, on the application of the company (in Form CHG - 8) or any person interested and on such \mathbb{Z} T&C as it deems just, direct that the time for the giving of intimation of payment/satisfaction shall be extended or, as the case may require, that omission or misst. shall be rectified.

Note: Signing of charge e-forms by insolvency resolution professional or resolution professional or liquidator for companies under resolution or liquidation:

The 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

[Amendment]

——→···· The End ····

Chapter 8 **Declaration and Payment** of Dividend



[Section 123 to 127]

Basics

- Definition u/s 2(35)
- Interim)

Provisions

- Sec. 123: Declaration of Dividends
- Types (Final/ Sec 124: Unpaid/ Unclaimed Dividend

Funds related to Dividend

- Sec. 125: IEPF
 - Establishment
 - Credits to the Fund
 - Utilization

Punishment for Non-Compliance

Sec. 127: Punishment for failure to distribute dividend within 30 days



Definition:

Section 2(35) "dividend" includes any interim dividend.

Important points relating to dividend:

- > It is a distribution of profits.
- Final dividend is declared & approved by shareholders (by OR at AGM) on recommendation of Board
 - The rate of dividend declared by SH shall not exceed the amount recommended by BOD.
- Dividend % is a proportion of nominal value or face value.

Concept clarity check:

- 1. BoD recommended 10% dív. Can SH, by passing unanimous resolution, declare 12% dividend?- No!
- 2. Calculate the amount of dividend in following case:

No. of shares held = 50

Face Value = Rs. 10; Market Value (in stock exchange) - Rs. 200; Purchase price - Rs. 190 SH approved and declared dividend = 10%

Amt. of dividend = No. of shares * Dividend * Face Value i.e., 50 shares * 10% * Rs. 10 = Rs. 50 Note - Market value or purchase price is irrelevant for the calculation of amt. of dividend

Types of dividend:

Classification based on time				
Particulars	Interim Dividend	Final Dividend		
Announcement	Announced and declared by SH BOD at any time during the FY or from closure of FY till the AGM.	Recommended by BoD and declared by shareholders at the AGM of the co.		
Source	Out of profits before final adoption of accounts. Sources for interim dividend = Surplus in PL or CY profit or Prior Profits			

Rate of	If the company has incurred loss during the CY upto	The rate recommended
Rate of Dividend	preceding quarter, then dividend not to be declared	by the Board cannot
	at a rate higher than Avg rate of dividend declared	be increased by the
	by co. during immediately preceding 3 FYs.	members.
Revocation	Can be revoked with consent of ALL shareholders.	Once declared - cannot be
		revoked.

Dividend shall be deposited in separate A/c of a scheduled bank within 5 days from date of declaration

Classification of Dividend based on Nature of Shares				
Preference Sha	Equity Shares			
Cumulative	Non-Cumulative (Default)			
Dividend gets accumulated	Dividend is payable only	Equity shares holder do not		
_	in a year of profit. No	enjoy any preferential rights for		
	accumulation of profit	dividends or repayment of capital		
Arrears in dividend due to	Holder not entitled to be	Rate of dividend depends upon		
insufficiency of profits -	paid arrears of dividend out	the dividend policy and availability		
Payable from future profits.	of future years i.e., right to	of profits after satisfying Pref.		
Unless this dividend is paid in	receive dividend expires if	SH rights		
full (incl. arrears), no dividend	not declared in any year.			
is payable to ESH				



Section 123: Declaration of Dividend

1. Source: Dividend shall be declared or paid by a company for any FY out of:

Profits* for that FY
(current) arrived at
after providing for
depreciation
(Sch II)

(a) Undistributed profits* of any previous FYs arrived at after providing for depreciation as per Sch II (i.e., credit balance in P&L and free reserves)

(a) Both (a) and (b) [Current + Past Profits] Money provided by CG/SG for payment of div. in pursuance of guarantee given by the Govt

- *Provided that While calculating profits exclude:
- > unrealised gains, notional gains, or revaluation of assets, and
- > any change in carrying amount of an asset/liability on measurement at fair value.

<u>Transfer to Reserves</u> - A company MAY, <u>before declaration of dividend</u> in any FY, transfer such % of its profits for that FY as it may consider appropriate to reserves of the company.

Conceptual Clarity Check:

- 1. Can capital reserve be used for payment of dividend? -No! Only free reserves can be used.
- 2. Carried over previous losses and depreciation not provided in PY has to be set off against CY profits before declaration of dividend.

- 3. Capital profits are not earned in normal course of biz. Hence, not available for distribution.
- 4. Is it okay if a company decides not to transfer any amount to reserves before dividend?

 Yes! Whether or not to transfer and what % to be trf to reserve is left to discretion of the co.
- 2. For the purposes of Sec 123(1)(a), depreciation shall be provided in accordance with Sch II
- 3. Rate of Dividend -

Board may declare <u>interim dividend</u> during any FY or at any time from closure of FY till holding of AGM out of:

- > Surplus in the P&L account or
- > Profits of the FY for which such interim dividend is sought to be declared (past FY), or
- > Profits generated in the FY till the quarter preceding date of declaration of interim dividend

Interim Dividend in case of loss in recent quarter (not Final Dividend):

<u>Provided that</u> - In case the co. has incurred loss during the current FY up to the end of quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate > Average dividends declared by company during immediately preceding 3 FYs

Concept clarity check:

Is upper limit on rate of dividend (i.e., not > Avg of preceding 3 FY) also applicable in case if there is profit in current FY till preceding quarter? - No. In case of profit, % of dividend can be higher.

Rule 3 Declaration of Dividend out of Reserves: [Very important]

In the event of inadequacy or absence of profits in any year, a co. may declare dividend out of free reserves subject to the fulfilment of the following 3 conditions, namely:

Rate shall not exceed Average of dividend of 3 immediately preceeding FY* Total amount drawn from accumulated profits <= 1/10th of [PUSC + FR] as per latest audited FS

(b) Amount drawn shall <u>first be utilised</u>
to set off losses of current FY

Balance in reserve after such drawal not < 15% of PUSC as per latest audited FS

- * This sub-rule (1) shall not apply if a co. has not declared any dividend in each of 3 preceding FY.
- 4. Dividend (incl. interim) Deposit in separate a/c with scheduled bank within 5 days from declaration
- 5. Dividend shall be paid by a co. only to the:

Registered shareholder of such share or to his order or shall not be payable except in cash.

to his banker and

Provided that nothing in this sub-section shall be deemed to prohibit the capitalisation of profits or reserves of a company for the purpose of issuing fully paid-up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company.

Concept clarity check:

- 1. Mr. Singh has purchased shares of Burraaah Ltd. from Mr. Jai by making full payment. However, transfer of shares is not yet registered with the co. Meanwhile, the co. announces dividend. Is the company allowed to pay the dividend to Mr. Singh? No. In such case, the company will keep the dividend till the registration is pending (Discussed in detail in sec 126)
- 2. Can a company issue bonus shares in lieu of dividend No. Dividend can only be paid in cash.
- 3. Can a company pay dividend via bank? Absolutely Yes. Cash doesn't mean hard cash. It means Cash, cheque, dividend warrant or via any e-mode.
- 6. A company which fails to comply with the provisions of sections 73 and 74 shall not, so long as such failure continues, declare any dividend on its equity shares.

Note: Section 8 companies are 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. [Sec 8]

Bonus Point

<u>What is record date?</u> - Record date is the date announced by the company for determining members who are entitled to dividend. All person whose name is included in the register of members on the record date shall be entitled to dividend.



Section 124: Unpaid Dividend Account (Refer timeline at the end of this chapter)

- 1. Where a dividend is declared but not paid or claimed within 30 days from the date of declaration,
 - > the company shall, within 7 days from the expiry of the said 30 days,
 - > transfer the total unpaid/unclaimed amount of dividend to a special account (with scheduled bank) called the Unpaid Dividend Account (UDA)
- 2. Preparing of Statement of the Unpaid Dividend
 - > Within 90 days of transferring any amount to the Unpaid Dividend Account
 - > prepare a statement containing the following:

Name Last known address Unpaid dividend amount

- > and place it on website and on any other website approved by CG for this purpose.
- 3. Payment of Interest on default

If default is made in transferring the total amount u/ss (1) to UDA, company shall:

- > Pay interest @12% p.a. from the date of such default
- > Interest accruing on such amount shall ensure to benefit of members of the co. in proportion to amt. remaining unpaid to them.

- 4. Claimant shall apply to co. concerned for payment of unpaid amount (prior to trf. to IEPF)
- 5. Transfer of Unclaimed or unpaid amount to Investor Education and Protection Fund (IEPF)
 - > If remains unpaid or unclaimed for 7 years from the date of such transfer
 - > It shall be transferred by the company along with interest to the IEPF, and
 - > A prescribed statement containing details of such transfer shall be sent to IEPF Authority &
 - > Authority to issue receipt as an evidence of such transfer.

6. Transfer of Shares to IEPF

All shares in respect of which dividend has not been paid/claimed for \geq 7 consecutive years shall be transferred by the company in the name of IEPF along with a statement containing such details.

<u>Author's Note</u> - Note that this section is talking about transfer of the "shares" itself and not the unpaid amount of dividend. The trf. of unpaid amount is already discussed u/ss (5) <u>Provided that</u> any claimant of shares trfd. above shall be entitled to claim the transfer of shares from IEPF with such procedure and on submission of such documents as may be prescribed.

Explanation:

In case any dividend is paid or claimed for <u>any</u> year during the said period of 7 consecutive years, the share shall not be transferred to Investor Education and Protection Fund.

7. Punishment for Contravention of this section:

	Company	Officer in default
Penalty	Rs. 1 lakh + Rs. 500/day after first	Rs. 25,000 + Rs. 100/day
Max penalty	Rs. 10 lakhs	Rs. 2 lakhs



Section 125: Investor Education and Protection Fund

(Read with IEPF Authority (Accounting, auditing, transfer and refund) Rules 2016)

- 1. The CG shall establish a Fund to be called the Investor Education and Protection Fund (IEPF)
- 2. There shall be credited to the Fund
 - a) the amount given by the CG by way of grants after due appropriation made by Parliament by law in this behalf for being utilised for the purposes of the Fund;
 - b) donations given to the Fund by CG, SG, cos. or any other institution;
 - c) the amount in Unpaid Dividend Account of companies transferred to Fund u/s 124(5)
 - d) the amount in general revenue account of the CG which had been transferred to that account u/s 205A (5) of Companies Act, 1956 and remaining unpaid on commencement of this Act;
 - e) the amount lying in IEPF u/s 205C of the Companies Act, 1956;
 - f) the interest or other income received out of investments made from the Fund.
 - (fa) all shares held by IEPFA u/s 90(9) of the Act and all resultant benefits out of such shares
 - g) the amount received under section 38(4);
 - h) the application money received by companies for allotment of any securities and due for refund;

- i) matured deposits with companies other than banking companies;
- j) matured debentures with companies;
- k) interest accrued on the amounts referred to in clauses (h) to (j);
- 1) sale proceeds of fractional shares arising out of bonus shares, merger, etc. for >=7 yrs
- m) redemption amount of preference shares remaining unpaid or unclaimed for >=7 yrs; and
- n) such other amount as may be prescribed.

<u>Provided that</u> no such amount referred to in clauses (h) to (j) shall form part of the Fund unless such amount has remained unclaimed and unpaid for 7 years from date it became due for payment.

Summary da Summary Other Amt. of UDA General IEPF in Co. Donation by income from CG grants Revenue A/C Act 1956 CG/SG/Cos. u/s 124 investment Shares held Redemption Matured sale proceeds Application **Amount** by IEPFA of pref. deposit or of fractional disgorged money + Benefits shares shares (>=7 debenture +

3. The Fund shall be utilised for: [CD PRO]

(>= 7 years)

u/s 38(4)

a) the refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon

(>=7 yrs)

yrs)

Intt. (>7 yrs)

- b) promotion of investors' education, awareness and protection;
- c) distribution of any disgorged amount among <u>eligible</u> and <u>identifiable applicants</u> for shares or debentures, shareholders, debenture-holders or depositors <u>who suffered losses</u> due to wrong actions by any person, in accordance with orders made by the Court which had ordered disgorgement;
- d) reimbursement of legal expenses incurred in pursuing class action suits u/s 37 and 245 by members, debenture holders, or depositors as may be sanctioned by the Tribunal; and
- e) any other purpose incidental thereto, in accordance with such rules as may be prescribed:

Provided that, where, as per provision of Sec 205C of Co. Act, 1956, amount is transferred to IEPF, after the expiry of 7 yrs, such person shall be entitled to get refund out of IEPF (constituted under Co. Act 2013)

- 4. Any person claiming to be entitled to amt referred u/ss (2) may apply to IEPFA for payment thereof.
- 5. CG to constitute, by notification, an authority for administration of Fund consisting of:

Chairperson
[Ex-officio - Secretary, MCA]

a CEO (appt. by CG)

Members not > 7 (including CP)

thereon

- 6. Manner of administration, appt. of members, holding of IEPFA meetings- As per prescribed rules
- 7. Resources CG may provide to IEPFA such offices, officers, employees, etc. as prescribed.
- 8. The authority shall administer the Fund and maintain separate accounts and other relevant records in relation to the Fund in such form as may be prescribed after consultation with C&AG.
- 9. It shall be competent for IEPFA to spend money out of Fund for carrying out the objects of IEPF.
- 10. Accounts of the Fund shall be audited by the C&AG of India (at specified intervals). Audited accounts + audit report to be forwarded annually by IEPFA to the CG.

11. Annual Report:

- > IEPFA to prepare its annual report (prescribed form and time for each FY)
- > Giving full account of its activities during the FY and
- > Forward a copy thereof to the CG and
- > CG shall cause annual report + audit report to be laid before each House of Parliament

126. Right to dividend, rights shares and bonus shares to be held in abeyance pending registration of transfer of shares

- Notwithstanding anything contained in any other provision of this Act,
- > Where any instrument of transfer of shares has been delivered to any co. for registration and
- > Such transfer has not been registered by the co.,
- > Such company shall:

Transfer the dividend w.r.t. such shares to UDA account (unless the co. is authorised, in writing, by registered holder to pay such dividend to transferee specified in transfer instrument)



Keep in abeyance - Any offer of right shares u/s 62(1)(a) or issue of fully paid up bonus shares



127. Punishment for failure to distribute dividends

- > Where a dividend has been declared
- > But, within 30 days of such declaration, it has not been paid or warrant has not been posted, to entitled SH,
- > The punishment shall be:

	Every Director who is knowing	Company
	a party to default (not OID)	
Imprisonment	Extend to 2 years AND	NA
Fine - During the period	Not < Rs. 1k / day - Default	Simple Interest 18% p.a.
where default continues	continues	

Provided that no offence u/s 127 shall be deemed to have been committed where [LADDO]:

- (a) the dividend could not be paid by reason of the operation of any law.
- (b) SH has given directions to co. regarding payment of dividend and those directions cannot be complied with and the same has been communicated to him
 (3 conditions - Given directions + cannot comply + communicate)
- (c) there is a dispute regarding right to receive the dividend;
- (d) the dividend has been lawfully adjusted by the company against any sum due from shareholder; (for example adjustment of calls in arrears), or
- (e) for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to default on part of company.

Modification for Nidhi Company (w.r.t. Sec 127):

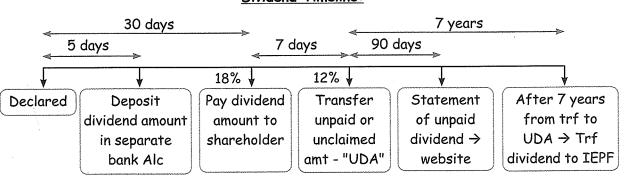
In case of Nidhi Co., where dividend payable is <= Rs 100, it shall be sufficient compliance of sec 127 if:

- > declaration of dividend is announced in local language in one local newspaper of wide circulation.
- announcement is also displayed on the notice board of the Nidhi for at least 3 months.

Concept clarity check:

The company is responsible to post the dividend warrant within 30 days of declaration of dividend. However, if such post doesn't reach SH within 30 days, it's not the responsibility of the co. Hence, company cannot be penalised if warrant doesn't reach before 30 days.

Dividend Timeline:



——···· The End ····

Chapter 9 Accounts of Companies



[Section 128 to Section 138]

Sec	Name	Sec	Name
128	Books of Accounts to be kept by co/	133	CG to Prescribe AS
129	Financial Statement	134	Financial Statement, Boards Report, etc
129 <i>A</i>	Periodical financial results	135	Corporate Social Responsibility
130	Re-opening of accounts on Court's or	136	Right of Member to Copies of Audited
	Tribunal's Orders		FS
131	Voluntary Revision of FS/Board's Report	137	Copy of FS to be Filed with Registrar
132	Constitution of NFRA	138	Internal Audit

Form	Purpose
AOC 1	Statement containing salient features of FS of subsidiaries/ associates/JVs
AOC 2	Details containing contracts or arrangements entered into with related parties
AOC 3	Statement containing salient features of the audited FS
AOC 3A	Detailed statement on FS to be filed by co. complying with Cos (Ind AS) Rules
AOC 4	Form to file a FS and other documents of the company with the Registrar
AOC 4 (XBRL)	XBRL doc. in respect of FS and other documents to be filed with the Registrar
AOC 4 (CFS)	Form to file CFS s and other documents with the Registrar
AOC 4 (NBFC)	Form for NBFCs to file financial statement and other documents with the
	Registrar
AOC 5	Notice to declare the address of the location in which the BoAs are maintained



Important Definitions

<u>"Books of account" includes</u> records maintained in respect of:

sums of money received

sales and

assets and

items of cost

and expended

purchase

liabilities

u/s 148

Financial statement in relation to a company, includes:

BS as at

P&L account

CFS for

Statement of

Explanatory

end of FY

(in case of NPO - Income & Exp a/c

FУ*

change in equity

note annexed

*Provided that FS, w.r.t. OPC, small co. and dormant co. and Private co. (startup), may not include CFS;

"Book and Paper" and "Book or Paper": Includes: [WARM DVD]

Books of

Accounts

Deeds

Voucher

Writings

Documents

Minutes

Registers

maintained on paper or in electronic form;



Section 128: Books of account, etc., to be kept by company:

For the purpose of this section, books of accounts (BOA) means - Books of account and other relevant books and papers and financial statement (FS)

1. Co. to prepare BoA:

Every co. shall prepare and keep BOA and FS at its RO every FY

- > Giving a true and fair view of state of the affairs
- > of the company, including that of its branch office(s), and
- > explaining all such transactions and

Such books shall be kept on accrual basis and as per the double entry system of accounting

Note - Such BOA may be kept at such other place in India as BoD may decide. Inform RoC within 7 days of such decision - by filing a notice in writing (Form AOC -5) giving full address of such place.

Provided that - Companies may keep books in e-mode in prescribed manner.

🔀 Rule 3 - Manner of maintaining BoA & FS in e-form - Companies (Accounts) Rules, 2014:

- > Such BOA in e-mode shall remain accessible in India at all times so as to be usable for subsequent reference.
- > Features of accounting software:
- For FY commencing after 1/4/2023 Every co. using accounting software for maintaining BOA shall use only such software which has the following feature:

recording audit trail of every transaction and

ensuring that audit trail cannot be disabled, and

creating an edit log of each change made in BOA + date of such changes.

- > BoA shall be retained completely in original format info. shall remain complete & unaltered.
- > Info. received from branch office not be altered + keep in manner depicting what was originally received from the branches.
- > Info. of such e-record should be capable of being displayed in legible form.
- \succ There shall be proper system for storage, retrieval, display or printout of the e-records
- > Such e-records shall not be disposed of or rendered unusable, unless permitted by law.
- > Backup of such e-records shall be kept in servers physically located in India on daily basis.
- > Co. shall intimate the following to RoC on an annual basis at time of filing FS: (No LIC)

Name of the service provider internet protocol (IP) address of service provider

location of the service provider* where BOA are maintained on cloud, such address as provided by service provider

*Where service provider is located o/s India, name & add. of person in control of BoA in India

- 2. Where a co. has branch office (India or o/s India), it shall be deemed to have complied with provisions of BoA, if:
 - > proper BOA relating to transactions effected at branch office are kept at that office and
 - \triangleright proper summarized returns periodically are sent to company at its RO or other place as u/ss (1)

3. BOA open for inspection for directors only:

BOA maintained	⊳	open for inspection at RO or other place in India
within India	≻	by any members <u>director</u>
	≽	during business hours
BOA maintained	➤	Director shall furnish a request to co. setting out the full details of
outside India		the financial info. sought and the period for which it is sought.
	≽	Co. shall produce such info. to director within 15 days of date of
		receipt of the written request.
	≽	Such info shall be sought for by the director himself and not by or
		through his power of attorney holder or agent or representative.

Note - Inspection of BoA of any subsy co. shall be done by person authorised by a Board resolution.

- 4. Where inspection is made u/ss (3), officers and other employees of co. to give all assistance to the person making such inspection.
- 5. BOA to be kept in good order:

BOA (together with vouchers relevant for entries) pertaining to the period:

- > not less than 8 FY immediately preceding a FY, or
- > where company had been in existence for <8 yrs, w.r.t. all preceding years together with vouchers relevant to any entry in such books of account shall be kept in good order.

Note - If investigation ordered - CG may direct that BoA may be kept for longer period.

6. In case of contravention of such provision, following shall be responsible:

MD WTD in charge CFO Any other person of co. charged by BoD with such duty

for a fine which shall not < Rs. 50,000 which may extend up to Rs. 5 lakhs

<u>Note</u> - This section majorly talks about books of accounts and books and paper. Although, FS is mentioned in the first subsection, but details of FS is discussed in Sec 129 below.



Section 129: Financial Statement (FS)

1. FS shall:

give a true and fair view of state of affairs of the co comply with the AS notified u/s 133, and

shall be in form as prescribed in Schedule III

Provided that the items contained in such FS shall be in accordance with the AS:

Provided further that nothing contained in this sub-section shall apply to:

insurance or banking co.

electicity co.

other class of co. for which form of FS specified in other Act

Provided also that FS shall not be treated as not disclosing a true and fair view of the state of affairs of the company, merely by reason of the fact that they do not disclose:

In case of:	Matters which are not required to be disclosed by:
Insurance co.	Insurance Act, 1938, or IRDA Act, 1999
Banking co.	Banking Regulation Act, 1949
Electricity co.	Electricity Act, 2003
Governed by other law	by that law

- 2. At every AGM of co. BoD shall lay before such meeting FS for the FY
- 3. Consolidated FS (CFS):

Where a co. has one or more subsy - Prepare CFS of the co. and all subsidiaries (in addition to FS) in manner prescribed. Such CFS - Lay before AGM along with FS u/ss (2)

Provided that co. shall also attach along with its FS - a separate statement containing the salient features of FS of its subsidiary, associates or JV in FORM AOC - 1



Rule 6 Manner of Consolidation

CFS shall be made in accordance with provisions of Sch III + Applicable AS

Provided that - If a co. is not required to prepare CFS under the AS, it shall be sufficient if it complies with provisions of CFS in Schedule III of the Act.

Provided further that - nothing in this rule shall apply w.r.t. prep of CFS if it meets ALL the following:

- i. it is wholly/partially owned subsidiary of another company and
 - > all its other members, including those not otherwise entitled to vote,
 - > having been intimated in writing and
 - > do not object to the company not presenting CFS
- ii. securities are not listed or are not in the process of listing (in or outside India), and
- iii. ultimate or any intermediate holding co. files CFS with the RoC in compliance with Ind AS

- 4. Provisions applicable to preparation, adoption and audit of FS of holding company shall, mutatis mutandis, apply to the CFS referred u/ss (3).
- 5. Without prejudice to ss (1), where FS do not comply with AS, co. shall disclose in its FS:

 deviation from AS reasons for deviation financial effects, if any, of such deviation
- 6. CG may, on its own or on application by cos, <u>exempt</u> any class of companies from complying with this section, if it is considered necessary in public interest.
- 7. If company contravention this section, following shall be responsible:

MD WTD in charge of finance

CFO

Any other person of co. charged by BoD with such duty

or in absence of any officer mentioned above, all directors

Punishable with - Jail up to 1 year or fine Rs. 50,000 to Rs. 5 lakhs or BOTH



Section 129A. Periodical financial results

CG may, require such class or classes of unlisted companies, as may be prescribed:

(a) prepare financial results of the co. on such periodical basis and in prescribed form; (b) to obtain approval of BoD & complete audit/limited review of such results in manner as prescribed;

(c) file copy with RoC within 30 days of completions of relevant period with prescribed fees.



Section 130 - Re-opening of Accounts on Court's or Tribunal's Orders:

- 1. A company shall not re-open it BOA and not recast its FS unless:
 - > An application to Court/Tribunal in this regard is made by: [CISCO]

CG

Income Tax Auth.

SEBI

Other stat. body

any person concerned

- > And an order is made by court or Tribunal to this effect that:
 - o the relevant earlier accounts were prepared in a fraudulent manner, or
 - o the affairs of co. were mismanaged casting doubt on reliability of FS

Provided that the court or Tribunal shall give notice to - CG, ITA, SEBI, etc. and consider their representation, if any, before passing orders.

- 2. Without prejudice to the provisions contained in this Act the accounts so revised or re-cast under sub-section (1) shall be final.
- 3. No order shall be made u/ss (1) for re-opening of BOA relating to a period earlier than 8 FY immediately preceding current FY.

Provided that, on investigation, where CG has directed for keeping BOA for period > 8 years, the BOA may be ordered to be re-opened within such longer period.



Section 131 - Voluntary Revision of FS or Board's Report (after Tribunal's approval):

Notice Served Representation Considered

Order Passed Accounts Revised

If it appears to directors of a co. that:

FS of co. do not comply with Sec 129 or

BoD report do not comply with Sec 134,

they may prepare revised FS or BoD report:

- > in respect of any of 3 preceding FY
- > after obtaining approval of the Tribunal
- > on an application made by the company in Form NCLT 1 within 14 days of BoD decision and
- > a copy of order passed by Tribunal shall be filed with Registrar within 30 days:

Provided that Tribunal shall give notice to CG and ITA and shall consider their representation, if any, made by that Government or the authorities before passing any order under this section.

Provided further that such revised FS or report shall not be prepared/filed more than once in a FY

Provided also that detailed reasons for revision of such FS or report shall also be disclosed in the Board's report in the relevant FY in which such revision is being made.

Rule 77 of NCLT Rules 2016:

> Application shall contain following particulars:

FY or period to which such accounts relates

Name and details-MD, CFO, CS, Directors and officers responsible for making BoA/FS

Where accounts are audited - Name and details of auditor

Copy of board resolution

Grounds for seeking such revision

Disclose facts if majority of dir./auditor has changed immediately before such appln.

- > Co. to advertise application At least 14 days before date of hearing.
- > Tribunal to issue notice to auditor of original FS and give OOBH.
- > Tribunal to pass appropriate orders as it may deem fit.
- > On receipt of Tribunal's approval, call for GM and notice of such GM publish in 2 newspaper.
- > In GM Revised FS, statement of directors and auditors Put up for consideration.
- > On approval in GM File such revised FS + statement ROC within 30 days.

2. How much can you alter FS or report of previous FYs?

Where copies of previous FS or report have been sent out to members or delivered to Registrar or laid before the Company in general meeting, the revisions must be confined to:

- (a) correction w.r.t. which previous FS/report do not comply with provisions of sec 129 or 134; and
- (b) the making of any necessary consequential alteration.
- 3. CG may make rules relating to or provisions as to:
 - > How previous FS or report shall be supplemented by document indicating correction
 - > Function of company's auditor in case of revised FS
 - > require the directors to take prescribed steps.

Note - Here, application will be made to Tribunal only. Courts (e.g., district court) cannot be involved.

Concept clarity check:

A Ltd. applied to Tribunal for revising FS on Dec 2022. Such application was approved and revisions were made. A ltd again applied in March 2023 for revision board report. Is such application valid?

Yes! The limit of once in a year is for each of these - FS and BoD report. As in Dec 2022, application was made to revise FS, one application for revising Board report can be made.



Section 132 - Constitution of National Financial Reporting Authority

- 1. CG may constitute NFRA to provide for matters w.r.t. Accounting & Auditing Standards (ASS).
- 2. Functions of NFRA (subsection 1A and 2 read with Rule 4, 6,7,9)
 - > NFRA to protect public interest and interest of investors, creditors and others by:
 - o establishing high quality AAS, and
 - o exercising effective oversight on accounting and auditing functions.
 - > NFRA shall exercise the following function:
 - o Maintain particulars of auditors appointed in Cos./BC
 - o Recommend AAS for CG's approval (NFRA to seek and consider ICAI's recommendation)
 - o Monitor and enforce compliance with AAS.

Rule 7: Accounting Standard

To ensure compliance with accounting standard by a co./BC, NFRA:

- o may review FS and request additional info. from company/auditor, if necessary
- o may require personal presence of officers &auditors for additional info. for FS review
- o shall publish its findings on non-compliance on its website unless not in public interest
- o where NFRA finds violations of AS it may further investigate.

Rule 8: Auditing Standard

To ensure compliance with auditing standard by a co./BC, NFRA may:

- review working papers and communications related to the audit.
- o evaluate the auditor's quality control system and documentation.

- o perform other testing of audit and quality control procedures as necessary.
- o require auditors to report on governance practices and risk reduction measures.
- o seek additional information or the personal presence of the auditor for clarifications.
- o shall monitor and enforce through experienced officers or experts in audit.
- o shall publish findings on non-compliances, with exceptions for public interest and confidentiality.
- o send a separate report with proprietary information to the CG.
- o investigate or take enforcement action if laws or standards are violated by an auditor
- > Oversee Quality of service of professions associated with ensuring compliance of AAS and suggest measures for improvement therein.

Rule 9: Overseeing quality of service:

- o NFRA may instruct auditors to improve audit quality, specifying a detailed plan with time-limits. Auditors must implement the required improvements and report compliance to NFRA.
- o NFRA monitors the auditor's progress and takes appropriate actions based on the improvements made.
- o NFRA may refer cases related to auditors' quality of service to the Quality Review Board or request reports from the Board.
- o NFRA may seek assistance from experts for oversight and monitoring activities.
- \triangleright Promote awareness for compliance of AAS
- > Co-operate with national and international organisation for adherence to AAS
- > Other incidental functions

3. Constitution of NFRA:

- > a chairperson-appointed by CG, having expertise in accountancy, auditing, finance or law, and
- > such other members not > 15 consisting of part-time & full-time members as prescribed:

Each division of the NFRA shall be presided over by Chairperson or full-time Member authorised by Chairperson. [Section 3A]

<u>Section 3B</u> - There shall be an executive body of the NFRA consisting of Chairperson and full-time Members of such Authority for efficient discharge of its functions.

Such chairperson and members shall:

give declaration to CG regarding no conflict of interest or lack of indepedence not associate with any audit firm (or related consultancy firm) during course of such appt + 2 years after ceasing The following persons shall be appointed as part time members of NFRA, namely:

Position	Designation
MCA Representative	Joint Secretary (ex-officio)
CAG of India Representative	Accountant General or Principal Director (ex-officio)
RBI Representative	Executive Director (ex-officio)
SEBI Representative	Executive Director (ex-officio)
President, ICAI	Ex-officio
Chairperson, AS Board, ICAI	Ex-officio
Chairperson, AAS Board, ICAI	Ex-officio
Two experts	From the field of accountancy, auditing, finance, or law

4. Powers to investigate: The NFRA shall:

- > have power to investigate, either suo motu or on reference by CG into matters of professional or other misconducts under CA Act, 1949
 - <u>Provided that</u> where NFRA has initiated such investigation, no other institute shall initiate or continue any proceedings in such matter.
- have same power as vested in civil court: [A IPC]
 - o Discovery and production of BoA and other docs at specified place & time;
 - o summoning and enforcing the attendance of persons and examining them on oath; and
 - o inspection of any books, registers and other docs. of co. at any place.
 - o issuing commissions for examination of witnesses or documents;
- > where professional or other misconduct is proved, have the power to make order for:
 - a. Fine:

Person liable:	Minimum	Ma×imum
Individuals	Rs. 1,00,000	5 times of fees received
Firms	Rs. 5,00,000	10 times of fees received

- b. NFRA can <u>debar</u> a member/firm from audits and valuations for 6 months to 10 years based on their discretion.
- 5. Any person aggrieved by order of NFRA u/ss (4) may prefer an appeal before Appellate Tribunal.

Additional points of NFRA:

1/4 1 66	
Head office	New Delhi
Meeting	At any place in India as it may deem fit
Books of accounts	Maintain in manner as prescribed in CG in consultation with C&AG
Audit	C&AG
Annual Report	Each FY, giving full account of its activities during FY
Forward to CG (annually)	> Accounts as certified by C&AG
CG to lay these reports	> Auditor's report thereon
before each House of	> Annual Repot
Parliament	

Rule 3 of NFRA Rules: Classes of companies or BC governed by NFRA:

NFRA may undertake investigation of auditors of following classes of companies and BC:

- > companies whose securities are listed on any stock exchange in India or outside India;
- > unlisted public companies having:

PUSC not less than 500 crores, or

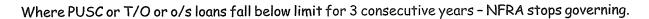
T/O not less than Rs. 1,000 crore

outstanding loans, debentures and deposits of not less than Rs. 500 crores

as on the 31st of March of immediately preceding FY

- > insurance cos., banking companies, electricity companies or companies governed by special Act.
- > any BC or company or person, etc. on a reference made to NFRA by CG in public interest
- > BC incorporated outside India which is subsidiary or associate of any of the above mentioned companies if the income or net worth of such subsidiary or associate company > 20% of consolidated income or net worth of such above mentioned companies,

Every BC, (other than co. as defined in section 2(20)), formed in India, and governed under this rule shall, within 15 days of appointment of an auditor u/s 139, inform NFRA in Form NFRA-1, \mathcal{D} the particulars of the auditor so appointed.





Section 133: CG to prescribe Accounting Standards (AS):

CG may prescribe AS or any addendum thereto, as recommended by ICAI, constituted u/s 3 of CA Act, 1949, in consultation with and after examination of recommendations made by NFRA.

Provided that:

- Until NFRA is constituted u/s 132,
- > the CG may prescribe the AS or any addendum thereto,
- > as recommended by ICAI, in consultation with and after examination of recommendations by National Advisory Committee on Accounting Standard (NACAS) constituted u/s 210A of Companies Act, 1956 (previous law)

 $\underline{\text{Note}}$ - Since NFRA constituted in 2018, hence this proviso lost it operating effects.



Section 134: Financial Statement, Board's Report, etc.

- 1. The FS, including CFS, shall be approved by the BoD before it is signed on behalf of BoD by:
 - > Chairperson of the co., if so authorized by BoD or else 2 directors (1MD), AND
 - > CEO. CFO and CS

before it is submitted to auditor for his report thereon.

<u>In case of OPC</u> - Sign by one director only.

- 2. Auditor's report shall be attached to every FS.
- 3. In the FS laid before company in GM, a BoD's report shall be attached, which includes [FC WARM Dividend Reserve 3 Policy]:

Web address where AR u/s 92 has been placed	No. of board meetings	Directors's responsibility statement (DRS)	Details of fraud reported b auditors u/s 143(12) other than those reportable to Co
Statement on declaration given by ID u/s 149(6)	& adverse rer	& comments on every qua nark - by auditor in his r ice in his secretarial aud	report or by CS company
particulars of loan, guarantee investments u/s 186	affecting fin.	nge and commitments – position of co. between and date of report	contracts and arrangemen with related parties u/s 188 (Form AOC -2)
amount proposed to be carried to any reserve	absorption, fo	vation of energy, tech orex earnings and outgo or prescribed	recommended amount of dividend
statement indicating & implementation o policy and risks ident	f risk mgt.	Policies on director's appointment and rem. (if covered u/s 178)	details of policy developed of implemented on CSR initiative taken during the year

in case of listed company and every other public company having such PUSC >= Rs. 25 crores - statement indicating the manner in which formal annual evaluation of performance of Board, its Committees and of individual Directors has been made

Other matters as may be prescribed

 $\underline{Provided\ that}$ - where above disclosures are made in FS already, such disclosures shall be referred to instead of repeating it in BoD's report

Provided further that where policies are made available on company's website, if any, it shall be sufficient compliance of the requirements under such clauses if the salient features of the policy and any change therein are specified in brief in the Board's report and the web-address is indicated therein at which the complete policy is available

Note - In case of OPC or Small co, CG may prescribe an abridged Board's report.

4. BoD report shall, in case of a OPC, <u>mean</u> a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by auditor in his report.

- 5. <u>Director's responsibility statement shall state that: [AS AP Care GC Control Law]</u>
 - a. in preparation of the annual accounts, the applicable AS had been followed along with proper explanation relating to material departures;
 - b. Directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of FY and of the P&L for that period:
 - c. Directors had taken proper and sufficient care for:
 - · the maintenance of adequate accounting records as per this Act
 - · safeguarding the assets of the co. and
 - · for preventing and detecting fraud and other irregularities;
 - d. the Directors had prepared the annual accounts on a going concern basis; and
 - e. the Directors, in the case of a listed company, had laid down internal financial controls (IFC) to be followed by the company and that such IFC are adequate and were operating effectively.

Explanation: For the purposes of this clause, the term "IFC" means:

- · the policies and procedures adopted by the company
- · for ensuring the orderly and efficient conduct of its business,
- including adherence to company's policies, the safeguarding of its assets, the prevention and detection of frauds and errors, the accuracy and completeness of the accounting records, and the timely preparation of reliable financial information;
- f. the Directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.
- 6. Sign on BoD report Chairman, if authorised. Or else, 2 directors (1 MD)

 Note In case where in the co. there is only 1 director, FS shall be signed by such 1 dir. (e.g. OPC)
- 7. A signed copy of every FS, including CFS, if any, shall be issued, circulated or published along with:

 any notes annexed to or forming part of such FS

 auditor's report

 Board's report
- 8. If a company is in default in complying with this section:
 Co. liable to penalty of Rs. 3 lakhs; OID shall be liable to penalty of Rs. 50,000

Rule 8: Matters to be Included in Board's Report

1. BoD's report shall be prepared based on <u>standalone</u> F5 of the co. and shall report on highlights of performance of subsy, associates and JVs and their contribution to overall performance of co.

- 2. Additionally, BoD report shall include following information:
 - (i) the financial summary or highlights;
 - (ii) the change in nature of business, if any;
 - (iii) details of directors or KMP who were appointed or have resigned during the year;
 - (iiia) statement regarding opinion of Board w.r.t. integrity, expertise and experience of independent director appointed during the year".
 - (iv) names of cos. which have become or ceased to be its subsy, JV or assoc. during the year;
 - (v) the details relating to deposits, covered under Chapter V of the Act:
 - a. accepted
 - b. remaining unpaid or unclaimed as at the end of the year;
 - c. any default in repayment of deposits or interest thereon during the year and if so, number of such cases and the total amount involved:

at the beginning of year

max during the year

at the end of year

- (vi) the details of deposits which are not in compliance with requirements of Chapter V;
- (vii) details of significant and material orders passed by regulators/courts/tribunals impacting the going concern status and company's operations in future;
- (viii) details in respect of adequacy of internal financial controls w.r.t. FS
- (ix) a disclosure, as to whether maintenance of cost records as specified by the CG u/s 148, is required and accordingly such accounts and records are made and maintained,
- (x) a statement that the co. has complied with provisions relating to the constitution of Internal Complaints Committee under the Sexual Harassment related Act
- (xi) details of application made or any proceeding pending under IBC during the year along with their status as at the end of the financial year.
- (xii) the details of difference between amount of valuation done at time of one time settlement and the valuation done while taking loan from the Banks or FI along with reasons thereof.



Section 135: Corporate Social Responsibility (CSR):

Read with Companies (Corporate Social Responsibility Policy) Rules, 2014

- 1. Every co. having:
 - \triangleright net worth >= Rs. 500 crores, or
 - > turnover >= Rs. 1,000 crore or

During immediately preceding FY

> net profit >= Rs. 5 crores

shall constitute CSR Committee consisting of 3 or more Directors (at least 1 independent director)

Company Type	CSR Committee Composition
Co. which is not required to appoint ID	2 or more directors (without any ID)
Private co. with only 2 directors	2 directors
Foreign company covered under these	CSR Committee with at least 2 persons - one as per
rules	section 380(1)(d) & one nominated by the foreign co.

Note:

- 1. If any of the limits not met for 3 consecutive FYs not required to comply with Sec 135.
- 2. Net profit to be consider as per Sec 198 i.e., Profit Before Tax.

Exemption - Where the amount to be spent by co. $u/ss(5) \le Rs. 50 \text{ lakhs}$, CSR committee shall not be applicable. In such case, function of CSR committee to be discharged by BoD.

2. Board report u/s 134 to disclose the composition of CSR committee

3. Function of CSR committee:

- > Formulate and recommend to board CSR policy indicating activities to be undertaken
- > Recommend amount of expenditure to be incurred on such activity
- > Monitor CSR policy of company
- 4. The Board of such company shall:
 - (a) after taking into account recommendations of CSR Committee, approve CSR Policy and disclose contents of thereof in its report and place it on website.
 - (b) ensure that activities as are included in CSR Policy are undertaken by the company.
- 5. The Board shall ensure that the company spends, in every FY,
 - > at least 2% of <u>average</u> net profits
 - \succ made during the 3 immediately preceding FY or in pursuance of its CSR Policy

 $\underline{\text{Note}}$ - Where co. has not completed 3 FY since incorp. - Take average of such immediately preceding FYs (i.e., Jitne saal tha, unka average lo)

Provided that the co. shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for CSR activities:

Provided further that, if a co. fails to spend such amount:

- > Board shall specify reasons for not spending the amount in its report u/s 134, and
- > unless the unspent amt. relates to any ongoing project, transfer it to a Fund specified in Schedule VII, within 6 months of expiry of the FY

Provided that if co. spends excess amounts, such company may set off such excess amount against the requirement to spend for such number of succeeding FY and in such manner as prescribed.

🛂 As per Rules

Where co. spends an amount in excess of requirement, such excess amount may be set off against requirement to spend u/ss (5) up to immediate succeeding 3 FY provided that:

- (i) such excess amt. shall not include the surplus arising out of such CSR activities
- (ii) the Board of the company shall pass a resolution to that effect.

6. Transfer ongoing project to special account:

Amt. remaining unspent u/ss (5), pursuant to any ongoing project, undertaken by a co. in pursuance of its CSR Policy, shall be:

- > transferred within 30 days from end of FY to a special account to be opened in any scheduled bank to be called "Unspent Corporate Social Responsibility Account", and
- > spent it in pursuance of obligation towards CSR Policy within 3 FY from date of such trf,
- > failing which, the co. shall trf. the same to a Fund (as per sch VII) within 30 days from date of completion of the 3rd Fy.

7. Default u/ss (5) or (6):

Co. shall be liable to penalty - Lower of:

- > 2x of (amt. required to be transferred to the Fund or unspent CSR account) or
- > Rs. 1 crore

OID shall be liable to penalty - Lower of:

- > 1/10th of (amt required to be transferred to the Fund or unspent CSR account) or
- Rs. 2 lakhs

Companies (Corporate Social Responsibility Policy) Rules, 2014

Rule 2: Definitions

<u>"CSR"</u> means the activities undertaken by a Company in pursuance of its statutory obligation u/s 135 as per provisions contained in these rules, but shall not include the following, namely: (SPEL FB)

Sponsorship

Political

Employee

Law

Foreign

Business

(i) activities undertaken in normal course of business of the company.

Provided that any 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 FY 2020-21 to 2022-23 subject to the conditions that:

- (a) such R&D activities is carried out in collaboration with institutes mentioned in Sch VII;
- (b) details of such activity to be disclosed separately in Annual report on CSR (in BoD report);
- (ii) any activity undertaken by co. outside India except for training of Indian sports personnel representing any State or UT at national level or India at international level;
- (iii) contribution of any amount directly or indirectly to any political party u/s 182 of the Act;
- (iv) activities benefitting employees of the company;
- (v) activities supported by cos. on sponsorship basis for marketing benefits for its products;
- (vi) activities carried out for fulfilment of any other statutory obligations under any other law

"Administrative overheads" means:

- > expenses incurred for 'general mgt. and admin' of CSR functions
- > but shall not include expenses directly incurred for designing, implementation, monitoring, and evaluation of a particular CSR project or programme.

"Net profit" means net profit of a company as per its FS, but shall not include the following, namely:

- (i) profit arising from overseas branch(es) of co., whether operated as separate co. or not; and
- (ii) any dividend received from other companies in India, which are covered under and complying with prov. of sec 135 of the Act.

"Ongoing Project" means a multi-year project undertaken in fulfilment of its CSR obligation having timelines <= 3 years excluding FY 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.

RULE 3: APPLICABILITY:

Every co. including its holding, or subsidiary and a foreign company u/s 2(42) having branch office or project office in India which fulfils criteria u/s 135(1) shall comply with section 135.

Provided that net worth, turnover and net profit of a foreign co. shall be computed as per Balance sheet and P&L prepared as per Section 381 and 198 of the Act

Provided further that a co. having any amount in its unspent CSR account u/s 135(6) shall constitute CSR committee and comply with CSR Provisions [Amendment]

RULE 4. CSR IMPLEMENTATION

- 1. Board shall ensure that CSR activities are undertaken by the company itself or through:
 - (a) Sec 8 company, or a registered public trust or a registered society:
 - > established by the co., under Income Tax Act, either singly or along with other co., or
 - > established by CG or State Government; or
 - > having an established track record of at least 3 years in undertaking similar activities
 - (b) any entity established under an Act of Parliament or a State legislature; or
- 2. Every entity, covered above, who intends to undertake any CSR activity, shall register itself with the CG by filing form CSR-1 with Registrar.

Form CSR-1 shall be signed and submitted electronically and shall be verified digitally by CA, CS or CMA in practice.

On submission thereof, a unique CSR Registration Number shall be generated automatically.

- 3. A company may engage international organisations for designing, etc. of the CSR projects or programmes as per its CSR policy as well as for capacity building of their own personnel for CSR.
- 4. A company may also collaborate with other companies for undertaking projects in such a manner that CSR committees of respective cos. are in a position to report separately on such project.

- 5. Board shall satisfy itself that funds so disbursed have been utilised for purposes as approved and CFO (or person responsible for fin. mgt.) shall certify to the effect.
- 6. In case of ongoing project, Board shall monitor the implementation of the project w.r.t. the approved timelines and year wise allocation and shall be competent to make modifications, if any, for smooth implementation of the project within the overall permissible time period.

Note - International organisation can also be engaged for CSR implementation.

RULE 5: CSR COMMITTEE:

CSR Committee shall formulate and recommend to the Board, an annual action plan in pursuance of its CSR Policy, which shall include the following, namely:

- (a) the list of CSR projects that are approved to be undertaken in areas specified in Sch VII;
- (b) the manner of execution of such projects;
- (c) the modalities of utilisation of funds and implementation schedules for the project;
- (d) monitoring and reporting mechanism for the projects; and
- (e) details of need and impact assessment, if any, for the projects undertaken by the company: Provided that Board may alter such plan at any time during FY, on recommendation of its CSR Committee, based on the reasonable justification to that effect.

RULE 7: CSR EXPENDITURE:

- 1. Board shall ensure that admin overheads shall not exceed 5% of total CSR expense for the FY.
- 2. Any surplus arising out of CSR activities shall:
 - > not form part of business profit of a co. and
 - > shall be ploughed back into same project or
 - > trf. to Unspent CSR Account and spent as per CSR policy and annual action plan or
 - \succ trf. to a Fund specified in Sch VII, within 6 months of expiry of the FY.
- 3. Covered above.
- 4. CSR amount may be spent for creation or acquisition of a capital asset, which shall be held by:
 - (a) section 8 company, or a Registered Public Trust or Registered Society, having charitable objects and CSR Registration Number; or
 - (b) beneficiaries of said CSR project, in the form of self-help groups, collectives, entities; or
 - (c) a public authority:

Provided that any capital asset created prior to commencement of this Rule, shall within 180 days (may seek further 90 days) comply with this provision.

RULE 8: CSR REPORTING

- 1. Board Report pertaining to any FY shall include an "Annual report on CSR"
- 2. In case of a foreign co., the Balance Sheet u/s 381 of the Act, shall contain annual report on CSR

^{**} Annual Report on CSR containing particulars specified in Annexure I or II, as applicable.

3. <u>Impact assessment:</u>

- (a) Every co. having avg CSR obligation >= Rs. 10 crores in 3 immediately preceding FYs, shall:
 - > undertake impact assessment, .
 - > through an independent agency,
 - > of their CSR projects having outlays >= Rs. 1 crore, and
 - > which have been completed not less than 1 year before undertaking the impact study.
- (b) Impact assessment reports Place before BoD & annexed to the annual report on CSR.
- (c) Co. undertaking impact assessment may book expense towards CSR for that FY, not exceeding higher of [Amendment]:
 - > 2% of total CSR exp. for that FY or
 - > Rs. 50 lakhs

RULE 12: [Amendment]

Every co. covered under Sec 135(1) shall furnish a CSR report in Form CSR-2 to Registrar for the preceding FY (2020-21) 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 the preceding FY (2020-21), Form CSR-2 shall be filed separately on or before 31dt March June 2022, after filing Form AOC-4, etc.

Additional clarifications on CSR:

- 1. Read Sch VII from ICAI Module Pg. 9.44 (not imp. from exam point of view. Just read casually)
- 2. Entries in Sch VII is to be interpreted liberally.
- 3. CSR activity should be taken up as a project. One-off events such as marathon won't qualify
- 4. Expense incurred by foreign holding co. for CSR activities in India will qualify as CSR spend of the Indian subsidiary if, it is routed through Indian subsy.

COVID RELATED CLARIFICATIONS:

- 1. Following spendings are eligible CSR activity:
 - > COVID-19 related activities
 - 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
 - \succ COVID-19 vaccination for persons other than the employees and their families
 - > Carrying out awareness campaigns or public outreach campaigns on COVID vaccination program.
 - Setting up makeshift hospitals and temporary COVID Care facilities
 - For the activities related to "Harr Ghar Tiranga" campaign, such as mass scale production and supply of the National Flag, outreach and amplification efforts and other related activities
- 2. Companies including Government co. may undertake the activities or projects or programmes using CSR funds, directly by themselves or in collaboration as shared responsibility with other cos.



Section 136: Right of member to copies of audited financial statement.

1. A copy of following documents laid before GM:

FS CFS, if any auditor's report every other doc. required to be attached to FS

shall be sent to every:

member trustee for DH all other entitled person

not less than 21 days before the date of the meeting.

Provided that if copies of docs are sent less than 21 days before date of meeting, it shall be deemed to have been duly sent if it is so agreed by members:

<u>If company has share capital:</u>
Majority in numbers + 95% of PUSC

If company has no SC:

95% of total VP

Provided further that, in case of listed co., this sub-section shall be deemed to be complied with if:

- > copies of documents are made available for inspection at RO during working hours for 21 days before date of meeting.
- > statement containing salient features of such docs or copies thereof is sent to member, DT of DH in Form AOC-3 not less than 21 days before date of meeting unless SH ask for full FS.

Note - Cos. which are regd to comply with Cos (Ind AS) Rules, 2015 shall send in Form AOC - 3A

Mode of sending FS: In case of all:

listed companies and

such public companies having:

- NW of more than Rs. 1 crore and
- Turnover of more than Rs. 10 crore

the financial statements may be sent:

Shareholding is in:	Mode
Demat form + Email IDs registered with depository	E-mode
Otherwise than demat form but members have	E-mode
positively consented in writing to e-mode	
In all other cases	Dispatch of physical copies through
	any recognised mode of delivery u/s 20

Provided - Listed co. shall also place its FS including CFS, and other docs on its website

Provided also that every listed company having subsidiary(ies) shall place separate audited accounts w.r.t. each of subsidiary on its website, if any.

Provided also that a listed company which has a subsidiary incorporated outside India (herein referred to as "foreign subsidiary (F-sub)"):

where such F-sub is statutorily required to prepared CFS under law of the country of incorporation - this proviso is complied with if such CFS is placed on website of listed co.

where F-sub is not required to get FS audited and hence does not get FS audited - holding Indian listed co. may place unaudited FS on website**

£.

**Where FS is in language other than English, place a translated copy in English on the website.

2. Co. shall allow members/DT to inspect the documents stated u/ss (1) at its RO during biz. hours.

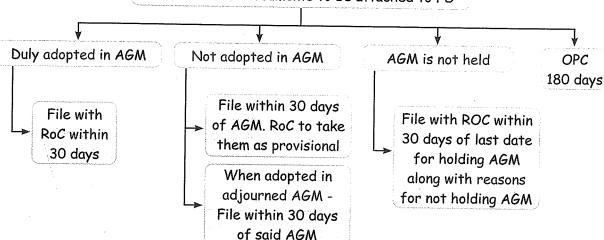
Provided that every co. having subsy shall provide a copy of separate audited or unaudited FS, as prepared in respect of each of its subsidiary to any member of the company who asks for it.

3. <u>Default in complying with this section:</u>

Co. - Liable to penalty of Rs. 25,000 ; OID - Liable to penalty of Rs. 5,000

Section 137: Copy of FS to be filed with RoC:

FS + CFS + All documents to be attached to FS



6. Filing FS with ROC:

- > A copy of FS, including CFS, along with all docs required to be attached to FS,
- duly adopted at AGM shall be
- > filed with RoC within 30 days of date of AGM
- > in the following forms:

AOC 4	Financial Statement and other documents
	Consolidated Financial Statement
	NBFCs to file FS and other documents with the Registrar
AOC-4 CFS NBFC (Ind AS)	NBFCs to file CFS with the Registrar

Note - Along with such FS, co. shall attach <u>accounts</u> of its subsy which have been incorporated outside India and which have not established their place of business in India.

Where FS is not adopted in AGM or adjourned AGM:

- > Such unadopted FS shall be filed with RoC within 30 days of date of AGM.
- > RoC to take it in records as provisional till FS are filed after adoption in the adjourned AGM

Where FS gets adopted in adjourned AGM - File with RoC within 30 days of such adjourned AGM

In case of OPC:

File copy of FS duly adopted by its member within 180 days from closure of FY

In case of foreign subsidiary not having audited FS - Send unaudited FS to RoC

In case of a subsy incorporated o/s India (foreign subsidiary) which is not required to get FS audited under law of such country and does not get it audited - Holding Indian company to file unaudited FS \pm declaration to such effect to ROC

Where such FS is in language other than English - translated copy to be sent.

- 7. Where AGM is not held, FS + Documents duly signed shall be filed with RoC within 30 days of last date before which AGM should have been held.
- 8. Co. fails to file copy of FS:
 - Co. Liable to penalty of Rs. 10,000 + Rs. 100/days Max. Rs. 2 lakhs
 - Person responsible Liable to penalty of Rs. 10,000 + Rs. 100/days Max. Rs. 50,000

Person responsible -

- MD and CFO, or
- \triangleright in absence of MD and CFO any other director charged with such responsibility
- in absence of any such director all directors.

<u>Additional Points:</u>

1. Following class of companies shall file FS and other documents in e-form AOC-4 XBRL:



co. listed in India and

Co. having

Co. having

Cos. required to prepare

their Indian subsy

PUSC >= 5 cr.

turnover >= 100 cr.

FS as per Ind AS

Note - Once you come in purview of above limit, continue to file AOC-4 XBRL.

2. NBFCs, Housing finance cos. engaged in business of banking or insurance sector – exempted from filing FS.



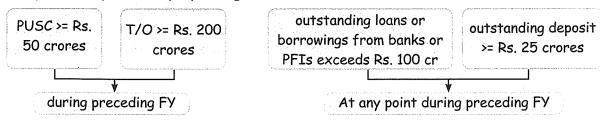
Section 138: Internal Audit

Prescribed class of cos. shall appoint internal auditor (CA or cost accountant, or such other professional as may be decided by the Board) to conduct internal audit of co's functions and activities

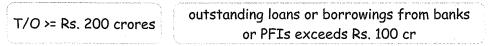
RULE 13: COMPANIES REQUIRED TO APPOINT INTERNAL AUDITOR:

Following companies shall be required to appoint an internal auditor (who can be either individual or partnership firm or BC), namely:

- (a) every listed company;
- (b) every unlisted public company having:



(c) every private company having:



<u>Who shall become an internal auditor</u> – Either individual or partnership firm or body corporate – *CA* or cost accountant, or *CS* or such professional as may be decided by the Board to conduct internal audit <u>What is his role?</u> – To conduct internal audit of the functions and activities of the company

Note - An internal auditor may or may not be an employee.

Concept clarity check:

If an unlisted co. has outstanding loan of Rs. 100 crores exactly, in such case, the provision of internal auditor shall not apply as the law says - outstanding loan and borrowings from banks or financial institution exceeding Rs. 100 crores. So exact 100 crore will not be covered here.



Chapter 10 Audit and Auditors



[Section 139 to 148]

Sec	Name	Sec	Name
139	Appointment of Auditors	144	Auditor not to Render Certain Services
140	Removal, Resignation of Auditor and	145	Auditor to Sign Audit Reports, etc
	Giving of Special Notice		
141	Eligibility, Qualifications and	146	Auditors to Attend GM
	Disqualifications of Auditors		
142	Remuneration of Auditors	147	Punishment for Contravention
143	Powers and Duties of Auditors and	148	CG to Specify Audit of Items of Cost in
	Auditing Standards		Respect of Certain Companies

	Form	Section	Purpose
	ADT-1		Form to inform the Registrar regarding the appointment of auditor by the co.
	ADT-2 ADT-3	140	Application for removing the auditor before the expiry of their term by the co.
/	ADT-3	140	Notice of resignation of auditor
/	ADT-4	143(12)	Form to report any suspected fraud by the auditor to the Central Government



Section 177(1): Applicability of Audit Committee:

Following companies are required to constitute audit committee (AC):

- Listed Public Companies
- Unlisted public co having:
 - o PUSC >= 10 crores
 - o T/O >= 100 crores
 - o Outstanding loan, debentures, and deposits (in aggregate) > 50 crores

Note:

- 1. Exemptions JV/WOS/Dormant co
- 2. If ceases to fulfil conditions for 3 consecutive years Provision not applicable
- 3. Limits to be checked as existing on last date of latest audited financial statement.



Section 139: Appointment of auditors

- 1. Appointment of subsequent auditors and tenure:
 - Every co. shall, at the first AGM appoint an individual or firm or BC as an auditor,
 - > who shall hold office from conclusion of that meeting till conclusion of 6th AGM and,
 - > thereafter, till conclusion of every 6th AGM, and
 - > the manner of selection of auditor shall be as may be prescribed.

Rule 3: Manner of selection of Auditor:

1 Who will select the auditor?

In case where a company is:	Competent Authority:	Responsibility: [MCQ]
Required to constitute AC u/s 177	Such AC shall	> take into consideration Qualification and experience (Q&E) of proposed indv/ firm > whether such Q&E are Commenciate with size
Not required to constitute such AC	the Board shall -	 whether such Q&E are Commensurate with and requirements of the co. while considering appointment, have reg to any order or pending proceeding related professional Misconduct before ICAI or couprofessional

- 2. AC/Board may call for such other info. form proposed auditor as it may deem fit.
- 3. Recommendation of name of auditor: Subject to sub-rule (1):
 - Where co. is required to constitute AC Such AC shall recommend name of indv/firm as auditor to Board for consideration.
 - > In other cases Board shall consider and recommend an indv/firm as auditors to members in AGM for appointment.
- 4. If Board agrees with AC recommendation further recommend to member in AGM for appt.
- 5. If Board disagrees Refer back to AC for reconsideration citing reasons for disagreement

What if AC decides not to reconsider original recommendation?

If AC, after considering reasons by Board, <u>decides not to reconsider</u> its original recom.:

Board shall record reasons for its disagreement with AC and send its own recom. for consideration of members in AGM; and

if Board agrees with recommendations of AC, it shall place the matter for consideration by members in AGM.

Before such appointment, the following shall be obtained from the auditor:

- Written consent of such auditor to such appointment
- Certificate from the auditor stating that: [LET the Proceedings begin!]

indv/firm is Eligible for appt. and is not disqualified under this Act or CA Act

proposed appt. is as per the Terms provided in this Act

proposed appt. is within Limits laid down by or under authority of the Act

list of Proceedings against auditor/audit firm or any partner thereof pending w.r.t. professional matters of conduct, as disclosed in the certificate, is true and correct

Note - Certificate shall also indicate whether auditor satisfied criteria u/s 141

On appointment of auditor: The company shall:

- > inform the auditor concerned of his or its appointment, and
- File notice (Form ADT-1) of appt. with RoC within 15 days of meeting in which auditor is appt. Explanation: For this Chapter, "appointment" includes reappointment

NFRA Rules:

Every BC [other than co. u/s 2(20)] formed in India + governed by NFRA shall inform NFRA (Form NFRA-1) w.r.t., the particulars of auditor appt. u/s 139 (1) within 15 days of such appt.

2. Tenure, re-appointment and cooling period of an auditor:

(For other companies, there is no tenure/cooling period)
The following companies (except OPC and small cos):

me ronowing companies (except Orc and small cos)

Listed UPC having co. PUSC >= 10 cr

Private Ltd. cos.

All companies having public borrowings

o. PUSC >= 10 cr having PUSC >= 50 cr from bank/PFI or public deposit >= 50 cr

shall not appoint or re-appoint:

- (a) an individual as auditor for > 1 term of 5 consecutive years; and
- (b) an audit firm as auditor for > 2 terms of 5 consecutive years:

Cooling period:

individual auditor who has completed his term under clause (a)

Audit firm which has completed it term under clause (b)

shall not be eligible for re-appointment as <u>auditor</u> in the same company for 5 years from the completion of his term

Incoming auditors should not have common partner with retiring auditors:

As on date of appt., no audit firm having common partner(s) to other audit firm, whose tenure has expired immediately preceding the FY, shall be appt. as auditor of same company for 5 years:

 $\underline{\text{Note}}$ - Nothing contained in this sub-section shall prejudice the right of the company to remove an auditor or the right of the auditor to resign from such office of the company.

Rule 6: Manner of rotation of auditor:

- 1. AC shall recommend to Board Name of indv/firm who may replace incumbent auditor on expiry of term.
- 2. Where co. is required to constitute AC Board shall consider recommendation of AC <u>In other cases</u> Board shall itself consider rotation of auditors and recommend for appt. of next auditors by members in AGM

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- 3. For the purpose of the rotation of auditors-
 - (i) in case of an auditor, period for which indv/firm has held office as auditor prior to commencement of the Act shall be taken into account for calculating 5 or 10 consecutive years.
 - (ii) the incoming auditor shall not be eligible if it is associated with outgoing auditor under the same network of audit firms.

 \underline{Note} - "Same network" includes firms operating under same Brand name or Trade name or common Control (BTC)

4. Where co. has appointed 2 or more indv/firms or a combination thereof as joint auditors, co. may follow rotation of auditors in such a manner that both or all of the joint auditors, as the case may be, do not complete their term in the same year.

Explanation: For rotation of auditors:

- (a) break in term for 5 continuous years shall be considered as fulfilling requirement of rotation;
- (b) if a partner, who is in charge of an audit firm and also certifies the FS, retires from said firm and joins another firm of CAs, such other firm ineligible to be appt. for 5 years.

Refer Illustration in ICAI Module Pg. 10.10 and 10.11 (not imp. as it was transition provision)

3. Rotation of partners internally in an audit firm:

Subject to the provisions of this Act, members of a company may resolve to provide that:

- (a) in the audit firm appointed by it, 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.
- 4. CG may, by rules, prescribe manner in which cos. shall rotate their auditors Mentioned above
- 5. Auditor in case of a Govt co. (Subsequent auditor)
 - > Notwithstanding anything contained in sub-section (1),
 - > in case of Govt. co. or any other co. owned/controlled (directly or indirectly) by CG or SG or partly by CG and partly by SG,
 - > the C&AG shall, in respect of a FY, appoint an auditor duly qualified to be appt.,
 - > within 180 days from commencement of FY,
 - > who shall hold office till conclusion of AGM.
- 6. First auditor in case of Company (other than Govt co.)
 - Notwithstanding anything contained u/ss (1),
 - > the first auditor of a co. (other than Govt. co) shall be appointed by BoD
 - > within 30 days from the date of registration of co. and
 - > in case of failure of BoD to appoint such auditor Inform the members, who shall within 90 days at an EGM appoint such auditor and
 - > such auditor shall hold office till conclusion of the first AGM.

- 7. Auditor in case of a Govt co. (First auditor)
 - > Notwithstanding anything contained in sub-section (1) or (5),
 - > in case of Govt. co. or any other co. owned/controlled (directly or indirectly) by CG or SG or partly by CG and partly by SG,
 - > the first auditor shall be appointed by C&AG
 - > within 60 days from the date of registration of the co. and
 - > in case C&AG fails to appt. such auditor within 60 days BoD shall appt. within next 30 days;
 - > and in case of failure of BoD to appoint within next 30 days Inform the members, who shall within 60 days at an EGM appoint such auditor and
 - > such auditor shall hold office till conclusion of the first AGM

8. Any casual vacancy in the office of an auditor shall:

Other than Govt co:	Fill casual vacancy:	
i.e., Co. whose accounts	> By BoD - 30 days	
are NOT subject to audit	> If vacancy due to resignation - Appt. to be approved at GM	
by C&AG	(Ordinary Resolution) within 3 months of BOD recommendation.	
	> Hold office till conclusion of next AGM	
Co. whose accounts are	C&AG to fill vacancy within 30 days.	
subject to audit by C&AG	Failure of C&AG - BoD to fill vacancy - Next 30 days	

9. Re-appointment of retiring auditor:

A retiring auditor may be re-appointed at an AGM, if:

- (a) he is not disqualified for re-appointment;
- (b) he has not given a notice unwillingness to be re-appointed in writing; and
- (c) SR has not been passed at that meeting:

appt. some other auditor or providing expressly that he shall not be re-appointed.

- 10. Where at any AGM, no auditor is appointed or re-appointed, the existing auditor shall continue to be the auditor of the company.
- 11. Where a co. is required to constitute AC u/s 177, all appointments, including the filling of a casual vacancy of auditor shall be made after taking into account recommendations of such committee.

Note: For this chapter:

- 1. "Appointment" includes reappointment
- 2. Word "firm" shall include a LLP incorporated under LLP Act, 2008
- 3. NFRA Rules related explanation has been intentionally skipped from notes. Students may consider reading NFRA Rules Pg. 10.16 to 10.18 of ICAI mat.

Concept clarity check:

- 1. Can an auditor be appointed for 4 years? No. He cannot be appointed for less than 5 years.
- 2. Can an audit firm be appointed as internal auditor during the cooling period? Yes! There is no such restriction. The only restriction is - such an audit firm cannot be apptd. as statutory auditor.
- 3. What if a company appoints



Section 140: Removal, resignation of auditor and giving of special notice

Removal of auditor:

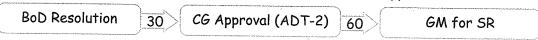
Auditor appointed u/s 139 may be removed from his office before expiry of his term only by:

- > SR of the company
- \succ After obtaining previous approval of CG (Regional Director) in manner prescribed

Provided that - Before any such action, auditor shall be given ROBH.

Rule 7 - Manner of removal of auditor:

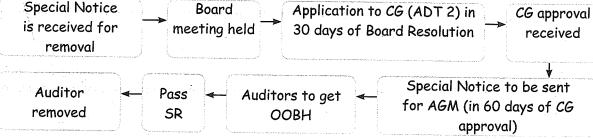
- Application to CG shall be made within 30 days of BoD resolution in Form ADT-2.
- > Co. to hold GM for passing SR within 60 days of receipt of approval of CG.



Specified IFSC company where no decision is communicated by CG within 60 days - Deemed approval of CG and then CG to appoint auditor at GM within 3m from expiry of such 60 days.

Before removal, auditor shall be given OOBH (Audi Alteram Partem i.e., principal of natural justice to give OOBH)

Summary of removal of Auditor



2. Resignation of auditor:

- Auditor who has resigned shall,
- > file within 30 days from date of resignation,
- > a statement in Form ADT-3 with the company and Registrar and C&AG (only in case of Govt. co)
- indicating reasons and other facts as may be relevant with regard to his resignation.
- 3. Contravention: Auditor fails to comply with provision u/ss (2) Liable to: Penalty of - Lower of Rs. 50,000 or an amount equal to remuneration of auditor In case of continuing failure - Further penalty of Rs. 500/day after the first - Max Rs. 2 lakhs

- 4. Special notice for removal of auditor and representation thereon by auditor
 - (i) Special notice (u/s 115) shall be required for resolution at AGM for:
 - a. appointing a person other than a retiring auditor, or
 - b. providing expressly that retiring auditor shall not be re-appointed, except where retiring auditor has completed consecutive tenure of 5/10 years.
 - (ii) On receipt thereof Company shall forthwith send a copy thereof to the retiring auditor.
 - (iii) Where notice is given + retiring auditor makes representation in writing (not exceeding a reasonable length) and requests its notification to members, the company shall, unless the representation is received by it too late for it to do so:
 - a. in notice given to members, state the fact that representation is made; and
 - b. send copy of representation to every member,
 - c. if copy thereof couldn't be sent (cause it was received too late or due to cos. default):
 - > auditor may require the representation to be read out at the meeting (without prejudice to his right to oral representation)*
 - > a copy of such representation shall be filed with the Registrar:

*Tribunal may order not to send representation:

- ightharpoonup On application (in Form NCLT-1) by co/aggrieved person, if Tribunal is satisfied that w rights are being abused,
- > It may order that such copy may not be sent, and representation need not be read out
- 5. Tribunal may order to change auditor:
 - > Tribunal may:

suo motu appln. by CG (in Form NCLT 9) appln. by person concerned (in Form NCLT 9)

- > if it is satisfied that auditor has (directly or indirectly):
 - o acted in a fraudulent manner or
 - o abetted or colluded in any fraud by, or in relation to, Co., its Directors or officers,
- > it may, by order, direct the company to change its auditors.

Instead of directing the company, Tribunal may itself change auditor:

If application is made by CG and Tribunal is satisfied that any change of the auditor is required it shall, within 15 days of receipt of such appln, make an order that:

- > he shall not function as an auditor and
- > the CG may appoint another auditor in his place:

<u>Debarring the auditor</u>: An auditor (indv/firm) against whom final order has been passed under this section shall:

- > not be eligible to be appt. as an auditor of any co. for 5 years from passing of such order and
- > the auditor shall also be liable for action u/s 447.

 $\underline{\text{Note}}$ - In case of a firm, the liability shall be of the firm and that of every partner (s) who acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the co., dir. or officers.



Section 141: Eligibility, qualifications and disqualifications of auditors

- 1. Eligibility:
 - A person shall be eligible for appt. as auditor only if he is a CA.
 - A firm where majority (not all) of partners are CAs practicing in India Such firm may be appt.
- 2. Who will sign on behalf of firm: Where a firm including LLP is appointed as an auditor only the partners who are CAs shall be authorised to act and sign on behalf of the firm.
- 3. <u>Disqualification:</u> Following persons shall not be eligible for appt. as auditor of a company, namely:
 - (a) Body Corporate (other than LLP)
 - (b) an officer or employee of the company;
 - (c) a person who is a partner or employee of an officer or employee of the company;
 - (d) a person who, or his relative or partner:
 - (i) is holding any security of CASH OR SOH.
 Except Relative may hold security in company or ASH of face value not > Rs. 1 lakh;
 - 1. If relative acquires security above Rs. 1 lakh, corrective action to maintain limits if Rs. 1 lakh shall be taken by the auditor within 60 days of such acquisition or interest.
 - 2. Holding of all the relatives shall be taken in aggregate to check threshold.
 - (ii) is indebted to the CASH or SOH > Rs. 5 lakhs
 - (iii) has given guarantee or provided security w.r.t., indebtedness of any third person to CASH or $SOH > Rs.\ 1$ lakh.
 - (e) a person or a firm who, whether directly or indirectly, has business relationship with CASH or SOH or associate of such holding co.;

Business Relationship: Any transaction entered into for a commercial purpose, except:

- (i) transactions which are in nature of prof. services permitted to be rendered by auditor;
- (ii) transactions in OCOB of company at arm's length price
- (f) person whose relative is a director or is in employment of company as a director or KMP;
- (g) a person who is in full time employment elsewhere, or, a person or a 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 > 20 cos;

While calculating the limit of 20 companies:

- 1. Exclude OPC, small co., dormant company and private cos. having PUSC < Rs. 100 crores
- 2. In case of firm, the limit of 20 shall be for each partner. i.e., limit of 20 is per person.

- (h) a person who has been convicted by a court of an offence involving fraud and a 10 years has not elapsed from the <u>date of such conviction</u>;
- (i) a person who, directly or indirectly, renders any service referred to in section 144 to the company or its holding company or its subsidiary company or its associate.
- 4. Where person appt. as an auditor incurs any disqualifications mentioned u/ss (3) after appt., he shall vacate his office and it shall be deemed to be a casual vacancy in the office of the auditor.



Section 142: Remuneration of auditors

- 1. Remuneration to be fixed at GM or in such manner as may be determined in such GM. For first auditor BoD to fix remuneration.
- 2. Remuneration shall, in addition to fee payable to an auditor, include:
 - > expenses incurred in connection with such audit and
 - > any facility extended to him

but does not include any rem. paid to him for any other service rendered at request of co.

Concept clarity check:

Can engagement letter be signed without stating fees and merely stating that fees shall be decided mutually? - Yes! Such engagement letter is valid.



Section 143: Power and duties of auditors and auditing standards

- 1. Power of auditors: Every auditor of a company shall:
 - > have right of access at all times to BoA of co., whether kept at RO or at any other place &
 - be entitled to require from officers such info & explanation (I&E) as may be necessary for performance of his duties, and
 - have right to access records of all its subsidiary or associate cos. in so far as it relates to the consolidation of its FS with that of its subsy and associate cos.

<u>Inquiry by auditor</u>: Amongst other matters, auditor to inquire into following matters:

- (a) whether loans & advances on the basis of security have been properly secured and whether term thereof is prejudicial to interest of co/members.
- (b) whether transactions which are represented merely by book entries are prejudicial to interest of co.
- (c) whether asset of co. as consist of shares, debentures or other securities have been sold at price < purchase price (except in case of investment co. or banking co.)
- (d) whether loans & advances have been shown as deposits.
- (e) whether personal expenses have been charged to revenue account
- (f) where it is stated in books that shares have been allotted for cash:
 - > whether cash is actually received, and
 - if no cash is received, whether BoA and Balance sheet is correct, regular and no misleading

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2. <u>Auditor Report:</u> Auditor shall make a report to members of the co.:

Report on:

- Accounts examined.
- Every FS laid before co. in GM

After taking into account:

- Provision of this Act
- · A5 and SAs
- Matters to be included in Auditor's report.

Express opinion:

- To the best of his info. and knowledge
- Accounts and FS give true & fair view of state of co's affairs at end of FY.

3. Auditor's report shall also state:

- (a) Info. and explanations (I&E):
 - > Whether sought and obtained all I&E which to best of his knowledge is necessary for audit
 - > If not, details thereof and effect of such info. on FS

(b) Books of accounts:

- whether, in his opinion, proper BoA as per law have been kept by co. (as per his examination)
- > proper returns adequate for his audit have been received from branches not visited by him:

(c) Branch auditor's report

- > whether report on BoA of any branch office audited u/ss (8) by person other than company's auditor has been sent to him and
- > manner in which he has dealt with it in preparing his report;
- (d) whether BS and P&L dealt with in report are in agreement with BOA and returns;
- (e) whether FS comply with the AS;
- (f) observations or comments of auditors on financial transactions or matters which have any adverse effect on the functioning of the company;
- (g) whether any director is disqualified u/s 164(2);
- (h) any qualification, reservation or adverse remark relating to maintenance of accounts and other matters connected therewith;
- (i) whether co. has adequate IFC w.r.t FS in place and operating effectiveness of such controls Reporting on IFC shall not apply to a private co (92+137):
 - > which is OPC or small co.
 - > which has T/O < Rs. 50 crores and aggregate borrowing from bank/PFI < Rs. 25 crores
- (j) such other matters as may be prescribed

Rule 11: Other matters to be included in Auditor's report:

Include their views and comments on the following matters, namely:

- (i) whether co. has disclosed impact of pending litigations on its financial position in its FS;
- (ii) whether co. has made provision (as per law or AS) for material foreseeable losses, if any, on long term contracts including derivative contracts;
- (iii) whether there is any delay in transferring amt. to IEPF by the company.
- (iv) Omitted
- (v) Ultimate Beneficiaries:
 - i. Whether mgt. has represented that no funds has been advances or lent to any person (intermediary) with an understanding that such intermediary shall lend such funds on behalf of co. to ultimate beneficiary or provided any guarantee or security on behalf of such ultimate beneficiary.
 - ii. Whether mgt. has represented that no funds has been received by the company from any person ("Funding parties") with an understanding that the co. shall lend such funds to ultimate beneficiary or provided any guarantee or security on behalf of such ultimate beneficiary.
 - iii. Nothing has come to the notice of auditor that caused him to believe that above representations contain any material misstatement.
- (vi) whether the dividend declared or paid during the year is in compliance with sec 123.
- (vii)W.r.t. FY commencing on or after 1/4/22, whether company has used accounting software for maintaining BoA which:
 - > has a feature of recording audit trail facility and
 - > same has been operated throughout the year for all transactions recorded therein &
 - > audit trail feature has not been tampered with and
 - $\,>\,$ audit trail has been preserved as per statutory requirements for record retention.
- 4. Where any matter included in audit report is answered in negative or with a qualification, the report shall state the reasons therefor.
- 5. In case of Govt co. or Govt controlled companies:
 - > C&AG to appoint auditor u/s 139(5) or 139(7)
 - > Direct such auditor the manner in which accounts are to be audited, and
 - > Auditor to submit a copy of audit report to C&AG which will include:

Directions issued by C&AG

Action taken thereon

Impact on accounts and FS

6. <u>C&AG may order supplementary audit.</u>

C&AG shall, within 60 days of receipt of audit report, have right to:

- (a) conduct supplementary audit of FS by person as he may authorise in this behalf.

 For the purpose of such audit, authorized person may require info. as C&AG may direct.
- (b) comment upon or supplement such audit report.

 Provided that any such comments by C&AG shall be:

- sent by co. to every person entitled to copies of audited FS u/s 136 and
- · also be placed before AGM along with audit report.
- 7. C&AG may, if he considers necessary, by an order cause test audit to be conducted of the BoA of such co. covered u/s 139 (5) or (7)

8. Branch office:

Branch is in India:

Where co. has a branch office, BOA of branch office shall be audited either by:

- · Auditor appointed for co. (Co's auditor), or
- By any other person qualified for appt.
 as auditor of co. & appointed as such for branch audit

Branch is outside India:

Where co. has a branch office outside India, BoA shall be audited either by:

- · Company's auditor, or
- accountant or any other person duly qualified to act as auditor as per law of that country.

Note:

- > Duties and power of company's auditor w.r.t. branch audit shall be as per Sec 143(1) to (4)
- > Branch auditor to prepare report on BoA of branch examined by him and send it to Co's auditor
- > Co's auditor shall deal with such report in his report in manner as he considers necessary.
- 9. Every auditor shall comply with the auditing standards (SAs).
- 10. CG may prescribe SAs or any addendum thereto, as recommended by ICAI, constituted u/s 3 of CA Act, 1949, in consultation with and after examination of recommendations made by NFRA Provided that - Until such SAs are notified, SAs notified by ICAI shall be deemed SAs
- 11. CG may, in consultation with NFRA direct that auditor's report may include such other matters as may be specified.

12. Reporting of Fraud by Auditor:

- > If an auditor of a co..
- in course of performance of his duties as statutory auditor,
- has reasons to believe that an offence of fraud, involving individually amount >= Rs. 1 crore,
- > is being committed against the co. by its officers or employees,
- \succ the auditor shall report the matter to CG.

Report to C	CG as under:		
Inform	Auditor to report matter to AC or BoD immediately (not > 2 days) of his knowledge		
AC/BoD	seeking reply within 45 days		
Forward	On receipt of reply - Auditor to forward his report + AC/BoD reply + his comments		
to CG	thereon to CG within 15 days of reply.		
	In case of no reply - Forward his report + note that details were forwarded to AC/		
	BoD for which no reply received (within 15 days)		
Mode	The report shall be sent to:		
· ·	> Secretary, MCA in a sealed cover		
	> by Registered Post with acknowledgment due (RPAD), or speed post		
	> followed by an email in confirmation of the same		
	The report shall be sent:		
	> in Form ADT - 4		
	> on letter-head of auditor containing address, email and phone number		
	> and signed by auditor with his seal ,and indicate membership no.		
Fraud <	Auditor shall report the matter to AC u/s 177 or BoD immediately (not > 2 days) of		
Rs. 1 cr.	his knowledge and report the following matter [NAP]:		
	Nature of fraud with description Approx. amount involved Parties involved		
Of each fraud reported above, following details shall be disclosed in BOD			
	Nature of fraud with description Approx. amount involved		
	Parties involved, if remedial action not taken remedial action taken		
Above pro	ovision to apply mutatis mutandis to cost auditor & secretarial auditor.		

13. Report fraud can never lead to contravention of duty (E.g., - confidentiality):

No duty of an auditor shall be regarded as having been contravened by reason of his reporting the matter u/ss (12) if it is done in good faith.

Penalty:

If any auditor, cost accountant or CS in practice do not comply with provisions of fraud u/ss (12):

- (a) in case of a listed company, be liable to a penalty of Rs. 5 lakh; and
- (b) in case of any other company, be liable to a penalty of Rs. 1 lakh

Concept clarity check:

If some of the employee did fraud of Rs. 10 crores on the co. and such fraud was brought to the notice of the auditor by the management of the co., would auditor be required to report it to CG? No. As per sec 143(12), only fraud that the auditor identified himself in course of audit is to be brought to attention of CG. Here, the auditor just need to report to AC/BoD. Not CG.





Section 144: Auditor not to render certain services.

An auditor appointed under this Act shall:

- provide to co. only such other services as are approved by AC/BoD but
- > which shall not include following services (directly or indirectly) to CASH, namely [KIS A BF OM]:

accounting and book keeping services;

internal audit design and implementation of any financial info. system

actuarial services

investment advisory and banking services

rendering of outsourced financial services

management services others as prescribed

Explanation: For this section, "directly or indirectly" shall include rendering of services by auditor:

l	Individual	Himself, relative, other connected person or entity in which he has significant influence
	Firm	Itself, partners, parent, subsidiary or associate entity or other entity in which firm/
		partner has significant influence.

Concept clarity check:

- > Can a statutory auditor be appointed as GST auditors or tax auditors? Absolutely, yes.
- > Can a statutory auditor be appointed as cost auditors? No. Specifically restricted u/s 148



Section 145: Auditor to sign audit reports, etc.

Auditor shall sign Auditor's report or sign/ certify any other doc. as per sec 141(2), and QOC on financial transactions having adverse effect on functioning of co. mentioned in auditor's report shall be:

- > Read out before co. in GM.
- > Open to inspection by any member



Section 146: Auditors to attend general meeting:

Notice related to GM to be sent to auditor

Auditor shall attend GM either himself or through Auth. Rep.

Auditor shall have right to be heard on business which concerns him as auditor



Section 147. Punishment for contravention

1. Contravention u/s 139 to 146:

Co. - Fine - Rs. 25,000 to Rs. 5 lakhs OID - Fine - Rs. 10,000 to Rs. 1 lakh

2. <u>Auditor contravenes u/s 139, 144, 145</u>:

Fine - Rs. 25,000 to Lower of - (Rs. 5 lakhs or 4x remuneration of auditor)

If such contravention is knowingly or wilfully to deceive co./SHs or crs or tax authorities: Imprisonment - Up to 1 year AND

Fine - Rs. 50,000 to Lower of - (Rs. 25 lakhs or 8x remuneration of auditor)

- 3. Where auditor is convicted u/ss (2), he is liable to:
 - a. refund remuneration
 - b. pay damages to co/stat bodies or members or creditors for loss arising out of incorrect or misleading statements made in his audit report
- 4. CG shall, by notification, specify any statutory body or officer for ensuring prompt payment of damages u/ss (3) and such person specified shall, on payment file report with CG
- 5. In case of an audit firm, it is proved that partner(s) of such firm:
 - > acted in a fraudulent manner or
 - > abetted/colluded in any fraud against co.

the liability (civil or criminal) as per this Act or other law, for such act shall be of partners concerned of the audit firm and of firm - jointly and severally

In case of criminal liability, punishable with only imprisonment - Only concerned partners liable



Section 148: CG to specify audit of items of cost in respect of certain companies.

Read with Companies (Cost Records and Audit) Rules 2014

- 1. <u>CG to order maintaining cost record:</u>
 - Notwithstanding anything contained in this Chapter,
 - > the CG may, by order, cos. engaged in production of prescribed goods or providing prescribed services.
 - direct that particulars relating to utilisation of material or labour or other items of cost as may be prescribed shall also be included in BoA

Provided that, prior to passing such order for companies regulated under special act, CG shall consult the concerned regulatory body.

🔼 Rule 3: Applicability of cost records: .

- Companies [including foreign co. u/s 2(42)] engaged in production of goods or providing service as specified in Table A (6 Regulated sectors) and Table B (33 non-regulated sectors)
- > having overall T/O of >= Rs. 35 crores in immediately preceding FY shall maintain such cost records.
- Non-Applicability: Micro Enterprise /Small Enterprise as defined u/s 9(7) of MSMED Act, 2006

Rule 5: Maintenance of records

- > Cost records to be maintained in Form CRA-1
- > Maintain such records on a regular basis to facilitate calculation of per unit cost for each product every FY.
- > Cost records shall be maintained to enable co. to exercise control over various costs to achieve optimum economies in utilisation of resources.

2. CG may order audit of such cost records:

If CG is of opinion, that it is necessary to do so, it may, by order, direct audit of such cost records of such companies having net worth or turnover of such amount as may be prescribed.

Cost statements shall be signed by the BoD before they are submitted to auditor for reporting.

Rule 4: Applicability of cost audit

·	Overall Annual Turnover	Turnover of Individual products for which records in maintained under Rule 3
Regulated Sector Companies	Rs. 50 crores	Rs. 25 crores
Non-Regulated Sector Companies	Rs. 100 crores	Rs. 35 crores

Non-Applicability of this Cost Audit (for companies maintaining Cost Records u/Rule 3)

- 1) Revenue from exports in Forex > 75% of total revenue OR
- 2) Operating from SEZ
- 3) Engaged in generation of electricity for captive consumption through Captive Generating Plant.
- 3. Manner of appointment and remuneration of cost auditor:

In case of cos. required to constitute AC:

- (a) On recommendation of AC, BoD to appoint an individual/firm of cost accountant in practice.
- (b) Remuneration thereof shall be recommended by AC, considered and approved by BoD and ratified by SH

In case of other companies:

- (a) BoD to appoint an individual/firm of cost accountant in practice
- (b) Remuneration thereof, considered and approved by BoD and ratified by SH subsequently.

Important note - Auditor u/s 139 of the company cannot be appointed as auditor of cost records.

- Appointment Cost Auditor shall be appointed within 180 days of commencement of every FY.
- Provided that before such appointment is made obtain
 - 1) Written consent of the cost auditor to such appointment, and
 - 2) A certificate that
 - (a) the individual/firm is eligible for appointment and is not disqualified for appointment under Cost and Works Accountants Act, 1959) and rules thereunder
 - (b) the individual or the firm satisfies the criteria provided u/s 141 of Companies Act, 2013
 - (c) the proposed appointment is within the limits laid down by authority of the Act; and
 - (d) the list of proceedings against the cost auditor/audit firm or any of the partner pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

- > Cost Auditor/Firm shall be informed of his or its appointment as such and file a notice of such appointment with the CG in form CRA-2 (+ fees) within earlier of:
 - 1) within 30 days of Board meeting in which such appointment is made or
 - 2) within 180 days of the commencement of the financial year,
- Term: Till the expiry of 180 days from the closure of the FY or till he submits the cost audit report, for the FY for which he has been appointed.
- Removal before expiry of Term:
 - 1) Board resolution after giving ROBH to the Cost Auditor and recording the reasons for such removal in writing.
 - 2) Form CRA-2 with CG for intimating appointment of another cost auditor to be enclosed with the relevant Board Resolution for Removal of the Cost Auditor.
- Pasignation: Nothing contained herein shall prejudice the right of cost auditor to resign.
- Casual Vacancy: In case of Casual Vacancy, whether due to resignation, death or removal, it shall be filled by the BoD in 30 days and inform CG of such appointment within 30 days in Form CRA-2
 Such cost audit shall comply with cost auditing standards as issued by ICAI (Cost) + CG
- 4. Audit u/s 148 is in addition to audit u/s 143
- 5. Qualifications, disqualifications, rights, duties and obligations applicable to auditors under this Chapter shall, so far as may be applicable, apply to a cost auditor

Report on the audit of cost records

- > To be submitted by Cost Accountant to BoD in 180 days from end of FY to which it pertains
- > along with reservations or qualifications or observations or suggestions, if any,
- in form CRA-3
- 6. Forward cost auditor's report to CG along with explanation of reservations:

 Co. shall within 30 days from date of receipt of cost audit report Furnish CG (Form CRA-4) with such Report + Full I&E on every reservation or qualification contained therein.
- 7. On receipt of report + info. u/ss (6), if CG is of opinion that further I&E is necessary it may call for such further I&E and co. shall furnish the same within time specified by CG
- 8. Default under this section:

Co. and OID - Punishable u/s 147 (1)

Cost auditor - Punishable u/s 147 (2) to (4)

NFRA [NATIONAL FINANCIAL REPORTING AUTHORITY] AND AUDITOR

Read with NFRA Rules, 2018

Compliance with SAs

Filing of Return (Rule 5)

Quality and Improvement (Rule 9)

Monitoring and enforcing Compliance with SAs (Rule 8)

1. NFRA may:

- > Review working papers (including audit plan and other audit documents) and related communications
- > Evaluate the sufficiency and documentation of the quality control system of auditor and
- > Perform such other testing of the audit, supervisory, and quality control procedures of the auditor as considered necessary or appropriate.

2. NFRA may require:

- > Require an auditor to report on its governance practices and internal processes designed to promote quality, protect its reputation and reduce risks of the auditor
- > Seek additional Info/Expln in connection with conduct of Audit/require personal presence.
- > Send a separate report containing proprietary or confidential information to CG.
- Where the NFRA 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.

3. NFRA shall

- > Perform its monitoring and enforcement activities through its officers or experts with sufficient experience in audit of the relevant industry.
- > 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 public interest and it records reasons in writing.
- 4. NFRA 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.

Filing of Return with NFRA (Rule 5)

- Every auditor of classes of companies and body corporate governed by NFRA
- > File a return on or before 30th November every year in Form NFRA-2

Overseeing Quality and suggesting Improvement (Rule 9)

NFRA is empowered for overseeing the quality of services and suggesting measures for improvement

- On the basis of its review, direct 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.
- > It shall be the duty of auditor to make required improvements and send a report explaining how it has complied with the directions made by the NFRA.



- > NFRA shall monitor the improvements made by the auditor and take such action as it deems fit depending on progress made by the auditor.
- > NFRA may refer such cases 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 body corporates from such Board as it may deem appropriate.
- > The NFRA may take the assistance of experts for its oversight and monitoring activities.

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Chapter 12 General Clause Act



Introduction:

- The General Clauses Act, 1897 (GCA) contains 'definitions' of certain terms and general principles of interpretation.
- > The GCA also comes for a rescue in the absence of clear definition in the specific enactments
- > Objects of the Act are:
 - · to shorten the language of Central Acts;
 - · to provide for uniformity of expression by giving definitions for common terms;
 - to state explicitly certain convenient rules for construction and interpretation of central acts:
 - to guard against slips and oversights by importing certain common clauses.



Application Of the General Clauses Act

Act does not define any "territorial extent" clause. It applies to the Central Acts.

The Central Acts to which this Act apply are:

- (a) Acts of Indian Parliament (Central Act) along with rules and regulations made thereunder;
- (b) Acts of Dominion Legislature passed between 15th August 1947 and the 26th of January 1950;
- (c) Acts passed before commencement of the Constitution by the Governor-General in Council or the Governor-General acting in a legislative capacity.

Article 367 of the Constitution of India authorises use of General Clauses Act for the interpretation of constitution.



Some Basic Understand of Legislature:

<u>"Preamble":</u> Every Act has a preamble which expresses the scope, object and purpose of the Act. It is the main source for understanding the intention of lawmaker behind the Act. Whenever there is ambiguity in understanding any provision of Act, Preamble is accepted as an aid to construction of the Act.

 $\underline{\text{Note}}$ - 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.

<u>Definitions</u> - Words are defined in the respective Act. Sometimes, definitions are referred in other statutes. If words are not defined in the respective Acts, such words are to be taken from General Clauses Act.



Section 1:

Preliminary - Short Title - General Clause Act, 1897



Section 2:

Repealed.



Section 3: Definitions:

Word	
Act	'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;
Affidavit	'Affidavit' shall include affirmation and declaration in the case of persons by
	law allowed to affirm or declare instead of swearing.
	Note: The terms "Affidavit", "Oath" & "Swear" have same definitions in the
	Act.
Central Govt	> In relation to anything done before the commencement of the Constitution,
	mean the Governor General in Council
	> In relation to anything done or to be done after the commencement of the
C	Constitution, mean the President
Commencement	The day on which the Act or Regulation comes into force;
	Coming into force on entry into force referred to the process by which legislations
	Coming into force or entry into force refers to the process by which legislation; regulations, etc. comes to have legal force and effect.
	regulations, etc. comes to have legal force and effect.
	State of Orissa Vs. Chandrasekhar Singh Bhoi
	A Law cannot be said to be in force unless it is brought into operation by legislative
	enactment, or by the exercise of authority by a delegate empowered to bring
	it into operation. The theory of a statute being "in operation in a constitutional
	sense" though it is not in fact in operation has no validity.
Document	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.
1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	For example, book, file, painting, inscription and even computer files are all
	documents. However, it does not include Indian currency notes.
Enactment	Shall include a Regulation (as hereinafter defined) and any Regulation of Bengal,
	Madras or Bombay Code, and shall also include any provision contained in any Act
	or in any such Regulation as aforesaid;
	It has been held that an "enactment" would include any Act (or a provision
	contained therein) made by the Union Parliament or the State Legislature.
Financial year	FY shall mean the year commencing on the first day of April.
Year	Means - A year reckoned according to the British calendar (Jan to Dec)

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; > The question of good faith under GCA is one of fact. It is to be determined w.r.t. the facts and circumstances of each case. > The term "good faith" has been defined differently in different enactments. > This definition of the good faith does not apply to that enactment which contains a special definition of the term "good faith" and the definition given in that particular enactment has to be followed. Definition may be applied only if there is nothing repugnant in context. In Maung Aung Pu Vs. Maung Si Maung, it was pointed out that: > the expression "good faith" is not defined in the Indian Contract Act, 1872 and definition given here in GCA, 1897 does not expressly apply the term on ICA. > The definition of good faith as is generally understood in the civil law, and which may be taken as a practical guide in understanding the expression in ICA > The definition is that - Nothing is said to be done in good faith which is done without due care and attention as is expected with a man of ordinary prudence. > An honest purchase made carelessly without making proper enquiries cannot be said to have been made in good faith so as to convey good title. Government shall include both the Central Government and State Government. Immovable shall include: Property ➤ Land. > Benefits to arise out of land, and > Things attached to the earth, or Permanently fastened to anything attached to the earth. Where, in any enactment, the definition of immovable property is in the negative and not exhaustive, the definition as given in GCA will apply. Example: 1. In Shantabai v. State of Bombay, the Supreme Court pointed out that trees must be regarded as immovable property (IP) because they are attached to or rooted in the earth 2. An agreement to convey forest produce like tendu leaves, bamboos etc., the soil for making bricks, the right to build on and occupy the land for business purposes and the right to grow new trees and to get leaves from trees that grow in further are all included in the term IP. 3. Tree is an IP. But timber is not an IP. 4. Right of way to access from one place to another, may be considered as IP

5. Right to drain of water is NOT IP.

	6. Any machinery fixed to the soil, standing crops can be held as IP 7. Insurance Policies covering immovable property - Not covered under IP Example: Ananda Behera v. State of Orissa. "Right to catch or carry fish" as an IP.
Imprisonment	shall mean imprisonment of either description as defined in the Indian Penal
	Code; i.e., Rigorous or Simple imprisonment
Movable Prop	mean property of every description, except immovable property.



Section 4

is transition provision and hence intentionally not covered here



Section 5: Coming into operation of enactment.

- Where, if any specific date of enforcement is prescribed in the Official Gazette, Act shall into enforcement from such date.
- Where any Central Act has not specifically mentioned a particular date to come into force, it shall be implemented on the day on which it receives the assent of:
 - Governor General (for Acts made before commencement of Indian Constitution)
 - the President in case of an Act of Parliament.

Example:

SEBI (ICDR) (5th Amendment) Regulations, 2015 was issued by SEBI vide Notification dated 14th August 2015 w.e.f. 1 January 2016. Here, this regulation shall come into force on 1st January 2016 rather than the date of its notification in the gazette.

Notes:

- Where an Act empowers the government to bring any of the provisions into operation on any day which it deems fit, no Court can issue a mandamus with a view to compel the Government to bring the same into operation on particular day.
- 2. If a sufficient time has elapsed since an Act or any of its provisions has been passed and it has not been brought into force (operation) by the Government, the Court through a writ can direct the Government to consider the question as to when the same should begin to operate.
- Effective date of Rules:
 - 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.
- 4. Law takes no cognizance of fraction of day. It comes into force from midnight.

 Example Law which comes into force on 1st Jan shall apply from midnight of 31st December.
- 5. All laws are applicable prospectively unless otherwise mentioned specifically.



Section 6: Effect of Repeal:

Where any Central legislation or regulation repeals any Act made or yet to be made, unless another purpose exists, the repeal shall not: [Revive Right Penalty Litigation]

- Revive anything not enforced or prevailed during the period at which repeal is effected or;
- Affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

- Affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
- Affect any inquiry, litigation or remedy w.r.t. such claim, privilege, debt or responsibility or any
 inquiry, litigation or remedy may be initiated, continued or insisted.

Important Case Laws:

Zimpor ranti dase bawsi			
Kolhapur Canesugar	Supreme Court held that Sec 6 only applies to repeal and not to omissions		
Works Ltd. V, Union	and applies when repeal is of a Central Act or Regulation and not of a Rule.		
of India			
Navrangpura Gam	· 'Repeal' of provision is in distinction from 'deletion' of provision.		
Dharmada Milkat	· 'Repeal' ordinarily brings about complete obliteration of the provision		
Trust v. Ramtuji	as if it never existed, thereby affecting all incoherent rights and all		
Ramaji	causes of action related to the 'repealed' provision.		
	· 'Deletion' ordinarily takes effect from date of legislature effecting the		
	said deletion, never to effect total wiping out of the provision as if it		
	never existed.		

Example:

The 3 farm laws were repealed after 1 year of protest by the farmers.



Section 6A: Repeal of Act making textual amendment in Act or Regulation

- > Where any Central Act or Regulation repeal any enactment
- > then such repeal shall not affect continuance of any amendment or insertion made by the enactment so repealed.



Section 7: Revival of repealed enactments:

- > In any Central Act or Regulation made after commencement of this Act,
- > for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed,
- > it shall be necessary to expressly state that purpose.



Section 8: Construction of references to repealed enactments

- Where this Act or Central Act or Regulation made after the commencement of this Act,
- > repeals and re-enacts, with or without modification, any provision of a former enactment,
- \succ then references in any other enactment or in any instrument to the provision so repealed shall,
- > unless a different intention appears, be construed as references to the provision so re-enacted.

Example:

- 1. Companies Act 1956 was repealed and re-enacted as Companies Act, 2013. In such case, every other Act which had reference to Companies Act 1956 will be construed as reference to 2013 unless different intention appears.
- 2. In section 115 JB of the Income Tax Act, 1961, for calculation of book profits, the Co. Act, 1956 are required to be referred. With the advent of Co. Act, 2013, the corresponding change has not been made in section 115 JB of the Income Tax Act, 1961. On referring of Sec. 8 of the GCA, book profits to be calculated u/s 115 JB of the Income Tax Act will be as per the Co. Act, 2013.



Section 9: Commencement and termination of Time:

- In any legislation or regulation, it shall be sufficient,
- > for purpose of excluding the first in a series of days to use the word "from" &
- > for the purpose of including the last in a series of days to use the word "to".
- > In simple words Where the word "from" is used, exclude that particular date and where the word "to" is written, "include" that date.

Example:

A company declares dividend for its shareholder in its AGM 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.



Section 10: Computation of time:

- > Whereby any legislation or regulation,
- > any act is directed to be done in any court or office on a certain day or within prescribed period
- > then, if the Court or office is closed on that day or last day of the prescribed period,
- > the act shall be considered as done in due time if it is done on the next day afterwards on which the Court or office is open.

Note - Even if the offices or Court are closed because of some random holiday or Sunday or Saturday or any reason, this provision will still apply.



Section 11: Measurement of Distances

Unless a different intention appears - Measure in a straight line on a horizontal plane.

<u>Example:</u> Distance between two cities by roadways is 100 kms and by water ways 80 kms. For purpose of any Central Act under GCA, distance shall be measured in a straight line on a horizontal plane.



Section 12: Duty to be taken pro rata in enactments

- Whereby any enactment, any duty of customs or excise or in the nature thereof, is leviable on any given quantity, by weight, measure or value of any goods or merchandise,
- > then a like duty is leviable according to the same rate on any greater or less quantity.



Section 13: Gender and number

In all legislations and regulations, unless there is anything repugnant in the subject or context-

- > Words importing the masculine gender shall be taken to include females, (i.e., he includes she) and
- > Words in singular shall include the plural and vice versa.

<u>Exception</u>: Where word used conveys a specific gender, there is a presumption that provisions of GCA do not apply. For example:

- 1. the word 'bullocks' could not be interpreted to include 'cows'.
- 2. The word 'male descendants' cannot be interpreted to include females



Section 14: Power and Functionaries:

Powers conferred by Central Acts may be exercised from time to time as occasion requires.



Section 15:

- Whereby any legislation or regulation,
- > a power to appoint any person to fill any office is conferred, then unless otherwise provided,
- > any such appointment, may be made either by name or by virtue of office.



Section 16: Power to appoint to include power to suspend or dismiss:

- > The authority having for the time being power to make the appointment
- > shall also have power to suspend or dismiss any person so appointed

<u>Example</u> - Wherever the law provides that court will have the power to appoint, suspend or remove a receiver, the legislature simply enacted that wherever convenient the court may appoint receiver and it was implied within that language that it may also remove or suspend him



Section 17: Substitution of Functionaries:

- For indicating the application of a law to every person executing the functions of an office,
- > it shall be sufficient, to mention the <u>official title</u> of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.



Section 18: Successor

- > For indicating the relation of a law to successors of any functionaries,
- > it shall be sufficient to express its relation to the functionaries.



Section 19: Official Chiefs and subordinates

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.



Section 20: Construction of orders, etc., issued under enactments

- Whereby any legislation or regulation,
- a power to issue any notification, order, scheme, rule, form, or by-law is conferred,
- > then expression used in such notification, etc., shall, unless otherwise specified, have the same respective meaning as in the Act or regulation conferring power.



Section 21:

- Where any legislation or regular confers the power to issue notifications, etc.,
- > it shall be deemed to include power to add, to amend, vary or rescind such notifications, etc.



Section 22:

- Where, by any Central Act or Regulation (which is not in force), on the passing thereof, a power is conferred to make rules or bye-laws, or to issue orders thereunder,
- then that power may be exercised at any time after passing of Act /Regulation (even before commencement thereof);
- but such rules, bye-laws or orders shall not take effect till commencement of Act or Regulation.

<u>For example:</u> If Companies Act, 2013 was passed on 29th Aug 2013. It authorised CG to make rules related to NCLT. CG made rules related to NCLT in 2014. However, NCLT provisions were not implemented till 2016. In such cases, the NCLT Rules will also apply only from 2016.



Section 23: Publication for public comments:

Where power to makes Rules, etc. is subject to the condition of rules or bye-laws being made after previous publication, then:

Publish draft → Specify date → Consider objection → Publish in OG

- a. <u>Publish</u> a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby (in manner prescribed)
- b. It shall be published with the <u>draft notice</u> specifying a date on or after which the draft will be taken into consideration.
- c. Consider any <u>objection</u> or suggestion which may be received from any person w.r.t. draft before the date so specified;
- d. Publication in the <u>Official Gazette</u> of such rule or bye-law after previous publication shall be conclusive proof that the rule or bye-laws has been duly made

<u>Conclusive presumption</u> - After the publication of the rules in the Official Gazette, it is to be <u>inferred</u> that the procedure for making the rules has been followed. Any irregularities in the publication of the draft cannot therefore be questioned.

<u>Note</u> - It is also open to the authority to make suitable changes in the draft before finally publishing them. It is not necessary for that authority to re-publish in the amended form before their final issue so long as the changes made are ancillary to the earlier draft and cannot be regarded as foreign to the subject matter thereof.



Section 24: Continuation of orders etc., issued under enactments repealed and re-enacted

- If a statute is repealed and re-enacted in the same or substantially the same terms, the re-enactment neutralizes the previous repeal and the provisions of the repealed Act which are re-enacted, continue in force without interruption.
- > If, however, the statute is repealed and re-enacted in <u>somewhat different terms</u>, the amendments and modifications operate as a repeal of provisions of repealed Act which are changed by and are repugnant to the repealing Act.

Example - The Mines Act of 1923 was repealed and replaced by the Mines Act of 1952. Rules made under the repealed Act must be deemed to continue in force by virtue of this section until superseded.



Section 25: Recovery of fines (to be done as per IPC and CCrP):

- > Sec 63 to 70 of the Indian Penal Code (IPC) and
- > provisions of Code of Criminal Procedure w.r.t issue and execution of warrants for levy of fines
- > shall apply to all fines imposed under any Act, Regulation, etc.,
- unless otherwise specified.



Section 26: Provision as to offence punishable under two or more enactments

- Where an act or omission constitutes an offence under 2 or more enactments,
- > then offender shall be liable to be prosecuted & punished <u>under either or any</u> of those enactments,
- > but shall not be punished twice for the same offence.

<u>Note</u> - As per Supreme Court, a plain reading of sec 26 shows that there is no bar to trial or conviction of an offender under 2 enactments, but there is only a bar to punishment twice for the same offence.

Additional Points:

- 1. When there are 2 alternative charges in same trial, e.g., sec 409 of IPC and sec 5(2) of Prevention of Corruption Act, the fact that accused is acquitted of one of the charges will not bar his conviction on the other. [M.P. v. V.R. Agnihotri]
- 2. This provision apply only when 2 offences which form the subject of prosecution is the same, i.e., the ingredients which constitute the two offences are the same. If the offences under the two enactments are distinct and not identical, none of these provisions will apply.



Section 27: Meaning of service by post:

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:

- (i) Properly Addressing
- (ii) Pre-paying, and
- (iii) Posting by registered post.

A letter containing the document to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Important case laws:

United	A notice when required by law to be sent by 'registered post acknowledgement
Commercial	due' is instead sent by 'registered post' only, the protection of presumption
Bank v. Bhim	regarding serving of notice under 'registered post' under this section of the Act
Sain Makhija	is neither tenable nor based upon sound exposition of law.
Jagdish Singh.v	Held that - where notice is sent to landlord by registered post, and it is returned
Natthu Singh	by tenant with an endorsement of refusal - presumed notice has been served.
Smt. Vandana	Held that - where notice sent by registered post to person concerned at
Gulati v.	proper address is deemed to be served upon him in due course unless contrary
Gurmeet Singh	is proved. Endorsement 'not claimed/not met' is sufficient to prove deemed
	service thereof.

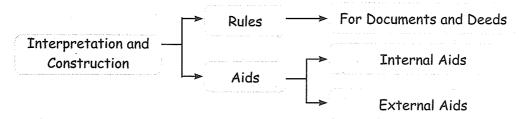


Section 28, 29 and 30 - Intentionally not covered

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Chapter 13 Interpretation Of Statutes

Chapter Map





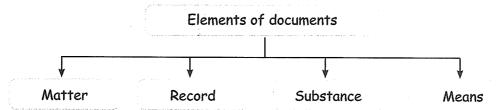
Important Definitions

1. Statute

- > To the common man the term 'Statute' generally means laws and regulations of various kinds irrespective of the source from which they emanate.
- > In India the constitution provides for the passing of a bill in Lok Sabha and Rajya Sabha and finally after obtaining the assent of the President of India to it, it becomes an Act of Parliament or Statute.

2. Document

- A document is a paper or other material thing giving information, proof or evidence of anything.
- Section 3 of the Indian Evidence Act, 1872 states that 'document' means any 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 the purpose of recording that matter.
- Section 3(18) of the General Clauses Act, 1897 states that the term '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 of recording this matter.



3. Elements

- > Matter: This is the first element. Its usage with the word "any" shows that the definition of document is comprehensive.
- Record: This second element must be certain mutual or mechanical device employed on the substance. It must be by writing, expression or description.

- > Substance: This is the third element on which a mental or intellectual element comes to find a permanent form
- Means: This represents forth element by which such permanent form is acquired and those can be letters, any figures, marks, symbols which can be used to communicate between two persons.

4. Instrument:

- $\,>\,\,$ Formal legal document which creates or confirms a right or records a fact.
- > Formal writing of any kind, such as an agreement, deed, charter or record, drawn up and executed in a technical form or a formal legal document having legal effect, either as creating a right or liability or as affording evidence of it.
- > Section 2(14) of the Indian Stamp Act, 1899 states that 'instrument' includes every document by which any right or liability is or purports to be created, transferred, extended, extinguished or recorded.

5. Deed:

- An instrument in writing (or other legible representation or words on parchment or paper)
 purporting to effect some legal disposition.
- > All Deeds are instruments but all instruments may not be deeds.

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Interpretation/Construction

<u>Interpretation</u>

- > The process by which the Courts seeks to ascertain the meaning of the legislature through the medium of the words in which it is expressed.
- > The process by which the real meaning of an Act (or a document) and the intention of the legislature in enacting it (or of the parties executing the document) is ascertained.
- Interpretation is resorted to in order to resolve any ambiguity in the statute.

Construction

- > Is applied to a written statute or document
- > It means to determine from its known elements its true meaning or the intention of its framers.
- > Involves drawing conclusions beyond the actual expressions used in the text by referring to other parts of the enactment and the context in which the law was made.
- Thus, when you construe a statute you are attempting to ascertain the intention of the legislature.

<u>Difference between Interpretation and Construction</u>

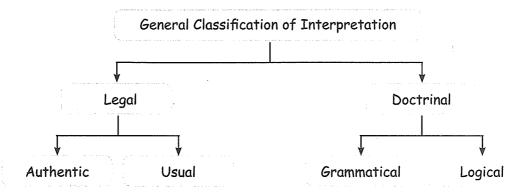
In practice construction includes interpretation and the terms are frequently used synonymously. However, these two terms have different connotations.

Interpretation	Construction
	Drawing of conclusions from a statute that lie
true sense in which the author intended that	beyond the direct expression of the words used
they should be understood	therein

Where the Court adheres to the plain meaning	Where the court decides whether the wording
of the language used by the legislature	was meant to cover the situation before the
	court

Importance of Interpretation

- > Interpretation is resorted to in order to resolve any ambiguity in the statute.
- > It is the art of finding out the true sense of words that is to say the sense in which their author intended to convey the subject matter.
- > In relation to statute law, interpretation is of importance because of the inherent nature of legislation as a source of law.



Note

- > Authentic is when rule of interpretation is derived from the legislator himself.
- > Usual is when rule of interpretation is derived from some other source such as custom or case law.
- > Grammatical is when the court applies only the ordinary rules of speech.
- > Logical when the court goes beyond words and tries to discover intention of the statute in some other way.

Need of interpretation/ construction?

- > The words of a statute can be vague, ambiguous or reasonably capable of more than one meaning.
- The fundamental rule of interpretation of a statute is that it should be expounded according to the intent of those that made it.
- The purpose of interpretation is to discern the intention which is conveyed either expressly or impliedly by the language used.
- > Normally, grammatical interpretation is the only approach to be adopted. This is based on the principle of absoluta sententia expositore non indiget meaning "clear words need no explanation." Where the law is clear and unambiguous the court shall construe it based on the strict grammatical meaning. The emphasis in grammatical interpretation is on "what the law says."
- > However, where the grammatical interpretation leads to a manifest absurdity or is logically flawed, the courts can adopt the logical interpretation which seeks to ascertain "what the law means".



Rules Of Interpretation/Construction

Primary Rules

- Rule of Literal Construction
 - > It is a cardinal rule of construction and it is the primary duty of the court that a statute must be construed literally and grammatically giving the words their ordinary and natural meaning.
 - > If the phraseology of a statute is clear and unambiguous and capable of one and only one interpretation, then it would not be correct to extrapolate these words out of their natural and ordinary sense. "Absoluta sententia expositore non indiget"
 - > If there is an inconsistency with any express intention or declared purpose of the statute, or it involves any absurdity, repugnancy, inconsistency, the grammatical sense must then be modified, extended or abridged only to avoid such an inconvenience, but no further.
 - > Technical words are to be understood in technical sense
- Rule of Reasonable Construction (Interpretatio fienda est ut res magis valeat quam pereat)
 - the words of a 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.
 - > When the words of an enactment are capable of two constructions that there is scope for interpretation or construction. Then, that interpretation, which furthers the object, can be preferred to that which is likely to defeat or impair the policy or object.
 - > When the grammatical interpretation leads to a manifest absurdity then the courts shall interpret the statute so as to resolve the inconsistency and make the enactment a consistent whole, it is permissible to depart therefrom and to interpret the provision of statutes only to the extent it avoids such absurdity and no further. This is the Golden Rule of Interpretation
- 3. Rule of Harmonious Construction
 - > The expressions used therein should ordinarily be understood in a sense in which they best harmonize with the object of the statute.
 - > This rule is applied when there is a conflict between two provisions of a statute.
 - Where an expression is susceptible of a narrow or technical meaning, as well as a popular meaning, the court would be justified in assuming that the legislature used the expression in the sense, which would carry out its objects and reject that which renders it invalid.
 - "Generalia specialibus non derogant". A specific rule will override a general rule.
 - > This rule can be adopted only when there is a real and not merely apparent conflict between provisions, where the words of a statute, on a reasonable construction thereof, admit of one meaning only then such natural meaning will prevail.
 - > In some cases, statute may give a clear indication as to which provision is subservient and which overrides. This is done by the use of the terms "subject to", "notwithstanding" and "without prejudice".
 - a) Subject to: When the same subject matter is covered by that provision and by another provision or enactment subject to which it operates and there is a conflict between them, then the latter will prevail over the former.

- b) Notwithstanding: Unlike the "subject to" clause, the notwithstanding clause has the effect of making the provision prevail over others.
- c) Without prejudice: When certain particular provisions follow general provisions and when it is stated that the particular provisions are without prejudice to those general provisions the particular provisions would not restrict or circumscribe the operation and generality of the preceding general provisions.

4. Rule in Heydon's Case or Mischief Rule

- > What was Heydon's Case? In Heydon's case (1584 3 Co Rep 79 P. 637), it was laid down by the Barons of the Exchequer that "for the true and sure interpretation of all Statutes in general, four things are to be discerned and considered.
 - a. What was the law before the making of the act?
 - b. What was the defect, mischief, hardship caused by the earlier law?
 - c. How does the act of Parliament seek to resolve or cure the mischief or deficiency?
 - d. What are the true reasons for the remedy?
- > The intention of this rule is always to make such construction as shall suppress the mischief and advance the remedy according to the true intention of the legislation.
- > Applying Heydon's case courts will be bound to look at the state of the law at the time of the passing of the enactment and not only as it then stood, but under previous Statutes too.
- > The mischief rule can be applied only if there is any ambiguity in the present law.

5. Rule of Beneficial Construction

- > This is strictly speaking not a rule but a method of interpreting a provision liberally so as to give effect to the declared intention of the legislation.
- 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 not been treated fairly in the past.
- > In such cases it is permissible to give an extended meaning to words or clauses in enactments.
- > But this can only be done when two constructions are reasonably possible and not when the words in a statute are quite unequivocal.

6. Rule of Exceptional Construction

- > We have already seen that the words of a statute must be construed so as to give a sensible meaning to them if possible. They ought to be construed ut res magis valeat quam pereat.
- > "And" and "Or"

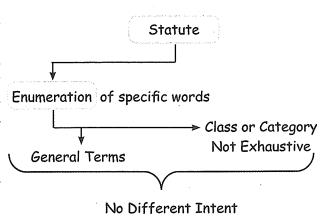
And	Or
A particle joining words and sentences and	A disjunctive particle that marks an
expressing the relation of connection or addition.	alternative, generally corresponding to
The word "and" is normally conjunctive that is used	"either", as "either this or that".
to conjoin words, clauses or sentences, signifying	
that something is to follow in addition to that,	
which precedes.	

But sometimes "and" is read as "or" and vice versa to give effect to the manifest intention of the legislature as disclosed from the context. That would depend on the context and meaning of other provisions in the same statute or document.

- "May", "Must" and "Shall"
 - a) 'May' signifies permission and implies that the authority has been allowed discretion. "May" though permissive sometimes has compulsory force and is to be read as shall. Where the word 'may' has been used as implying a requisite condition to be fulfilled, the court will and ought to exercise the powers which it should and in such a case the word 'may' will have a compulsory force.
 - b) 'Must' is doubtlessly a word of command.
 - c) "Shall" though mandatory is to be read as may. It is well settled that the use of the word 'shall' does not always mean that the enactment is obligatory or mandatory; it depends upon the context in which the word 'shall' occurs and on the purpose for which the requirement has been enacted, particularly in the context of the other provisions of the Act and the general scheme thereof.

7. Rule of Ejusdem Generis

- > The term 'ejusdem generis' means 'of the same kind or species'.
- > "Where specific words pertaining to a class or category or genus are followed by general words, the general words shall be Enumeration of specific words construed as limited to the things of the same kind as those specified."
- > Applicability:
 - a) The statute contains an enumeration of specific words
 - b) The subject of enumeration constitutes a class or category
 - c) That class or category is not exhausted by the enumeration
 - d) General terms follow the enumeration; and
 - e) There is no indication of a different legislative intent.
- > The rule of ejusdem generis is not an absolute rule of law but only a part of a wider principle of construction and therefore this rule has no application where the intention of the legislature is clear.
- > Exceptions to the Rule:
 - a) If the preceding term is general and that which follows, this rule cannot be applied.
 - b) Where the particular words exhaust the whole genus.
 - c) Where the specific objects enumerated are essentially diverse in character.
 - d) Where there is an express intention of legislature that the general term shall not be read ejusdem generis the specific terms.
- > This rule has to be applied judiciously. This rule may be understood as an attempt to settle a conflict between specific and general words.



Secondary Rules

- 1. Doctrine of Noscitur a Sociis
 - Noscitur a Sociis means that when two or more words that are susceptible of analogous meaning, are coupled together they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is the meaning of the more general word being restricted to a sense analogous to that of the less general.
 - > Examples of the principal of Noscitur a Sociis are as follows:
 - a) Fresh orange juice is not a fruit juice. 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. v. Savoy Hotel, (1966) 2 All. E.R. 299)
 - b) Private Dispensary of a doctor is not a commercial establishment. In dealing with the definition of commercial establishment in Section 2 (4) of the Bombay Shops and Establishments Act, 1948, which reads, "commercial establishment means an establishment which carries on any business, trade or profession", the word 'profession' was construed with the associated words 'business' and 'trade' and it was held that a private dispensary of a doctor was not within the definition. (Dr. Devendra M. Surti v. State of Gujrat, A.I.R. 1969 SC 63)
- 2. Doctrine of Contemporanea Expositio
 - > This doctrine is based on the concept that a statute or a document is to be interpreted by referring to the exposition it has received from contemporary authority.
 - > The maxim "Contemporanea Expositio est optima et fortissinia in lege" means "contemporaneous exposition is the best and strongest in the law."
 - > A law should be understood in the sense in which it was understood at the time when it was passed.
 - > The maxim "optima legum interpres est consuetude" simply means, "Custom is the best interpreter of law".
 - > This maxim is to be applied for construing ancient statutes, but not to Acts that are comparatively modern.

INTERNAL AIDS TO INTERPRETATION/ CONSTRUCTION

Long Title	Preamble	Heading	Marginal Notes	Definitional Sections
Illustrations	Proviso	Explanation	Schedules	Read the Statute as a Whole

- 1. Long Title
 - > An enactment would have what is known as a 'Short Title' and also a 'Long Title'.
 - > The 'Short Title' merely identifies the enactment and is chosen merely for convenience
 - > The 'Long Title' describes the enactment and does not merely identify it.

> The title may be referred to for the purpose of ascertaining its general scope and of throwing light on its construction, although it cannot override the clear meaning of the enactment.

2. Preamble

- > The Preamble expresses the scope, object and purpose of the Act more comprehensively than the Long Title.
- > The Preamble may recite the ground and the cause of making a statute and the evil which is sought to be remedied by it.
- > Like the Long Tile, the Preamble of a Statute is a part of the enactment and can legitimately be used for construing it.
- However, the Preamble does not over-ride the plain provision of the Act but if the wording of the statute gives rise to doubts as to its proper construction, for example, where the words or phrase have more than one meaning and a doubt arises as to which of the two meanings is intended in the Act, the Preamble can and ought to be referred to in order to arrive at the proper construction.
- > 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.

3. Heading

- In an Act, we would generally find that a number of its sections referring to a particular subject are grouped together, sometimes in the form of chapters, prefixed by headings and/or Titles.
- > These Heading and Titles prefixed to sections or groups of sections can legitimately be referred to for the purpose of construing the enactment or its parts.
- > The headings of different portions of a Statute can be referred to determine the sense of any doubtful expression in a section ranged under any particular heading.
- > They cannot control the plain meaning of the words of the enactment though, they may, in some cases be looked at in the light of preamble if there is any ambiguity in the meaning of the sections on which they can throw light.
- > It may be noted that headings may sometimes be referred to know the scope of a section in the same way as the preamble.
- But a heading cannot control or override a section.

4. Marginal Notes

- > Marginal notes are summaries and side notes often found at the side of a section or group of sections in an Act, purporting to sum up the effect of that section or sections.
- > They are not a part of the enactment, for they were not present when the Act was passed in Parliament but inserted after the Act has been so passed.
- > Hence, they are generally not an aid to construction however reference to marginal notes may be permissible in exceptional cases for construing a section in a statute.
- Marginal notes appended to <u>Articles of the Constitution</u> have been <u>held to be part of the Constitution</u> as passed by the Constituent Assembly and therefore have been used in construing the Articles.

5. Definitional Sections

- > The legislature has the power to embody in a statute itself the definitions of its language and it is quite common to find in the Statutes 'definitions' of certain words and expressions used in the body of the statute.
- > 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 in interpreting a Section of the Act unless there be anything repugnant in the context. This is called an exhaustive definition.
- > The Court cannot ignore an exhaustive statutory definition and try and extract what it considers to be the true meaning of the expression independently of it.
- > The purpose of a definition clause is two-fold:
 - (i) to provide a key to the proper interpretation of the enactment, and
 - (ii) to shorten the language of the enacting part by avoiding repetition of the same words contained in the definition part every time the legislature wants to refer to the expressions contained in the definition.
- > Construction of definitions may be understood under the following headings:



(i) Restrictive and extensive definitions:

The definition of a word or expression in the definition section may either be restricting of its ordinary meaning or may be extensive of the same.

When word is defined as:	What it denotes:		
'means'	Restrictive and Exhaustive		
	We must restrict the meaning of the word to that given in the definition		
'includes'	Extensive		
	Here the word defined is not restricted to the meaning assigned to it		
	but has extensive meaning which also includes the meaning assigned to		
•	it in the definition section.		
'means and	Exhaustive		
includes'			
'to apply to	Extensive		
and include'	Where an expression is defined in an Act, it must be taken to have,		
	throughout the Act, the meaning assigned to it by the definition,		
	unless by doing so any repugnancy is created in the subject or context.		
	Example: Section 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.		
'is deemed to	Inclusive or Extensive		
include'	Words are used to bring in by a legal fiction something within the		
	word defined which according to its ordinary meaning is not included		
	within it		

(ii) Ambiguous definitions:

Sometime, we may find that the definition section may itself be ambiguous, and so it may have to be interpreted in the light of the other provisions of the Act and having regard to the ordinary meaning of the word defined. Such type of definition is not to be read in isolation. It must be read in the context of the phrase which it defines, realising that the function of a definition is to give accuracy and certainty to a word or phrase which would otherwise be vague and uncertain but not to contradict it or depose it altogether.

(iii) Definitions subject to a contrary context:

When a word is defined to bear a number of inclusive meanings, the sense in which the word is used in a particular provision must be ascertained from the context of the scheme of the Act, the language of the provision and the object intended to be served thereby.

6. Illustrations

- > Many, though not all, sections have illustrations appended to them.
- > These illustrations follow the text of the Sections and, therefore, do not form a part of Sections.
- > However, illustrations do form a part of the statute and are considered to be of relevance and value in construing the text of the sections.
- > However, illustrations cannot have the effect of modifying the language of the section and can neither curtail nor expand the ambit of the section.

7. Proviso

- > The function of a proviso is to except something out of the enactment or to qualify something stated in the enactment which would be within its purview if the proviso were not there.
- > A proviso is embedded in the main body of the section and becomes an integral part of it.
- > Provisos that are so included begin with the words, "provided that".
- > The effect of the proviso is to qualify the preceding enactment which is expressed in terms which are too general.
- > Ordinarily a proviso is not interpreted as stating a general rule.
- > Exception clauses are intended to restrain the enacting clause to particular cases.
- > Savings clause is used to preserve from destruction certain rights, remedies, or privileges
- > It is a cardinal rule of interpretation that a proviso or exception to a particular provision of a statute only embraces the field which is covered by the main provision.
- > It carves out an exception to the main provision to which it has been enacted as a proviso and to no other.

8. Explanation

- > An Explanation is at times appended to a section to explain the meaning of certain words or phrases used in the section or of the purport of the section.
- An Explanation may be added to include something within the section or to exclude something from it.
- > An Explanation should normally be so read as to harmonise with and clear up any ambiguity in the main section.

- > It should not be so construed as to widen the ambit of the section.
- > Objects of an explanation to a statutory provision:
 - (i) Explain the meaning and intendment of the Act itself
 - (ii) Clarify any obscurity and vagueness (if any) in main enactment to make it consistent with the object
 - (iii) Provide an additional support to the object of the Act to make it meaningful and purposeful
 - (iv) Fill up the gap which is relevant for the purpose of the explanation to suppress the mischief and advance the object of the Act
 - (v) Cannot take away a statutory right
- > However, it would be wrong to always construe an explanation as limited to the aforesaid objects. The meaning to be given to an explanation will really depend upon its terms and not on any theory of its purpose

9. Schedules

- > The Schedules form part of an Act. Therefore, they must be read together with the Act for all purposes of construction.
- > However, the expressions in the Schedule cannot control or prevail over the expression in the enactment.
- > If there appears to be any inconsistency between the schedule and the enactment, the enactment shall always prevail.
- > They often contain details and forms for working out the policy underlying the sections of the statute

10. Read the Statute as a Whole

- > It is the elementary principle that construction of a statute is to be made of all its parts taken together and not of one part only.
- > The deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be so interpreted as to bring them into harmony with other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible.
- > And the same approach would apply with equal force with regard to Acts and Rules passed by the legislature.
- > One of the safest guides to the construction of sweeping general words is to examine other words of like import in same enactment or instrument to see what limitations must be imposed on them.
- > If we find that a number of such expressions have to be subjected to limitations and qualifications and that such limitations and qualifications are of the same nature that circumstance forms a strong argument for subjecting the expression in dispute to a similar limitation and qualification.
 - Example: If one section of an Act requires 'notice' should be given, then a verbal notice would generally be sufficient. But, if another section provides that 'notice' should be 'served' on the person or 'left' with him, or in a particular manner or place, then it would obviously indicate that a written notice was intended



EXTERNAL AIDS TO INTERPRETATION/CONSTRUCTION

Apart from the statute itself there are many matters which may be taken into account when the statute is ambiguous. These matters are called External aids to Interpretation.

Historical Setting Consolidating
Statutes &
Previous Law

Usage Earlier &
Later Acts and
Analogous Act

Dictionary Definitions Use of Foreign Decisions

1. Historical Setting

- > The history of the external circumstances which led to the enactment in question is of much significance in construing any enactment.
- > We have to take help from all those external or historical facts which are necessary in the understanding and comprehension of the subject matter and the scope and object of the enactment.
- > History in general and Parliamentary History in particular, ancient statutes, contemporary or other authentic works and writings all are relevant in interpreting and construing an Act.
- > We have also to consider whether the statute in question was intended to alter the law or leave it where it stood before.

2. Consolidating Statutes & Previous Law

- > The Preambles to Statutes contain expressions such as "An Act to consolidate" the previous law etc
- > In such a case, the Courts may stick to the presumption that it is not intended to alter the law
- > They may solve doubtful points in the statute with the aid of such presumption in intention, rejecting the literal construction.

3. Usage

- > Usage is also sometimes taken into consideration in construing an Act.
- > The acts done under a statute provide quite often the key to the statute itself.
- > It is well known that where the meaning of the language in a statute is doubtful, usage how that language has been interpreted and acted upon over a long period may determine its true meaning.
- ▶ It has been emphasized that when a legislative measure of doubtful meaning has, for several years, received an interpretation which has generally been acted upon by the public, the Courts should be very unwilling to change that interpretation, unless they see cogent reasons for doing so.

4. Earlier & Later Acts and Analogous Acts

- Exposition of One Act by Language of Another:
 - a) The general principle is that where there are different Statutes in 'pari materia' (i.e. in an analogous case), though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other.

- b) If two Acts are to be read together then every part of each Act has to be construed as if contained in one composite Act.
- c) But if there is some clear discrepancy then such a discrepancy may render it necessary to hold the later Act (in point of time) had modified the earlier one.
- d) However, this does not mean that every word in the later Act is to be interpreted in the same way as in the earlier Act.

Where the later of the two Acts provides that the earlier Act should, so far as consistent, be construed as one with it	Then an enactment in the later statute was held to be excluded from the earlier statute as well.
Where a single section of one Act is incorporated into another statute	It must be read in the sense which it bore in the original Act from which it is taken consequently, it would be legitimate to refer to all the rest of the Original Act to ascertain what that Section means, though one Section alone is incorporated in the new Act

Earlier Act Explained by the Later Act:

Not only may the later Act be construed in the light of the earlier Act but it (the later Act) sometimes furnishes a legislative interpretation of the earlier one, if it is 'pari materia' and if, but only if, the provisions of the earlier Act are ambiguous.

Where the earlier statute contained a negative provision but the later one merely omits that negative provision, this cannot by itself have the result of substantive affirmation.

In such a situation, it would be necessary to see how the law would have stood without the original provision and the terms in which the repealed sections are re-enacted.

Reference to Repealed Act:

Where a part of an Act has been repealed, it loses its operative force. Nevertheless, such a repealed part of the Act may still be taken into account for construing the un-repealed part. This is so because it is part of the history of the new Act.

5. Dictionary Definitions

- First we have to refer to the Act in question to find out if any particular word or expression is defined in it.
- > Where we find that a word is not defined in the Act itself, we may refer to dictionaries to find out the general sense in which that word is commonly understood.
- > However, in selecting one out of the several meanings of a word, we must always take into consideration the context in which it is used in the Act.
- > It is the fundamental rule that the meanings of words and expressions used in an Act must take their colour from the context in which they appear.
- Further, judicial decisions laying down the meaning of words in construing Statutes in 'pari materia' will have greater weight than the meaning furnished by dictionaries.
- > However, for technical terms reference may be made to technical dictionaries.

6. Use of Foreign Decisions

Foreign decisions of countries following the same system of jurisprudence as ours and given on laws similar to ours can be legitimately used for construing our own Acts. However, prime importance is always to be given to the language of the Indian statute. Further, where guidance can be obtained from Indian decisions, reference to foreign decisions may become unnecessary.

Rules of Interpretation/ Construction of Deeds and Documents

> Find out what a reasonable man, who has taken care to inform himself of the surrounding circumstances of a deed or a document, and of its scope and intendments, would understand by the words used in that deed or document.

The principle of construction in case of a document and a deed, as of statute, does not differ

so much except in some minor details.

> A deed must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be so interpreted as to bring them in harmony with other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible.

In all cases endeavor shall be made to find out how a reasonable and well-informed person would

understand by the words used in the deed or document.

The golden rule of construction is to ascertain the intention of the parties to the instrument after considering all the words in their ordinary, natural sense.

To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used.

The intention deduced after the document is read as a whole should be the actual term the

parties intended to agree.

> It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances.

- Where a particular word has a clear and definite significance and there is surety of the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of that word when used by someone who is not so equally skilled in the art of conveyancing.
- It is inexpedient to construe the terms of one deed by reference to the terms of another.
- > It is an elementary rule of construction that the same word cannot have two different meanings in the same document, unless the context compels the adoption of such a course.
- It may also happen that there is a conflict between two or more clauses of the same document. An effort must be made to resolve the conflict by interpreting the clauses so that all the clauses are given effect to.

If, however, it is not possible to give effect to all of them, then it is the earlier clause that will over-ride the latter one.

Similarly, if one part of the document is in conflict with another part, an attempt should always be made to read the two parts of the document harmoniously, if possible.

If that is not possible, then the earlier part will prevail over the latter one which should, therefore, be disregarded.

——→···· The End ····