Indira Gandhi National Open University
School of Management Studies

BCOC-135
Company Law

Block

4

COMPANY MANAGEMENT

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BLOCK 4 COMPANY MANAGEMENT

You know that a company is an artificial person which cannot act on its own. It acts through its principal officers who take policy decisions called directors in various types of meetings by passing the necessary resolutions. Hence, it is necessary to know about the directors, their duties, rights etc. and the rules regarding the conduct of these meetings and passing of various resolutions. A company secretary plays a very importance role in the administration of a company. It is also important to know what constitutes a managerial position that entitles a person to receive managerial remuneration. In this block, you will learn about directors, managerial remuneration, the rules regarding various types of meetings and resolutions, the role of a company secretary. This block has four units.

Unit 13 deals with the meaning of director, qualifications, disqualifications, removal, rights and duties and powers of directors. It also discusses different committees of Board of Directors.

Unit 14 explains the meaning, manner of payment of managerial remuneration, overall limits for managerial remuneration.

Unit 15 deals with the positions of a company secretary and discusses the rules relating to his appointment, removal, duties, liabilities, rights, etc.

Unit 16 deals with the meaning and importance of meetings, and discusses the rules regarding the conduct of various types of meetings including notice, quorum, proxies and voting. It also explains the various types of resolutions that are passed from time to time in different meetings.

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UNIT 13 DIRECTORS

Structure

13.0 OBJECTIVES

After studying this Unit, you should be able to:

- define a director;
- explain the legal position of directors;
- describe the qualifications and disqualifications of a director;
- explain the procedure of appointment of directors;
- list the circumstances when the director's office falls vacant;

- explain the mode of removing a director;
- describe the powers, duties and liabilities of directors; and
- explain the different committees of Board of directors.

13.1 INTRODUCTION

In Unit 12, you learnt about the membership of a company. You know that the number of members of a public company is usually large and are spread all over the country. Hence, they elect some persons to manage the affairs of the company. Such persons are known as directors who are responsible mainly for determining the business policies and directing and controlling the overall affairs of the company. In this unit you will learn the legal position of directors, their qualifications and disqualifications, the method of their appointment, and their power, duties and liabilities and committees of Board of Directors.

13.2 DEFINITION OF A DIRECTOR

The directors are the persons elected by the shareholders to direct, conduct, manage or supervise the affairs of the company. They manage and control the overall affairs of the company. The day to day working of the company is left to other managerial persons appointed for the purpose.

Section 2(34) of the Companies Act, 2013 defines a 'director' to mean a director appointed to the Board of a company. According to section 2(10)

Board of Directors of Board in relation to a company means collectively body of the directors of the company.

13.3 WHO CAN BE APPOINTED AS A DIRECTOR?

Section 149 of the Companies Act provides that only an individual can be appointed as director. Thus, no body corporate, association or firm can be appointed director of a company.

However, no person shall be appointed as a director of the company unless he has been allotted a **Director Identification Number (DIN)**.

No individual, who has already been allotted a Director Identification Number, can apply for, obtain or possess another Director Identification Number [Section 155].

If any individual applies for more than one DIN, he may be punished with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees. In case, the contravention is a continuing one, he may be fined further five hundred rupees for every day till the contravention continues [Section 159].

13.4 POSITION OF DIRECTORS

It is not easy to explain the legal position of the directors because the same have not been defined by the Companies Act clearly. Bowen L. J. observed "directors are described sometimes as agents, sometimes as trustees and sometimes as managing partners. But each of these expressions is used not as

exhaustive of their powers and responsibilities, but as indicating useful points of view from which they may, for the moment and for the particular purpose be considered." Thus, the real position of a director is not merely that of an agent, or trustee of managing partner, but a combination of all these positions. Let us now discuss their position under various headings as follows:

As Agents: The company being an artificial person cannot manage its affairs on its own. It has to be entrusted to some human agency known as directors. They are elected representatives of the shareholders and may be termed as agents of the company. The relationship between the company and its directors is that of principal and agent. Therefore, the general principles of the law of agency govern the relations of the company and its directors. As agents, it is their duty to carry on the business with reasonable care and diligence. They must act within the authority conferred upon them by the Act, Memorandum and Articles and while entering into contracts on behalf of the company within the scope of this authority, they will bind the company. In other words, if they act beyond the scope of their authority, they will be held personally liable. However, you should note that the acts done beyond the powers of the directors may be ratified by the shareholders in general meeting of the company provided such acts are not beyond the powers of the company.

To bind the company, the directors must act in the name of the company. **Directors are the agents of the company and not of the individual shareholders.**

It is, however, not correct to say that directors are the agents of the company because agents are not elected but appointed and secondly, the agents have no independent powers while the directors have independent powers on certain matters.

As Trustees: The 'trustee' means a person who holds and manages the property for the benefit of other persons. Though in the strict legal sense, directors are not the trustees of the company, but, to some extent, they have been treated as trustees of the company. They are the custodians of the money and properties of the company and as such are responsible for the proper use of such money and property. If they misuse the money or property, they have to refund or reimburse the same.

The directors must exercise their powers in good faith and for the benefit of the company, and not for their own benefit. The directors stand in a fiduciary capacity in relation to the company. The same degree of integrity and standard of conduct is expected from the directors as it is expected from a trustee. **You should note that directors are trustees for the company and not of individual shareholders.**

However, you should remember that directors are not the trustees in the strict sense because unlike a trustee a director does not enter into contracts in his own name. He enters into contracts for the company of which he is a director and he does not hold any property in trust, because the property is held by the company in its own name.

As Managing Partner: Directors have been described as the managing partners because on the one hand, they are entrusted with the management and control of the affairs of the companies and on the other hand, they are the shareholders of the company. They manage the affairs of the company for their own benefit as a shareholder and for the general benefit of the company.

But they are not managing partners in the strict sense, because the liability of the director is limited to the value of shares held by him whereas the liability of a partner is unlimited. Further, unlike a partner, a director has no authority to bind the other directors and shareholders.

As Employees: Directors are the elected representatives of the shareholders. As such, they are not employees or servants of the company. But under a special contract with the company a director may hold a salaried employment in the company and in that case he will be treated as an employee or servant of the company and he will enjoy all the rights available to an employee.

Thus, it is clear from the above discussion that directors are neither the agents, nor the trustees, nor managing partners, nor employees of the company. In fact, they combine in themselves all these positions. They stand in a fiduciary position towards the company in respect of their powers and capital under their control.

13.5 NUMBER OF DIRECTORS AND DIRECTORSHIPS

Section 149(1) provides that every company shall have a Board of Directors consisting of individuals as directors and shall have—

a) a minimum number of three directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company; and

b) a maximum of fifteen directors:

However, a company may appoint more than fifteen directors after passing a special resolution.

Besides, such class or classes of companies, as may be prescribed, shall have at least one woman director.

Number of Directorships

As per section 165 of the Companies Act, 2013 a person cannot hold office at the same time as a director in more than **twenty companies.** However, members, by passing a special resolution, may fix a lesser number. Further, out of the total number of twenty companies, his directorships in **public companies** cannot exceed **ten** including directorships in private companies that are either holding or subsidiary company of a public company.

Any person holding office as director in companies more than the specified limits immediately before the commencement of this Act shall, **within a period of one year** from such commencement—

a) choose, not more than the specified limit, companies in which he wishes to continue to hold the office of director;

b) resign his office as director in the other remaining companies.

He must intimate the choice made by him:

i) to each of the companies in which he was holding the office of director before such commencement; and

ii) to the Registrar having jurisdiction in respect of each such company.

Further, no such person shall act as director in more than the specified number of companies,—

a) after despatching the resignation of his office as director; or

b) after the expiry of one year from the commencement of this Act, whichever is earlier.

Penalty: If a person accepts an appointment as a director in more than the specified number of companies, he shall be punishable with fine of five thousand rupees for every day after the first during which the contravention continues.

13.6 DIRECTOR'S IDENTIFICATION NUMBER

Director Identification Number (DIN) is an unique identification number allotted to an individual who is an existing director of a company or intends to be appointed director of a company as per section 153 & 154 of the Companies Act, 2013.

Every individual, who is to be appointed as director of a company shall make an application electronically in Form NO. DIR-3. to the Central Government for the allotment of a Director Identification Number (DIN) along with such fees as provided in the Companies (Registration Offices and Fees) Rules, 2014. Rule 9(1).

- The Central Government shall, within one month from the receipt of the application allot a DIN to the application;
- The DIN allotted to the director is valid for the life time and the same shall not be allotted to any other person.

Section 156 of the Act provides that every existing director shall, within one month of the receipt of DIN from the Central Government, intimate his DIN to all companies wherein he is a director.

Obligation to indicate DIN

Section 158 provides that every person or company, while furnishing any return, information or particulars as are required to be furnished under the Act, shall mention the DIN in such return, information or particulars in case of such return, information or particulars relate to the director contain any reference of any director.

Punishment for contravention

Section 159 provides that if any individual or director of a company, contravenes any of the provisions of Section 155 and Section 156 such individual or director of the company shall be liable to a penalty which may extend to fifty thousand rupees and where the default is a continuing one, with a further penalty which may extend to five hundred rupees for each day after first during which such default continue.

If a company fails to furnish DIN before the expiry of the period specified with additional fee, under Section 157 the company shall be punishable with fine which shall no less than Rs. 25,000 but which may extend to Rs. 1,00,000 and every officer of company who is in default shall be punishable with fine which shall not be less Rs 25,000 but which may extend to Rs.1,00,000.

13.7 QUALIFICATIONS OF A DIRECTOR

The Companies Act has not prescribed any academic or professional qualifications for directors. Also, the Act imposes no share qualification on the directors. So, unless the company's articles contain a provision to that effect, a director need not be a shareholder unless he wishes to be one voluntarily. But the articles usually provide for a minimum share qualification.

13.8 DISQUALIFICATIONS OF DIRECTORS

The circumstances in which a person cannot be appointed as a director of a company are listed in Section 164 of the Companies Act. A person shall not be capable of being appointed director of a company if:

a) he is of unsound mind and stands so declared by a competent court;

b) he is an undischarged insolvent;

c) he has applied to be adjudicated as an insolvent and his application is pending;

d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months. However, this disqualification will last only up to five years from the date of expiry of the sentence.

   But, if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;

e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

f) he has not paid any calls for six months or more in respect of any shares of the company held by him, whether alone or jointly with others;

g) he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or

h) he has not been allotted DIN.

Besides, no person **who is or has been** a director of a company which—

a) has not filed financial statements or annual returns for any continuous period of three financial years; or

b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so. Provided that where a person is appointed as director of a company which is in default, he shall not incur disqualification for a period of six months from the date of appointment.

Additional disqualifications for directors of a private company - A private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified above.

Check Your Progress A

1) Define a director.

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2) Enumerate the positions in which a director acts.

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3) What is the minimum number of directors in a public and a private company?

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4) List four cases when a person becomes disqualified for appointment as director of a company.

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5) State whether the following statements are True or False:

i) Every public company must have at least five directors and every other company at least three directors.

ii) Only an individual can be appointed as a director of a company.

iii) Directors are trustees for the company and not for individual shareholders or for third persons who have entered into contracts with the company.

iv) A person can be a director in more than twenty companies at the same time.

v) A person who fails to pay the calls in respect of shares held by him for more than six months, cannot be appointed as a director of the company.

13.9 APPOINTMENT OF DIRECTORS

You know that only individuals can be appointed as directors of the company. Any person who is competent to contract and has obtained DIN is eligible for appointment as a director of the company. The discussion on appointment of a director may be dealt with under the following heads:

1. Appointment of first Directors
2. Appointment by shareholders at general meeting
3. Appointment by the Board of Directors
4. Appointment of Resident Director
5. Appointment of Independent directors
6. Appointment of Director elected by small shareholders.

1) **Appointment of First Directors (Section 152):** The first directors are usually appointed by name in the articles or in the manner provided therein. Where the articles do not provide for the appointment of first directors, the subscribers to the memorandum, who are individuals, shall be deemed to be the first directors of the company until the directors are duly appointed. In case of a One Person Company an individual being member shall be deemed to be its first director until the director or directors are duly appointed by the member in accordance with the provisions of this section.

No appointment without DIN - No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number (DIN).

Consent to act as Director - A person appointed as a director shall not act as a director unless he gives his consent to hold the office as director. The consent must be filed with the Registrar within thirty days of his appointment in the prescribed manner.

2) **By Shareholders in General Meeting:** According to section 152(2) every director shall be appointed by the company in general meeting except where the Act provides otherwise. In case of a public company, **at least two-thirds** of the total number of directors* must be rotational directors.

The remaining directors (i.e, one-third or less) should also, unless articles of the company provide otherwise, be appointed by the company in general meeting.

Appointment of directors in case of a private company - In case of a private company, if the articles are silent as to the appointment of directors or do not specifically provide for appointment of directors otherwise than in a general meeting, then the directors are to be appointed in general meeting by the shareholders - Calcutta High Court in the case of **Swapan Das Gupta v. Navin Chand Suchanti [1988]**.

Manner of rotation – At the first annual general meeting of **a public company** held next after the date of the general meeting at which the first directors are

*For the purposes of this sub-section, "total number of directors" shall not include independent directors, whether appointed under this Act or any other law for the time being in force, on the Board of a company.

appointed and at every subsequent annual general meeting, one-third of the rotational directors or the number nearest to one-third, shall retire from office.

The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment. **Persons who became directors on the same day may** retire as per agreement among themselves. In case, there is no such agreement, it shall be determined by draw of lot.

At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

Appointment of a director other than a retiring director [Sec. 160] - Section 160 along with Rule 13 of Companies (Appointment and Qualification of Directors) Rules, 2014 lay down the procedure of appointment of a person other than retiring director.

If any person, other than the retiring director wishes to stand for directorship or any member proposes a person for directorship, he must signify his intention to do so by giving 14 days' notice to the company before the general meeting and the company must inform the members at least seven days before the general meeting. The information shall be given:

1) by serving individual notices, on the members through electronic mode to such members who have provided their email addresses to the company for communication purposes, and in writing to all other members; and

2) by placing notice of such candidature or intention on the website of the company, if any.

However, it shall not be necessary for the company to serve individual notices upon the members as aforesaid, if the company advertises such candidature or intention, not less than seven days before the meeting at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and circulating in that district, and at least once in English language in an English newspaper circulating in that district.

Also, the candidate or the member who intends to propose him as director has to deposit a sum of Rs. 1 lakh or such higher amount as may be prescribed which shall be refunded to such person or, as the case may be, to the member, if the person proposed gets elected as a director or gets more than twenty-five per cent of total valid votes cast either on show of hands or on poll on such resolution. The deposit is not required for independent director or a director recommended by Nomination and Remuneration committee or recommended by Board of Directors.

Appointment of directors to be voted on individually - Section 162 prescribes the mode of voting on appointment of directors. No motion can be made at the general meeting of a company for the appointment of two or more persons as directors by a single resolution, unless a resolution is first unanimously passed that it shall be so made. According to Sub-section (3) a motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

3) **By Board of Directors:** The Board of directors may also appoint directors in the following cases:

i) **Additional Directors (Section 161):** The Board of directors may, if authorised by the Articles, appoint additional directors. But care should be taken to see that the total number of directors including the additional director does not exceed the maximum number fixed by the Articles. Such an additional director shall hold office only up to the date of the next annual general meeting or the last date, on which the annual general meeting should have been held, whichever is earlier.

ii) **Alternate Director (Section 161):** The Board of directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint an alternate director to act for a director during his absence for a period of not less than three months from India. However, a person holding any alternate directorship for any other director in the company shall not be appointed.

No person shall be appointed as an alternate director for an **independent director** unless he is qualified to be appointed as an independent director under the provisions of this Act.

iii) **Director against a casual vacancy (Section 161):** If the office of any director falls vacant for some reason before the expiry of his term of office, such a casual vacancy may be filled by the **Board of directors at its meeting** according to the regulations of the Articles. Such a vacancy may be caused by death, resignation, insanity, insolvency etc. The person who is appointed by the Board to fill up the casual vacancy, shall hold the office only up to the date up to which the director in whose place he is appointed, would have held the office.

iv) **Nominee directors:** Subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

4) **Appointment of Resident Director:** For the first time the Companies Act, 2013 has introduced the concept of resident director. Sub-section (3) of section 149 provides that every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.

5) Appointment of Independent Director: Sub-section (4) of section 149 requires every listed public company to have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies. A managing director or a whole-time director or a nominee director is not an independent director.

Meaning of an Independent Director – As per Section 149 (6) of the Companies Act, 2013, to be an independent director, the individual should:

a) not be a managing director or a whole-time director or a nominee director;

b) be a person of integrity and possess relevant expertise and experience;

c) i) not be a promoter of the company or its holding, subsidiary or associate company;

ii) not be related to promoters or directors in the company, its holding, subsidiary or associate company;

d) have or had no pecuniary (monetary) relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

e) not have any relative who has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent. or more of its gross turnover or total income of fifty lakh rupees or such higher amount, as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;

f) be a person who, neither himself nor any of his relatives—

i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;

ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of—

A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent or more of the gross turnover of such firm;

iii) holds together with his relatives two per cent or more of the total voting power of the company; or

iv) is a chief executive or director, by whatever name called, of any non-profit organisation that receives twenty-five per cent or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or

g) possess such other qualifications as may be prescribed.

You should note that under the Companies Act, 2013, nominee directors of Banks or Financial Institutions will not be considered as independent directors. Prior to passing of this Act, such directors were considered as independent directors.

Appointment of Independent Director [Section 150]

An independent director may be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors. The responsibility of exercising due diligence before selecting a person as an independent director shall lie with the company making such appointment.

The appointment of independent director shall be approved by the company in general meeting. An explanatory statement is required to be annexed to the notice of the general meeting called to consider the said appointment of independent director. The explanatory statement must indicate the justification for choosing the appointee for appointment as independent director. The explanatory statement must also include a statement that "in the opinion of the Board, he fulfills the conditions specified in this Act for such an appointment."

No person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director.

Schedule IV to the Companies Act, 2013 has very elaborately given the manner of appointment of independent directors, their re-appointment, tenure, resignation, removal and separate meetings of the independent directors as well as their evaluation. A summary of these provisions is being given hereunder.

The appointment of independent directors shall be formalised through a letter of appointment, which shall set out :

a) the term of appointment;

b) the expectation of the Board from the appointed director; the Board-level committee(s) in which the director is expected to serve and its tasks;

c) the fiduciary duties that come with such an appointment along with accompanying liabilities;

d) provision for Directors and Officers (D and O) insurance, if any;

e) the code of business ethics that the company expects its directors and employees to follow;

f) the list of actions that a director should not do while functioning as such in the company; and

g) the remuneration, mentioning periodic fees, reimbursement of expenses for participation in the Boards and other meetings and profit related commission, if any.

Re-appointment

The re-appointment of independent director shall be on the basis of report of performance evaluation.

Remuneration

Sections 149(9) and 197(7) read together provide that subject to the provisions of section 197, an independent director may receive remuneration by way of sitting fees for attending meetings of the Board or Committees thereof, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members. He shall, however, be not entitled to any stock option.

Resignation or Removal

1) The resignation or removal of an independent director shall be in the same manner as that of any other director as provided in sections 168 and 169 of the Act.

2) An independent director who resigns or is removed from the Board of the company shall be replaced by a new independent director within a period of not more than 180 days from the date of such resignation or removal, as the case may be.

3) Where the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation or removal, as the case may be, the requirement of replacement by a new independent director shall not apply.

Separate Meetings

1) The independent directors of the company shall hold *at least one meeting in a year,* without the attendance of non-independent directors and members of management;

2) All the independent directors of the company shall strive to be present at such meeting;

3) The meeting shall:

   a) review the performance of non-independent directors and the Board as a whole;

   b) review the performance of the Chairperson of the company, taking into account the views of executive directors and non-executive directors;

   c) assess the quality, quantity and timeliness of flow of information between the company management and the Board that is necessary for the Board to effectively and reasonably perform their duties.

Evaluation Mechanism

1) The performance evaluation of independent directors shall be done by the entire Board of Directors, excluding the director being evaluated.

2) On the basis of the report of performance evaluation, it shall be determined whether to extend or continue the term of appointment of the independent director.

Term of office

As per sub–sections 10 and 11 of Section 149, an independent director shall hold office for a term up to five consecutive years on the Board of a company and shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

No independent director shall hold office for more than two consecutive terms, but such independent director shall be eligible for appointment after the expiration of three years of ceasing to become an independent director.

Liability of Independent Directors - Sub–section 12 of Section 149 makes an independent director liable only in respect of such acts of omission or commission by a company

i) which had occurred with his knowledge, and

ii) with his consent or connivance **or** where he had not acted diligently.

Code of Independent Directors

The Companies Act, 2013, for the first time, laid down a code for independent directors in Schedule IV.

The code is a guide to professional conduct for independent directors. Adherence to these standards by independent directors and fulfillment of their responsibilities in a professional and faithful manner will promote confidence of the investment community, particularly minority shareholders, regulations and companies in institution of independent directors.

6) Appointment of director elected by small shareholders [151]

A listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.

'Small shareholder' means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.

The Ministry of Corporate Affairs, in this regard, has prescribed the rules. Rule 7 of Companies (Appointment and Qualification of Directors) Rules, 2014 requires that a company may appoint small shareholders' director where a notice to that effect is given by:

i) not less than one thousand small shareholders; or

ii) one-tenth of the total number of such shareholders, whichever is lower.

Appointment of Directors through System of Proportional Representation

You have learnt that for the appointment of every director, a separate resolution has to be passed. Normally, they are elected by a simple majority. As a result it is possible that the minority of the shareholders may not be in a position to send their representative on the Board of directors. Therefore, Section 163 of the Act provides them an opportunity to have their representative on the Board. This is done by adopting the system of proportional representation. The Articles may have a provision to this effect by which not less than two-third of the total number of directors of the company be appointed by the single transferable vote, or by a system of cumulative voting or otherwise. Such appointments may be made once in three years.

Appointment of Women Director on the Board

Section 149 of the Companies Act 2013 read along with the Rule 3 of the Companies (Appointment and Qualification of Directors) Rules 2014 prescribes for (a) every listed company and (b) every public company having a paid up share capital of not less than one hundred crores rupees or turnover of three hundred crores or more to appoint at least one women director.

A company which has been incorporated under the Act and is covered under the aforesaid criteria shall appoint at least women director within a period of six months form date of its incorporation.

In case of any intermittent vacancy of women director, the same has to be filled by the board at the earliest but not later than immediate next board meeting or three months from date of such vacancy whichever is later.

13.10 VACATION OF OFFICE OF A DIRECTOR

Section 167 provides for the office of a director becoming vacant on the happening of certain events. Sub-section (1) of section 167 provides that the office of a director shall become vacant if:

a) he incurs any of the disqualifications specified in section 164;

b) he absents himself from all the meetings of the Board of Directors held during a period of twelve months **with or without** seeking leave of absence of the Board;

c) he fails to disclose or acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;

d) he becomes disqualified by an order of a court or the Tribunal;

e) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months.

   Please note that the office shall be vacated by the director even if he has filed an appeal against the order of such court;

f) he is removed in pursuance of the provisions of this Act;

g) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified above.

Penalty: If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified above, he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both [Section 167(2)].

Disqualification of all the directors: Where all the directors of a company vacate their offices under any of the disqualifications specified above, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting. [Section 167(3)].

13.10.1 Retirement of a Director

You know that two-third of the directors are liable to retire by rotation and if a director retires at an annual general meeting and is not re-elected, he ceases to hold the office.

13.10.2 Resignation by a Director (Section 168)

A director may resign in accordance with the rules laid down in the Articles. If the Articles contain no such rule, he can resign at any time by giving a reasonable notice to the company, it is immaterial whether the company accepts

his resignation or not. A resignation once made will take effect immediately when the intention to resign is made clear. A resignation cannot be withdrawn, except with the consent of the company concerned.

The resignation letter should be sent to the company at the registered office of the company. The resignation should preferably be in writing, but sometimes even oral resignation may be effective, for example, if it is made at the general meeting of the company.

13.11 REMOVAL OF A DIRECTOR

A director can be removed from office before the expiry of his term by (a) shareholders; or (b) the Tribunal. Let us now discuss them in detail.

a) **Removal by shareholders -** Section 169 recognises the inherent right of shareholders to remove the directors appointed by them. It is not even necessary that there should be proof of mismanagement, breach of trust, misfeasance or other misconduct on the part of the directors. Where the shareholders feel the policies pursued by the directors or any of them are not to their liking, they have the option to remove the directors by passing an ordinary resolution in the same way as they have the right to appoint directors by passing an ordinary resolution.

Section 169 provides that a company may, by ordinary resolution of which special notice as per section 115 has been given, passed in general meeting, remove a director before the expiry of his term of office. However, the following directors cannot be so removed:

i) Directors appointed by the Tribunal; under Section 242; and

ii) Directors appointed under the system of proportional representation.

In **Queen Kuries & Loans (P.) Ltd. v. Sheena Jose [1993]**, it was held that the notice must disclose the ground on which the director is proposed to be removed.

On receipt of the special notice for removal of a director, the company must forthwith send a copy thereof to the director concerned and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting.

If the director concerned has sent a written representation to the company, the company shall send a copy of the same to all the members. If the representation could not be send because of the shortage of time, it may be read at the meeting.

A vacancy created by the removal of a director may be filled up by the appointment of another director in his place provided special notice of such appointment has been given to members. A director so appointed shall hold office only for the remaining period of the director removed. Such a vacancy can also be filled up a casual vacancy. A removed director cannot be reappointed, but he can claim compensation for loss of office.

b) **Removal by Tribunal [Section 242] -** Where an application has been made to the Tribunal under section 241 against oppression and mismanagement of a company's affairs, the Tribunal may order for the termination or setting aside of an agreement which the company might have made with any of

its directors. It may also order the removal of any of the directors of the company. A director so removed shall not be entitled to claim any compensation from the company for the loss of office [Section 243 (a)].

Besides, such a director shall not be entitled to serve as a manager, managing director or director of the company without leave of the Tribunal for a period of five years from the date of Tribunal's order terminating or setting aside his contract with the company [Section 243 (b)]. However, the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter.

Penalty: Sub-section (2) of section 243 provides that any person who knowingly acts as a managing director or other director or manager of a company in contravention of clause (b) of sub-section (1), and every other director of the company who is knowingly a party to such contravention, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five lakh rupees, or with both.

Check Your Progress B

1) How are the first directors of a public company appointed?

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2) Who are rotational directors?

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3) What do you mean by an alternate director?

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4) List four grounds when the office of a director falls vacant.

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5) How can the shareholders of a company remove a director?

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6) State whether the following statements are True or False.

i) The first directors are usually named in the Articles.

ii) Unless the Articles provide for the retirement of all directors at every annual general meeting, at least one-third of the total number of directors are liable to retire by rotation.

iii) A retiring director cannot be re-appointed.

iv) An alternate director can hold office up to the next annual general meeting.

v) The office of the director does not become vacant if he fails to disclose his interest in any contract with the company before the Board.

vi) A resignation by a director is effective immediately when the intention to resign is made clear.

vii) A director cannot be removed before the expiry of his term of office.

viii) A director who is removed by the Tribunal is not entitled to any compensation for loss of office.

ix) If a new director is to be appointed, a notice in writing shall be given to the company at least twenty-one days before the meeting.

7) Who can be appointed as an independent director?

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8) Which companies must have independent directors?

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13.12 POWERS OF DIRECTORS

You know that the directors are appointed to manage and supervise the overall affairs of the company. Section 179 of the Companies Act, 2013 provides:

Subject to the provisions of the Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do.

In exercising the aforesaid powers or doing any of the aforesaid acts or things, the Board will be subject to the provisions contained in that behalf in the Companies Act or any other Act, or in the Memorandum or Articles of the company, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting. However, no regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.

Directors are required to act collectively in the form of Board. Directors

individually cannot take any decision regarding company's affairs; decisions must be taken at the meetings of the Board or by circulation of proposal among the members of the Board. But the Board has the power to delegate authority in certain respects to an individual director or to a committee of directors.

Though, the shareholders cannot generally interfere or restrict the powers of the directors, but, in the following exceptional cases, the general meeting of shareholders may exercise powers conferred on the Board of directors:

i) where the directors act *mala fide* and against the interest of the company, for example, when their personal interest clash with their duty towards the company;

ii) where the Board of directors for some valid reasons becomes incompetent to act, for example, all the directors are interested in a particular transaction;

iii) where there is deadlock in management i.e., the directors are unwilling to exercise their powers, for example, when the directors are equally divided and, therefore; cannot come to any decision.

Powers to be exercised by Board only : Section 179(3) of the Companies Act, 2013 provides that the Board of directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board:

a) to make calls on shareholders in respect of money unpaid on their shares;

b) to authorise buy-back of securities under section 68;

c) to issue securities, including debentures, whether in or outside India;

d) to borrow monies subject to provisions of sections 180 and 186;

e) to invest the funds of the company;*

f) to grant loans or give guarantee or provide security in respect of loans;

g) to approve financial statement and the Board's report;

h) to diversify the business of the company;

i) to approve amalgamation, merger or reconstruction;

j) to take over a company or acquire a controlling or substantial stake in another company;

k) any other matter which may be prescribed:

However, the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditions as it may specify.

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* The acceptance by a banking company in the ordinary course of its business of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, or the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be deemed to be a borrowing of monies or, as the case may be, a making of loans by a banking company within the meaning of this section [Second Proviso to section 179(3)].

* This power shall however be subject to the provisions of sections 180 and 186.

Other powers to be exercised at Board Meetings: Besides the powers specified in section 179 there are certain other powers also which can be exercised only at the meeting of the Board. These include:

1. The power of filling casual vacancies in the Board (Section 161).
2. Sanctioning of a contract in which a director is interested (Section 188).
3. The power to recommend the rate of dividend to be declared by the company at the Annual General Meeting, subject to the approval by the shareholders.
4. The power to make political contributions (Section 182).
5. The power to appoint a person as managing director or manager who is holding either office in another company [Section 203].
6. The power to give loan to or invest in any shares of any other body corporate* [Section 186].
7. The power to enter into any contract or arrangement with a related party [Section 188].

Powers to be exercised with the sanction in general meeting: Section 180 of the Companies Act, 2013 provides that the Board of directors of a company cannot exercise the following powers without the consent of the shareholders by way of **special resolution**:

a) Sell, lease or otherwise dispose of the whole, substantially the whole, of the undertaking of the company, or where the company owns more than one undertaking, of the whole or substantially the whole, of any such undertaking.

   The aforesaid restriction shall not be applicable to the sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing.

b) Invest, otherwise than in trust securities, the amount of compensation received by it as a result of any merger or amalgamation.

c) Borrow monies exceeding the aggregate of the paid-up capital of the company and its free reserves. **'Borrowing' does not include temporary loans** (i.e., loans payable on demand or within six months such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character but excluding loans for capital expenditure) obtained from the company's bankers in the ordinary course of business.

The special resolution passed by the company in general meeting must specify the total amount up to which monies may be borrowed by the Board of Directors.

a) Remit or give time for the repayment of any debt due by a director.

b) Contribute to a charitable or other fund.

However, as per **section 181**, **t**he Board of Directors of a company may contribute to *bona fide* charitable and other funds any amount the aggregate

* Section 186 requires that not only the resolution be passed at a meeting of the Board but it must be a unanimous resolution.

of which, in any financial year, does not exceed five per cent of its average net profits for the three immediately preceding financial years. Any contribution beyond this ceiling will require the prior approval of shareholders. But, the resolution required to be passed is **ordinary resolution** only and not the special resolution.

Other restrictions on the powers of the Board: In addition to the restrictions imposed by Section 180, there other restrictions also:

i) **Restriction on making political contributions:** According to Section 182, Government companies and companies which have been in existence for less than three financial years are prohibited from making political contributions. Any other company may contribute any amount or amounts directly or indirectly to any political party or for any political purpose to any person. The amount of such contribution must not exceed seven and a half per cent of its average net profits during the three immediately preceeding financial years. Further, for making such contributions, a resolution authorising such contribution, should be passed at the meeting of the Board of directors.

   The company must disclose in its profit and loss account the amount or amounts of such contributions during the financial year to which that account relates, giving:

   a) particulars of the total amount contributed; and

   b) the name of the party to which such amount has been contributed.

ii) **Restriction on related party transactions (Section 188):** No contract or arrangement with a related party shall be entered into by the Board of directors, in the case of a company having the prescribed paid-up share capital, or transactions not exceeding such sums, as may be prescribed, except with the prior approval of the company by a **special resolution.** Further, no such member who is a related party shall vote on such special resolution.

   "related party" means –

i) a director or his relative;

ii) a key managerial personnel or his relative;

iii) a firm, in which a director, manager or his relative is a partner;

iv) a private company in which a director or manager is a member or director;

v) a public company in which a director or manager is a director or holds along with his relatives, more than two per cent of its paid-up share capital;

vi) anybody corporate whose Board of directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

vii) any person on whose advice, directions or instructions a director or manager is accustomed to act :

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

viii) anybody corporate which is –

A) a holding, subsidiary or an associate company of such company; or

B) a subsidiary of a holding company to which it is also a subsidiary;

C) an investing company or the venture of the company.

iii) **Restriction on Loans to Directors (Section 185):** Section 185 provides that a company shall not, directly or indirectly, advance any loan (including any loan represented by a book debt) to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

iv) **Restriction on payment of compensation for loss of office (Section 202):** No payment is made to a director who resigns in view of reconstruction or amalgamation of a company and takes some position as officer in reconstructed or amalgamated company or resigns or company is wound up due to the negligence or default of director or guilty of fraud, gross mismanagement or gross negligence or breach of trust.

v) **Office or place of profit (Section 188):** The same provisions that have been discussed above under restrictions on related party transactions are applicable to holding of office or place of profit by a director or his related party.

Managerial Powers of Directors

The directors are the elected representatives of shareholders and are entrusted with the power to manage the affairs of the company in the best interest of shareholders. The Board of directors has the following managerial powers:

i) power to make contracts with third parties on behalf of the company;

ii) power to recommend dividends;

iii) power to allot, forfeit and transfer shares of the company;

iv) power to appoint director to fill up the casual vacancy;

v) power to take decision regarding the terms and conditions for the issue of debentures;

vi) power to appoint managing director, manager or secretary of the company;

vii) power to form policy and issue instructions for the efficient running of the business; and lastly

viii) power of control and supervise of work of subordinates.

13.13 DUTIES OF DIRECTORS

You have learnt that directors of a company occupy an important position in the management of the company and they have vast powers. However, it is expected of them to exercise these powers for the public good and protect and safeguard the interests of the company and shareholders.

The duties of directors depend upon the nature and size of the company. While discharging their duties, they must comply with the provisions of the Articles

and the Companies Act. The duties given in the Articles will certainly vary from company to company.

The duties of directors can broadly be classified under the following two heads:

1) Statutory duties; and

2) General duties.

13.13.1 Statutory Duties

Some of the statutory duties of directors are:

a) **To file return of allotments** (Section 39) – Directors are undr a statutory obligation to file with the Registrar, within a period of 30 days, a return of the allotments stating the specified particulars.

b) **To disclose interest** (Section 184) - A director who is interested in a transaction of the company must disclose his interest to the Board. The disclosure must be made at the first meeting of the Board held after he has become interested.

c) **To disclose receipt from transfer of property** (Section 191) - Any money received by the directors from the transferee in connection with the transfer of the company's property or undertaking must be disclosed to the members of the company and approved by the company in general meeting.

d) **Duty to attend Board meetings** - A number of powers of the company are exercised by the Board of directors in their meetings held from time to time. Although a director may not be able to attend all the meetings but if he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board, his office shall automatically fall vacant [Section 167(1)(b)].

e) To convene Annual General Meeting (AGM) and also extraordinary general meetings [Sections 96 & 100].

f) To prepare and place at the AGM along with the financial statements including consolidated financial statement, if any, and auditors' report, a report by the Board of Directors covering the specified particulars (Sections 134).

g) To authenticate annual financial statement including consolidated financial statement, if any (Section 134).

h) To appoint first auditor of the company (Section 139).

i) To appoint cost auditor of the company (Section 148).

j) To make a declaration of solvency in the case of voluntary winding-up (Section 305).

It may be noted that the above is not an exhaustive listing of statutory duties of the Board.

13.13.2 General Duties

There are some duties of a general nature which every director must discharge.

The following are some of the general duties:

i) **Duty of good faith:** The directors occupy a fiduciary position in a company. Fiduciary position means a position of trust and confidence. Therefore, directors must act honestly and diligently in the interest of the company and shareholders. They just not make any secret profits from their dealings with the company. If a director makes some secret profits by utilising his position, he shall be liable to account for it.

ii) **Duty of reasonable care**: The directors should discharge their duties with reasonable care. The degree of care expected from him is the same as is reasonably expected from persons of their knowledge and status. If the directors fail to exercise due care and skill in the performance of their duties, they shall be liable for negligence. But they cannot be held liable for mere errors of judgement.

iii) **Duty not to delegate:** The directors must perform their duties personally. They are appointed because of their skill, competence and integrity, therefore, the maximum delegatus non potest delegare (a delegate cannot delegate further) is applicable to them. But if permitted by Articles of the company, the directors can delegate certain functions to the extent permitted by the Act of the Articles.

13.14 LIABILITIES OF DIRECTORS

The liabilities of directors may be considered under the following heads:

1. Liability to the company.
2. Liability to third parties.
3. Liabilities for breach of statutory duties.
4. Criminal liability.
5. Liability for acts of co-directors

1. **Liability to the company -** The liability of a director to the company may arise from :

   a) Breach of fiduciary duty,

   b) Ultra vires acts,

   c) Negligence, and

   d) Mala fide Acts.

a) **Breach of fiduciary duty -** Where a director acts dishonestly to the interest of the company, he will be held liable for breach of fiduciary duty. Most of the powers of directors are 'powers in trust' and therefore, should be exercised in the interest of the company and not in the interest of the directors or any section of members. Thus, where the directors, in order to forestall a take-over bid, transferred the unissued shares of the company to trustees to be held for the benefit of the employees, and an interest-free loan from the company was advanced to the trustees to enable them to pay for the shares, it was held to be a wrongful exercise of the fiduciary powers of the directors - **Hogg v. Cramphorm Ltd. [1967]**.

b) **Ultra vires acts -** Directors are supposed to act within the parameters of the provisions of the Companies Act, Memorandum and Articles of association, since these lay down the limits to the activities of the company and consequently to the powers of the Board of directors. Further, the powers of the directors may be limited in terms of specific restrictions contained in the Articles of association. The directors shall be held personally liable for acts beyond the aforesaid limits, being ultra vires the company or the directors. Thus, where the directors pay dividends or interest out of capital, they will be liable to indemnify the company for any loss or damage suffered due to such act.

c) **Negligence -** As long as the directors act within their powers with reasonable skill and care as expected of them as prudent businessmen, they discharge their duties to the company. But, where they fail to exercise reasonable care, skill and diligence, they shall be deemed to have acted negligently in discharge of their duties and consequently shall be liable for any loss or damage resulting therefrom. However, error of judgment will not be deemed as negligence. But, the Court may grant relief to directors against such liability under section 463 of the Act.

d) **Mala fide acts -** Directors are the trustees for the moneys and property of the company handled by them, as well as for exercise of the powers vested in them. If they dishonestly or in a mala fide manner, exercise their powers and perform their duties, they will be liable for breach of trust and may be required to make good the loss or damage suffered by the company by reason of such mala fide acts. They are also accountable to the company for any secret profits they might have made in course of performance of duties on behalf of the company.

Directors can also be held liable for their acts of 'misfeasance', i.e., misconduct or wilful misuse of powers.

2. **Liability to Third Parties -** The discussion on liabilities of directors towards third parties may be grouped as under:

1. Liability under the provisions of the Companies Act, 2013.
2. Liability for breach of warranty of authority.

Liability under the Companies Act - The directors shall be personally liable to the third parties, inter alia, under the following provisions of the Companies Act, 2013:

i) **Prospectus -** Failure to state any particulars as per the requirements of section 26 of the Act or mis-statement of facts in a prospectus renders a director personally liable for damages to the third party. Section 35 provides that a director shall be liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damages he may have sustained by reason of any untrue or misleading statement included therein. He may, however, escape liability where he proves that the prospectus was issued without his consent or he withdrew his consent before the issue of the prospectus.

ii) **With regard to allotment -** Directors may also incur personal liability for allotment before minimum subscription is received (Section 39).

If the amount stated in the prospectus as the minimum amount has not been subscribed and the sum payable on application is not received within a period of thirty days from the date of issue of the prospectus, or such other period as may be specified by the Securities and Exchange Board, the amount received as application money shall be returned within such time and manner as may be prescribed. In case of default, the company and its officer who is in default shall be liable to a penalty, for each default, of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

iii) **Fraudulent conduct of business** - Directors may also be made personally liable for the debts or liabilities of a company by an order of the Tribunal under section 339. Such an order shall be made by the Tribunal where the directors have been found guilty of fraudulent conduct of business.

Liability for breach of warranty - Directors are supposed to function within the scope of their authority. Thus, where they transact any business in respect of matters, ultra vires the company or ultra vires the articles, they may be proceeded against personally for any loss sustained by any third party.

3) **Liability for Breach of Statutory Duties -** The Companies Act, 2013 imposes numerous statutory duties on the directors under various sections of the Act. Default in compliance of these duties attract penal consequences. The various statutory penalties which directors may incur by reason of non-compliance with the requirements of the Companies Act have been discussed at appropriate places.

4) **Criminal liability -** Apart from civil liability under the Act or under the common law, directors of a company may also incur criminal liability under common law, as well as under the Companies Act, and other statutes.

For non-compliance of certain provisions of the Act, directors may incur criminal liability involving fine or imprisonment or both. Some of the provisions of the Act under which the directors incur criminal liability are:

i) issue of a prospectus containing an untrue statement.

ii) Failure to deposit application money in a schedule Bank.

iii) Fraudulently inducing persons to invest money in the company.

iv) Accepting deposits or inviting any deposit in excess of the prescribed limit.

v) Destruction, mutilation, alteration or falsification of any books, papers or documents.

vi) Failure to file annual returns.

vii) Default in holding the annual general meeting.

viii) Granting loans to directors without the necessary approvals.

ix) Failure to maintain proper accounts, etc.

5. **Liability for acts of co-directors:** A director is not liable for the acts of his co-directors unless he was a party to it. A director is not the agent

of his co- directors. He cannot be held liable on the ground that he ought to have discovered the fraud. But a managing director or the chairman signing the accounts without understanding its implications cannot escape liability.

13.15 COMMITTES OF THE BOARD OF DIRECTORS

You have read that directors of a company are appointed to manage the affairs of a company. They are responsible for controlling, managing and directing the affairs of a company. Board of Directors is a team of people elected by a company's shareholders. It represents the shareholders' interest and ensures that company management acts on their behalf to discharge their functions efficiently. In order to carry out their responsibilities efficiently and to handle the issues effectively the Board may constitute various committees. Each committee is formed for some specific work and members of these committees are experts in the specified field. The role and structure of each committee is defined by the Board of Directors. The Board is responsible for the acts of the committees. The various committees constituted by the Board under Companies Act 2013 are:

1) Audit Committee (2) Nomination and Remuneration Committee (3) Stakeholders relationship Committee (4) Corporate Social Responsibility committee.

Audit Committee

As per Section 177, every listed public company and such other companies as may be prescribed, to constitute an audit committee. Rule 6 of the Companies (Meetings of the Board and its Powers) Rules, 2014 requires the following classes of companies to constitute an Audit Committee of the Board—

i) all public companies with a paid up capital of ten crore rupees or more;

ii) all public companies having turnover of one hundred crore rupees or more;

iii) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

The Audit Committee shall consist of a minimum of three directors with independent directors forming a majority. The majority of members of Audit Committee including its Chairpersons shall be persons with ability to read and understand the financial statement.

As per the listing agreement, two third of the members of the Audit Committee shall be independent directors and the committee is required to be chaired by an independent director. The Company Secretary shall act as the secretary to the Audit Committee. The audit committee must meet at least four times a year and between two meetings not more than one hundred and twenty days shall elapse.

The primary focus of the Audit Committee is on the oversight of financial reporting and disclosures. It inter alia includes

i) making the recommendation for appointment, remuneration and terms of appointment of auditors of the company;

ii) reviewing and monitoring the auditor's independence and performance, and effectiveness of audit process;

iii) examining the financial statements and the auditors' report thereon;

iv) approving and modification of transactions of the company with related parties;

v) scrutiny of inter-corporate loans and investments;

vi) valuation of undertaking or assets of the company, whenever necessary;

vii) evaluation of internal financial controls and risk management systems; and

viii) monitoring the end use of funds raised through public offers and related matters.

The composition of Audit Committee needs to be disclosed in the Board's Report. If the Board of Directors has not accepted any recommendation of the Audit Committee, the same along with reasons thereof, is also required to be disclosed in the Board's report.

Nomination and Remuneration Committee

Section 178 requires every listed public company and such other class **of** companies as may be prescribed, to constitute the Nomination and Remuneration Committee of the Board of Directors. Rule 6 of the Companies (Meetings of the Board and its Powers) Rules, 2014 requires the following classes of companies to constitute a Nomination and Remuneration Committee of the Board—

i) all public companies with a paid up capital of ten crore rupees or more;

ii) all public companies having turnover of one hundred crore rupees or more:

iii) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

The Nomination and Remuneration Committee shall consist of a minimum of three non- executive directors with independent directors forming a majority. The chairperson of the company may be appointed as a member of the Nomination and Remuneration Committee but shall not chair the Committee. As per the listing agreement, all the members of the Nomination and Remuneration Committee shall be non-executive directors and the chairperson shall be an independent director. The Nomination and Remuneration Committee *inter alia* is responsible for:

i) identifying persons who are qualified to become directors and who may be appointed in senior management positions;

ii) specifying manner for effective evaluation of performance of Board, its committees and individual directors;

iv) formulating the criteria for determining qualifications, positive attributes and independence of a director; and

v) recommending to the Board, a policy relating to the directors, key managerial personnel and other employees.

Stakeholders Relationship Committee

Section 178(5) requires that a company which consists of more than one thousand shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year shall constitute a Stakeholders

Relationship Committee. The Stakeholders Relationship Committee is chaired by a non-executive director and may have other members as may be decided by the Board. This committee is primarily responsible for looking into the mechanism of redressal of grievances of shareholders, debenture holders and other security holders including complaints related to transfer of shares, non-receipt of annual report and non- receipt of declared dividends.

Corporate Social Responsibility Committee (CSR Committee)

As per Section 135 (1) every company having net worth of rupees five thousand crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during the immediately preceding financial year to constitute a Corporate Social Responsibility (CSR) Committee of the Board.

The CSR Committee shall consist of three or more directors, out of which at least one director shall be an independent director. The composition of the CSR committee shall be disclosed in the Board's Report.

The CSR committee is responsible for:

i) formulating and recommending to the Board, a CSR Policy indicating the activities to be undertaken by the company;

ii) recommending the amount of expenditure to be incurred on the CSR activities;

iii) monitoring the Corporate Social Responsibility Policy of the company from time to time.

It may be noted that the activities to be undertaken have been specified in Schedule VII of the Act and the company is required to spend, in every financial year, at least two per cent of the average net profit of the company made during the three immediately preceding financial years, on CSR activities. The activities include: (i) eradicating extreme hunger and poverty. (ii) promotion of educations; (iii) promoting gender equality and empowering women; (iv) reducing child mortality and improving maternal health; (v) ensuring environmental sustainability (vi) employment enhancing vocations skills etc.

Check Your Progress C

1) How do the directors of a company exercise their powers?

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2) List any four powers of directors which can be exercised only at Board meetings.

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3) Name important duties of a director.

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4) List the different committees formed by the Board of Directors.

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5) State whether the following statements are True or False:

i) The directors of a company have the power to do all such acts as the company is authorised do to.

ii) The power to issue debenture can be exercised only with the consent of shareholders in general meeting.

iii) The Board has the power to recommend the rate of dividend to be declared by the company.

iv) Casual vacancies can be filled up by the Board of Directors.

v) The directors can remit or give time for the repayment of any debt due by a director.

vi) A director must always act in the general interest of the company.

vii) A director interested in a contract must disclose his interest in such contract at the general meeting of shareholders.

13.16 LET US SUM UP

Since a company is an artificial person created by law, it can act only through human agents. These agents are known as directors. The directors collectively are called as 'Board of Directors'. Directors are the persons, who are responsible for directing, controlling the overall affairs of the company.

A public company must have at least three directors, a private company at least two directors and a 'one person company' must have at least one director. A company cannot have more than fifteen directors.

No individual can be a director of more than twenty companies at the same time. However, members, by passing a special resolution, may fix a lesser number. Further, out of the total number of twenty companies, his directorships in public companies cannot exceed ten including directorships in private companies that are either holding or subsidiary company of a public company.

All persons appointed as directors of the company must file with the Registrar their consent in writing to act as such. Director's legal position is quite interesting-sometimes they act as agents of the company, sometimes as trustees and sometimes even as managing partners of the company. They are also treated as officers of the company.

A person who is competent to contract can become a director. But a person of unsound mind, undischarged insolvent, persons convicted for moral turpitude and sentenced to six months imprisonment are disqualified to act as directors.

Directors can be appointed by Articles, by shareholders in general meetings, by the Board, by the third parties and by the Tribunal. The directors may be appointed on the basis of proportional representation.

The office of the director shall fall vacant on various grounds, such as, his calls are in arrears for at least six months, he absents himself from all the meetings of the Board of Directors held during a period of twelve months **with or without** seeking leave of absence of the Board, he fails to disclose his interest in any contract, etc.

The directors of a company can also be removed by shareholders, by the Tribunal.

The Act has given wide powers to directors which must be exercised by them in good faith and for the benefit of the company. There are certain powers which can be exercised by them only at the meetings of the Board and certain powers can be exercised by them with the consent of the shareholders in general meeting.

The directors are liable to the company for negligence, breach of trust, for ultra vires acts and for wilful misconduct. The directors are liable to third parties in some cases, e.g., when he acts in his own name, for misstatements in the prospectus, etc. The directors also incur criminal liability for non-compliance of the various provisions of the Act.

In order to carry out the responsibilities effectively the Board may constitute various committees under Companies Act 2013. These Committees are : 1) Audit committee, (2) Nomination and remuneration committee (3) Stakeholders relationship committees and (4) Corporate social responsibilities committee. The Board is responsible for the acts of the committee. The role and structure of each committee is defined by the board of directors.

13.17 KEY WORDS

Director: One who performs the functions of a director.

Trustee: One who holds some property in trust for the benefit of another person or persons.

Casual Vacancy: A vacancy caused by the death, insanity or insolvency of a director

Alternate Director: A director who is appointed in place of the original director.

Rotational Director: Directors who are liable to retire by rotation.

Ultra-vires the company: Beyond the powers of the company.

Misfeasance: Wilful misconduct or wilful negligence.

Criminal Liability: Punishment by way of fine or imprisonment or both.

Audit Committee: The purpose of audit committee is to provide oversight of financial reporting and disclosures.

CSR Committee: Its main purpose is formulating and recommending CSR policy and activities to be undertaken by company.

13.18 ANSWERS TO CHECK YOUR PROGRESS

A	5	i) False;	ii) True;	iii) True;	iv) False;	v) True
B	6	i) True;	ii) False;	iii) False;	iv) False;	
		v) False;	vi) True;	vii) False;	viii) True;	ix) False
C	5	i) True;	ii) False;	iii) True;	iv) True;	v) False;
		vi) True;	vii) True			

13.19 TERMINAL QUESTIONS

1) Who are the directors of a company? How are they appointed?
2) Explain the rules regarding the number of directors and directorships.
3) Discuss the legal position of directors.
4) What restrictions have been imposed by the Companies Act in respect of appointment of directors?
5) Explain the qualifications and disqualification for the office of a director.
6) What are the circumstances when the office of a director shall become vacant?
7) How can a director be removed from office before the expiry of their term of office?
8) Discuss the powers and duties of directors.
9) Explain the liability of directors towards the company and third parties. Can a director be held liable for criminal liability?
10) Describe the role and structure of Audit Committee of a Company.
11) Discuss the responsibilities of Nomination and Remuneration Committee.

Note: These questions will help you to understand the unit better. Try to write answers for them but do not submit your answers to the University. These are for your practice only.

UNIT 14 MANAGERIAL REMUNERATION

Structure

14.0 OBJECTIVES

After study of this Unit, you should be able to:

- explain the meaning of managerial remuneration;
- learn the mode of payment of managerial remuneration;
- know the overall ceiling including individual ceilings on managerial remuneration;
- describe the position about payment of managerial remuneration in a year the company makes a loss or has inadequate profits;
- explain the concept of effective capital; and
- understand the concept of sitting fee and the provisions relating to payment thereof.

14.1 INTRODUCTION

In the previous unit, you have learnt that a company essentially functions through the Board of directors. In this Unit, you will study the manner in which the members of the Board of directors are remunerated. You will appreciate that a public company may be using public money in a big way. Directors, therefore, cannot take away unreasonable amounts by way of remuneration for the services

that they render. Companies Act has, therefore, imposed certain restrictions on the amount that may be paid to them as remuneration. The amount paid to the directors for rendering their services in managing the affairs of the company is known as 'managerial remuneration'. In this Unit, you will study the definition of managerial remuneration and also the overall ceiling as well as individual ceilings imposed by the Companies Act with respect to such payments.

Before we understand the meaning of managerial remuneration, it is important to understand what constitutes a managerial position that entitles a person to receive managerial remuneration. Though the term managerial position has not been defined in the Act, a reference to section 197 clearly suggests that directors, including managing director and whole time director of the company and manager constitute managerial personnel. An executive in a company, howsoever, lofty position he may be holding in the company will not come under the concept of managerial personnel and accordingly any remuneration or compensation package received by him will not be counted as 'managerial remuneration' contemplated in the Act. Even a person carrying administrative designation of manager like general manager or any functional manager will not be included as a managerial personnel.

14.2 MEANING OF MANAGERIAL REMUNERATION

Managerial remuneration may take the form of monthly payments, say, salary, or a specified percentage of net profits or a commission and/or by way of a fee for each meeting of the Board (called sitting fee).

Section 2(78) defines "remuneration" to mean any money or its equivalent given or passed to any person for services rendered by him and includes perquisites as defined under the Income-tax Act, 1961. Explanation VI B to Schedule V further provides that "Remuneration" shall also include reimbursement of any direct taxes to the managerial person.

Section 197(3) provides that where any insurance is taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel. But, if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration.

14.3 WHAT IS NOT MANAGERIAL REMUNERATION?

Following are not included in managerial remuneration.

- Any insurance premium paid on a policy taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company. But, if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration [Section 197(3)].

- Any remuneration for services rendered by any director in any other capacity shall not be so included if—

  a) the services rendered are of a professional nature; and

  b) in the opinion of the Nomination and Remuneration Committee, if the company has such a Committee as per section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession [Section 197(*4*)].

- Guarantee commission' paid to a director ***(Suessen Textile Bearings Ltd. v. Union of India*** **[1984]**. The Court observed that *Guarantee Commission* received by the director is for personal liability which the director undertakes. Therefore, guarantee commission is not remuneration within the meaning of Section 197 (corresponding to section 309 of the previous Act) .

14.4 MODES OF PAYMENT

A director or manager may be paid remuneration by way of:

·monthly payment*; or

·specific percentage of net profit; or

·partly by one way or partly by other.

Besides, he may be paid sitting fee also for attending Board meetings.

An independent director may receive remuneration by way of sitting fees and reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.

Sitting Fees: The amount of sitting fees payable to a director shall not exceed the amount, as may be prescribed. **Rule 4 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014** has prescribed a ceiling of **rupees *one lakh rupees per meeting*** of the Board or committee thereof. Sitting fee is not defined in the Act. It means fee payable to director for attending meeting of the Board or Committee.

Overall Ceiling

The total managerial remuneration payable by a **public company** to its directors, including managing director and whole-time director and its manager in respect of any financial year **must not exceed eleven per cent of the net profits** of that company for that financial year [Section 197 (1)].

Check Your Progress A

1. What is the meaning of managerial remuneration?

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* The Delhi High Court in **Ravindra Kumar Sanghal v. Auto Lamps Ltd. [1984]** had held that the expression 'monthly ' remuneration excludes all payments what are not paid monthly, like bonus, leave encashment, etc.

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2. List the modes of payment of remuneration ?

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14.5 INDIVIDUAL CEILING ON MANAGERIAL REMUNERATION

Section 197 provides that *except with the approval of the company by a special resolution in general meeting—*

i) the remuneration payable to any one managing director; or whole-time director or manager shall not exceed five per cent. of the net profits of the company and if there is more than one such director, remuneration shall not exceed ten per cent. of the net profits to all such directors and manager taken together;

ii) the remuneration payable to **directors** who are neither managing directors nor whole-time directors shall not exceed:

   a) one per cent of the net profits of the company, if the company has a managing or whole time director or manager;

   b) three per cent of the net profits in any other case.

Private companies are exempted from the aforesaid ceilings of Sec. 197.

14.5.1 Remuneration paid to a Director in a Professional Capacity

Remuneration for services rendered by any director in any other capacity shall not be so included if—

(*a*) the services rendered are of a professional nature; and

(*b*) in the opinion of the Nomination and Remuneration Committee, if the company has such a Committee as per section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession [Section 197(*4*)].

14.5.2 Additional Remuneration from Subsidiary

Sub-section (14) of section 197 provides that any director **who is in receipt of any commission** and who is a managing or whole time director of a company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board's report.

14.6 EXCESS REMUNERATION PAID

If any director draws or receives, directly or indirectly, by way of remuneration any amount in excess of the limits prescribed under section 197 or without

the prior sanction of the Central Government, he shall refund the same within two years. Till the time he refunds the excess amount to the company, he shall hold it in trust for the company [Section 197(9)].

Further, the company cannot waive its recovery unless permitted by the Central Government.

14.7 MANAGERIAL REMUNERATION VIS-À-VIS SCHEDULE V

Part II of Schedule **V** allows a public company, to appoint a managing or whole-time director or a manager and fix their remuneration so long as the same is in accordance with the conditions laid down in Schedule V without seeking the prior approval of the Central Government.

The **salient features of Schedule V** are as follows:

Section I: Remuneration payable by companies having profits - A company having profits in a financial year may pay remuneration to a managerial person or persons not exceeding the limits specified in section 197 [*Already discussed under 'Individual ceilings on managerial remuneration'*].

Section II: Remuneration payable by companies having no profits or inadequate profits - Where in any financial year, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding the higher of the limits under (A) and (B) given below*:

A)	**Where the effective capital of a company is:-**	**Limit of yearly remuneration payable shall not exceed** (Rupees):-**
i)	Negative or less than 5 crores	30 lakhs
ii)	5 crores and above but less than 100 crores	84 lakhs
iii)	100 crores and above but less than 250 crores	120 lakhs
iv)	250 crores and above	120 lakhs *plus* 0.01% of the effective capital in excess of Rs. 250 crores

B) In the case of a managerial person who **was not:**

i) a security- holder holding securities of the company of nominal value of rupees five lakh or more; or

ii) an employee; or

iii) a director of the company or not related to any director or promoter at any time during the two years prior to his appointment as a managerial person **— 2.5% of the current relevant profit.**

* w.e.f. 12.9.18

** *Explanation*—It is hereby clarified that for a period less than one year, the limits shall be pro-rated.

However, to pay the remuneration to a managerial person as per the aforesaid ceiling limits, it has been made mandatory that:

i) payment of remuneration is approved by a resolution passed by the Board and, where a company has Nomination and Remuneration Committee, also by the Nomination and Remuneration Committee; and

ii) the company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a **continuous period of thirty days** in the preceding financial year before the date of appointment of such managerial person.

Schedule V allows companies to pay remuneration to their managerial personnel ***up to double the amount of the aforesaid ceiling,*** by observing the required procedure as stated above *and* passing a special resolution at the general meeting which shall remain valid for a period of three years.

Section III

The following companies may pay to a managerial personnel **up to two times the amount permissible under Section II** without the Central Government approval:

a) A **foreign company** with the approval of its shareholders in general meeting subject to the limits under section 197.

b) A ***newly incorporated company*** up to a period of seven years from the date of its incorporation.

c) A ***sick company*** for a period of five years from the date of sanction of scheme of revival.

A company in a Special Economic Zone as notified by Department of Commerce from time to time which has not raised any money by public issue of shares or debentures in India, and has not made any default in India in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in any financial year, may pay remuneration up to Rs. 2,40,00,000 per annum.

Besides the aforesaid remuneration, a managerial personnel of a company having no profits or having inadequate profits shall also be eligible to perquisites including contribution to provident fund, gratuity, encashment of leave at the end of the tenure.

The restrictions with regard to managerial remuneration contemplated under Sections 197 (including Schedule V) do not apply to a Private Companies

14.8 MEANING OF EFFECTIVE CAPITAL

The expression "effective capital", for the purposes of Schedule V is as follows:

1) Paid-up share capital

   (excluding share application money or advances against shares);

2) Share Premium Account

3) Reserves and Surplus

   (excluding revaluation reserve);

4) Long-term loans and deposits repayable after one year

(excluding working capital loans, over drafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements)

A sub total (1 + 2 + 3 + 4)

5) Investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities),

6) Accumulated losses

7) Preliminary expenses not written off.

B sub-total (5 + 6 + 7)

Effective Capital = A - B

14.10 TIME WHEN EFFECTIVE CAPITAL SHALL BE CALCULATED

Where the appointment of the managerial person is made in the year in which company has been incorporated the effective capital shall be calculated as on the date of such appointment. *In any other case*, the effective capital shall be calculated as on the last date of the financial year preceding the financial year in which the appointment of the managerial person is made.

Check Your Progress B

1. Mr. Weldon was appointed as a Director of Esquire Engineering Ltd. with effect from 1st October, 2012. Since the company, namely, Esquire Engineering Ltd. wanted to take full advantage of the wisdom and expertise of Mr. Weldon, it offered him remuneration payable on monthly basis and made an application to the Central Government for approval for payment of such remuneration. Anticipating the approval of the Central Government, Esquire Engineering Ltd. started paying such remuneration from the date of appointment and continued to do so till 31st March, 2013. the Central Government did not fully approve the remuneration proposed by the company and restricted the same to a lower amount. On scrutiny of the accounts, it was established that the company, till 31st March, 2013, has paid to Mr. Weldon a total sum of Rs.1.20 lacs in excess of the remuneration sanctioned by the Central Government.

   You are required to state with reference to the provisions of the Companies Act, 2013 in respect of recovery and waiver of recovery of the excess remuneration so paid, whether Mr. Weldon can keep the excess remuneration so received?

2. Examine whether the payment of following remuneration to Non-executive Directors (Directors who are neither in the whole-time employment of the company nor Managing Director) is in accordance with the provisions of the Companies Act, 2013:

   Sitting fee payable to Directors is increased from Rs.20,000 to Rs.30,000 per meeting by amending the Articles of Association.

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3. State briefly the legal requirements to be complied with by a public company to give effect to the following proposals:

   i) Payment of minimum remuneration to a whole-time director in a financial year when the company has suffered a loss. The appointment has been made in accordance with the conditions specified in Schedule V to the Companies Act and he is being remunerated by way of commission on net profits.

   ii) Appointment of a person as Managing Director without remuneration in accordance with the conditions specified in Schedule V to the Companies Act, when he is already holding position of a Managing Director in a Private Company.

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14.11 LET US SUM UP

The amount paid to the directors for rendering their services in managing the affairs of the company is known as 'managerial remuneration'. Managerial remuneration may take the form of monthly payments, say, salary, or a specified percentage of net profits or a commission and/or by way of a fee for each meeting of the Board (called sitting fee). Sitting fee cannot exceed rupees *one lakh rupees per meeting***.** An independent director may receive remuneration by way of sitting fees and reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.

Any insurance premium paid on a policy taken by a company on behalf of its managerial person is not to be included in managerial remuneration except where such person is proved to be guilty of any negligence, default, misfeasance, breach of duty or breach of trust.

Again, any remuneration paid to a director for services of a professional nature will not be included in his remuneration provided, in the opinion of the Nomination and Remuneration Committee/ Board of Directors, the director possesses the requisite qualification for the practice of the profession.

Also, 'Guarantee commission' paid to a director is not managerial remuneration.

The total managerial remuneration payable by a **public compa-ny** to its directors, including managing director and whole-time director and its manager in respect of any financial year **must not exceed eleven per cent of the net profits**

of that company for that financial year. Remuneration payable to any one managing director; or whole-time director or manager must not exceed five per cent. of the net profits of the company and if there is more than one such director, remuneration shall not exceed ten per cent. of the net profits to all such directors and manager taken together.

The remuneration payable to **directors** who are neither managing directors nor whole-time directors shall not exceed:

a) one per cent of the net profits of the company, if the company has a managing or whole time director or manager;

b) three per cent of the net profits in any other case.

Where in any financial year, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person any amount within the ceilings prescribed under Schedule V.

A private company may pay any amount to its managerial personnel including directors.

14.12 KEY WORDS

Nomination and Remuneration Committee: Nomination and Remuneration Committee is to comprise of three or more non-executive directors out of which not less than one-half shall be independent directors.

Sitting Fee : Sitting fees is the amount payable to a director for attending meetings of the Board or committees thereof.

14.13 ANSWERS TO CHECK YOUR PROGRESS

B) 1) As per Section 197, a director who is neither in the whole time employment of the company nor a managing director may be paid remuneration by way of monthly, quarterly or annual payment. No approval of the Central Government is required.

However, if any director draws or receive, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without the prior sanction of the Central Government, where it is required, he shall, refund such sums to the company and until such sum is refunded, hold it in trust for the company.

The company cannot waive the recovery of any sum refundable to it under sub-section (9) unless permitted by the Central Government.

2) **Sitting Fees:** The amount of sitting fees payable to a director cannot exceed the amount, as may be prescribed. **Rule 4 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014** has prescribed a ceiling of **rupees *one lakh rupees per meeting*** of the Board or committee thereof. Since the raise is within the specified celing, it shall be legally valid.

3) i) Depending upon the effective capital of the company, a whole-time director can be paid as per Schedule V.

ii) According to section 203 read along with Schedule V, the following shall be necessary:

a) Passing of resolution of the Board of Directors.

b) Remuneration from one or both the companies should not exceed the ceiling as prescribed under Schedule V

14.14 TERMINAL QUESTIONS

1. Explain in brief the limitations under the Companies Act, 2013 regarding payment of remuneration to the managerial personnel.
2. Explain the provisions of the Companies Act regarding the payment of minimum remuneration to managing director and whole time director in the event of loss or inadequacy of profits in a financial year of the company.
3. What is meant by 'Sitting Fee'? Is there any ceiling on the amount that may be paid to the directors of a public company? Discuss.

Note: These questions will help you to understand the unit better. Try to write answers for them but do not submit your answers to the University. These are for your practice only.

UNIT 15 COMPANY SECRETARY

Structure

15.0 OBJECTIVES

After studying this Unit, you should be able to:

- define a company secretary;
- describe the qualifications of a company secretary;
- learn the manner of appointment of a company secretary;
- explain the position of a company secretary; and
- describe the duties and liabilities of a company secretary.

15.1 INTRODUCTION

A company secretary plays an important role in the administration of a joint

stock company. The provisions of the Companies Act have become so complicated that it needs constant attention for their compliance. It has become practically impossible for the top management to supervise the routine administration as well as ensure the compliance with the provisions of the Act. It is for relieving the top management from this responsibility that company secretary is appointed. In this unit, you will learn the meaning of company secretary, his qualifications and appointment and the role played by him. You will also learn the duties and liabilities of a company secretary.

15.2 MEANING OF A COMPANY SECRETARY

A secretary is an officer of the company who is appointed to perform the ministerial or administrative duties. You should remember that it is not his duty to manage the affairs of the company; he is primarily concerned to ensure that the affairs of the company are conducted in accordance with the provisions of the Companies Act and Memorandum and Articles of Association of the company.

The Indian Companies Act, 2013 in section 2(24) defines a '**company secretary'** or 'secretary' as follows :

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

The Company Secretaries Act, 1980 defines a company secretary as "a person who is a member of the Institute of Company Secretaries of India" [Section 2(1)(c)].

Thus, to be a company secretary of a company, one has to be a member of the Institute of Company Secretaries of India.

A Section 8 Company i.e., an association not for profit' may appoint a Secretary who is not a member of Institute of Company Secretaries of India.

15.3 APPOINTMENT OF WHOLE-TIME COMPANY SECRETARY

15.3.1 Compulsory Appointment of a Whole-time Company Secretary

Section 203 read along with Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules 2014 (as amended) provide that every listed company and every other public company having a paid-up share capital of ten crore rupees or more shall have whole-time key managerial person which includes a company secretary.

However, in June, 2014, MCA with respect to unlisted public companies brought down the prescribed amount from ten crores to five crores in so far as appointment of whole-time company secretary is concerned. Through the insertion of Rule 8A, even the private companies with a paid up capital of rupees five crores or more are now mandated to have a whole-time company secretary.

You may note that the following classes of companies must appoint a company secretary, namely-

i) Every Listed company;

ii) Unlisted public company having a paid-up share capital of rupees five crore or more;

iii) Private company having a paid-up share capital of rupees five crore or more.

15.3.2 Manner of Appointment of Whole-time Company Secretary

The whole-time company secretary of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration [Section 203(2)].

15.3.3 Whole-time Company Secretary not to Hold Office in more than One Company

A whole-time company secretary, like any other key managerial personnel, shall not hold office in more than one company except in its subsidiary company at the same time [Section 203(3)].

However, he may be appointed a director of any company with the permission of the Board.

15.3.4 Vacation of Office of the Whole-Time Company Secretary

If the office of the whole-time company secretary is vacated, the resulting vacancy shall be filled up by the Board at a meeting of the Board within a period of six months from the date of such vacancy [Section 203(4)].

15.4 COMPANY SECRETARY IN PRACTICE

You have learnt that the term 'Company Secretary' here means a person who is a member of the Institute of Company Secretaries of India. A Company Secretary may accept full time employment as secretary of a company or he may choose to practice independently as a company secretary, either individually or in partnership with one or more practising company secretaries. According to Section 6 of the Company Secretaries Act, 1980 only a member of the Institute whether in India or elsewhere shall be entitled to practice provided that he has obtained from the council a certificate of practice.

Section 2(25) of the Companies Act, 2013 defines 'Secretary in practice' to mean a secretary who is deemed to be in practice within the meaning of sub-section (2) of section 2 of the Company Secretaries Act, 1980.

As per Section 2(2) of the Company Secretaries Act, 1980 a member of the Institute shall be deemed "to be in practice" when, individually or in partnership with one or more members of the Institute in practice or in partnership with members of such other recognised professions as may be prescribed, he, in consideration of remuneration received or to be received, engages himself, *inter alia*—

a) in the practice of the profession of Company Secretaries to, or in relation to, any company; or

b) offers to perform or performs services in relation to the promotion, forming,

incorporation, amalgamation, reconstruction, reorganization or winding up of companies; or

c) offers to perform or performs such services as may be performed by—

i) an authorised representative of a company with respect to filing, registering, presenting, attesting or verifying any documents (including forms, applications and returns) by or on behalf of the company,

ii) a share transfer agent,

iii) an issue house,

iv) a share and stock broker.

v) a secretarial auditor or consultant.

Check Your Progress A

1) Define a company secretary.

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2) Who can be appointed as secretary of a company?

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3) Who appoints the company secretary?

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4) What do you mean by a 'secretary in practice'?

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5) State whether the following statements are true or false.

i) Only a person who is a member of the Institute of Company Secretaries of India can he appointed as secretary of a company.

ii) A body corporate can be appointed as the secretary of a company.

iii) Every listed company and every other company having paid up share capital of Rs. 5 crore or more must appoint a whole-time secretary.

iv) A person having a graduate degree in commerce can be appointed, as a secretary.

v) A company secretary cannot be appointed as a director of the company.

15.5 REMOVAL OF A COMPANY SECRETARY

You know that the appointment of a company secretary is generally done by means of a resolution of the Board of directors, as such he can be removed by the Board of directors or by the managing director, if he is so authorised by the Board.

When a secretary is appointed, the terms and conditions of his service are stated in the service agreement. Usually, there is a clause in the service agreement which provides the manner in which he can be dismissed. The secretary, being an employee of the company is a servant of the company and his removal is governed by the common rules governing the relationship of master and servant. However, the secretary must be given due notice of termination of his employment in accordance with the terms and conditions of his employment. In case no period of notice is mentioned in the service agreement, a reasonable notice should be given, otherwise the company shall be liable to pay compensation to him. Even if the company secretary is appointed for a fixed term, the company can remove him before the expiry of the terms by giving him a reasonable notice.

The services of a secretary may, however, be terminated without notice for wilful disobedience, misconduct, negligence, incompetence or permanent disability. When the Tribunal orders compulsory winding up of the company, the order of the Tribunal shall be deemed to be the notice of discharge of a secretary along with other employees of the company.

15.6 POSITION OF A COMPANY SECRETARY

The position of a company secretary has undergone a tremendous change during the last so many years. He has arisen from the position of a clerk to an indispensible figure in the corporate hierarchy. The Companies Act, 2013 describes him as 'key managerial personnel' along with CEO/Managing director/ Manager, Whole-time director, and Chief Financial Officer. The position of a company secretary can be discussed under the following headings:

i) **As a Servant of the Company**: Lord Esher observed in the course of his judgment in **Barnett Hoares & Co. *vs.* The South London Tramways Co. Ltd.** that secretary is a mere servant, his position is that he is to do what he is told. There is a service agreement between the secretary and the company and his employment is governed by the terms and conditions of this agreement, therefore he is an employee of the company. He is to work under the control of the Board of directors. He has to carry out the orders of the directors. It is for the secretary to ensure effective execution and implementation of the management policies laid out by the Board. He cannot exercise independent discretion in the work assigned to him.

ii) **As an Agent of the Company:** Since the secretary is concerned with the administration of the company, he acts on behalf of the company. The duties of a secretary are of ministerial and administrative in nature. The routine matters relating to the company are left to be looked after by the secretary. He has to deal with the staff, workers, trade unions, shareholders and the outsiders. So he has to use his discretion in dealing with such matters. He is an important link between the company and the outsiders.

All policy decisions are conveyed by the secretary to the staff and outsiders.

iii) **As an Officer of the Company:** As one of the key managerial personnel, company secretary is treated as principal officer of the company as well as 'officer in default' for the purposes of various sections of the Act. As per section 205, the company secretary shall be responsible for—

a) reporting to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;

b) ensuring that the company complies with the applicable secretarial standards issued by the Institute of Company Secretaries of India and approved by the Central Government;

c) discharging such other duties as may be prescribed.

As noted above, company secretary is responsible for the compliance of various legal formalities under different Acts. He is bracketed with the managerial personnel including directors and is liable to punishment by way of imprisonment, fine or otherwise for violation of the provisions of the Companies Act.

Rule 10 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides that a Company Secretary shall also discharge, the following duties, namely:-

1) to provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers;

2) to facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings;

3) to obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act;

4) to represent before various regulators, and other authorities under the Act in connection with discharge of various duties under theAct;

5) to assist the Board in the conduct of the affairs of the company;

6) to assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices; and

7) to discharge such other duties as have been specified under the Act or rules; and

8) such other duties as may be assigned by the Board from time to time.

iv) **As an Advisor to the Board:** The secretary plays an important role and enjoys a unique position in the management of the company. Though the policies of the company are formulated by the directors, but since the secretary has complete information about all internal matters and changes in the policies of the government, he is in a better position to supply the required information and advice to the directors. He advises the Board on various legal matters. He can be described as the real guiding spirit behind the Board of directors.

From the above it should be clear to you that the position of the secretary has changed over the years. Though he has no managerial functions to perform, but he is described as a responsible officer of the company, he is the principal administrative officer of the company. We can state that while the directors are the brains of the company, the secretary is its ears, eyes and hands.

15.7 DUTIES OF A COMPANY SECRETARY

The duties of a company secretary vary from company to company depending upon its size, management structure and the personal qualifications of the secretary. In India, in private and in joint sectors, apart from the secretarial duties, the company secretary is normally entrusted with legal, administrative and management functions. In large sized companies, there are separate managers incharge of the functions relating to accounts, law and personnel etc. Even in such cases the role of the company secretary as the coordinator cannot be under estimated. It can be said that the company secretary acts in three fold capacity, namely, as an agent of the Board of directors, as a person incharge of secretarial work relating to the company and as chief administrative officer of the company.

The duties of a company secretary can broadly be divided into two categories - (a) statutory duties, and (b) general duties. The statutory duties can further be subdivided into two-duties under Companies Act and duties under other Acts.

15.7.1 Statutory Duties

Following are some of the statutory duties of the company secretary under the Companies Act:

i) Signing of any document or proceedings requiring authentication by the company under (Section 21).

ii) Filing of necessary documents and returns with the Registrar of Companies, e.g. return of allotment of shares, annual returns, annual accounts etc. (Section 39).

iii) Giving the notice of the increase in the share capital to the Registrar (Section 64).

iv) Delivering the share certificate within 2 months of allotment or within one month of registration of transfer (Section 56)(4).

v) Registration of charges with the Registrar of Companies (Section 77).

vi) Getting the name painted outside every office or the place of its business and to get is engraved on the seal, if any, of the company (Section 12).

vii) To make available for inspection and furnish copies of register of members (Section 94).

viii) Sending notice of general meetings to every member of the company (Section 101).

ix) Filing of certain agreements and resolutions with the Registrar (Section 117).

x) Keeping minutes of the proceedings of general meetings and of Board of directors and other meetings.

xi) To make available for inspection register of director and key managerial personnel and their shareholding (Section 171).

xii) Maintaining the various registers and statutory books of the company.

The Secretary shall be held responsible as an officer, in default, if there is a default in complying with the provisions of the Act relating to duties. According to Section 2(6), a secretary, among others, has been defined as an officer in default.

Duties under Other Acts: A company secretary has also to see to it that the requirements of other Acts are also complied with. Under the Income Tax Act, the secretary being the 'Principal Officer' is responsible for the deduction of income tax from the salaries of its employees and its deposition in the Government treasury. Under the Indian Stamp Act, the secretary should ensure that various documents like share certificates, transfer forms etc. are properly stamped as per the requirements of the Indian Stamp Act.

The secretary is also required to comply with the provisions of various labour and industrial laws such as The Factories Act, The Industrial Disputes Act, Minimum Wages Act, etc.

15.7.2 General Duties

Apart from the statutory duties stated above, a secretary is required to perform several general duties. These include:

i) To carry out the orders of the Board of directors.

ii) To assist the Board in the formulation of policy decisions.

iii) Not to disclose confidential information relating to the affairs of the company.

iv) Not to make any secret profits on account of his position.

v) To act as a medium and link between the company and outsiders.

vi) To provide information to the shareholders.

vii) To organise, supervise and coordinate the office work.

15.8 LIABILITIES OF A COMPANY SECRETARY

You have learnt that it is the duty and responsibility of a secretary to see that the affairs of the company are conducted in accordance with the provisions of the Companies Act, Memorandum and Articles of Association. If a default is made in complying with certain provisions of the Act, a secretary, being an officer of the company, shall be liable for fine and punishment.

The liability of a company secretary can be discussed under two headings, namely, statutory liabilities and contractual liabilities.

Statutory Liabilities

The company secretary may be held liable for the following matters under Companies Act :

i) **Default in filing returns as to allotment** - If a default is made in filing returns as to allotment of shares within the prescribed time, he shall be punishable with fine which may extend to one thousand rupees for every day during which the default continues or one lakh rupees, whichever is less [Section 39(5)].

ii) **Default in the preparation of share/debenture certificates –** As per section 56(4) the company shall deliver the certificates of all securities allotted, transferred or transmitted—

a) within a period of two months from the date of incorporation, in the case of subscribers to the memorandum;

b) within a period of two months from the date of allotment, in the case of any allotment of any of its shares;

c) within a period of one month from the date of receipt by the company of the instrument of transfer under sub-section (1) or, as the case may be, of the intimation of transmission under sub-section (2), in the case of a transfer or transmission of securities;

d) within a period of six months from the date of allotment in the case of any allotment of debenture:

Where the securities are dealt with in a depository, the company shall intimate the details of allotment of securities to depository immediately on allotment of such securities.

In case of default, the company secretary, as an officer in default, shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees [Section 56(6)].

iii) **Default regarding Register of members/debentureholders, etc. –** Failure will make company secretary, if he is in default, punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees and where the failure is a continuing one, with a further fine which may extend to one thousand rupees for every day, after the first during which the failure continues. [Section 88].

iv) **Default in the filing of particulars regarding charges** - If a default is made in filing with the Registrar the particulars of any charge created by the company, every officer of the company who is in default which includes a company secretary shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both [Section 86].

v) **Default regarding the publication of name of company** - If a default is made in getting the name and address of the registered office of the company painted or affixed or printed outside every office or place of business or printed on all its business letters, bill heads, etc., company secretary, if he is in default, shall be liable to a penalty of one thousand rupees for every day during which the default continues but not exceeding one lakh rupees [Section 12].

vi) **Default in filing of annual returns -** If a company secretary fails to file the annual return in or a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made thereunder, he shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees [Section 92].

vii) **Default in holding annual general meeting** - Default in holding the

annual general meeting in accordance with the provisions of sections 96 to 98, shall make him liable to a fine which may extend to one lakh rupees and in the case of a continuing default, with a further fine which may extend to five thousand rupees for every day during which such default continues. [Section 99].

viii) **Default in circulation of members' resolutions -** If a default is made in circulating members' resolution of which they have given notice to the company, he shall be punishable with fine which may extend to Rs. 25,000 [Section 111].

ix) **Default in registering certain resolutions and agreements -** This default shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees. [Section 117].

x) **Default in recording the minutes of the meetings -** If a default is made in recording the minutes of all proceedings of every general meeting and meetings of the Board, a fine of Rs. 5000 may be levied upon an officer in default which includes company secretary [Section 118].

xi) **Default in maintaining minute books or allowing inspection or furnishing copies of minutes to members** - If a default is made in furnishing a copy of the minutes within seven working days after the date of request by any member or if inspection is not allowed, he shall be liable for a fine of Rs. 5,000 for each such refusal or default, as the case may be. [Section 119].

xii) **Failure to give notice of Board's meeting -** A meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means. Failure to give notice will make every officer of the company whose duty is to give notice under this section (company secretary is such an officer) and who fails to do so shall be liable to a penalty of twenty-five thousand rupees [Section 173].

xiii) **Failure to maintain the register of directors and key managerial personnel and their shareholding –** Company secretary in default shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees. [Section 172].

xiv) **Failure to maintain register of inter-corporate loans and investments -** For this default company secretary, if he is in default shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees [Section 186].

Apart from the liability under the Companies Act, a secretary shall be liable for fine and punishment if he violates the provisions of the Income Tax Act, Indian Stamp Act, Sales Tax Act and labour and industrial laws.

The company secretary is also, as a principal officer, responsible to fulfil the duties cast upon him under the Foreign Exchange Management Act (FEMA).

Contractual Liabilities

In addition to the various statutory liabilities, a company secretary has several contractual liabilities which arise out of his service agreement, they are as follows:

i) he shall be liable for any loss or damages caused to the company by willful neglect or negligence in the discharge of his duties;

ii) he shall be personally liable if he acts beyond his authority;

iii) he shall be liable to account for the secret profits made by him by virtue of his position as a secretary;

iv) he shall be liable to indemnify the company for any loss suffered by the company as a result of disclosure of some secret information relating to the company;

v) he shall be liable for any fraud or wrong done to the company during the course of his employment.

15.9 RIGHTS OF A COMPANY SECRETARY

Some rights are given to the company secretary by the Act, Board of directors and the general meetings of shareholders. He also derives some rights out of the service agreement with the company. A secretary has the following rights:

i) right to control and supervise the working of his department;

ii) right to sign documents requiring authentication by the company;

iii) right to be indemnified for any loss suffered by him while discharging his duties.

iv) right to receive remuneration.

But a company secretary has no right to borrow money in the name of the company or to make allotment of shares or register transfer of shares without the express authority or consent of the Board of directors. He has no authority to call a meeting of the company.

From the above, it should be clear to you that secretary is responsible officer of the company and he has several statutory and contractual liabilities. But, he has to work according to the directions of the Board of directors.

15.10 ROLE OF A COMPANY SECRETARY

The company secretary plays an important role in company administration. The scope of his role depends on the size and nature of the company. He is liable not only to the company, but also to its shareholders, creditors, employees and the society.

From the discussion given above, a three-fold role of the company secretary can be visualized, namely, as a statutory officer, as a coordinator and as an administrative officer.

i) **Statutory Officer:** As a principal officer of the company, the company secretary is responsible for strict compliance with the various provisions of the Companies Act and the requirements of other Acts. He is responsible for proper maintenance of books of accounts and other registers. He has

to sign several documents such as annual returns, return of allotment, filing of documents with respect to verification of registered office for commencement of business. He is responsible for authentication of the financial statements, for holding meetings of directors and shareholders and maintaining minutes of such meetings.

As a statutory officer, the company secretary is responsible to comply with the provisions of other Acts, such as Income Tax Act, Sales Tax Act, Factories Act, Industrial Disputes Act, etc.

ii) **Coordinator**: A company secretary is the link between the Board of directors and other executives of the company. The Board lays down the policy decisions, but it is the secretary who ensures their proper implementation. He acts as a link between the Board, managing director and the Chairman on the one hand and with the staff on the other hand. In a company where there are several independent departments such as sales, purchase, personnel etc., he acts as a coordinator with these functionaries for ensuring that the policy decisions are duly carried out and if there are some matters which require further consideration, the secretary shall place them before the Board and convey the decision of the Board to the concerned department.

The company secretary also acts as a coordinator with trade unionists, auditors, shareholders of the company, Government and the community at large. He is to ensure the compliance of the provisions of Companies Act and various other Acts. He should see that the company functions in a manner as to achieve the declared objectives of the Government. With respect to corporate social responsibility (CSR) of the company, the secretary can advise the Board regarding the matters where the company can contribute to the welfare of the society as well as meet its CSR obligations.

iii) **Administrative Officer:** As a general administrative officer, he is responsible for efficient administration of the company. He has to supervise, control and coordinate the functioning of different departments such as finance, personnel, organisation. He should develop a strong and efficient organisational structure. He has also to ensure the safety and proper maintenance of the assets and properties of the company. He has to ensure that they are not misused. The company secretary is responsible for ensuring that records are maintained properly. With the fast changes taking place, a secretary is expected to play a still more important role in the administration of the company. He is to assist the Board in laying down the policies and dealing with the Government and financial institutions.

Check Your Progress B

1) How can the secretary of a company be removed?

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2) Enumerate the rights of a secretary.

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3) List any three statutory duties of a company secretary.

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4) What do you mean by three-fold role of a secretary?

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5) State whether the following statements are true or false.

i) A secretary can be removed by giving him a due notice.

ii) No notice is necessary for removing a secretary for wilful misconduct, negligence or permanent disability.

iii) A secretary appointed for a fixed term cannot be removed before the expiry of the term.

iv) A secretary can convene a general meeting, make allotment of shares, register transfer of shares.

v) Company secretary is responsible for the compliance of the provisions of the Companies Act and other laws of the country.

vi) The company secretary is liable only to the directors and not to the shareholders.

vii) Some managerial powers can be delegated by the Board to the secretary.

viii) A company secretary can make secret profit by using his position.

ix) A company secretary has to ensure the safety of the assets of the company.

15.11 LET US SUM UP

The term company secretary means a person who is a member of the Institute of Company Secretaries of India. Every listed company and every other company having a paid-up share capital of Rs. 5 crores or more must have a whole-time secretary.

The Companies Act also recognises the concept of company secretary in practice. A secretary who obtains the licence from the institute can only practice. A secretary is generally appointed by the Board of directors. He can be removed by a resolution of the Board or by the managing director, if he is so authorised by the Board. Before removing a secretary, a proper notice must be given to him. However, no notice is necessary for wilful misconduct, negligence, or permanent disability.

The company secretary occupies an important position in the company administration. His position is that of a servant, agent and an officer of the company. He has several statutory and other duties. Being an officer of the

company, he is liable to be fined or punished for not complying with the provisions of the Companies Act or other laws of the country. Because he is occupying a position of trust, he must not use his position to make secret profits. He must keep the matters of the company up to himself only.

A secretary plays a three-fold role-a statutory officer, a coordinator and an administrative officer of the company.

15.12 KEY WORDS

Company Secretary: A person who is a member of the Institute of Company Secretaries of India.

Secretary in Practice: An individual who is a member of the Institute of Company Secretaries of India and who has obtained from the Council a certificate to practice.

Statutory Duties: Duties laid down in the Statute.

Breach of Duty: Non-performance of a contractual or statutory duty.

Contractual Duties: Duties arising out of the contract.

15.13 ANSWERS TO CHECK YOUR PROGRESS

A	5	i)	True;	ii)	False;	iii) True;	iv) False;	
		v)	False					
B	5	i)	True;	ii)	True;	iii) False;	iv) False;	
		v)	True;	vi)	False;	vii) True;	viii) False;	
		ix)	True					

15.14 TERMINAL QUESTIONS

1) Define the term 'Secretary' under the Companies Act. Who can be appointed as a secretary of a company?

2) How is the secretary of a company appointed? State how can he be dismissed?

3) Discuss the legal position of a company secretary and state his main functions.

4) Enumerate the duties of a company secretary.

5) Discuss the statutory and contractual liabilities of a company secretary.

6) Discuss the role of a company secretary as (a) statutory officer, (b) coordinator and (c) administrative officer.

7) "The secretary is a link between the directors and shareholders of a company." Explain.

Note: These questions will help you to understand the unit better. Try to write answers for them but do not submit your answers to the University. These are for your practice only.

UNIT 16 MEETINGS OF SHAREHOLDERS AND BOARD

Structure

16.0 OBJECTIVES

After studying this Unit, you should be able to:

- explain the meaning of a company meeting;
- discuss the importance of company meeting;
- explain the various types of company meetings;
- list the requisites of a valid meeting;
- explain the rules regarding the notice, proxies, quorum, etc; and

- explain the different types of resolutions and the purposes for which they can be passed.

16.1 INTRODUCTION

A company, being an artificial person, cannot act by itself like a human being. The business of the company is carried on by the elected representatives, called as 'directors'. The decisions are taken by the directors at the meetings of the Board. But they cannot take decision on all matters relating to the working of the company. There are certain matters which are to be decided by the general body of shareholders. For this purpose, the meetings of the shareholders are held wherein decisions are taken by shareholders by means of passing resolutions. In this Unit, you will study the different types of meetings and the business transacted therein; and the rules regarding the holding and conduct of such meetings. You will also study the various types of resolutions and the purposes for which they are required.

16.2 MEANING OF MEETING AND ITS IMPORTANCE

'Meeting' may generally be defined as the gathering, assembly or coming together of two or more persons for transacting any lawful business. For proper working of the company, it is necessary that the shareholders meet as often as possible and discuss matters of mutual interest and take important decisions. Meetings provide a place for fruitful participation where free and frank discussion takes place. The decisions taken at the meetings generally become acceptable and are met with least resistance.

To constitute a valid meeting there must be at least two persons, because a meeting cannot be constituted by one person. But there are certain circumstances where one person can constitute a valid meeting, they are:

a) Where one person holds all the shares of a particular class, he alone can constitute a meeting of that class;

b) Where the meeting is called by an order of the Tribunal, the Tribunal may direct that one member of the company present in person or by proxy shall constitute a valid meeting.

Company meetings play a significant role in decision making process. They provide an opportunity to shareholders to review the working of the company and take policy decisions, thereby controlling the Board of directors. The directors are duty-bound to follow the decisions taken at the general meeting of shareholders. Meetings constitute a very important aspect in the management and administration in the company form of organisation.

16.3 KINDS OF MEETINGS

Company meetings can broadly be classified as follows

1) **Meetings of Shareholders:** Such meetings are also known as general meetings of the members which are held to exercise their collective rights. The meetings of the shareholders may again be of the following three types:

   a) Annual General Meeting;

   b) Extraordinary General Meeting; and

   c) Class Meeting.

2) **Meetings of Directors:** The directors are to act collectively in the form of a Board, and the decisions are taken at the meetings of the Board of directors. These meetings may again be of two types:

a) Meetings of the Board of directors; and

b) Meetings of the committee of directors.

3) **Other Meetings:** These meetings may be any of the following:

a) Meetings of debenture-holders;

b) Meetings of creditors

c) Meetings of creditors and contributories on the winding up of the Company.

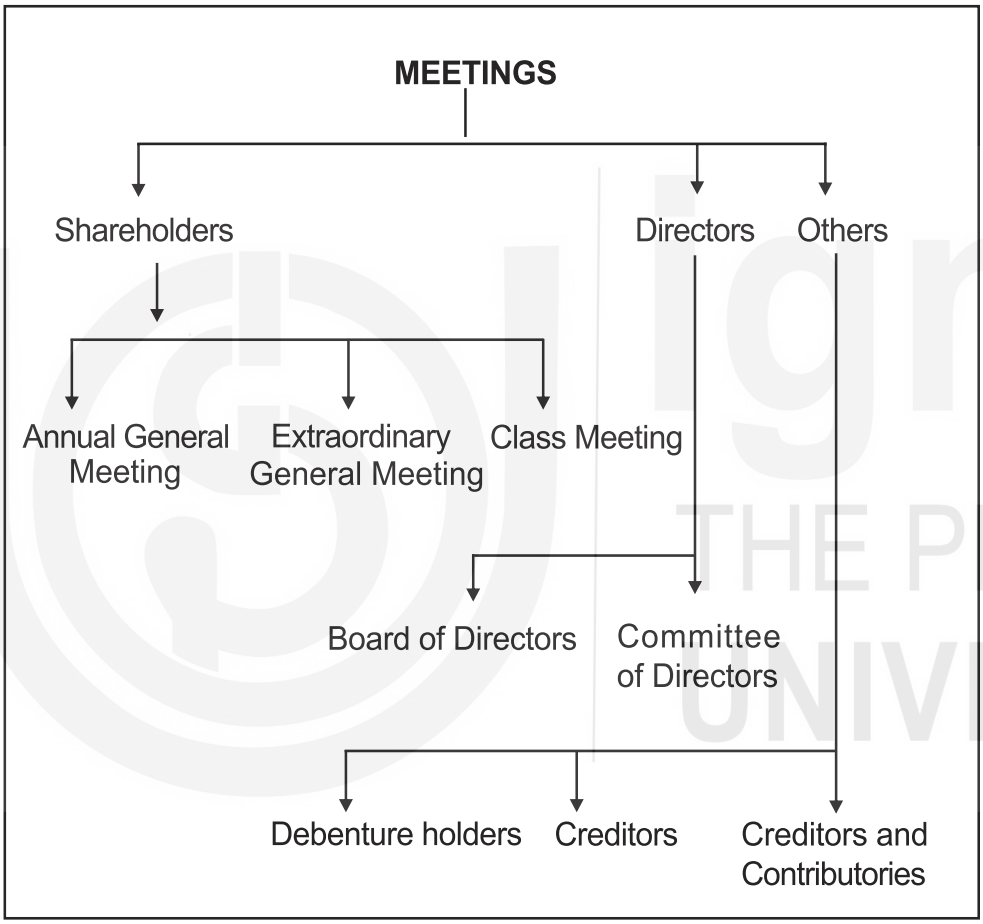

Figure 16.1: Will help you in understanding the types of meetings

Check Your Progress A

1) Define a meeting.

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2) List the different types of members' meetings.

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16.4 ANNUAL GENERAL MEETING

The annual general meeting of a company is an important means through which the shareholders get the opportunity to exercise their power of control. It is at this meeting that the directors retire and seek re-election. The shareholders get an opportunity of reviewing and evaluating the overall performance of the company during a year. The shareholders can place their views before the management and can seek clarifications on matters about which they are not satisfied. Thus, you may note that an annual general meeting is very important. Annual general meeting is held every year.

Every company, public or private, other than one man company must in each calendar year hold, in addition to any other meeting a general meeting, its annual general meeting and the notice must specify that it is the annual general meeting.

The holding of an annual general meeting is a statutory requirement.

Following are the rules regarding annual general meetings:

i) **First Annual General Meeting** - The first Annual General Meeting (AGM) of a company must be held within nine months from the date of the closing of its financial year. No extension of time can be allowed for holding the first AGM.

ii) **Subsequent AGMs**

a) There must be one meeting held in each year, i.e., calendar year. Where the first AGM of a company has been held within nine months from the date of the closing of its financial year then it need not hold another AGM in the year of its incorporation.

The meeting adjourned to next calendar year does not become meeting of that year **[Sree Meenakshi Mills Co. Ltd. v. Assistant Registrar of Joint Stock Companies** [1938] 8 Comp. Cas. 175 (Mad.).]

b) The gap between two AGMs must not be more than fifteen months.

c) Meeting must be held not later than six months from the close of the financial year.

Extension of Time

The Registrar may, for any special reason, extend the time within which any annual general meeting, **other than the first annual general meeting**, shall be held, by a period not exceeding three months [Section 96].

The aforesaid extension of 3 months can be given only by the Registrar. Courts are not empowered to grant the said extension - **Nungambakkam Dhanarakshaka Saswatha Nidhi Ltd. v. R.O.C. [1972]**

iii) The company must give **clear twenty-one days' notice** to: (i) every member of the company; (ii) the legal representative of a deceased member; (iii) the assignee of an insolvent member; (iv) the auditor(s) of the company; (v) every director of the company. Notice may be given either in writing or through electronic mode in the prescribed manner.

A shorter notice may also be given if it is agreed to by 95% of the members

entitled to vote at the meeting. The consent may be given in writing or by electronic mode.

iv) Every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated [Section 96 (2)]. Thus, no meeting can be called on a national holiday, for example, on 15th August, 2nd October and 26th January.

However, the Central Government may exempt any class of companies from the provisions of this sub-section subject to such conditions as it may impose.

v) The Board of directors can cancel or postpone the holding of the meeting on the scheduled date, but this power should be exercised by the Board bonafide and for proper reasons. The better course for the Board will be to hold the meeting and then have the matter decided by the meeting.

vi) **Consequences of not holding Annual General Meeting**

You learnt that holding of the annual general meeting is a statutory requirement. If a company makes a default in holding the annual general meeting in accordance with the provisions of Section 96 of the Companies Act, the following two consequences will follow:

a) Any member of the company can apply to the Tribunal for calling the meeting. On such application, the Tribunal may order the calling of the meeting, or it may issue directions for calling the meeting, which may even include a direction that one person present in person or proxy shall constitute the annual general meeting. A meeting called by the order of the Tribunal shall be deemed to be annual general meeting of the company (Section 97).

b) The company and every officer of the company who is in default shall be punishable with fine which may extend to one lakh rupees and in the case of a continuing default, with a further fine which may extend to five thousand rupees for every day during which such default continue (Section 99).

vii) **The Business to be transacted:** According to Section 102 of the Companies Act, 2013, at the annual general meeting ordinary business is to be transacted. Any other business can also be transacted at the annual general meeting, but that will be termed as 'special business. Thus, the annual general meeting can transact both ordinary and special business. The following ordinary business is generally transacted at every annual general meeting:

a) the consideration of the financial statements and the reports of the Board of directors and auditors;

b) the declaration of dividend;

c) the appointment of directors in the place of those retiring; and

d) the appointment of the auditors and fixing their remuneration

If any other business (other than those mentioned above) is to be transacted at the annual general meeting, it shall be treated as special business. Where any items of special business, as aforesaid, is to be transacted at the meeting, there shall be annexed to the notice calling such meeting, namely:—

the nature of concern or interest, financial or otherwise, if any, of—

i) every director and the manager, if any;

ii) every other key managerial personnel; and

iii) relatives of the persons mentioned in (i) and (ii) above.

The statement should also contain any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

You should note that the ordinary business requires an ordinary resolution, while the special business may be passed by an ordinary resolution or special resolution, as required by the Act.

You will study the details of ordinary and special resolutions later in 16.14 of this Unit.

16.5 EXTRAORDINARY GENERAL MEETING

All general meetings of a company other than the annual general meeting are called 'extraordinary meetings'. Extraordinary general meeting is a meeting which is held between two annual general meetings. These meetings are called in emergencies or on special occasions. This meeting is called to discuss some urgent special business which cannot be postponed till the next annual general meeting, for example, alteration in the Memorandum or Articles of Association, reduction of capital, issue of debentures, etc. All business transacted at such meeting is deemed to be special business.

An extraordinary general meeting may be called by

a) Board of directors on its own motion; or

b) the Board of directors on the requisition of members; or

c) the requisitionists themselves; or

d) the Tribunal.

a) **By the Board of Directors**: Clause 42 of Table F (Schedule 1) states that "the Board may, whenever it thinks fit, call an extraordinary general meeting." Notice of not less than 21 clear days' should be given (Section 101). A shorter notice may, however, be held valid if consent is accorded thereto by members of the company holding 95 per cent or more of the voting rights.

b) **By the Board on requisition:** According to Section 100 of the Act, the Board of directors must call an extraordinary general meeting of the company on the requisition of required number of members. The requisition letter for calling this meeting must be signed by members holding at least one-tenth of the paid-up capital and having a right to vote on the matter of requisition. In the case of a company having

no share capital, it must be signed by those members who have at least one-tenth of the total voting power.

The requisition must state the purpose for which the meeting is requisitioned and it must be deposited at the registered office of the company. You should note that only such matter can be taken up at the meeting which is specified in the requisition.

On receipt of a valid requisition, the Board of directors should, within 21 days, move to call a meeting and the meeting must actually be held within 45 days of the date of deposit of the requisition. A notice of 21 clear days is necessary for calling the extraordinary general meeting. A duty has been imposed on the management to disclose, in an explanatory statement all material facts relating to every special business to enable the members to form a judgement on the business.

c) **By the Requisitionists:** If the Board of directors fails to call the meeting within 21 days and the meeting is not held within 45 days of the deposit of the requisition, the meeting may be called by the requisitionists themselves. But the equisitionists must hold the meeting within three months from the deposit of the requisition. Such meeting must, as nearly as possible, be held in the manner as called by the Board of directors. When the requisitionists themselves call a meeting, they may recover the reasonable expenses incurred from the company, and the company may deduct such amount from the amount of remuneration payable to the directors in default.

   If the meeting is called by requisitionists, it can only transact the special, business for which it has been expressly convened. The resolutions, which are properly passed at such requisitioned meeting, shall be binding upon the company.

d) **By the Tribunal:** Under Section 98 of the Act, the Tribunal is empowered to call, hold or conduct such a meeting, if for any reason it is impracticable to call or conduct an extraordinary general meeting. The term 'impracticable' means not possible to call, hold or conduct the meeting in accordance with the provisions of the Act and Articles, for example, if the meeting cannot be called because of the rivalry of two groups.

   The Tribunal may order for the calling, holding and conducting such a meeting:

   a) on its own motion, or

   b) on an application of any director, or

   c) on an application of any member entitled to vote at that meeting.

The Tribunal should use this power sparingly and on being convinced that it is in the larger interest of the company. While calling a meeting, the Tribunal may give such directions as it thinks fit, including the direction, that one member present in person or by proxy would constitute the quorum.

Like any other general meeting, the notice of the extraordinary general meeting must also be given at least 21 clear days before the date of the meeting specifying the date, time and place of the meeting. The notice must also specify the special

business to be transacted at the meeting. You should note that unlike an annual general meeting, extraordinary general meeting may be held on any day including a national holiday. The meeting may be held at a place other than the registered office of the company or even outside the city in which the registered office is situated.

16.6 CLASS MEETINGS

Section 48 provides that where the share capital of a company is divided into different classes of shares, the rights attached to the shares of any class may be varied. To vary such rights, consent in writing of the holders of at least three-fourths of the issued shares of that class or with the sanction of a special resolution passed at a separate meeting of the holders of the issued shares of that class must be obtained.

In case variation by one class of shareholders affects the rights of any other class of shareholders, the consent of three-fourths of such other class of shareholders shall also be obtained.

Rights of dissentient shareholders

If the holders of 10 per cent of the issued shares of that class did not assent to the variation, they may make an application to the Tribunal. The application must be made within 21 days of the date of the consent or the passing of the special resolution. The Tribunal may, after hearing the interested parties, either confirm or cancel the variation. The company must, within 30 days of the service of the Tribunal's order, forward a copy of the order to the Registrar.

In case of default in complying with the aforesaid provisions, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

Check Your Progress B

1) What is an annual general meeting?

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2) What is the purpose of holding annual general meeting?

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3) What business is usually transacted at the annual general meeting of a company?

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4) What is an extraordinary general meeting?

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5) Who can call an extraordinary general meeting?

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6) What is the minimum number of members who can requisition an extraordinary general meeting?

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7) State whether the following statements are True or False.

i) The time interval between two annual general meetings shall not exceed fifteen months.

ii) The first annual general meeting must be held within fifteen months from the date of its incorporation:

iii) An annual general meeting may be called by giving a notice shorter than 21 days if all members entitled to vote give their consent.

iv) Declaration of dividend is an item of ordinary business.

v) Members of a company holding 5% of the voting power can requisition an extraordinary meeting.

vi) In an extraordinary general meeting of a company all business transacted is deemed to be special business.,

vii) The requisitionists may themselves convene an extraordinary general meeting within six months of depositing the requisition.

viii) An extraordinary general meeting can be called on a national holiday and at a place other than the registered office of the company.

ix) Rights of a particular class of shareholders may be varied by passing a special resolution at a general body meeting of all the shareholders.

16.7 BOARD MEETINGS

You have learnt that directors exercise their powers collectively at periodical meetings of the Board. The rules regarding the holding and conduct of Board

meetings are laid down by the Act and the Articles. Important provisions of the Companies Act, in this regard, are as follows:

1. **First Meeting:** According to section 173(1), every company shall hold the first meeting of the Board of Directors within thirty days of the date of its incorporation.

2. **Subsequent Meetings:** Every company must hold a minimum number of four meetings of its Board of Directors every year and the gap between two Board meetings must not be more than one hundred and twenty days.

   A One Person Company, small company shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days. Also the requirement as to quorum, as set out in section 174, shall not apply to One Person Company in which there is only one director on its Board of Directors [Section 173(5)].

3. **Participation of directors through video conferencing or other audio visual means [Section 173(2)]**

   The participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed.

4. **Notice of Board Meeting**

   A meeting of the Board shall be called **by giving not less than seven days' notice in writing** to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

   A meeting of the Board may be called at **shorter notice to transact urgent business** subject to the condition that at least one independent director, if any, shall be present at the meeting.

   In case independent directors are absent from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any [Sub-section (3)].

5. **Time and place of Board meeting**

   The notice must state the date, time and place of the meeting. Unlike the provisions of the Act regarding annual meetings, there is no provision in the Act specifying that Board meetings must be held at the registered office of the company or between business hours, namely, 9 A.M to 6 P.M. Thus, Board meetings may be held at any place and outside the business hours according to the convenience of the directors.

6. **Quorum**

   According to section 174(1), the quorum for a meeting of the Board of directors shall be 1/3rd of its total strength (any fraction contained in that 1/3rd to be rounded off to one) or two directors, whichever is higher. "Total strength" *shall not include* directors whose places are vacant. Again, interested director(s) shall not be counted for the purposes of quorum. The

participation of the directors by video conferencing or by other audio visual means shall also be counted for the purposes of quorum.

Can Articles fix a higher quorum? In *Amrit Kaur Puri* v. *Kapurthala Flour Oil & General Mills Co. (P.) Ltd.* [1984] 56 Comp. Cas. 194 (P&H), Punjab and Haryana High Court held 'yes', articles can fix higher quorum, they cannot, however, fix a lower number.

7. ***Interested directors:*** If, at any time, the number of interested directors exceed or is equal to 2/3rd of the total strength, the remaining directors, that is to say, the number of directors who are not interested, present at the meeting, being not less than two, shall be the quorum of such meeting [Section 174(3)].

Adjournment for want of quorum

If a meeting of the Board could not be held for want of quorum, then, unless the articles otherwise provide, the meeting shall automatically stand adjourned till the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a national holiday, at the same time and place [Section 174(4)].

Passing of Resolution by Circulation

No resolution shall be deemed to have been duly passed by the Board unless the resolution has been circulated in draft, together with necessary papers to all Directors, by post or by hand or by courier or by electronic means.

Where not less than 1/3rd of the total number of Directors require that any such resolution must be decided at the meeting, the Chairperson shall put the resolution to be decided at a meeting of the Board. Such resolution shall be a part of minutes of such meeting.

Check Your Progress C

1) What are the legal rules as regards the frequency of Board meetings?

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2) What is the quorum in a director's meeting?

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3) State whether the following statements are True or False:

i) A meeting of the Board of directors must be held at least once in every four months and at least three such meetings must be held in every year.

ii) The quorum for a Board meeting is one-third of its total strength or two directors, whichever is less.

iii) Every company must hold first meeting of the Board of director within six month of its incorporation.

iv) The Notice of the Board Meeting should not be less than seven days in writing.

16.8 REQUISITES OF A VALID MEETING

The decisions taken at the general meeting shall be valid and binding only if the meeting itself has been properly called and conducted. Any irregularity in calling or conducting the meeting shall invalidate the proceedings of the meeting. The company meetings must be conducted in accordance with the rules and regulations laid down in the Act and the Articles of Association. The following are the requisites of a valid meeting:

1) **Proper Authority**: The meeting shall be valid only when it is called by a proper authority. The proper authority to convene the meeting is the Board of directors. The Board of Directors should pass a resolution at its meeting to call the general meeting, otherwise the notice calling the meeting will become invalid and the proceedings of the company shall not be effective (**Harban vs. Phillips**). Thus, a notice issued by the secretary without the authority of a resolution of the board is patently invalid.

   Though the Board of directors is the authority to convene a general meeting, but under certain circumstances the meeting may be called by requisitionists or by the Tribunal.

2) **Proper Notice**: 'Notice' means an advance intimation of the meeting so as to enable the person concerned to prepare himself for it. A proper notice should be given to every member, legal representative of every deceased member, the assignee of an insolvent member; auditors and directors of the company. The notice must be clear and should state the purpose for which the meeting is called. The notice must either be in writing or through prescribed electronic mode. It must be given at least 21 clear days before the date of the meeting.

   You should note that deliberate omission to serve notice to one or more members will invalidate the meeting. But an accidental omission will not render the meeting invalid. Similarly, the non-receipt of the notice will not affect the validity of the meeting. The notice must state the place, date, day and hour (i.e., time) of the meeting.

3) **Quorum**: Quorum means the minimum numbers of members whose presence is necessary at the meeting for transacting the business of the company. In the absence of a quorum, no meeting can be held. Any resolution passed at a meeting without quorum shall be invalid.

4) **Chairman**: Every general meeting of the company should be presided over by a chairman. The chairman has to be there to conduct the meeting in a proper and smooth manner. The Articles usually provide the mode of appointment of the chairman of a meeting.

   If the Articles do not provide otherwise, the members who are personally present at the meeting shall elect one of themselves to act as the chairman of the meeting. The chairman should act bonafide and in the interest of the company, he must act in an impartial manner.

5) **Properly Conducted**: It is essential that the business at the meeting must be conducted according to rules. Company meetings are held for discussing particular issues relating to the company's working and taking a decision on the same. The matter should be placed in the form of a resolution, it should be discussed thoroughly, amendments to it should be carefully considered and then it should be decided by voting by show of hands or poll.

6) **Proper Record**: A proper record of the proceedings should be kept in the Minutes Book. Every company is required to maintain minutes of the proceedings of every general meeting and meetings of the Board and its Committees. When the minutes are confirmed and signed by the chairman, they are acceptable in a court of law as evidence of the proceedings.

16.9 NOTICE OF MEETINGS

The normal rule for any meeting of shareholders of a public company is that the meeting should be called by giving a notice of not less than 21 clear days.

The essentials of a valid notice are:

a) It must clearly state the date, time and place of the meeting as also the purpose of the meeting.

b) The notice must be issued on the authority of a resolution of the Board of directors.

c) The notice should be signed by a person authorised by the Board. Usually, a director of the Board or the company secretary would sign the notice.

d) It must be sent to all persons who are entitled to receive the notice.

The words "clear days notice" indicate that the day of serving the notice and the day of meeting are excluded. Thus in normal practice, 21 clear days would mean 23 days. Further, if the notice is to be sent by post, another 48 hours are to be added to the 23 days. Thus the notice must be sent at least 25 days before the date of the meeting. A shorter notice can also be given if consent is given in writing or by electronic mode by not less than 95% of the members entitled to vote at such meeting. The consents can be given either before or at the meeting.

Persons Entitled to Notice

Section 101 states that notice of every meeting of the company must be sent to :

i) every member of the company;

ii) the legal representative of a deceased member;

iii) the assignee of an insolvent member;

iv) the auditor(s) of the company; and

v) every director of the company.

However, if the notice pertains to the meeting of a particular class of shareholders, then it should be sent only to the shareholders of that class.

16.10 QUORUM FOR MEETINGS

A quorum is the minimum number of persons who must be present in order to constitute a valid meeting. If the quorum is not present, the meeting shall not be valid and the business transacted at such meeting will be invalid. The main purpose of having a quorum is to avoid decisions being taken at a meeting by a small minority which may not be acceptable to the vast majority of members.

Generally, the quorum is fixed by the Articles of the company. According to Section 103 of the Companies Act, 2013 unless the Articles provide for a larger number,

a) **In case of a public company**,—

   i) five members personally present if the number of members as on the date of meeting is not more than one thousand;

   ii) fifteen members personally present if the number of members as on the date of meeting is more than one thousand but up to five thousand;

   iii) thirty members personally present if the number of members as on the date of the meeting exceeds five thousand.

b) **In the case of a private company**, two members personally present, shall be the quorum for a meeting of the company.

   If within half an hour from the time appointed for holding a meeting of the company, a quorum is not present, the meeting, if called upon the requisition of members, shall stand dissolved [Section 174(3)].

   In any other case, if there is no quorum within half an hour from the time fixed for holding the meeting, the meeting shall stand adjourned to the same day in the next week, at the same time and place, or to such other day and at such other time and place as the Board may determine and notify.

   If at the adjourned meeting also, there is no quorum within half an hour from the time appointed for holding the meeting, then the members present shall form the quorum. But you must remember that there must be at least two persons to hold the meeting.

   According to Regulation 44 of Table F, the quorum must be present at the time when the meeting begins and proceeds, to take up business. It means that the quorum must be present at the beginning of the meeting and it need not be present throughout or at the time of taking votes on any resolution. But as regards the meetings of the Board of directors, the quorum must be present throughout the meeting. You should note that a quorum is presumed unless it is questioned at the meeting.

16.11 PROXY

The term 'proxy' means the person who is authorised to act and vote for another at a meeting of the company. Section 105 of the Companies Act, states that any member of a company who is entitled to attend and vote at a meeting of the company, is entitled to appoint another person as his proxy to attend and vote instead of himself. Thus, any person may be appointed as a proxy whether he is a member of the company or not. Unless the Articles provide

otherwise, a proxy cannot be appointed in the case of a company having no share capital.

1) As per Rule 19 of the Companies (Management and Administration) Rules, 2014, a member of a company registered under section 8 (i.e. association not for profit) shall not be entitled to appoint any other person as his proxy unless such other person is also a member of such company.

2) The appointment of proxy shall be in the Form No. MGT.11**.** Section 105(7) provides that an instrument appointing a proxy, if in the Form No. MGT.11, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instrument by the Articles.

3) A person can act as proxy on behalf of members not exceeding fifty and holding in the aggregate not more than ten percent of the total share capital of the company carrying voting rights. However, a member holding more than ten percent, of the total share capital of the Company carrying voting rights may appoint a single person as proxy and such person shall not act as proxy for any other person or shareholder.

The proxy Form must be signed by the appointer or his attorney duly authorised in writing and must be stamped. The instrument appointing a proxy should be deposited with the company forty eight hours before the commencement of the meeting. Any provision in the Articles of the company requiring the proxy form to be deposited earlier than 48 hours will be invalid.

The proxy has no right to speak at the meeting. However, a proxy can demand a poll. A proxy is not allowed to vote except on a poll.

Every notice of a meeting must clearly state that a member is entitled to appoint a proxy and that the proxy need not be a member. If default is made, every officer in default shall be punishable with fine up to Rs.5,000. But no invitation to appoint any person as proxy be made at the expense of the company and in case any such invitation is issued, the officer in default will be liable to fine up to Rs. one lakh.

Every member entitled to vote at a meeting of the company is entitled to inspect the proxies deposited at any time during the business hours. However, he must have given at least 3 days notice in writing of his intention to so inspect. Inspection may be done 24 hours before the meeting or during the meeting.

You must remember that a proxy is always revocable, but it can be revoked before the proxy has voted. For revoking the proxy, the company must be informed. Death or insanity of a member appointing the proxy revokes the proxy, but proper intimation to the company is necessary. If the member appointing the proxy personally attends and votes at the meeting, the proxy shall stand revoked.

16.12 VOTING

You have learnt that the business of the company is transacted at meeting. A motion becomes a resolution when it is duly passed at the meeting. The shareholders have the right to discuss every proposed resolution and propose amendments therein. After the motion is discussed, it is put to vote. The voting may be (a) by show of hands or (b) by taking a poll. (c) by postal ballot:

a) **By show of hands**: At any general meeting, a resolution put to the vote of the meeting shall, unless a poll is demanded under section 109 or the voting is carried out electronically, be decided on a show of hands. On a show of hands, each member shall have one vote. Unless the Articles otherwise provide, proxies are not entitled to vote in case of such voting, The chairman counts the hands 'for' and 'against' a resolution and declares the result and when it is recorded in the minutes it becomes a conclusive proof of the fact. However, the dissatisfied shareholders may challenge the validity of the passing of the resolution or they may demand a poll.

b) **By taking a Poll**: Section 109 provides that before or on declaration of the result of the voting on any resolution on a show of hands, a poll can be demanded. The chairman on his own motion may order voting by poll.

A poll shall be ordered to be taken by the Chairman, if a demand for poll is made by the person or persons specified below, namely

a) **In the case of a company having a share capital**, by any member or members present in person or by proxy and holding shares in the company:

   i) which confer a power to vote on the resolution not being less than 1/10th of the total voting power, or

   ii) on which an aggregate sum of not less than five lakh rupees or such higher amount as may be prescribed has been paid-up;

b) **In the case of any other company**, by any member or members present in person or by proxy and having not less than 1/10th of the total voting power.

The demand for a poll may be withdrawn at any time by the persons who made the demand.

Time of taking poll - On a valid demand for poll having being made, the chairman must order the poll to be taken forthwith where demand for poll relates to : (i) Adjournment (Section 109); (ii) Election of Chairman of the meeting [Section 104].

Where demand for poll relates to any other question, a poll must be taken at such time not being later than forty-eight hours from the time when the demand was made, as the chairman may direct.

Where a poll is to be taken, the chairman of the meeting shall appoint persons to scrutinize the poll process and votes given on the poll and to report thereon to him in the manner as may be prescribed.

You should note that as soon as a demand for poll is made, all decisions taken by voting by show of hands stand cancelled.

Also note that in a poll, the voting rights of a member are in proportion to his share of the paid-up equity capital of the company. If the Articles so provide, members holding shares on which calls are in arrear or in regard to which the company has right of lien, may not be allowed to vote in a poll.

When more than one resolution is put to vote, poll should be taken on each separately.

The result of the poll shall be deemed to be the decision of the meeting on the resolution on which the poll was taken.

Postal Ballot: Postal Ballot means voting by ballot, post or through electronic means. A company may transact those items through postal ballot which are prescribed by Central Government by notification. This does not apply if the directors or auditors have a right to be heard in a meeting.

16.13 CHAIRMAN

Chairman is the person who has been designated or elected to preside over and conduct the proceedings of a meeting. A chairman is necessary for conducting a meeting properly. He is the chief authority in the meeting, he is the umpire of debates and he regulates the meeting.

Articles usually provide the mode of appointment of the chairman of a meeting. But if there is nothing in the Articles, the members personally present at the meeting shall elect one of themselves to be the chairman of the meeting. If a poll is demanded on the election of the chairman, it must be taken forthwith and a chairman elected for the purpose [Section 104].

Regulations 46 and 47 of Table F state the rules regarding the appointment of chairman. Companies usually incorporate these regulations in their Articles. As per these Regulations, if there is no such chairman or if he is not present within fifteen minutes of the time fixed for holding the meeting, or is unwilling to act as chairman of the meeting, the directors present shall elect one amongst themselves to be chairman of the meeting. If at any meeting, no director is willing to act as chairman or if no director is present within fifteen minutes of the time fixed for holding the meeting, the members present shall choose one of themselves as the chairman.

The chairman has *prima facie* authority to decide all questions which arise at a meeting and which require decision at the time. He has the power to give his ruling on points of order, to expel any unruly member, to adjourn the meeting if it becomes impossible to conduct the meeting smoothly, to regulate the taking of poll, to sign and date the proceedings of the meeting. If so authorised by the Articles, the chairman may give his casting vote to decide the issue where the members are equally divided for and against the resolution.

The chairman must see to it that the proceedings of the meeting are conducted according to the rules, that proper order is maintained at the meeting, that proper opportunity is given to members to express their views. He should see that the voting is fair and the sense of the meeting is properly ascertained on each and every motion. He must act bonafide at all times and in the interest of the company.

16.14 RESOLUTIONS

Decisions of the members at a general meeting are expressed by way of resolutions. At the meetings a definite proposal in the form of a 'motion' is placed, it is discussed thoroughly and finally is put to vote. When the motion is passed by the requisite majority, it is called a resolution. In simple words, resolution means the decision taken at the meeting.

The Companies Act provides for three types of resolutions that may be passed at the general meeting of a company: (i) Ordinary resolution; (ii) Special resolution; and (iii) Resolution requiring special notice.

16.14.1 Ordinary Resolution [Section 114(1)]

An ordinary resolution is one which is passed by a simple majority that is to say that the votes cast in favour of the resolution exceed the votes cast against the resolution. For example, if at a meeting where, say, 81 members cast their votes in a manner that 41 cast votes in favour and 40 against the motion, the ordinary resolution is said to be taken as passed. The voting may be either by show of hands or through electronic mode or by poll. An ordinary resolution is required to pass the annual financial statements, to declare dividend, to appoint auditors, to elect directors, to increase authorised share capital, etc.

16.14.2 Special Resolutions [Section 114(2)]

A special resolution is one which is required for transacting special business and is required to be passed by a three-fourths majority. Again, the voting may be by show of hands or through electronic mode or by poll. In determining the three-fourths majority, all the votes cast by members, whether personally or by proxy, are considered.

According to Section 114(2) of the Companies Act, a resolution shall be a special resolution when :

a) the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members;

b) the notice required under the Companies Act (i.e., at least 21 clear days' notice) has been duly given of the general meeting;

c) the votes cast in favour of the resolution (whether by show of hands or on poll), by members present in person or by proxy are not less than 3 times the number of votes, if any, cast against the resolution. Abstentions, if any, are not to be taken into account.

The special resolution is necessary to transact important business. The Articles of the company may specify purposes for which a special resolution is required. The Companies Act also expressly requires the passing of special resolution on certain matters. The following are some of the instances where special resolution is necessary :

i) to change the name of the company;

ii) to alter the Articles of Association;

iii) to shift registered office of the company from one State to another;

iv) to reduce capital;

v) to issue sweat equity shares;

vi) to buy-back its own shares;

16.14.3 Resolution Requiring Special Notice [Section 115]

A resolution requiring special notice is, in fact, not a type of resolution, but is a kind of ordinary resolution for which a prior notice of intention to move the resolution has to be given to the company. With regard to certain matters, a special notice is required to be given of a resolution to be moved at a meeting of the company. The object is to give members sufficient time to consider the

proposed resolution. Where special notice of a resolution is required by the Act or the Articles, notice of the intention to move such resolution shall be given to the company by **such number of members holding not less than one per cent of total voting power or holding shares on which aggregate sum not exceeding five lakh rupees or such amount, as may be prescribed, has been paid-up.** The company, in turn, shall give its members notice of the resolution in such manner as may be prescribed.

Rule 23 of the Companies (Management and Administration) Rules, 2014, in this regard, provides as follows:

i) **t**he notice shall be **sent by members** to the company **not earlier than three months but at least fourteen days before the date of the meeting** at which the resolution is to be moved, exclusive of the day on which the notice is given and the day of the meeting.

ii) **The company shall** immediately after receipt of the notice, give its members **notice of the resolution at least seven days before the meeting**, exclusive of the day of dispatch of notice and day of the meeting in the same manner as it gives notice of any general meetings.

iii) Where it is not practicable to give the notice in the same manner as it gives notice of any general meetings, the notice shall be published in English language in English newspaper and in vernacular language in a vernacular newspaper, both having wide circulation in the State where the registered office of the Company is situated and such notice shall also be posted on the website, if any, of the Company.

iv) The notice shall be published at least seven days before the meeting, exclusive of the day of publication of the notice and day of the meeting.

Special notice is required to move, besides the resolutions mentioned in the Articles, the following resolutions:

1) a resolution appointing an auditor other than the retiring one [Section 140];

2) a resolution purporting to remove a director before the expiry of his period of office [Section 169]; and

3) a resolution to appoint another director in place of the removed director [Section 169].

16.15 MINUTES

The Companies Act provides that every company must keep the minutes of the meetings containing a fair and correct summary of all proceedings of the meetings. The minutes of a meeting should be recorded within 30 days of the meeting in the books called the minute book, kept for the purpose. Each page of the minute book should be initialled and last page signed and dated by the chairman of the meeting. Section 120 allows keeping of the minutes in electronic form in the prescribed manner. The minutes duly signed by the chairman are presumptive evidence that the meeting was duly called and held and all proceedings duly carried out. The minutes book should be kept in the safe custody so as to avoid any tempering of the same. The minutes book relating to the general meeting is open to inspection of any member of the company without charge during business hours for at least for 2 hours.

Further, a member of the company is entitled to be furnished within Seven days of his request with a copy of any minutes of the general meeting on payment of such sum as may be prescribed.

Check Your Progress D

1) What is meant by notice of a meeting?

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2) To whom the notice of meetings must be sent?

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3) Define Quorum.

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4) What is the quorum for the general meeting of members?

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5) What do you understand by proxy?

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6) When should a proxy be deposited with the company?

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7) What is 'poll'?

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8) What is a resolution?

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9) What is a special resolution?

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10) List three instances which require a special resolution?

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11) What is a resolution requiring special notice?

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12) Why is a chairman necessary for a meeting of a company?

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13) State whether the following statements are True or False.

i) The quorum at a general meeting of a public company is the personal presence of three members.

ii) For the purposes of quorum, only members present in person and not by proxies, are to be counted.

iii) One person cannot constitute quorum under any circumstances.

iv) The proxy must be a member of the company.

v) A proxy can speak at a general meeting and cast his vote on a show of hands.

vi) A resolution put to vote at a general meeting shall be decided on a show of hands in the first instance.

vii) A poll can be demanded by any ten members of the company.

viii) An ordinary resolution is passed by a simple majority.

ix) A special resolution is passed by a two-third majority.

x) A special resolution is required to be passed for changing the name of a company.

xi) An ordinary resolution is necessary for issuing sweat equity shares.

xii) For appointing another director in place of the removed director, a resolution requiring special notice is necessary.

16.16 LET US SUM UP

The general meetings of members are of great importance in the working of the company. The members in the general meetings give the guidelines to the directors for carrying on the business of the company.

The meeting of the members can be of three types: (a) annual general meeting, (b) extraordinary general meeting, (c) Class meeting.

An annual general meeting is required to be held each year to transact ordinary business, such as presentation of audited financial statements, declaration of dividends, appointment of directors and auditors. The first annual general meeting must be held within a period of 9 months from the close of the first financial year. Subsequent annual general meetings must be held every calendar year with a gap not exceeding 15 months between the two AGMs. Besides, AGM must be held within a period of 6 months from the close of the financial year. Every person entitled to receive the notice, must get a notice at least 21 clear days before the date of the meeting.

Any meeting other than an annual general meeting is called an extraordinary general meeting. Such meetings may be convened at any time to transact some urgent business which cannot be postponed till the next annual general meeting. Such meeting can be convened by the directors either on their own motion or on requisition from members or by the requisitionists themselves on the failure of the Board to call the meeting or by the Tribunal.

The directors exercise their powers collectively at periodical meetings of the Board. Every company shall hold first meeting of the Board of directors within thirty days of its date of incorporation. It must hold minimum four meetings of the Board of directors every year. The participation of directors can be in person or through video conferencing. A meeting of the Board shall be called by giving not less than seven days in writing.

Unless the Articles provide for a larger number, the quorum shall be two members personally present in the case of a private company and **in case of a public company**—

i) 5 members personally present if the number of members present are up to 1000;

ii) 15 members personally present if the number of members present are more than 1000 but up to 5000;

iii) 30 members personally present if the number exceeds 5000.

Members of a company having share capital have a statutory right to appoint proxies. A proxy need not be a member of the company. A proxy cannot speak at the meeting but he can vote on a poll. The voting at the general meetings may be either by show of hands, through electronic mode or by taking a poll.

The decisions in meeting are taken in the form of resolutions. There are three types of resolutions : (i) ordinary, (ii) special, and (iii) resolution requiring special notice.

Ordinary resolution is one which is passed by simple majority of votes of members present in the meeting. An ordinary resolution is needed to transact ordinary business, for example, to adopt financial statements, declare dividend etc.

Special resolution is one where it is specifically mentioned in the notice calling the meeting. Such a resolution can be passed only by three-fourths majority. Special resolution is necessary for altering the Memorandum, for reducing share capital, for issue of sweat equity shares, for purchase of its own shares by a company, etc.

A resolution requiring a special notice is one where the mover of the resolution is required to give notice to the company at least 14 days before but not earlier than 3 months of the date of the meeting about the intention to move the resolution. A special notice is required before moving a resolution for removing a director before the expiry of his term, for appointing another person as a director in place of the removed director, for providing that the retiring auditors shall not be reappointed etc. Every company must keep the minutes of the meeting containing a fair and correct summary of all proceedings of the meetings. The minutes should be recorded within 30 days of the meeting in the minute book.

16.16 KEY WORDS

Meeting: An assembly of two or more persons for transacting some lawful business.

Notice: An intimation in writing about the date, day, place and time of the meeting.

Quorum: Minimum number of members who must be present at a meeting to transact a business.

Agenda: Matters to be discussed at the meeting.

Chairman: The person who presides over the meetings.

Motion: A proposal put before the meeting for consideration.

Resolution: When a motion is duly passed, it becomes a resolution or decision.

Proxy: A person appointed by the shareholder to represent and vote for him at a meeting.

Poll: A method of voting where a member records the number of votes in proportion to equity shares held by him.

Minutes: Written record of the proceedings of a meeting.

16.17 ANSWERS TO CHECK YOUR PROGRESS

B	7	i) True; ii) False; iii) False; iv) True; v) False; vi) True ; vii) False; viii) True; ix) False
C	3	i) True ii) True iii) False iv) True
D	13	i) False ii) True iii) False iv) False v) False vi) True vii) False viii) True ix) False x) True xi) False xii) True

16.18 TERMINAL QUESTIONS

1) What are the different types of meetings of a company? Explain the purpose of holding such meetings.

2) What are the requisites of a valid meeting?

3) What is 'notice' of a meeting? Explain briefly the rules regarding the notice of general meeting.

4) What is the significance of annual general meeting? What business is generally transacted at such meetings?

5) How an extraordinary general meeting be convened?

6) What is a 'special resolution'? For what purposes are such resolutions necessary?

7) Is a special resolution and a resolution requiring special notice same thing? Indicate two instances where special notice is necessary.

8) What do you mean by 'quorum'? What happens if there is no quorum at a meeting?

9) Write an explanatory note on proxies.

10) Discuss the provisions of the Companies Act regarding the meeting of the Board of Directors.

Note: These questions will help you to understand the unit better. Try to write answers for them but do not submit your answers to the University. These are for your practice only.