GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

JUNE 2017

MODULE 1

THE INSTITUTE OF
Company Secretaries of India
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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These answers have been written by competent persons and the Institute hopes that the **GUIDELINE ANSWERS** will assist the students in preparing for the Institute's examinations. It is, however, to be noted that the answers are to be treated as model answers and not as exhaustive and the Institute is not in any way responsible for the correctness or otherwise of the answers compiled and published herein.

The Guideline Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be well versed with the amendments in the Laws/Rules made upto **six** months prior to the date of examination.

C O N T E N T S

NOTE: Guideline Answers of the last Sessions need to be updated in the light of changes and references given below:

PROFESSIONAL PROGRAMME

UPDATING SLIP

ADVANCED COMPANY LAW AND PRACTICE

MODULE – 1 – PAPER 1

Examination Session	*Question No.*	*Updations required in the answers*
All previous sessions	—	All answers are based on the notified provisions of Companies Act, 2013 and the provisions of Companies Act, 1956 which are still in force. SEBI (ICDR) Regulations, 2009 as amended from time to time. SEBI (LODR) Regulations, 2015 as amended from time to time.

UPDATING SLIP

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

MODULE – 1 – PAPER 2

Examination Session	*Question No.*	*Updations required in the answers*
All previous sessions	—	All answers are based on the notified provisions of Companies Act, 2013 and the provisions of Companies Act, 1956 which are still in force. SEBI (SAST) Regulations, 2011 as amended from time to time. SEBI (ICDR) Regulations as amended from time to time. Consolidated FDI Policy as amended from time to time.

UPDATING SLIP

CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY

MODULE – 1– PAPER 3

Examination Session	*Question No.*	*Updations required in the answers*
All previous sessions	—	Provisions under the Companies Act, 2013 relating to mergers, winding up are already notified. Provisions of Insolvency and Bankruptcy Code relating to Insolvency Professionals, Insolvency Professionals Agency, Corporate Insolvency Resolution Process, Liquidation Process, Insolvency and Bankruptcy Board of India, Information Utilities, Voluntary Liquidation Process, etc. are already notified.

PROFESSIONAL PROGRAMME EXAMINATION

JUNE 2017

ADVANCED COMPANY LAW AND PRACTICE

Time allowed : 3 hours *Maximum marks : 100*

NOTE: *1. Answer **ALL** Questions.*

2. All references to sections relate to the Companies Act, 2013 unless stated otherwise.

Question 1

(a) Tempest Ltd., an unlisted company, has 500 shareholders, 400 debenture holders and 200 deposit holders. As a Company Secretary of the Company Advise the Board, if the Company is required to form a Stakeholders' Relationship Committee? Discuss the provisions relating to the functioning of such a committee. (5 marks)

(b) PGA Limited receive a deed of transfer of equity shares complete in all respect, before registering the transfer, it was noticed by the Company that the proposed transferee of the equity shares has deceased, please explain the course of action of PGA Limited in the aforesaid case. What if the PGA Limited is unaware about the such status of transferee ? Also explain whether the company is bound to enquire into the capability of the transferee to enter into a contract. (5 marks)

(c) Fortune Ltd. had below financial details during the last three financial years : (₹ In Crores)

Year	*Net Worth*	*Turnover*	*Net Profit*
2016-17	*100.00*	*490.00*	*5.50*
2015-16	*95.00*	*500.00*	*4.50*
2014-15	*80.00*	*380.00*	*2.00*

Discuss the compliance requirements for the Company on Corporate Social Responsibility.

Whether Company requires to spend amount on CSR Activities, and what are the consequences if the Company fails to spend any amount ? (5 marks)

(d) Prudent Ltd. an unlisted Company having 4,00,000 equity shares of ₹10 each, conducting its general meeting. Ramesh a Proxy of Suresh (Ramesh holds 42,000 equity shares in that Company), demands a Poll to pass a Resolution. Explain the Rights of Ramesh in the capacity of Proxy, whether he will be allowed to demand a Poll ? Also explain the role of the Chairman of the meeting in the case. (5 marks)

Answer 1(a)

Section 178(5) of the Companies Act, 2013 stipulates constitution of a Stakeholders' Relationship Committee as mandatory for every company consisting of more than 1000

shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year. Section 178(6) states that the Committee shall consider and resolve the grievances of security holders of the company.

Further, section 178(7) stipulates that the chairperson of the committee shall attend the general meetings of the company and in his absence, any other member of the Committee authorised by him in this behalf shall attend the general meetings of the company.

In view of the aforesaid provisions of the Companies Act, 2013, Tempest Ltd. is required to form a Stakeholders' Relationship Committee and also to comply with the above provisions.

Answer 1(b)

As per section 56 of the Companies Act, 2013, a company shall register the transfer of shares when a proper instrument of transfer, in Form S.H. 4, duly stamped, dated and executed by or on behalf of the transferor and the transferee has been delivered to the company within a period of sixty days from the date of execution, along with the certificates.

If the transferee dies before registration and the company has notice of his death, a transfer of shares cannot be registered in the name of the transferee who is already deceased. With the consent of the transferor and the legal representative of transferee, the transfer may be registered in the name of the legal heirs of the deceased transferee or his nominee, if any. In case of dispute, an order of the court will be insisted by the company before affecting the transfer and till that time the transfer will be kept in abeyance.

Wherein, the death of the transferee is not notified to the company, the company can register the transfer in the name of the deceased transferee, in as much as the company is not aware of the death of the transferee and the transfer is done *bona fide* by the company, as per the information available with it.

In *Killick Nixon Ltd.* v. *Dhanraj Mills Ltd.* (1983) 54 Com Cases 432, it was held that the company is not bound to enquire into the capability of the transferee to enter into a contract. The company has to act on the basis of what is presented in the transfer deed.

Answer 1(c)

Section 135(1) of the Companies Act, 2013 provides that every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

Section 135(3) requires that the Committee shall formulate and recommend to the Board, a CSR Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII. The Committee shall further recommend the amount of expenditure to be incurred on CSR activities and monitor the Policy from time to time.

As per section 135(5) of the Act, the Board shall ensure that the company spends, in every financial year, at least 2% of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy.

Accordingly, Fortune Ltd. whose net profits during the current year exceeds rupees five crore is required to comply with the requirements of section 135 and form a CSR Committee as explained above and spend an amount of rupees eight lakh (being 2% of the average net profits of rupees four crore). However, the company shall seek to give preference to the local area and areas around it where it operates for spending the aforesaid amount.

However, if Fortune Ltd. fails to spend such amount, the Board shall, in its report made u/s 134(3)(o), specify the reasons for not spending the amount.

Answer 1(d)

Section 109(1)(a) of the Companies Act, 2013 prescribes that before or on the declaration of the result of the voting on any resolution on show of hands, a poll may be ordered to be taken by the Chairman of the meeting on his own motion, and shall be ordered to be taken by him on a demand made in that behalf, in the case a company having share capital, by the members present in person or by proxy, where allowed, and having not less than 1/10th of the total voting power or holding shares on which an aggregate sum of not less than five lakh rupees or such higher amount as may be prescribed has been paid-up.

Section 109(4) prescribes that a poll demanded on any question other than adjournment of the meeting or appointment of Chairman shall be taken at such time, not being later than 48 hours from the time when the demand was made, as the Chairman of the meeting may direct.

The Chairman of the meeting shall get the poll process scrutinized and shall appoint such number of persons, as he deems necessary, to scrutinise the poll process and to report thereon to him in the prescribed manner. The Chairman shall declare the result of the voting on poll. [Rule 21 of Companies (Management and Administration) Rules, 2014].

Hence, in the given case, Ramesh, a proxy of Suresh, who holds more than 10% of the equity shares/voting powers, has right to demand the poll and the Chairman of the meeting shall conduct the same accordingly.

Attempt all parts of either Q. No. 2 or Q. No. 2A

Question 2

(a) Priya is a Whole-Time Director in Surya Limited and Sun Limited, wishing to draw Remuneration from both the Companies. As per the limits prescribed under the Companies Act, 2013, she is entitled to draw a remuneration of ₹10,00,000 from Surya Ltd. and ₹15,00,000 from Sun Limited, you being a Company Secretary advise Ms. Priya about her entitlement for the Remuneration in the aforesaid situation. (4 marks)

(b) Prism Ltd. appointed Mr. Sameer Rajpal as an Independent Director for a term of Three years, upon completion of his first term, he was re-appointed for another term for the same period, now upon completion of the second term, Company again wants to re-appoint him as the Independent Director of the Company, considering the fact that he has not completed the consecutive term of Ten years. Advise the Company on the feasibility of his re-appointment. (4 marks)

(c) Decide if the office of Mr. Satish Nirankar, Director of Royal Ltd. shall be vacated in the following circumstances :

(i) he did not attend any board meeting of the Company during the financial year 2016-17, but had promptly sent his leave of absence to Company by e-mail on 31st March, 2017, the last Board Meeting of Financial Year, which was acknowledged by the Company.

(ii) he is convicted by a court of an offence, not involving any moral turpitude and is sentenced for imprisonment for one year but immediately files an appeal in higher Court against the order of the lower Court. (4 marks)

(d) List the matters that cannot be dealt with in a meeting through video conferencing or other Audio Visual means. (4 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) A Ltd. has entered into a contract with B Ltd. by which the former will reserve 25% of their output to be sold to B. Ltd. or to a buyer at the direction of B Ltd. Can B Ltd. be called an associate company of A Ltd. ?

Also determine, if S Private Ltd. with a paid-up share capital of ₹45 lakh and annual turnover of ₹175 lakh, is a wholly owned subsidiary of H Ltd., a listed company. Can S Ltd. be called a small company ? (4 marks)

(ii) Decide whether the following transactions will fall within the ambit of "deposits" as defined under the Companies Act, 2013, quoting relevant provisions of the Act :

(a) Great Ltd. received an application money of ₹5 lakh on 1st January, 2017 towards allotment of equity shares, pursuant to an offer made earlier. The Company has neither made the allotment of shares nor refunded the application money so far.

(b) Great Ltd. collected a security deposit of ₹5 lakh from Mr. Parteek, an employee whose monthly salary was ₹25,000 per month.

(c) Will your answer be different, if the security deposit earned an interest at the rate of 6% per annum ?

(d) Great Ltd. collected a security deposit of ₹ 25 lakhs from Mr. Sorabh towards performance of the contract for supply and erection of a machinery. (4 marks)

(iii) Favourite Ltd., an unlisted Company, has the following figures at the end of the last financial year :

Paid-up share capital	:	*₹110.00 Crore*
Turnover	:	*₹600.00 Crore*
Borrowings by way of loans, debentures and deposits	:	*₹60.00 Crore*

Being a Company Secretary, advise the Company on the composition of its Board of Directors as required under the Companies Act, 2013. (4 marks)

(iv) List the conditions to be satisfied for declaration of dividend out of reserves. *(4 marks)*

Answer 2(a)

According to second proviso to sub–section (1) of section 197 of the Companies Act, 2013, 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.

Since the question has no information about profit of these companies, let us assume both companies do not have adequate profit to give salary to its whole time directors.

According to clause (d) of Part-I of Schedule V of the Companies Act, 2013, if a person is a managerial person in more than one company, he shall draw remuneration from one or more companies subject to the ceiling provided in Section V of Part-II of the said schedule.

The said section V of Part-II provides that subject to the provisions of sections I to IV, a managerial person shall draw remuneration from one or both companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is a managerial person.

According to Table A, where a company have negative or less than rupees five crore effective capital, it may give yearly remuneration to its whole time directors up to Rs. 60 lakh.

Hence, Ms. Priya is advised that she can draw remuneration from both the companies together up to rupees sixty lakh only.

Answer 2(b)

Section 149(10) of the Companies Act, 2013 prescribes that subject to the provisions of section 152, an independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

Section 149(11) states that 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 provided that an independent director shall not, during the said period of three years, be appointed in or be associated with the company in any other capacity, either directly or indirectly.

General Circular No. 14/2014 issued by MCA dated 9th June, 2014 clarifies that though an independent director is to be appointed for a term up to 5 years, there is no bar on appointment for a term of less than 5 years. However, such appointment for less than 5 years is to be counted as one term and at the end of two such consecutive terms, the director should demit his office, even if the total number of years of his appointment in such two consecutive terms is less than 10 years. In such a case, at the end of the 2 consecutive terms, he cannot be reappointed again as independent director and the cooling period of 3 years shall start.

In view of the above, Prism Ltd. cannot reappoint Mr. Sameer Rajpal as Independent director of the company at the end of second consecutive term.

Answer 2(c)

Section 167 of the Companies Act, 2013 provides that, among other grounds, the office of a director shall become vacant in case —

(i) 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. [Section 167(1)(b)]

(ii) 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 and the vacancy is irrespective of the fact that he has filed an appeal against the order of such court. [Section 167(1)(f) read with its proviso]

Case (i) :

In present case, he did not attend any of the Board meetings held during the financial year 2016-17. The office of directorship held by Mr. Satish Nirankar shall become vacant on completion of one year from the last meeting he attended.

The fact that he has given leave of absence and the company has acknowledged it shall have no effect.

Case (ii) :

When he is convicted by a court for more than six months (1 year in this case), his office shall be vacated even though the offence does not involve moral turpitude and even if he has filed an appeal against the order of the lower court in the higher court.

Answer 2(d)

Section 173(2) of the Companies Act, 2013 read with Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 prohibit the dealing of the following matters through video conferencing or other audio visual means –

(i) Approval of the annual financial statements;

(ii) Approval of the Board's report;

(iii) Approval of the prospectus;

(iv) Audit Committee Meetings for consideration of financial statement including consolidated financial statement if any, to be approved by the board under section 134(1) of the Act; and

(v) Approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

Answer 2A(i)

According to section 2(6) of the Companies Act, 2013 "associate company", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having

such influence and includes a joint venture company. "Significant influence" means control of at least 20% of total share capital, or of business decisions under an agreement.

In the instant case, B Ltd. controls more than 20% of the sale and disposal of the output of A Ltd. Thus, A Ltd. is the associate of B Ltd. But A Ltd. neither influences the business decision of B Ltd. in any manner nor does it control 20% of the total share capital of B Ltd. Hence B Ltd. cannot be called an associate of A Ltd.

Section 2(85) of the Act defines a "small company" as a company, other than a public company—

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

(ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees.

However, the definition excludes a holding company or a subsidiary company; a company registered under section 8; or a company or body corporate governed by any special Act.

In the instant case, S Private Ltd. satisfies the turnover and paid-up share capital criteria to be a small company, but being a subsidiary of H Ltd., falls under the exclusions to the definition and hence, is not a small company.

Answer 2A(ii)

The definition of deposits as per Rule 2 (c) of the Companies (Acceptance of Deposits) Rules, 2014, prescribes that 'deposit' includes any receipt of money by way of deposit or loan or in any other form, by a company.

(a) Deposit does not include any amount received and held pursuant to an offer made in accordance with the provisions of the Act towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment, so long as such amount is appropriated only against the amount due on allotment. If the securities for which application money or advance for such securities was received cannot be allotted within 60 days from the date of receipt of the application money or advance for such securities and such application money or advance is not refunded to the subscribers within 15 days from the date of completion of 60 days, such amount shall be treated as a deposit. [Rule 2 (c)(vii)]

In the instant case, the application money has been received on 1st January, 2017 and till date neither the allotment nor refund of the application money has been made. Further, 60 days of receipt of application money have already elapsed; hence the amount shall be treated as deposit.

(b) Deposit does not include any amount received from an employee of the company not exceeding his annual salary under a contract of employment with the company in the nature of non-interest bearing security deposit. [Rule 2 (c)(x)]

The security deposit of Rs. 5,00,000 collected from Mr. Prateek Rustagi as an employee, exceeds his annual salary of Rs. 3,00,000 and hence will be treated as deposit.

(c) In case, the security deposit earns interest at 6% per annum, that again violates the requirement of being non-interest bearing security deposit and hence it shall be treated as deposit. [Rule 2 (c)(x)]

(d) Deposit does not include any amount received in the course of, or for the purposes of, the business of the company as security deposit for the performance of the contract for supply of goods or provision of services [Rule 2 (c)(xii)(c)].

In the instant case, the security deposit of Rs. 25 lakh received from Mr. Sorabh Jain against performance of the contract for supply and erection of machinery shall not be treated as deposit.

Answer 2A(iii)

Sec 149 of the Companies Act, 2013 read with relevant rules provides for the following–

(a) Every public company shall have a Board of Directors consisting of minimum 3 Directors and maximum 15 directors. However, by passing special resolution, the company can appoint more than 15 directors.

(b) Every public company having a paid-up share capital of Rs.100 Crore or a turnover of Rs. 300 Crore shall appoint at least one woman director. Favourite Ltd. satisfies the paid-up share capital and turnover criteria and hence should appoint at least one woman director in the Board. [Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014]

(c) Every public company with a paid-up share capital of Rs. 10 Crore or more, or turnover of Rs. 100 Crore or more or outstanding loans, debentures and deposits exceeding Rs. 50 Crore should appoint at least two directors as independent directors. Favourite Ltd. satisfies all the criteria and hence is required to appoint minimum two independent directors in the Board. [Rule 4 of Companies (Appointment and Qualification of Directors) Rules, 2014]

In the instant case, the Company is advised that it should constitute a Board of minimum 4 directors out of which 2 (two) directors shall be independent directors and out of such 2 (two) independent directors, one shall be a woman director.

Answer 2A(iv)

Section 123 of the Companies Act, 2013 read with Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014 provides for the declaration of dividend out of reserve in the event of inadequacy or absence of profits in any year, a company may declare dividend out of surplus subject to the fulfilment of the following conditions –

(a) The rate of dividend shall not exceed the average of the rates at which dividend was declared by it in the 3 immediately preceding financial years. This condition shall not apply to a company which has not declared any dividend in each of the three preceding financial years.

(b) The total amount to be drawn from such accumulated profit shall not exceed

one-tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement.

(c) The amount so drawn shall first be utilized to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.

(d) The balance of reserves after such withdrawal shall not fall below 15% of its paid-up share capital as appearing in the latest audited financial statement.

Attempt all parts of either Q. No. 3 or Q. No. 3A

Question 3

(a) Advise whether the auditor appointment by a private limited company with paid-up share capital of ₹30.00 Crore in the following cases are valid for the financial year 2017-18 :

(i) Amarjeet, (an Individual Auditor) who has been the auditor since financial year 2011-12.

(ii) Firm VAP & Co., who completes 10 years continuously, at the end of financial year 2016-17. Vijay is a partner in VAP & Co.

(iii) Firm Ajay & Co., in which Vijay is also a partner in addition to being a partner of VAP & Co. (4 marks)

(b) Excel Ltd., an unlisted company, has a paid-up share capital of ₹30 Crore, turnover of ₹190 Crore and borrowings of ₹25 Crore and outstanding deposits of ₹30 Crore. Decide if the Company needs to comply with internal audit requirements under the Act. If so, can they appoint Siddh, who is the Practising Company Secretary, as their internal auditor ? (4 marks)

(c) Crown Ltd. has proposed to come out with a public issue of equity shares and in order to enable their employees to subscribe to the Company's shares, wants to extend loans to the employees including directors and key management personnel. Advise. (4 marks)

(d) "A Company being an artificial person having status in the eyes of the law." In light to this statement, please comment whether a company incorporated in India is having the status of a Citizen of this Country ? (4 marks)

OR (Alternate question to Q. No. 3)

Question 3A

Write notes on the following :

(i) CARO 2015

(ii) Pre-certification of e-forms

(iii) Consequence of non-registration of Charge

(iv) 'SPICE'. (4 marks each)

Answer 3(a)

Section 139(2) read with Rule 5 of the Companies (Audit and Auditors) Rules, 2014 provides for rotation of auditors. The said provisions are applicable to a private limited company having paid-up share capital of Rs. 20 Crore or more.

The aforesaid provisions prescribe that an individual auditor who has completed the term of five years cannot be reappointed as an auditor in the same company for five years from the completion of his term, likewise an audit firm which has completed the 2 terms of five years each cannot be eligible for re-appointment as auditor in the same Company for five years from the completion of such terms. [Section 139 (2) (i) & (ii)]

Also, if two or more audit firms have common partner, and one of these firms has completed two terms of five consecutive years, none of such audit firms shall be eligible for reappointment as auditor in the same company for 5 years from completion of such term.

In view of the given case:

(i) Amarjeet, an Individual cannot be appointed as auditor because he has completed the term of 5 consecutive years.

(ii) YAP & Co. cannot be appointed as the firm has completed the term of 10 consecutive years.

(iii) Ajay & Co. also cannot be appointed as it has a common partner with VAP & Co. which is not eligible of reappointment.

Answer 3(b)

Section 138 of the Companies Act, 2013 read with Rule 13 of the Companies (Accounts) Rules, 2014 stipulates that the following class of companies shall be required to appoint an internal auditor or a firm of internal auditors —

(i) Every listed company;

(ii) Every unlisted public company having paid up share capital of ₹ 50 Crore or more during the preceding financial year, or turnover of ₹ 200 Crore or more during the preceding financial year, or outstanding loans or borrowings from banks or public financial institutions exceeding ₹100 Crore or more at any point of time during the preceding financial year or outstanding deposits of ₹ 25 Crore or more at any point of time during the preceding financial year; and

(iii) Every private company having turnover of ₹ 200 Crore or more during the preceding financial year or outstanding loans or borrowings from banks or public financial institutions exceeding ₹100 Crore or more at any point of time during the preceding financial year.

The internal auditor so appointed, may or may not be an employee of the company. The internal auditor shall be either a Chartered Accountant or a Cost Accountant or any other professional as may be decided by the Board.

In the instant case, Excel Ltd. being an unlisted company, exceeds the prescribed

limit of outstanding deposit, *i.e.*, Rs. 25 Crore as applicable for such class of companies and hence is required to appoint an internal auditor. The provision allows appointment of any other professional other than Chartered Accountant or Cost Accountant as internal auditor and hence, Excel Ltd. can appoint Siddh who is the Company Secretary in practice, as internal auditor of the Company with the due approval of Board.

Answer 3(c)

Section 67(2) of the Companies Act, 2013 provides that no public company shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of purchase or subscription to be made by any person for any shares in the company or its holding company.

However, under section 67(3)(c) the above restriction does not apply to a loan by a company to persons in the employment of the company other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of 6 months with a view to enabling them to purchase or subscribe for fully paid up shares in the company or its holding company to be held by them by way of beneficial ownership.

In view of the above, Crown Ltd. can provide a loan up to a maximum of 6 months' salary or wages to their employees, but not to any director or key managerial personnel as such persons are explicitly excluded in the section.

Answer 3(d)

According to the Citizenship Act, 1955 only a person can be citizen of India. Definition of person given in Clause (f) of sub – section (1) of section 2 of that Act does not include any company or association or, body of individuals, whether incorporate or not.

In the case of *British India Steam Navigation Co. Ltd.* v. *Jasjit Singh*, AIR, 1964, S.C 1451:(1964), the Supreme Court held that Shipping Corporation of India Ltd. cannot claim to be a citizen of India, and as such, is not entitled to rely upon Article 19.

Answer 3A(i)

CARO 2015

As provided in section 143(11) of the Companies Act, 2013, the Central Government has directed that every report made by the auditor under section 143 for the financial year commencing on or after 1st April, 2014 will include a statement on matters specified under the Companies (Auditor's Report) Order, 2015. This order has been superseded by Companies (Auditor's Report) Order, 2016 made effective from 29th March 2016. This shall apply to every company including a foreign company as defined under section 2(42) of the Act.

The requirements as above do not apply to:

(i) a banking company defined under Banking Regulation Act, 1949;

(ii) an insurance company defined under Insurance Act, 1938;

(iii) Company licensed to operate under section 8 of the Companies Act, 2013;

(iv) One person company and small company as defined under section 2 (62) and 2(85) of the Companies Act, 2013;

(v) Private limited company, not being the subsidiary or holding company of a public company, having paid-up share capital and reserves and surplus not more than Rs. 1 Crore as on the balance sheet date and which does not have total borrowings exceeding Rs. 1 Crore from any bank or financial institution at any point of time during the financial year and which does not have a total revenue as disclosed in Schedule III to the Companies Act, 2013 (including revenue from discontinuing operation), exceeding ₹ 10 Crore during the financial year as per the financial statement.

Answer 3A(ii)

Pre-certification of e-forms

Apart from authentication of e-forms by authorized signatories using digital signatures, certain e-forms are also required to be pre-certified by practicing professionals who are members of professional bodies namely ICAI, ICSI or ICWAI with the responsibility of ensuring correctness, completeness and integrity of documents filed by them with MCA in electronic mode including filing of financial statements in XBRL mode. Pre-certification is not required in the case of one person companies and small companies.

Once an e-form has been pre-certified by a professional towards its authenticity based on the particulars contained in the books of accounts and records of the company, MCA21 system takes that e-form on file by way of straight through process. Professionals are responsible for certifying documents through digital signature and the system would accept the documents online without approval by ROC.

This process of taking the forms on record by way of straight through process requires professionals to be extra cautious and vigilant towards the information, he/she certifies in the forms. If a professional certifies incorrect information or omits any material information, which later on proves that the same was done knowingly, he/she will be liable for the punishment under section 448 read with section 447 of the Companies Act, 2013, besides disciplinary action by the respective Institute, which issued the certificate of practice to the professionals.

Answer 3A(iii)

Consequence of non-registration of charge

Section 77(3) provides that notwithstanding anything contained in any law for the time being in force, no charge created by a company shall be taken into account by the liquidator or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2) of section 77.

Where a charge is not registered with the ROC, it shall be void against the liquidator and another creditor of the company. Void against the liquidator means that the liquidator on winding up of the company can ignore the charge and can treat the creditor concerned as unsecured creditor. But, the non-filing or non-Registration of a charge does not make it invalid against the company as a going concern; however it is only at the time of liquidation, that it becomes void against the liquidator and the creditors.

Further, section 86 provides that if any company contravenes any provision pertaining to registration of charge, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to ten lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

Answer 3A(iv)

SPICe

Ministry of Corporate Affairs *vide* notification dated 1st October, 2016 has issued the Companies (Incorporation) Fourth Amendment Rules, 2016 which introduced 'Simplified Proforma for Incorporating Company Electronically (SPICe), as simplified integrated process for incorporation of the company under the Government Process Re-engineering (GPR) initiative.

Rule 38 has been inserted in the Incorporation rules to introduce the following e-forms —

(a) e-Form INC 32 as a single application for Reservation of name, Incorporation of a new Company, Application for PAN and TAN and Application for Allotment of DIN;

(b) e-Form INC 33 for filing e-Memorandum of Association;

(c) e-Form INC 34 for filing e-Articles of Association

These changes have been made effective from 1st October, 2016. The existing e-forms INC 29 and INC 7 will be phased out in due course. The initiative will enable speedy incorporation of the company and all the related services therewith, within the stipulated time frame.

Question 4

(a) Encode Pvt. Ltd. is having two shareholders namely Mr. Vishal and Mr. Joytan holding 9,00,000 and 5,50,000 equity shares, of ₹10 each, respectively. The Company's Paidup share Capital as on the date is ₹1,45,00,000 and Authorised Share Capital is ₹2,00,00,000. Company wishes to issue further equity shares for ₹7,50,000, i.e., 75,000 equity shares of ₹10 each at par, by way of Rights issue, to meet the working capital requirements and expansion plan of the Company, you being a Company Secretary of the Company is required to draft the Board Resolutions inter-alia approving the letter of offer towards aforesaid offer of the Rights Issue, assuming that the shareholders may renounce their rights of subscription and the proposed shares shall rank pari-passu with the existing Equity shares of the Company. (8 marks)

(b) CIN, issued by MCA, the unique identifier, provides the key profile of companies– Explain. (4 marks)

(c) Write note on Statutory duties of a Company Secretary. (4 marks)

Answer 4(a)

Meeting : Board Meeting

Date : 2nd June, 2017

Resolution : Board Resolution

The Board considered the matter and after due deliberations passed the following resolution(s):

"RESOLVED THAT pursuant to the provisions of Section 62(1)(a) and other applicable provisions, if any, of the Companies Act, 2013 and the Articles of Association of the Company, the consent of the Board be and is hereby accorded to offer and issue 75,000 (seventy-five thousand) equity shares of the company of the face value of ₹ 10/- (Rupees Ten) each at par (hereinafter referred to as 'new shares') to the existing equity shareholders on Rights Issue basis in the following manner:

Sl. No.	*Shareholder's Name*	*No. of Shares held*	*Value (₹)*	*% of Share-holding*	*Proposed under Right offer*
1.	Vishal Rastogi	9,00,000	90,00,000	62.07	46552
2.	Mr. Joytan Verma	5,50,000	55,00,000	37.93	28448
Total		14,50,000	1,45,00,000	100.00	75,000

i.e., in proportion of their existing shareholding in the paid-up share capital of the company as on date, on the terms and conditions as under:

The rights issue shall remain open from 6th June, 2017 to 5th July, 2017 (both days inclusive) (hereinafter referred to as "offer period");

(i) The full amount at ₹10 per equity shares along with the duly filled and signed application form for such equity shares shall be submitted during the offer period;

(ii) The offer aforesaid, if not accepted within the offer period, will be deemed to have been declined; and

(iii) The offer aforesaid shall include a right exercisable by the persons to renounce the equity shares being offered, in favour of any other person(s) provided such renunciation is made during the offer period and the renounce shall submit application form with the application money during the offer period.

RESOLVED FURTHER THAT the draft letter of offer along with application form, as placed before the Board and initialled by the Chairman for the purpose of identification, be and are hereby approved.

RESOLVED FURTHER THAT the new equity shares, so issued, shall upon allotment have the same rights of voting as the existing equity shares and be treated for all other purposes *pari passu* with the existing equity shares of the Company.

RESOLVED FURTHER THAT after the expiry of the aforesaid offer period or on receipt of earlier intimation from the person(s) to whom such notice was given that he declines to accept the new shares offered, or if the offer is not accepted within stipulated time, it shall be deemed declined and the Board of directors of the company be authorized to dispose of unsubscribed part of the new shares in such manner as they think most beneficial to the company subject to the terms of any resolution, agreement or regulation of articles of association of the company, if any.

RESOLVED FURTHER THAT the Directors of the company be and are hereby severally authorized to sign and issue the Letter of offer, Application for allotment, Application for Renunciation and such other papers/documents as may be necessary in this regard to all eligible equity shareholder of the Company".

Answer 4(b)

Every company incorporated on or after Nov 1, 2000 is allotted a 21 digit Corporate Identity Number (CIN) by the ROC, which indicates the listing status, economic activity (industry), State, Year of incorporation, ownership and sequential number assigned by the ROC. This number is to be quoted in all e-forms and once the number is typed, MCA site automatically pre-fills the essential particulars.

CIN is structured as under to indicate the profile of the company —

1st digit	Listing Status
Next 5 digits:	Economic activity (industry to which the company belongs)
Next 2 digits:	State in which Company is registered
Next 4 digits:	Year of incorporation
Next 3 digits:	Ownership
Next 6 digits:	Sequential number assigned by the ROC (Registration Number)

CIN can also be searched in MCA site based on ROC registration number, existing company name or old name, if any. Keeping in view the said specifications, CIN can be considered the unique identifier.

Answer 4(c)

As per section 205(1) of the Companies Act, 2013, the functions of the Company Secretary shall include —

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

(b) to ensure that the company complies with the applicable secretarial standards;

(c) to discharge such other duties as may be prescribed.

Rule 10 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides that the 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 minute 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 the Act;

(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.

Question 5

(a) Forecore Ltd. is a closely held company with 25 shareholders and proposes to make a public offer of convertible securities. The existing shareholders (Promoter) have their holdings in physical form. The company is wishing to issue, aforesaid convertible securities to the public, in physical form. Advise the feasibility. *(4 marks)*

(b) Explain the provisions to determine in what circumstances an Individual will be considered as a promoter of the Company, if Kundan has been identified as a promoter in the recent annual return of the Company, please comment whether Kundan will be considered as a promoter of that Company ? In the event of a mis-statement in the prospectus of the company, what will be the civil liability of Kundan ? *(4 marks)*

(c) Lal holds 1,00,000 preference shares in Luxury Ltd. (an unlisted company), wants to understand his voting rights in the Company. Advise. *(4 marks)*

(d) Dynamic Ltd. (paid-up share capital ₹25 Crore) proposes to enter into a contract with Sunil for the procurement of raw materials for an amount of ₹5 Crore during the financial year. Sunil is the step brother (father's second wife's son) of Anil, who is a director of Dynamic Ltd. Discuss the compliance requirements in respect of the aboveprocurement contract. *(4 marks)*

Answer 5(a)

Section 29 of the Companies Act, 2013 provides that every company making public offer shall issue the securities only in dematerialised form by complying with the provisions of the Depositories Act, 1996 and the regulations made thereunder.

Rule 9 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 further provides that the promoters of every public company making a public offer of any convertible securities may hold such securities only in dematerialised form, provided

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

Accordingly, Forecore Ltd. will be required to convert the promoters' shareholding (assumption has been taken that promoters' shareholding is convertible security) in dematerialized form before the aforesaid offer is made to public. Further, the new offer of convertible securities can only be made in dematerialized form; hence, Forecore Ltd. is prohibited from issuing such securities in physical form.

Answer 5(b)

As per section 2(69) of the Companies Act, 2013, 'promoter' means a person –

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

(ii) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or

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

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

Since, Kundan has been identified as a promoter in the recent annual return of the company which falls within the ambit of the definition of promoter; hence he is promoter of that Company.

Section 35(1) of the Act provides that where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person who is a promoter of the company shall without prejudice to any punishment to which any person may be liable under Section 36 to pay compensation to every person who has sustained such loss or damage.

Here in the given case, if Kundan makes such misleading information or statement in the prospectus, he will be held liable for the loss or damage occurred as a consequence of such misleading information and be liable to pay compensation to every person who has sustained such loss or damage.

However, he can escape his liability if he proves that the prospectus was issued without his knowledge or consent and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.

Answer 5(c)

As per Rule 9(2) of the Companies (Share Capital and Debentures) Rules, 2014, the voting rights of the preference shareholders are governed by the resolution passed for issuance of such preference shares in the general meeting of the company.

Section 47(2) of the Companies Act, 2013 provides that:

Every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares and, any resolution for the winding up of the company or for the repayment or reduction of its equity or preference share capital and his voting right on a poll shall be in proportion to his share in the paid-up preference share capital of the company:

Provided further that where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.

Answer 5(d)

Section 188(1)(a) prescribes that except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as may be prescribed, no company shall enter into any contract or arrangement with a related party with respect to the sale, purchase or supply or any goods or materials.

Rule 15(1) of the Companies (Meeting of Board and its Powers) Rules, 2014 prescribes that the agenda of the Board meeting at which the resolution is proposed to be moved shall disclose —

(a) the name of the related party and nature of relationship;

(b) the nature, duration of the contract and particulars of the contract or arrangement;

(c) the material terms of the contract or arrangement including the value, if any;

(d) any advance paid or received for the contract or arrangement, if any;

(e) the manner of determining the pricing and other commercial terms, both included as part of the contract and not considered as part of the contract;

(f) whether all factors relevant to the contract have been considered, if not, the details of factors not considered with the rational for not considering those factors; and

(g) any other information relevant or important for the Board to take a decision on the proposed transaction.

Rule 15(2) provides that where any director is interested in any contract or arrangement with a related party, such director shall not be present at the meeting during discussions on the subject matter of the resolution relating such contract or arrangement.

Section 2(76) defines a related party to mean a director or his relative. Section 2(77) read with Rule 4 of the Companies (Specification of Definitions Details) Rules, 2014 provides that the term relative includes step-brother.

In view of the above provisions, the transaction is a related party transaction as Anil's step-brother is a relative.

Question 6

(a) SRM Limited (a listed company), a wholly owned subsidiary of Spice Limited (an another listed company) proposes to acquire 10,000 equity shares of Spice Limited from the secondary market (in demat form). Advise SRM Limited on the feasibility of the proposal.

(b) Weak Ltd. is interested in obtaining the status of a dormant company, as they have not been carrying on operation for the past two years. Explain the enabling conditions to be fulfilled for applying to be a Dormant Company.

(c) State the procedure for voluntary revision of financial statements or the board's report by a Company.

(d) Star Ltd. was incorporated on 1st January, 2016. Further, Star Ltd. has floated its subsidiary company incorporated in Germany for which the financial year ends with June every year. In light to the above, please determine :

(i) The first financial year of Star Ltd. for which financial statement will be reported.

(ii) Does Star Ltd. have an option to align its financial year with that of its German subsidiary in respect to the consolidation of its accounts outside India ? *(4 marks each)*

Answer 6(a)

Section 19 of the Companies Act, 2013 provides that no company shall, either by itself or through its nominees, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void. First proviso to the said section states that, the above prohibition shall not apply to the following cases:

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

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

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

Provided further that the subsidiary company referred to in the first proviso shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee.

In the light of the above provisions, SRM Ltd. cannot hold equity shares in Spice Ltd. and further, Spice Ltd. is advised to prohibit from making any allotment or transfer in favour of SRM Ltd. If such an allotment or transfer is done, it will be void.

Answer 6(b)

Section 455 read with Rule 3 of the Companies (Miscellaneous) Rules, 2014 provides for the application for obtaining status of dormant company and its enabling conditions:

For the purposes of sub-section (1) of section 455, a company may make an application in Form MSC-1 along with such fee as provided in the Companies (Registration

Offices and Fees) Rules, 2014 to the Registrar for obtaining the status of a Dormant Company in accordance with the provisions of section 455 after passing a special resolution to this effect in the general meeting of the company or after issuing a notice to all the shareholders of the company for this purpose and obtaining consent of at least 3/4th shareholders (in value):

Provided that a company shall be eligible to apply under this rule only, if –

(i) no inspection, inquiry or investigation has been ordered or taken up or carried out against the company;

(ii) no prosecution has been initiated and pending against the company under any law;

(iii) the company is neither having any public deposits which are outstanding nor the company is in default in payment thereof or interest thereon;

(iv) the company is not having any outstanding loan, whether secured or unsecured:

Provided that if there is any outstanding unsecured loan, the company may apply under this rule after obtaining concurrence of the lender and enclosing the same with Form MSC-1 ;

(v) there is no dispute in the management or ownership of the company and a certificate in this regard is enclosed with Form MSC-1;

(vi) the company does not have any outstanding statutory taxes, dues, duties, *etc.* payable to the Central Government or any State Government or local authorities *etc.*;

(vii) the company has not defaulted in the payment of workmen's dues;

(viii) the securities of the company are not listed on any stock exchange within or outside India.

Answer 6(c)

Section 131(1) of the Act provides for conditions regarding voluntary revision of financial statements or Board's Report by a company, if it appears to the directors of a company that the financial statement of the company; or the report of the Board, do not comply with the provisions of section 129 or section 134 they may prepare revised financial statement or a revised report in respect of any of the three preceding financial years after obtaining approval of the Tribunal on an application made by the company in the following manner.

The company is required to make an application to the Tribunal in Form NCLT-1 and all relevant attachments shall be accompanied with Form NCLT-2. Every petition shall be verified by an affidavit in Form NCLT-6.

The company shall be required to make an advertisement thereby explaining the facts of the case in Form NCLT-3A.

The Tribunal shall give notice to the Central Government and the Income-tax authorities and shall take into consideration the representations, if any, made by that Government or the authorities before passing any order under this section.

The matter shall be heard by the NCLT and disposed off on its merits.

The necessary order shall be passed and the same shall be required to be filed with the ROC.

Answer 6(d)

Section 2 (41) of the Companies Act, 2013 provides that 'financial year', in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up.

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

In the light of the aforesaid provisions —

(a) The first financial year of Star Limited will be from 1st January, 2016 and shall end on 31st day of March, 2017.

(b) Since, Star Ltd. has a subsidiary incorporated in Germany who has to follow June as the financial year-end, Star Ltd. being the holding company, can make an application to the Tribunal. If the Tribunal is satisfied with the conditions, it will allow Star Ltd. to adopt the financial year ending June, in order to align with its subsidiary for the purpose of consolidation of its accounts outside India.

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SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

NOTE: *Answer **ALL** Questions.*

PART A

(Attempt all parts of either Q.No. 1 or Q.No. 1A)

Question 1

(a) Raj Mani Hadlooms Ltd., an unlisted Public Company, having paid-up Capital of Rs. 18 Crore, has seven Members. Shri Raj and Shri Mani are the Promoters of the company and their aggregate holding in the paid-up Capital is 95%. Now the promoters want to invest 2 Crore more in the paid-up capital. On 30th March, 2017, the Company has received Rs. 1 Crore each from promoters through RTGS as advance share capital money.

Discuss - Whether it is mandatory for the company to make a rights issue to implement the capital raising programme ? Can the company use the share capital advance prior to completing the allotment of shares ? State whether it is mandatory to determine fair price of shares if a preferential allotment were to be made to Promoters alone ?

(b) As a Secretarial Auditor, design a check list for being applied to verify the compliance of applicable provisions of the Act with respect to the variation of rights of preference shareholders carried out by RAM Company Limited. Assume there is no clause in the Articles of Association of the Company with respect to variation and terms of issue does not prohibit variation of the terms.

(c) While conducting a Secretarial Audit, what particulars and records have to be verified to audit the corporate guarantee given by Subse Mehanga Textile Garments Limited to Universal Textile Clothing Limited, if Universal Textile Clothing Limited is a wholly owned subsidiary of Subse Mehanga Textile Garments Limited.

(d) What is meant by Board Process ? What are the major decisions to be taken as part of the Board Process leading to an in principle decision to go for an initial public offer ?

(e) Next Annual General Meeting of Apolo Ltd., a BSE Listed Company, is scheduled to be held on 14th September, 2016. The Notice was sent to all the members, Stock Exchange, Directors and Auditors through email as well as by speed post on 12 August, 2016. The Notice was also uploaded on the website of the Company. You are the Company Secretary. In the evening of 13th September, 2016, Shri Manish Vaid, Managing Director instructed you to withdraw the Agenda item concerning the proposed issue of bonus shares to members. Explain in brief, what you would have done. *(5 marks each)*

OR (Alternate question to Q. No. 1)

Question 1A

(i) The Director (HR) of ABC Ltd. has desired for renovation and modernization of Admin Building situated at Bric Complex, New Delhi. There was special instruction for transfer/destroy of bulky records to facilitate more space. The Secretarial Department of the Company keeps and maintains all Secretarial Records permanently which has occupied huge space.

As a Secretarial officer, prepare a check list for Preservation of Secretarial Records. (5 marks)

(ii) SCP II a Mauritius body corporate intends to transfer all its shares in System Automation India Private Limited, Hyderabad to Orchard III, a body corporate having its registered office in Singapore. Please advise steps to be followed by the transferor, transferee and the Indian Company in carrying out the transaction under the Companies Act, 2013 and the Foreign Exchange Management Act, 1999 and rules and regulations therein. (5 marks)

(iii) The object clause of Vikram Engineering Ltd. was changed in year 2016-17. The company had made an initial public offer in the year 2015-16. Enumerate the list of documents to be checked in this regard while conducting secretarial audit for 2016-17. (5 marks)

(iv) Rohan Ltd., a public company is having a paid up capital Rs. 40 crore and a turnover of Rs. 490 crore. Advise whether the company is required to go for Internal Audit and briefly explain the areas that will come under within the scope of Internal Audit. (5 marks)

(v) Say True or False :

(a) Issuing Foreign Currency Convertible Bonds (FCCBs) under Automatic Route with attached warrants is not permitted.

(b) For the purpose of issue of Depository Receipts, a special resolution passed under section 62 of the Companies Act, 2013 is not sufficient to satisfy the special resolution required to be passed under section 41 of the Companies Act, 2013.

(c) Unless the size of money invested by foreign investors through Global Depository Receipts exceeds the limits for Foreign Direct Investment under Automatic Route, no approval of Government of India is required as such investments are considered as Foreign Direct Investment.

(d) The proceeds of issue of ADRs/GDRs under a scheme of sponsored ADRs/ GDRs need to be repartriated to India within a period of one year.

(e) Overseas Custodian Bank is a Indian Commercial bank established in the Public Sector by the Government of India. (1 mark each)

Answer 1(a)

No, it is not mandatory for company to make right issue to implement the capital raising programme, the company may go for the other method of the capital raising like preferential allotment, private placement.

In case of an allotment by way of private placement of shares, the proviso under section 42 (6) states that the money received with share application should not be utilised except for adjustment against allotment of securities or for refund arising from failure to allot securities. However, such a provision does not apply to Rights issue. Hence, if the company plans a preferential allotment of shares or a private placement of shares, the amount received by way of share application money cannot be utilised prior to allotment and in case the shares are not allotted, the money has to be returned.

For the purpose of issuing securities on a preferential allotment basis to the promoters alone it is mandatory that the fair price of the shares must be determined.

Answer 1(b)

Variation of rights of holders of a class of shares must be done in accordance with section 48 of the Companies Act, 2013. Therefore the following checklist could be administered by the Secretarial Auditor:

(a) Whether terms of issue prohibit variation of rights;

(b) Whether the memorandum and articles of association of the company contains any provision with respect to variation of rights;

(c) Whether the company has obtained the consent of holders of not less than three-fourths of the issued shares of that class;

(d) Whether such consent is in writing;

(e) Whether, in the absence of such written consent, a special resolution has been passed at a separate meeting of the shareholders of that class;

(f) Whether the proposed variation of rights is of such nature that would affect the rights of any other class of shareholders, consent of three-fourths of such other class of shareholders has been obtained;

(g) Whether not less than 10 % of the issued class of that class of shareholders have dissented to such variation;

(h) Whether such dissentient shareholders have moved to the National Company Law Tribunal objecting to such variation to have the variation cancelled within 21 days of obtaining written consent or passing special resolution;

(i) Whether the variation has become effective by confirmation of the same by the National Company Law Tribunal;

(j) Whether the copy of order of the Tribunal has been filed with the Registrar of Companies within 30 days of the date of order.

Answer 1(c)

Corporate Guarantee given by a holding company to its wholly- owned subsidiary is exempt from the provisions of Section 185 and 186(3) of the Companies Act, 2013 read with Rule 11 of the Companies (Meetings of Board and its Powers) Rules, 2014. However the Secretarial Auditor shall ensure that-

The proposal to give guarantee must have been approved by the Board of Directors at its meeting including the amount of guarantee.

Company has filed Form MGT-14 with Registrar of Companies within 30 days of board meeting as required under section 117(3)(g) read with section 179(3)(f).

The company has made disclosures in its Financial Statements in this regard as required under section 186(4).

The company has obtained the prior approvals of the public financial Institutions where any term loan is subsisting.

However, entries must be made in the register with respect to all guarantees; even of there is exemption under section 185 or section 186.

Answer 1(d)

The Board process can be said to be the entire process leading to the decision making by the board of directors with respect to any subject matter placed before them.

The Secretarial Standard -1 play a significant role in the effective board process from issuance of Notice to the Recording of Minutes, deliberation and participation of the members at the meeting.

In the case of Initial Public Offer, the board must first finalise a capital raising programme and identify an internal team or committee preferably comprising of the managing director, the CFO and the Company Secretary, requiring them to give a complete road map. The Board must make it known from such committee what it expects from them so that the board may be able to form a sound decision. It is also necessary to appoint and avail the services of capital market intermediaries such as the merchant bankers, the bankers to the issue, legal advisors, underwriters and registrars and share transfer agents. On the basis of information and inputs received from the capital raising committee, the board can arrive at a decision for commencing an initial public offer with specific approval for the amount to be raised, nature of security to be issued, objects of issue, agencies.

Thus, the board process must be leading to decision to make an initial public offer and such a decision must be consistent with the objectives of the company and the applicable regulations.

Answer 1(e)

Para 10 of Secretarial Standard – 2 (SS-2) prohibits withdrawal of Resolutions. As per para 10, Resolutions for items of business which are likely to affect the market price of the securities of the company shall not be withdrawn. Any resolution proposed for consideration through e-voting shall not be withdrawn. Also, Rule 14 of Companies (Share Capital and Debentures) Rules, 2014 states that the Company which has once announced the decision of its board recommending a bonus issue, shall not subsequently withdraw the same.

As per Rule 20 (xviii) of the Companies (Management and Administration) Rules, 2014, a resolution proposed to be considered through voting by electronic means shall not be withdrawn. As mentioned above, the view of Managing Director is in contravention of the Rule aforesaid and Para 10 of SS- 2. Therefore, the Agenda can't be withdrawn. In this case, the resolution for bonus issue is of such nature which is likely to affect or would have already affected the market price of the securities of the company. Moreover,

being a listed company, it is a resolution for which e-voting must be mandatorily provided. As such, the resolution cannot be withdrawn.

Answer 1A(i)

Section 118, 119, of the Companies Act, 2013 read with Rule 25, 26 of the Companies (Management and Administration), Rules, 2015 and Secretarial Standards 1 and 2, provides the detailed provisions on preservation of Minutes and other Records which are as under-

1. Minutes of all Meetings shall be preserved permanently in physical or in electronic form with Timestamp.
2. Where, under a scheme of arrangement, a company has been merged or amalgamated with another company, Minutes of all Meetings of the transferor company, as handed over to the transferee company, shall be preserved permanently by the transferee company, notwithstanding that the transferor company might have been dissolved.
3. Office copies of Notices, Agenda, Notes on Agenda and other related papers shall be preserved in good order in physical or in electronic form for as long as they remain current or for eight financial years, whichever is later and may be destroyed thereafter with the approval of the Board.
4. Office copies of Notices, Agenda, Notes on Agenda and other related papers of the transferor company, as handed over to the transferee company, shall be preserved in good order in physical or electronic form for as long as they remain current or for eight financial years, whichever is later and may be destroyed thereafter with the approval of the Board and permission of the Central Government, where applicable.
5. Minutes Books shall be kept in the custody of the Company Secretary.

Where there is no Company Secretary, Minutes shall be kept in the custody of any Director duly authorised for the purpose by the Board.

Answer 1A(ii)

This proposal involves transfer of shares of an Indian company from a foreign body corporate to another foreign body corporate. As per Foreign Exchange Management (Transfer or Issue of any Security by a person resident outside India) Regulations, 2000, a person resident outside India, may transfer shares of an Indian company without prior permission of the Reserve Bank of India to a person resident outside India. Unless the proposed transfer is by way of gift, approval of Reserve Bank of India is not necessary. In case of such transfer of shares by way of sale from a person resident outside India to a person resident outside India, only reporting will be in the form of annual return on foreign liabilities and assets (FLA) to be submitted to Reserve Bank, Department of Statistics, Information & Management, Mumbai by July 15th every year.

Apart from that, the transferor and transferee have to execute share transfer form in Form SH-4 and comply with the provisions of section 56 of Companies Act, 2013 and applicable provisions of the Articles of Association of the company.

Further, every transfer will require approval of Share Transfer Committee and also entry in the register of members and endorsement of share certificate.

Answer 1A(iii)

Indicative list of documents to be checked (Alteration of object clause of MOA)

1. Notice convening general meeting with relevant explanatory statement
2. Minutes of General Meeting
3. Annual Return
4. Financial Statement
5. Return of deposits
6. Advertisement for change in objects
7. Memorandum of Association
8. Articles of Association

Where the company has raised money from public through prospectus and has any unutilised amount out of the money so raised, it shall not change the objects for which the money so raised is to be applied unless a special resolution is passed through postal ballot and the notice in respect of the resolution for altering the objects shall contain the particulars as prescribed in the Rule 32 of Companies (Incorporation) Rules, 2014.

Answer 1A(iv)

As per Section 138 read with Rule 13 of the Companies (Account) Rules, 2014, every unlisted public company having paid up share capital of fifty crore rupees or more during the preceding financial year; or turnover of two hundred crore rupees or more during the preceding financial year shall be required to appoint an internal auditor or a firm of internal auditor to conduct internal audit of the functions and activities of the company.

Rule 13 of the Companies (Account) Rules, 2014 prescribe the manner and the intervals in which the internal audit shall be conducted and reported to the Board.

The Scope of Internal Audit should be determined by the board of Directors of the company which also includes the audit of policies and procedures adopted by the company for ensuring the orderly and efficient conduct of its business including adherence to company's policies, Auditing of the financial and non financial transactions of the company, the safeguarding of its assets, the prevention and detection of frauds and errors, the accuracy and completeness of the accounting records, and the timely preparation of reliable financial information.

Answer 1A(v)

(a) True, Issue of FCCBs with attached warrants is not permitted.

(b) False, as per the proviso to rule 4(2) of Companies (Issue of Global Depository Receipts) Rules, 2014 provides that a special resolution passed under section 62 for issue of shares underlying the depository receipts, shall be deemed to be a special resolution for the purpose of section 41 as well.

(c) True, GDR issue shall not exceed the sectoral cap of FDI policy. If it exceeds, FIPB approval is to be obtained.

(d) False, the proceeds of the issue of ADRs/GDRs under Scheme of Sponsored ADRs/GDRs shall be repatriated to India within a period of one month.

(e) False, "Overseas Custodian Bank" means a banking company which is established in a country outside India and which acts as custodian for the equity shares of Issuing Company, against which IDRs are proposed to be issued, by having a custodial arrangement or agreement with the Domestic Depository or by establishing a place of business in India.

PART B

Attempt all parts of either Q. No. 2 or Q. No. 2A

Question 2

(a) Explain the Intitutional Placement Programme. (5 marks)

(b) Explain the persons who are qualified to act as debenture trustees for a series of non-convertible unsecured debentures proposed to be issued by Company going to be listed under SEBI (Issue and Listing of Debt Securities) Regulations, 2008. (5 marks)

(c) Mention the important conditions to be followed by the Directors of the Target Company under Regulation 24 of the Securities and Exchange Board of India (Substantial Acquisitions and Take Overs) Regulations, 2011 ? (5 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) The Annual Financial Statements of Shri Ram Textiles Ltd. for the Financial Year 2015-16 were approved on 17th May, 2016. The Auditors' Report on Financial Statements was received on 14th June, 2016. The Annual General Meeting was held on 5th September, 2016. As quorum was not present, the meeting stood adjourned to 12th September, 2016. The Director (Finance) declared on 10th September, 2016 a final dividend. Actually there was no provision for proposed dividend in the Financial Statements.

Can he do so in light of provision of the Act ? (5 marks)

(ii) Briefly explain 'reservation on competitive basis' under SEBI (ICDR) Regulations 2009. Mention the conditions subject to which the reservation on competitive basis could be made under the above Regulations. (5 marks)

(iii) Sunlight Ltd. and Moonlight Ltd. have entered into a Joint Venture Agreement (JVA). Pursuant to provisions of JVA, a Joint Venture Company (JVC) shall be incorporated to run the Software Development Business in South Asia. Apart from Capital Investment, both the party will provide knowhow and intellectual assistance including business secrets to JVC. In this regard, Sunlight Ltd. and Moonlight Ltd. need to enter in a Non-Disclosure Agreement.

What are the points to be incorporated in Undertaking Clause and Exception Clause of Non-Disclosure Agreement ? Explain briefly. (5 marks)

Answer 2(a)

Institutional Placement Programme

When a listed issuer makes a further public offer of equity shares, or offer for sale of shares by promoter / promoter group of listed issuer in which, the offer, allocation and allotment of such shares is made only to QIBs in terms of Chapter VIII-A of SEBI (ICDR) Regulations, 2009 for the purpose of achieving minimum public shareholding it is called an IPP.

SEBI vide its notification dated January 30, 2012 has amended the Issue of Capital and Disclosure Requirements Regulations, 2009 whereby Chapter VIIIA - Institutional Placement Programme (IPP) has been inserted. The provisions of this Chapter shall apply to issuance of fresh shares and or offer for sale of shares in a listed issuer for the purpose of achieving minimum public shareholding in terms of Rule 19(2)(b) and 19A of the Securities Contracts (Regulation) Rules, 1957.

"Institutional Placement Programme" means a further public offer of eligible securities by an eligible seller, in which the offer, allocation and allotment of such securities is made only to qualified institutional buyers in terms of this Chapter. Eligible seller includes listed issuer, promoter / promoters group of listed issuer.

Answer 2(b)

As per the SEBI (Issue and Listing of the Debt Securities) Regulations, 2008, issuer shall appoint one or more debenture trustees in accordance with the provisions of section 117B of the Companies Act, 1956 (Corresponding to the Section 71 of the Companies Act, 2013) and Securities and Exchange Board of India (Debenture Trustees) Regulations, 1993. Being debt securities proposed to be listed as per Regulations 7 of SEBI (Debenture Trustee) Regulations, 1993, only the following persons are entitled to act as a debenture trustee.

(a) a scheduled bank carrying on commercial activity ; or

(b) a public financial institution within the meaning of section 4A of the Companies Act, 1956; and

(c) An Insurance company; or

(d) Body corporate

Note: The term public financial institution is also defined in the Section 2(72) of the Companies Act, 2013, which has widen the definition of the public financial institutions. In the SEBI (Debenture Trustee) Regulations, 1993; the corresponding Regulation are yet not modified.

Answer 2(c)

(1) During the offer period, no person representing the acquirer or any person acting in concert with him shall be appointed as director on the board of directors of the target company, whether as an additional director or in a casual vacancy:

Provided that after an initial period of fifteen working days from the date of detailed public statement, appointment of persons representing the acquirer or

persons acting in concert with him on the board of directors may be effected in the event the acquirer deposits in cash in the escrow account referred to in regulation 17, one hundred per cent of the consideration payable under the open offer:

Provided further that where the acquirer has specified conditions to which the open offer is subject in terms of clause (c) of sub-regulation (1) of regulation 23, no director representing the acquirer may be appointed to the board of directors of the target company during the offer period unless the acquirer has waived or attained such conditions and complies with the requirement of depositing cash in the escrow account.

(2) Where an open offer is made conditional upon minimum level of acceptances, the acquirer and persons acting in concert shall, notwithstanding anything contained in these regulations, and regardless of the size of the cash deposited in the escrow account referred to regulation 17, not be entitled to appoint any director representing the acquirer or any person acting in concert with him on the board of directors of the target company during the offer period.

(3) During the pendency of competing offers, notwithstanding anything contained in these regulations, and regardless of the size of the cash deposited in the escrow account referred to in regulation 17, by any acquirer or person acting in concert with him, there shall be no induction of any new director to the board of directors of the target company:

Provided that in the event of death or incapacitation of any director, the vacancy arising therefrom may be filled by any person subject to approval of such appointment by shareholders of the target company by way of a postal ballot.

(4) In the event the acquirer or any person acting in concert is already represented by a director on the board of the target company, such director shall be participate in any deliberations of the board of directors of the target company or vote on any matter in relation to the open offer.

Answer 2A(i)

As per Section 103(2) of the Companies Act, 2013, If the quorum is not present within half-an-hour from the time appointed for holding a meeting of the company the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine.

Further, as per Para 15.6 of SS-2, at an adjourned Meeting, only the unfinished business of the original Meeting shall be considered.

In the present case, there was no provision for declaration of proposed dividend in the original Annual General meeting so any new business cannot be taken in adjourned Annual General meeting and company cannot declare the dividend.

Answer 2A(ii)

The term "reservation on competitive basis" means reservation wherein specified securities are allotted in proportion of the number of specified securities applied for in respect of a particular reserved category to the number of specified securities reserved

for that category and "new issuer" means an issuer which has not completed twelve months of commercial production and its audited operative results are not available.

The reservation on competitive basis shall be subject to following conditions:

(a) the aggregate of reservations for employees shall not exceed five per cent of the post issue capital of the issuer;

(b) reservation for shareholders shall not exceed ten per cent of the issue size;

(c) reservation for persons who as on the date of filing the draft offer document with SEBI, have business association as depositors, bondholders and subscribers to services with the issuer making an initial public offer shall not exceed five per cent of the issue size;

(d) no further application for subscription in the net offer to public category shall be entertained from any person (except an employee and retail individual shareholder) in favour of whom reservation on competitive basis is made;

(e) any unsubscribed portion in any reserved category may be added to any other reserved category and the unsubscribed portion, if any, after such inter-se adjustments among the reserved categories shall be added to the net offer to the public category;

(f) in case of under-subscription in the net offer to the public category, spill-over to the extent of under subscription shall be permitted from the reserved category to the net public offer category;

(g) value of allotment to any employee in pursuance of reservation made under sub- regulations (1) or (2) of Regulation 4, as the case may be, shall not exceed two lakh rupees. In the case of reserved categories, a single applicant in the reserved category may make an application for a number of specified securities which exceeds the reservation.

Answer 2A(iii)

In the undertaking clause of Non Disclosure Agreement consideration of the disclosure of Confidential Information by the Disclosing Party, the Receiving Party agrees:-

(i) to keep confidential and not disclose to any third party, copy, reproduce, adapt, divulge, publish or circulate any part of or the whole of any Confidential Information without the prior written consent of the Disclosing Party; and

(ii) to restrict access to the Confidential Information disclosed to it under this Agreement to those of its employees and officers who need to know the same strictly for the Purpose; and

(iii) not to use Confidential Information disclosed to it under this Agreement for any purpose other than the Purpose; and

(iv) not to combine any part of or the whole of the Confidential Information with any other information; and

(v) not to disclose the whole or any part of the Confidential Information to any third

party without (a) the prior written consent of the Disclosing Party and (b) prior to disclosure to such third party procuring that the third party is bound by obligations which are no less onerous than those contained in this Agreement; and

(vi) to procure that each employee and officer to whom Confidential Information is disclosed under this Agreement is, prior to such disclosure, informed of the terms of this Agreement and agrees to be bound by them; and

(vii) to procure that the Confidential Information in its possession is stored securely and that physical access to it is controlled.

However, the above clause is subject to the some exception as under:

1. The protections and restrictions in this Agreement as to the use and disclosure of Confidential Information shall not apply to any information which the Receiving Party can show:-

   (a) is, at the time of disclosure hereunder, already published or otherwise publicly available; or

   (b) is, after disclosure hereunder published or becomes available to the public other than by breach of this Agreement; or

   (c) is rightfully in the Receiving Party's possession with rights to use and disclose, prior to receipt from the Disclosing Party; or

   (d) is rightfully disclosed to the Receiving Party by a third party with rights to use and disclose; or

   (e) is independently developed by or for the Receiving Party without reference or access to Confidential Information disclosed hereunder.

2. The Receiving Party shall not be in breach of Clause if it can demonstrate that any disclosure of Confidential Information was made solely and to the extent necessary to comply with a statutory or judicial obligation.

Question 3

(a) OK Tyre Co. Ltd. is planning to set up a plant for manufacturing of Tyres in Singur at Hugli district, West Bengal. As a member of team of Senior Management, can you prepare a note on Environment Impact Assessment (EIA) and the basic factors that should be addressed by EIA, which would be forming part of Agenda to be put up in ensuing Board meeting. (8 marks)

(b) Explain the role of the Board of Directors in doing their oversight function on the subject of Compliance Management. How Company Secretary of the Company could play a significant role in helping the Board in institutionalizing an adequate and effective Compliance Management System ? (7 marks)

Answer 3(a)

1. The purpose of Environmental Impact Assessment (EIA) is to identify and evaluate the potential impacts (beneficial and adverse) of development and projects on the environmental system. It is a useful aid for decision making

based on understanding of the environment implications including social, cultural and aesthetic concerns which could be integrated with the analysis of the project costs and benefits. This exercise should be undertaken early enough in the planning stage of projects for selection of environmentally compatible sites, process technologies and such other environmental safeguards.

2. The Environmental Impact Assessment (EIA) should be prepared on the basis of the existing background pollution levels vis-a-vis contributions of pollutants from the proposed plant. The EIA should address some of the basic factors listed below:

   - o Meteorology and air quality Ambient levels of pollutants such as sulphur dioxide, oxides of nitrogen, carbon monoxide, suspended particulate matters, should be determined at the center and at 3 other locations on a radius of 10 km with 120 degrees angle between stations. Additional contribution of pollutants at the locations are required to be predicted after taking into account the emission rates of the pollutants from the stacks of the proposed plant, under different meteorological conditions prevailing in the area.
   - o Hydrology and water quality
   - o Site and its surroundings
   - o Occupational safety and health
   - o Details of the treatment and disposal of effluents(liquid, air and solid) and the methods of alternative uses
   - o Transportation of raw material and details of material handling
   - o Control equipment and measures proposed to be adopted.

Answer 3(b)

A well-designed compliance management programme has abilities to perform the following key functions across the enterprise:

- — *Compliance Dashboard* : The compliance programme must provide a single enterprise-wide dashboard for all users to track and trend compliance events. All compliance events should be easily viewed interactively through the enterprise compliance dashboard. External auditors, internal auditors, compliance officers can use the dashboards to make decisions on the compliance status of the organization.
- — *Policy and Procedure Management* : A well-designed document management system forms the basis of managing the entire lifecycle of policies and procedures within an enterprise. Ensuring that these policies and procedures are in conformity with the ever-changing rules and regulations is a critical requirement. The creation, review, approval and release process of the policy documents and SOPs (Standard Operating Procedures) should be driven by collaborative tools that provide core document management functionality.
- — *Event Management* : The compliance management system must have ability to capture and track events, cases and incidents across the extended enterprise.

Compliance officers, call center personnel, IT departments, QA personnel, ethics hotline should be able to log in any adverse event across the enterprise, upon which the necessary corrective and preventive actions are initiated.

— *Rules and Regulations* : A well-designed compliance management solution must offer capabilities for organization to continuously stay in sync with changing rules and regulations. As soon as there are regulatory changes, the various departments should be notified proactively through "email based" collaboration. This process critically enables the organization to dynamically change their policies and procedures in adherence to the rules and regulations. While tracking a single regulation may be manually feasible, it becomes an error-prone task to track all local, state, and central regulations including those taking place across the globe. A well-designed Compliance management programme offers up-to-date regulatory alerts across the enterprise.

— *Audit Management* : Audits have now become part of the enterprise core infrastructure. Internal audits, financial audits, external audits, vendor audits must be facilitated through a real-time system. Audits are no more an annual activity and corporations offer appropriate audit capabilities. Appropriate evidence of internal audits becomes critical in defending compliance to regulations.

— *Quality Management* : Most organizations have internal operational, plant-level or departmental quality initiatives to industry mandates like Six-sigma or ISO 9000. A well-designed compliance management program incorporates and supports ongoing quality initiatives. Most quality practitioners agree that compliance and quality are two sides of the same coin. Therefore, it is critical to ensure that compliance management solution offers support for enterprise-wide quality initiatives.

— *Training Management* : Most compliance programs often require evidence of employee training. Regulations like Clause 49 of Listing Agreement and Sarbanes-Oxley Act, stress on employee training. In USA, lack of documented training can lead to fines and penalties. Often the compliance office has to work closely with the HR organization to facilitate employee training. Well-designed compliance program requires a well-integrated approach to training management.

— *Compliance Task Management* : Organizations must plan, manage and report status of all compliance related activities from a centralized solution. Automated updates from the various compliance modules should provide for up-to-the-minute status reporting that could be viewed by the Board, corporate compliance officer, entity compliance coordinators, quality offices and others as designated.

Question 4

(a) Explain the points to be observed in relation to Liquid and Solid Wastes as per Environmental Management Plan (EMP). *(4 marks)*

(b) State the time limit under the SEBI (Listing Obligations and Disclosure Requirements) 2015 for submitting a statement to the stock exchanges showing holding of specified securities and shareholding pattern separately for each class of securities and guide the managing director of FY Industries Limited who are going for reclassification of some of their promoters. *(6 marks)*

(c) *ADLAP Infra Project Ltd. is in process of Initial Public Offer of Rs. 450 Crore. M/s SPMG, is being appointed for due diligence in respect of Project of ADLAP.*

As the Company Secretary, prepare a Checklist for such due diligence to provide Project related information and records. *(5 marks)*

Answer 4(a)

Liquid Effluents

- Effluents from the industrial plants should be treated well to the standards as prescribed by the Central/State Water Pollution Control Boards.
- Soil permeability studies should be made prior to effluents being discharged into holding tanks or impoundments and steps taken to prevent percolation and ground water contamination.
- Special precautions should be taken regarding flight patterns of birds in the area. Effluents containing toxic compounds, oil and grease have been known to cause extensive death of migratory birds. Location of plants should be prohibited in such type of sensitive areas.
- Deep well burial of toxic effluents should not be resorted to as it can result in re-surfacing and ground water contamination. Re-surfacing has been known to cause extensive damage to crop and livestocks.
- In all cases, efforts should be made for re-use of water and its conservation.

Solid Wastes

- The site for waste disposal should be checked to verify permeability so that no contaminants percolate into the ground water or river/lake.
- Waste disposal areas should be planned down-wind of villages and townships.
- Reactive materials should be disposed of by immobilising the reactive materials with suitable additives.
- The pattern of filling disposal site should be planned to create better landscape and be approved by appropriate agency and the appropriately pretreated solid wastes should be disposed according to the approved plan.
- Intensive programs of tree plantation on disposal areas should be undertaken.

Answer 4(b)

As per Regulation 31 of the SEBI (LODR) Regulations, 2015, the listed entity shall submit to the stock exchange(s) a statement showing holding of securities and shareholding pattern separately for each class of securities, in the format specified by the Board from time to time within the following timelines —

(a) one day prior to listing of its securities on the stock exchange(s);

(b) on a quarterly basis, within twenty one days from the end of each quarter; and,

(c) within ten days of any capital restructuring of the listed entity resulting in a

change exceeding two per cent of the total paid-up share capital: Provided that in case of listed entities which have listed their specified securities on SME Exchange, the above statements shall be submitted on a half yearly basis within twenty one days from the end of each half year.

(2) The listed entity shall ensure that hundred percent of shareholding of promoter(s) and promoter group is in dematerialized form and the same is maintained on a continuous basis in the manner as specified by the Board.

(3) The listed entity shall comply with circulars or directions issued by the Board from time to time with respect to maintenance of shareholding in dematerialized form.

As per Regulation 31A, all entities falling under promoter and promoter group shall be disclosed separately in the shareholding pattern appearing on the website of all stock exchanges having nationwide trading terminals where the specified securities of the entity are listed, in accordance with the formats specified by SEBI.

The stock exchange, specified in sub-regulation (1), shall allow modification or reclassification of the status of the shareholders, only upon receipt of a request from the concerned listed entity or the concerned shareholders along with all relevant evidence and on being satisfied with the compliance of conditions mentioned in this regulation.

Re-classification of Promoters as public shareholders is subject to the following conditions:

(a) Such promoter along with the promoter group and the Persons Acting in Concert shall not hold more than ten per cent of the paid-up equity capital of the entity.

(b) Increase in the level of public shareholding pursuant to re-classification of promoter shall not be counted towards achieving compliance with minimum public shareholding requirement under rule 19A of the Securities Contracts (Regulation) Rules, 1957, and the provisions of these regulations.

(c) The event of re-classification shall be disclosed to the stock exchanges as a material event in accordance with the provisions of these regulations.

(d) Board may relax any condition for re-classification in specific cases, if it is satisfied about non-exercise of control by the outgoing promoter or its persons acting in concert.

Answer 4(c)

Checklist for due diligence in respect of Project related information of ADLAP

1. Project Feasibility report

2. Reports/documents prepared by independent research agencies in respect of the state of the industry and demand and supply for the company's products

3. Break-up of Cost of Project:

   — Land – Location site & map, area, copy of documents i.e. Sale/ Lease Deed for land, Soil Test Report, Order for converting land into Industrial land etc.

— Building – Details break-up from Architect, Approval details from Municipality etc. and Valuation Report from a Chartered Engineer. (for existing building and suitability of site)

— Equipments – Invoices/Quotations of main items. (Indicate Imported machinery separately)

— Margin Money for Working Capital – Margin Money for Working Capital (calculation)

— Preliminary & Pre-operative expenses – break-up

— Provision for contingencies – break-up

4. Schedule of Implementation.
5. Status of Project as on a recent date – Amount spent & sources
6. Promoter's contribution till date (supported by Auditor's Certificate, if possible)
7. Current & proposed Shareholding pattern
8. Sanctions received by the issuer from bankers/institutions for debt financing in the project
9. Notes on the following: Technical process, utilities (power, water, transport, effluent treatment, location, land building, Plant & Machinery).
   (a) Manpower:
      i. Break-up of employees – whether any agreements are entered into with employee – If so, copy of agreement
      ii. Details of Pay scales/bonus (including performance bonus)/PF/ Gratuity etc.
      iii. Employment of contract labour – no. of workers, copy of contract.
   (b) Quality Control facilities, Research & Development.
10. Market (Demand/supply with sources along with copies),
11. Marketing & Distribution (network etc.) & relevant documents wherever applicable.
12. Arrangements and strategy of the company for marketing its products
13. Discussions with important customers, suppliers, Joint Venture partners, collaborators of the company.

Question 5

(a) Write short notes on the following :

(i) National Green Tribunal Act, 2010

(ii) Checklist for Compliance of Terms of Insurance in Due Diligence for Banks

(iii) Risk Management Committee. (3 marks each)

(b) Define the following terms :

(i) Wilful default

(ii) "Specified Securities" under SEBI (ICDR) Regulation, 2009. (3 marks each)

Answer 5(a)(i)

National Green Tribunal Act, 2010

National Green Tribunal Act, 2010 was enacted for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

Answer 5(a)(ii)

Checklist for compliance of Terms of Insurance

Check the following in regard to compliance of terms of insurance:

(a) the company's assets have been insured comprehensively. Where a joint insurance on plant and buildings has been taken, the value thereof has been apportioned in the manner prescribed/ approved;

(b) the insurance policy has been taken in the joint names of the company and the bank(s)/financial institution(s) ;

(c) the policy has been kept alive for such full value, as has been determined by the bank(s)/financial institution(s) , all premia are being paid on time, and the company has not done any such act as would render the policy void or voidable;

(d) the policy has been taken from an insurance office of repute, as determined by the bank(s)/financial institution(s); and

(e) all moneys received under the insurance policies are held in trust for better securing to the bank(s)/ financial institution(s) , the payment of all moneys secured under the indenture agreement.

Answer 5(a)(iii)

Risk Management Committee

As per Regulation 21 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 -

(1) The board of directors shall constitute a Risk Management Committee.

(2) The majority of members of Risk Management Committee shall consist of members of the board of directors.

(3) The Chairperson of the Risk management committee shall be a member of the board of directors and senior executives of the listed entity may be members of the committee.

(4) The board of directors shall define the role and responsibility of the Risk

Management Committee and may delegate monitoring and reviewing of the risk management plan to the committee and such other functions as it may deem fit.

(5) The provisions of this regulation shall be applicable to top 100 listed entities, determined on the basis of market capitalisation, as at the end of the immediate previous financial year

Answer 5(b)(i)

During the due diligence for banks, Practicing Company Secretary also check the name of the company and or any of its directors does not appear in the defaulters' list of Reserve Bank of India.

A "willful default" would be deemed to have occurred if any of the following events is noted:-

(a) The company has defaulted in meeting its payment/repayment obligations to the lender even when it has the capacity to honour the said obligations.

(b) The company has defaulted in meeting its payment/repayment obligations to the lender and has not utilised the finance from the lender for the specific purposes for which finance was availed of but has diverted the funds for other purposes.

(c) The company has defaulted in meeting its payment/repayment obligations to the lender and has siphoned off the funds so that the funds have not been utilised for the specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets. In order to prevent the access to the capital markets by the willful defaulters, a copy of the list of willful defaulters (non-suit filed accounts) and list of willful defaulters (suit-filed accounts) are forwarded to SEBI by RBI and Credit Information Bureau (India) Ltd. (CIBIL) respectively.

Answer 5(b)(ii)

Under SEBI (ICDR) Regulations 2009, "Specified Securities" means equity shares and convertible securities. The "convertible security" has been defined to mean a security which is convertible into or exchangeable with equity shares of the issuer at a later date, with or without the option of the holder of the security and includes convertible debt instrument and convertible preference shares.

Question 6

(a) Stable Ltd. is being merged in Growing Ltd. As a Practicing Company Secretary, what are the information required to check if there is cross holding of Directors of the Transferee and Transferor Companies ? (5 marks)

(b) Hindustan Zinc Ltd. has issued the tender for developing Compliance Software for the Company. Webscroll Co. Ltd. was the sussessful bidder giving lowest price bid. As a Compliance Solution provider, what are the approaches to be adopted by Webscroll Co. Ltd. (5 marks)

(c) The Competition Commission of India has received a complaint that the combination proposal of Tina Ltd. and Meena Ltd. is going to have an appreciable

adverse effect on competition. Explain the factors to be considered to evaluate the effect of Combination under the Competition Act, 2002. (5 marks)

Answer 6(a)

The Practicing Company Secretary shall verify following information to check Cross holding of the Directors of the Transferee and Transferor Companies:

1. Relationship between the directors of the transferee and transferor companies under the Companies Act, 2013.
2. Names of the officers of both the transferee and transferor companies who are to be authorised to sign the Application, Affidavit and Petition. (The companies concerned can authorise any one person to act on behalf of them, who may be from either of the companies).
3. Names of the English and regional language newspapers in which notices are to be published.
4. Names in preferential order as to the chairmen of the meetings of the transferee and transferor companies. (The chairman in this case need not be a director on the board of directors of the company concerned or even a member of the company).
5. List of creditors and their dues.
6. List of individual cases to be given, as well as categorisation in various slabs.

Answer 6(b)

In this age of information technology and outsourcing, where corporate solutions are available at every step and in respect of every matter, there are several companies offering 'compliance solutions'.

Approach to Compliance Solutions

Compliance solution providers adopts following approaches for creating or enhancing an ethics and compliance program for companies—

Risk/Cultural Assessment : Through employee surveys, interviews, and document reviews, a company's culture of ethics and compliance at all levels of the organization is validated. Our Reports and recommendations with detail observations identify gaps between company's current practices and benchmarks with international practices.

Program Design/Update : In this phase, compliance solution providers help company in creating guideline documents that outline the reporting structure, communications methods, and other key components of the code of ethics and compliance program. This encompasses all aspects of the program, from grass roots policies to structuring board committees that oversee the program; from establishing the mandatory anonymous complaint reporting mechanism i.e., compliance and ethics help line or whistleblower hot line to spelling out the specifics of the code of ethics in a way that is easily understood by everyone at all levels of organization.

Policies and Procedures : In this phase compliance solution providers help company to develop or enhance the detailed policies of the program, including issues of

financial reporting, antitrust, conflicts of interest, gifts and entertainment, records accuracy and retention, employment, environment, global business, fraud, political activities, securities, and sexual harassment, among others.

Communication, Training, and Implementation : Even the best policies and procedures are useless if they are not institutionalized— they must become part of the fabric of the organization. Compliance solution providers help company to clearly articulate, communicate, and reinforce not only the specifics of the program, but also the philosophy behind it, and the day-to-day realities of it. In this way, key stakeholders and other personnel are more likely to embrace the program and incorporate it into their attitudes and behaviours.

Ongoing self-Assessment, Monitoring, and Reporting : The true test of a company's ethics and compliance program comes over time. How do one know in one year or five that both the intent and letter of the law are still being observed throughout organization? How does the program and the organization adapt to changing legislation and business conditions? As the organization evolves for example, through mergers and acquisitions will the program remain relevant? The cultural assessment, mechanisms, and processes put in place including employee surveys, internal controls, and monitoring and auditing programs, help organisations achieve sustained success.

Answer 6(c)

The Act envisages appreciable adverse effect on competition in the relevant market in India as the criterion for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act empowers the Commission to evaluate the effect of Combination on the basis of factors mentioned in sub section (4) of Section 20.

Factors to be considered by the Commission while evaluating appreciable adverse effect of Combinations on competition in the relevant market:

(a) actual and potential level of competition through imports in the market;

(b) extent of barriers to entry into the market;

(c) level of concentration in the market ;

(d) degree of countervailing power in the market;

(e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(f) extent of effective competition likely to sustain in a market;

(g) extent to which substitutes are available or are likely to be available in the market;

(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

(j) nature and extent of vertical integration in the market;

(k) possibility of a failing business;

(l) nature and extent of innovation;

(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

***

CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY

Time allowed : 3 hours *Maximum marks : 100*

NOTE: *1. Answer ALL Questions.*

2. All references to sections relate to the Companies Act, 2013 unless stated otherwise.

PART A

Question 1

(a) "Measuring the shareholders' value" is the objective of Good Corporate Governance.

Comment on the statement, how buy back of shares achieves it. (5 marks)

(b) A scheme of Merger of Happy Limited with Lucky Pvt. Ltd. was filed with the National Company Law Tribunal (NCLT). The Regional Director raised objections that the additional filing fees and stamp duty on the increased share capital of the Lucky Pvt.Ltd. is to be paid and also against the changing name of the transferee company, for not complying with Section 61 of the Companies Act 2013.

Will the objection of the Regional Director hold good ? Explain. (5 marks)

(c) Discuss "Strategic Alliance" and "Joint Venture" as corporate restructuring strategies. (5 marks)

(d) How the rights of the minority shareholders are protected during merger/ amalgamation/takeover ? (5 marks)

Answer 1(a)

It is right to say that good corporate governance calls for measuring the shareholders' value. When a company has surplus funds for which it does not have good avenues for deployment, assuring an average return on capital employed and earnings per share (EPS), the company's financial structure requires balancing.

The Board of directors of the Company has to make a thorough study into the financial structure of the company, the precise reasons for its restructuring and the mode of restructuring which would be suitable to the requirements of the company in the given circumstances.

One of the methods of financial restructuring open to a company is buy-back of its own securities. Buy-back results in the return of the shareholders money to the shareholders and a reduction of the floating stock of the company's securities in the market while at the same time creating value for the remaining equity.

In a reconstruction exercise, the reasons for embarking upon a buy-back are varied and could include:

(i) Facilitating reduction of share capital without recourse to the lengthy and time

consuming process of passing special resolution subject to confirmation by the Tribunal as required under section 66 of the Companies Act, 2013;

(ii) Creation of liquidity in a company's share capital and providing an exit route, where shares are unlisted, or to encourage investment in an unlisted company by agreeing to purchase shares subscribed for at a later date;

(iii) Proper and judicious deployment of the company's finances by investing the same in the purchase of its own securities;

(iv) Maintaining shareholders' value in a situation of poor state of secondary market by a return of surplus cash to the shareholders; and countering hostile take-over.

Answer 1(b)

The intention of section 230(7) of the Companies Act, 2013 is to reconstitute the company without being required to make a number of applications under the Companies Act, 2013 for various alternatives which may be required in the Memorandum of Association and Articles of Association of the company for functioning as reconstructed company under the scheme under section 230 of the Companies Act, 2013. It is intended to be used as a single window clearance.

It has been held in various cases that not only section 230 of the Companies Act, 2013 (previously section 391 of the Companies Act, 1956) is a complete code, it is intended to be used as a 'single window clearance system' to encourage that parties are not put to avoidable unnecessary procedure of making repeated applications to the Tribunal (previously court), for various other alternatives or changes which might be ordered effecting to implement the sanctioned scheme, whose overall fairness and feasibility have been judged by the NCLT under section 230 of the Companies Act, 2013 (previously section 394 of the Companies Act, 1956).

The authorised share capital could be clubbed and additional fees may not be required to be paid and processes which are applicable for the change of name [section 13(2) of the Companies Act, 2013] could be duly made under section 230 of the Companies Act, 2013 by the power vested with the NCLT.

The power to approve the scheme along with the change of name of company lies with the NCLT under section 230(7) of the Companies Act, 2013.

So, the objection of Regional Director will not hold good.

Case law

In *Jaypee Cement Limited* v. *Jayprakash Industries Limited* [2004] 2 Comp LJ 105 (All)/ [2004] XXXIVCS LW 50 the Allahabad High Court held that the combining of the authorised share capital of the transferor company with that of the transferee company resulting in increase in the authorised share capital of the transferee company does not require the payment of registration fee or the stamp duty because there is no reason why the same fee should be paid again by the transferee company on the same authorised capital.

Answer 1(c)

Corporate restructuring is the process of significantly changing a company's business model, management team or financial structure to address challenges and increase shareholder value. Corporate restructuring is an inorganic growth strategy.

Strategic Alliance is an agreement between two or more parties to collaborate with each other in order to achieve certain objectives while continuing to remain independent organisations. It is an arrangement to share resources to undertake a specific and mutual benefit project. Often, strategic alliances allow involved organizations to pursue opportunities at a faster rate than if they function alone. It provides access to additional knowledge and resources that are held by the other party, which may ease the learning curve for the new pursuit, along with providing set-up time and costs.

Joint Venture is an entity formed by two or more companies to undertake financial activities together. The parties agree to contribute equity to form a new entity and shares the revenues, expenses and capital of the company. It may be project based joint venture or functional based joint venture. The joint venture entered into by the companies in order to achieve a specific task is known as **project based joint venture**. The joint venture entered into by companies in order to achieve mutual benefit is known as **functional based joint venture**. Because the joint venture can access assets, knowledge and funds from both of its partners it can combine the best features of those companies without altering the parent companies.

Answer 1(d)

Minority shareholders rights are protected in following manner during merger/ amalgamation/ takeover:

The scheme is required to be approved by the shareholders, before it is filed with the NCLT (previously court) for its approval. The scheme is circulated to all the shareholders along with the statutory note of NCLT (previously court) convened meeting and the explanatory statement under section 230(3) of the Companies Act, 2013 approving the scheme of shareholders.

The NCLT (previously court) while approving the scheme seeks objections, if any, against the scheme from the shareholders, etc. Any interested person (including minority shareholders) may appear before the NCLT following the due process.

Under section 235 of the Act, a transferee company, which has acquired 90% shares of a transferor company through a scheme or contract, is entitled to acquire shares of remaining 10% shareholders. Such acquisition of 10% shares should be as per directions of NCLT.

Under section 235, 236 and section 237(4) read with section 230(3) of the Companies Act, 2013, dissenting shareholders have been provided with an opportunity to approach NCLT.

In case of takeover as per SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, SEBI has got power to appoint investigating officer to undertake investigation, in case complaints are received from investors, intermediaries or any other person.

Attempt all parts of either Q. No. 2 or Q. No. 2A

Question 2

(a) What are the obligations of the Committee of the Independent Directors of a target company in connection with providing reasonable recommendation on the open offer made by the acquirer ? (5 marks)

(b) Enumerate the common mistakes made by the corporate leading to pitfalls in mergers and acquisition ? (5 marks)

(c) What is a "Voluntary Offer" as per Regulation 6 of Takeover Code 2011 ? (5 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) M/s Brite Instruments Pvt. Limited is acquiring M/s Sunshine Pvt.Limited. You are the Company Secretary of M/s Brite Instruments Pvt Limited. Help your management (Board of Directors) to prepare a checklist in this regard. (5 marks)

(ii) In case of Takeover, what are the cases in which the amount is released from Escrow Account ? (5 marks)

(iii) Scheme of Reconstruction pursuant to order of competent authority does not trigger, an open offer under SEBI (SAST) Regulations. Discuss the regulation citing the case law. (5 marks)

Answer 2(a)

A committee of independent directors shall be constituted by the Board of the target company to provide reasoned recommendations on the open offer being made by the acquirer and the target company shall publish such recommendations.

The committee of independent directors (hereafter referred as committee) will be entitled to obtain external professional advice at the cost of the target company. The committee shall provide its reasoned recommendation on the open offer to the shareholders of the target company and such recommendation will be published in such form as may be specified, at least two working days before commencement of the tendering period, in the same newspapers where the public announcement of the open offer was published. Simultaneously, copies shall be sent to SEBI and the stock exchanges where the shares of the target company are listed and the stock exchanges shall forthwith disseminate such information to public.

The committee shall ensure that the copy containing reasoned recommendations is also sent to the manager for open offer and where there are competing offers, to the managers to the open offer for every competing offer.

Answer 2(b)

Corporate make following common mistakes leading to pitfalls in mergers and acquisitions:

(i) Ego problems on both sides – buyer and seller – crop up very frequently and

resulting clashes make bad situations worse. Trying to have two chiefs is a formula for disaster.

(ii) Attempt to hasten the integration between both the parties' raises the likelihood of making serious errors. Sudden and radical changes such as relocating the company's entire production operations should be carefully considered before implementation.

(iii) Many buyers assert their ownership by moving quickly to convert the acquired company. This does not always work in the right direction and spirit.

(iv) A cautious approach should be applied to competitor end runs. While the company is focussed on integration, it furnishes an ideal time for competitors to make a run on the market.

(v) Unless the acquired business is in the exact same field, different dynamics need to apply for smooth operation and integration.

(vi) One of the most common and damaging mistake is to lay off crucial employees from the acquired company. This is a very complicated, delicate matter and even the seller might not have an accurate idea as job titles can be misleading from the functions that are entwined with them.

Answer 2(c)

Voluntary Offer (Regulation 6)

A voluntary open offer under Regulation 6 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, is an offer made by a person, who himself or through 'persons acting in concert' (PACs), if any, holds 25% or more shares or voting rights in the target company, but less than the maximum permissible non-public shareholding limit, for such number of shares such that the aggregate of the shareholding of the acquirer after the offer shall not exceed the maximum permissible non-public shareholding.

Restrictions on Voluntary Offer

A voluntary offer cannot be made if the acquirer or 'persons acting in concert' (PACs) with him has acquired any shares of the target company in the 52 weeks prior to the voluntary offer without attracting the provisions of the regulations, to make a public announcement. The acquirer is prohibited from acquiring any shares during offer period other than those acquired in the open offer. The acquirer is also not entitled to acquire any share for a period of 6 months, after completion of open offer, except pursuant to another voluntary open offer.

Answer 2A(i)

Check-list for M/s Brite Instruments Pvt. Ltd. (the transferee company) while acquiring M/s Sunshine Pvt. Ltd. is as follows :

(i) Offer made to M/s Sunshine Pvt. Ltd. (transferor company) is made after due diligence.

(ii) Copy of notice for the general meeting along with a copy of e-form No. 35A is circulated by the transferor company to its members.

(iii) Intimation received from the transferor company in respect of approval of the offer by the requisite majority of the shareholders of the transferor company.

(iv) Notice as prescribed in section 235 of the Companies Act, 2013 given by the company to dissenting shareholders of the transferor company for the purpose of acquiring their shares.

(v) If there is any Court Order in favour of the dissenting shareholders of the transferor company, terms of the same has been complied with.

(vi) The company must ensure that the prescribed notice has been sent to those shareholders of the transferor company who have not assented to the transfer of the shares and that such shareholders have agreed to transfer their shares to the company.

(vii) To ensure that the copy of the notice has been sent to the dissenting shareholders of the transferor company and duly executed instrument(s) of transfer together with the value of the shares have been sent to the transferor company.

Answer 2A(ii)

Release of amount from Escrow Account [Regulation 17(10)]

The amount lying in escrow account can be released in the following cases only:

1. In case of withdrawal of offer, the entire amount can be released only after certification by the managers to the open offer.
2. The amount deposited in special escrow account is transferred to special bank account opened with the Bankers to an issue; however the amount so transferred shall not exceed 90% of the cash deposited in the escrow account.
3. The balance 10% in the escrow account is to be released to the acquirer on the expiry of thirty days from the completion of all obligations under the open offer.
4. The entire amount to the acquirer on the expiry of thirty days from the completion of all obligations under the offer where the open offer is for exchange of shares or other secured instruments.
5. In the event of forfeiture of amount, the entire amount is distributed in the following manner:
   (a) One third of the amount to target company;
   (b) One third of the escrow account to the Investor Protection and Education Fund established under SEBI (Investor Protection and Education Fund) Regulations, 2009;
   (c) Residual one third is to be distributed to the shareholders who have tendered their shares in the offer.

Answer 2A(iii)

Regulation 10(1)(d)(ii) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 states that acquisition pursuant to a scheme of arrangement involving

the target company as a transferor company or as a transferee company or reconstruction of the company including amalgamation, merger or demerger, pursuant to an order of a court of a competent authority under any law or regulation, Indian or foreign does not trigger open offer as required under Regulation 3 or Regulation 4 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, even if the acquisition crosses the specified threshold limit for open offer.

In the case law of Spice Jet being taken over by Ajay Singh, since the Ministry of civil aviation, a competent authority approved the scheme of reconstruction, the acquirer Ajay Singh did not go through the open offer process as mandated under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

Regulation 10(6) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 provides that in respect of any acquisition made pursuant to exemption provided in SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the acquirer should file a report with the stock exchanges where the shares are listed, in the prescribed form and not later than 4 working days from the acquisition and the stock exchange shall forthwith disseminate such information to the public.

Question 3

Examine and explain the following statements citing relevant provisions of law :

(a) The reduction of share capital can result in extinguishment of class of shares. (3 marks)

(b) The amalgamated company has to issue new shares to Non-resident Indians in amalgamation and for that it has to obtain permission of Reserve Bank of India under the provisions of the Foreign Exchange Management (FEMA) Act, 1998. (3 marks)

(c) Name various documents which requires Stamping in case of merger. (3 marks)

(d) M/s Happy Exports Limited was merged with M/s Smart Exports Limited. The order passed by High Court was filed with the Registrar of Companies (ROC). But the same was not taken on record by ROC. Will the scheme still be effective? (3 marks)

(e) The Tribual can modify transfer date proposed in a scheme of amalgamation. (3 marks)

Answer 3(a)

In Siel Ltd., Re (2008) 144 Com Cases 469 : (2009) 89 SCL 434 (Del), a scheme of amalgamation and arrangement involved reduction of share capital by extinguishment of shares of a particular class. The reduction was approved by the majority of shareholders and creditors of the transferee company. The court, now NCLT approved the reduction and extinguishment of a portion of share capital was held to be permissible as no one was prejudicially affected.

Answer 3(b)

When a scheme of amalgamation envisages issue of shares/cash option to non-resident Indians, the amalgamated company is required to obtain the permission of

Reserve Bank of India, subject to conditions prescribed under the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.

Answer 3(c)

Documents mentioned below require stamping in case of merger:

Court Order : When transfer takes place by virtue of a court order to a scheme of amalgamation, stamp duty is payable. The order of the court ordering the transfer of assets and liabilities of the transferor company to the transferee company is deemed to be a conveyance.

Stamp duty on other documents : Usually, in a merger, several other documents, agreements, indemnity bonds, etc. are executed, depending on the facts of each case and requirements of the parties. Stamp duty would also be leviable as per the nature of the instrument and its contents.

Answer 3(d)

Filing of Tribunal (earlier court) Order with Registrar of Companies (ROC)

The order made in the Tribunal (earlier court) under section 230(8) of the Companies Act, 2013 should be filed with the Registrar of Companies. If the order is not filed with the Registrar, it will not have any effect.

The requirement under this section is filing of the order of the Tribunal (previously court) and it does not specify the need for Registrar to register it.

The section 230(8) of the Companies Act, 2013 only mandates the company to file the order of the Tribunal with ROC to give effect to the scheme of merger. The Register of Companies is bound to register the Certified Order copy of the Tribunal which is filed with the ROC by the company. Therefore, if the company files the Order of the Tribunal sanctioning the scheme of amalgamation or merger with the Registrar of Companies then the scheme becomes effective. (Note: Tribunal here refers to the National Company Law Tribunal.)

Answer 3(e)

Amongst others, the foremost requirement is the determination of cut-off date from which all properties, movable as well as immovable and rights attached thereto, etc., are required to be transferred from amalgamating company to the amalgamated company. The date may be called transfer date or appointed date. The scheme becomes effective only after a certified copy of the order of the Tribunal is filed with the concerned office of Registrar of Companies.

As per section 232(6), the scheme shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

The Supreme Court in *Marshall Sons & Co. [India] Ltd.* v. *Income Tax Officer* (1977) observed that it is true that while sanctioning the scheme, it is open to the National Company Law tribunal (NCLT) previously court, to modify the transfer date, if

there is little doubt that such date would be the date of amalgamation or date of transfer, but when the NCLT (previously court) does not prescribe any specific date, but merely sanctions the scheme, presented to it, the date specified in the scheme is the transfer date. It cannot be otherwise.

PART B

Quesiton 4

(a) *What is the Valuation documentation and what is the objective of this ?* *(5 marks)*

(b) *Write a note on International Valuation Standards Council.* *(5 marks)*

(c) *"Valuation is an important aspect in merger and acquisition and it should be done by a team of experts." Comment on the statement, mentioning which type of experts should be in the team.* *(5 marks)*

Answer 4(a)

Valuation Documentation

Valuation exercise is based on observation, inspection, analysis and calculation. During this process, the valuer goes through various documents, records his observation, makes relevant calculation and records these calculations and analyse results. In this process a lot of documents are generated which forms the basis of his conclusion on the valuation of the subject matter. It is very necessary for him to preserve all such records so that these documents may help him to substantiate his conclusion on valuation. Moreover, these documents also become a matter of reference in future.

Objectives of documentation in valuation exercise

Documentation is "an essential element" of valuation quality. Valuation documentation provides the principal written record to support the following:

1. The Valuer's report assertion that the valuation exercise was performed with due diligence and in accordance of generally accepted valuation principles; and
2. The Valuers' conclusions about valuation of the subject matter of the valuation exercise and other related aspects of valuation.

The following are some more specific objectives of documentation in Valuation exercise:

— Assisting Valuer to plan and perform the Valuation Exercise;

— Assisting those responsible to direct, supervise, and review the work performed;

— Providing and demonstrating the accountability of those performing the work (i.e., compliance with applicable standards);

— Assisting quality-control reviewers to understand and assess how the engagement team reached and supported significant conclusions;

— Enabling internal and external inspection teams and peer reviewers to assess compliance with professional, legal, and regulatory standards and requirements; and

— Assisting successor Valuer.

Answer 4(b)

The International Valuation Standards Council (IVSC) is the established international standard setter for valuation. Through the International Valuation Standards Board, the IVSC develops and maintains standards on how to undertake and report valuations, especially those that will be relied upon by investors and other third party stakeholders. The IVSC also supports the need to develop a framework of guidance on best practices for valuation of the various classes of assets and liabilities and for the consistent delivery of the standards by properly trained professionals around the globe. The IVSC has published International Valuation Standards (IVS) since 1985.

Membership of IVSC is open to organisations of users, providers, professional institutes, educators, and regulators of valuation services. IVSC members appoint the IVSC Board of Trustees.

Answer 4(c)

Valuation exercise in merger and acquisition should be done by a team of experts keeping into consideration the basic objectives of acquisition. Team should comprise of financial experts, accounting specialists, technical and legal experts who should look into aspects of valuation from different angles.

Accounting expert has to foresee the impact of the events of merger on profit and loss account and balance sheet through projection for next 5 years and economic forecast. Using the accounting data he must calculate performance ratios, financial capacity analysis, budget accounting and management accounting and read the impact on stock values, etc. besides, installing accounting and depreciation policy, treatment of tangible and intangible assets, doubtful debts, loans, interests, maturities, etc.

Technocrats has their own role in valuation to look into the life and obsolescence of depreciated assets and replacements and adjustments in technical process, etc. and form independent opinion on workability of plant and machinery and other assets.

Legal experts advice is also needed on matters of compliance of legal formalities in implementing acquisition, tax aspects, review of corporate laws as applicable, legal procedure in acquisition strategy, laws affecting transfer of stocks and assets, regulatory laws, labour laws, preparing drafts of documents to be executed or entered into between different parties, etc.

Question 5

(a) Bell Limited is planning to merge with (take over) Ring Limited. The following is the data regarding both the companies :

	Bell Ltd.	*Ring Ltd.*
Paid up Capital (Fully Paid Up Equity Shares of ₹10 each)	*₹40,00,000*	*₹24,00,000*
Market Price of Shares (Latest traded in Stock Exchange)	*₹40*	*₹24*

Profit After tax (PAT)	*₹20,00,000*	*₹14,40,000*

What should be the basis of exchange ratio so that the Bell Limited gains ? *(5 marks)*

(b) Swan Limited is the holding company of Duck Limited. Swan Limited wants to merge Duck Limited with it.

Swan Limited holds 30,000 Equity Shares of ₹10 each fully paid up in Duck Limited.

The following details are available with us :

(Value in ₹)

	Swan Ltd.	*Duck Ltd.*
Paid up Equity shares	*50,00,000*	*40,00,000*
(₹10 each)		
Market value of shares	*50*	*25*
(Latest traded in Stock Exchange)		
Profit After Tax (PAT)	*25,00,000*	*12,00,000*

Calculate the no. of shares Swan Ltd.will issue to the shareholders of Duck Ltd. If exchange ratio is on the basis of :

(i) Earning Per Share (EPS)

(ii) Market Price. *(5 marks)*

(c) The method of valuation of a business, however, depends to a great extent on the acquisition motive. What are those motives of valuation ? *(5 marks)*

Answer 5 (a)

Step –I

Earnings per share method

Earnings per share (EPS) : Profit after tax /Total number of shares

	Bell Ltd.	Ring Ltd.
EPS (Rs.)	5	6
	(20,00,000/4,00,000)	(14,40,000/2,40,000)

No. of shares to be issued to shareholders of Ring Ltd. = 6/5 x 2,40,000 = 2,88,000 shares

Step-II

Market Price method

Market Price (Rs.)	40	24

No. of shares to be issued to shareholders of Ring Ltd. = (Market price of shares of Ring Ltd. /Market price of shares of Bell Ltd.) x Total shares of Ring Ltd.

No. of shares to be issued to shareholders of Ring Ltd. = 24/40 x 2,40,000 = 1,44,000 shares

Since Bell Ltd. is required to issue half the number of shares to Ring Ltd. under market price method as compared to EPS method. So, Bell Limited should offer exchange ratio on the basis of Market Price.

Answer 5 (b)

Step –I

Earnings per share method

		Swan Ltd.	Duck Ltd.
(i)	EPS (Rs.)	5	3
		(25,00,000/5,00,000)	(12,00,000/4,00,000)

No. of shares to be issued: 3/5 x 3,70,000* = 2,22,000 shares

Step-II

Market Price method

(ii)	Market Prices (Rs.)	50	25

No. of shares to be issued : 25/50 x 3,70,000 = 1,85,000 shares

Note : * Total No. of shares of Duck Ltd. – Shares held by Swan Ltd. :

(4,00,000 - 30,000) = 3,70,000

Answer 5(c)

Valuation and acquisition motives are an important aspect in the merger/ amalgamation/takeover activity. The method of valuation of business, however, depends to a great extent on the acquisition motives. The acquisition activity is usually guided by strategic behavioral motives. The reasons could be:

(i) Either purely financial, e.g., taxation, assets-stripping, financial restructuring involving an attempt to augment the resources base and portfolio-investment;

(ii) Business related, e.g., expansion or diversification;

(iii) Behavioral reasons of personal ambitions or objectives of the top management, e.g., desire to grow big.

PART C

Attempt all parts of either Q. No. 6 or Q. No. 6A

Question 6

(a) Explain the steps to be followed for the "Corporate Insolvency Resolution" process with timelines. (8 marks)

(b) Explain the different functions of Insolvency professionals. (6 marks)

(c) Explain "Property" under Recovery of Debts (and Bankruptcy) Act 1993. *(4 marks)*

(d) Explain "Financial Asset" under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002. *(2 marks)*

OR (Alternate question to Q. No. 6)

Question 6A

(i) Measures to be taken by Assets Reconstruction or Securitisation Company for the purpose of Assets Reconstruction. *(5 marks)*

(ii) Assistance to take possession of secured assets from the Chief Metropolitan Magistrate or the District Magistrate under (SARFAESI) Act, 2002. *(5 marks)*

(iii) Right to lodge a "Caveat" under (SARFAESI) Act, 2002. *(5 marks)*

(iv) "Demand Notice" under Security Interest (Enforcement) Rules 2002. *(5 marks)*

Answer 6(a)

Steps to be followed for the Corporate Insolvency Resolution Process (CIRP) are as under :

(a) A financial creditor (himself or jointly with other financial creditors), an operational creditor or the corporate debtor (through Corporate applicant i.e. corporate debtor itself; or an authorised member, partner of corporate debtor; or a person who has control and supervision over the financial affairs of the corporate debtor) may initiate corporate insolvency resolution process in case a default is committed by corporate debtor. The financial creditor/operational creditor or corporate debtor as the case may be initiate the CIRP by making an application to NCLT under sections 7, 8 and 10 respectively.

(b) Financial creditor on default and operational creditor after ten days from the date of delivery of demand notice can initiate CIRP.

(c) A financial creditor and corporate debtor shall propose the name of IRP and operational creditor may propose the name of IRP.

(d) NCLT within 14 days of receipt of application by order shall admit or reject application. Before rejecting, it should give notice to rectify the defects within 7 days of receipt of notice.

(e) NCLT to declare moratorium, appoint Interim Resolution Professional (IRP) for a term not exceeding thirty days from the date of appointment and cause public notice.

(f) An Insolvency Professional shall make a Public Announcement in newspaper in one English language and regional Language not later than three days from the date of his appointment. Public announcement shall contain the information such as name and address of the corporate debtor under CIRP, name of the authority with which corporate debtor is registered. The last date for submission of claims and date on which CIRP will be closed.

(g) 'Insolvency commencement date' starts from the date of admission of application and it is to be completed within 180 days of commencement which can be extended by ninety days only one time by NCLT.

(h) Interim Resolution professional to constitute Committee of Creditors comprising of financial creditors within 30 days from the date of his appointment.

(i) Management of affairs of corporate debtors as a going concern, powers of Board of directors or the partner of debtor shall stand suspended and exercised only by the IRP.

(j) Committee of creditors within 7 days of the constitution either resolve to appoint IRP as resolution professional (RP) or replace IRP with another RP.

(k) All decisions of Committee of Creditors shall be taken by vote not less than 75% of voting share of financial creditors. All financial creditors shall be part of Committee of Creditors and if any financial creditor is a related party of corporate debtor, then such financial creditor will not have any right of representation, participation or voting. If 75% of voting share of financial creditors consider the case complex and require extension of time beyond 180 days, the NCLT can grant a one-time extension of up to 90 days.

(l) Preparation of information memorandum by IRP for formulating Resolution Plan by resolution applicant. A resolution applicant means any person who submits resolution plan to the resolution professional. Upon receipt of resolution plans, Resolution Professional shall place it before the Committee of Creditors for its approval.

(m) Resolution Applicant prepares the Resolution Plan based on the information memorandum.

(n) Submission of Resolution Plan by Resolution Applicant to the Committee of Creditors by IRP and to be approved by 75% of voting share of financial creditors.

(o) IRP to submit approved Resolution Plan to NCLT which shall approve or reject it and order liquidation.

(p) The approved plan shall be binding on the corporate debtor, and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

(q) Moratorium ends on the date of approval.

(r) Appeal may be made to NCLAT against the order passed by NCLT within 30 days from date of an order approving or rejecting the resolution plan.

Answer 6(b)

Functions and obligations of Insolvency professionals under the provisions of section 208 of the Insolvency and Bankruptcy Code, 2016 are:

(1) Where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary, in the following matters, namely:

(a) A fresh start order process under Chapter II of Part III;

(b) Individual insolvency resolution process under Chapter III of Part III;

(c) Corporate insolvency resolution process under Chapter II of Part II;

(d) Individual bankruptcy process under Chapter IV of Part III; and

(e) Liquidation of a corporate debtor firm under Chapter III of Part II.

(2) Every Insolvency Professional shall abide by the following code of conduct :

(a) To take reasonable care and diligence while performing his duties.

(b) To comply with all requirements and terms and conditions specified in the bye-laws of the Insolvency Professional Agency of which he is a member.

(c) To allow the insolvency professional agency to inspect his records.

(d) To submit a copy of the records of every proceedings before the adjudicating authority to the Board as well as to the Insolvency Professional Agency of which he is a member.

(e) To perform his function in such manner and subject to such conditions as may be prescribed.

In the resolution process, the insolvency professional manage the affairs of the debtor as a going concern, collect information relating to the assets, finances and operations of corporate debtor for determining the financial position, verifies the claims of the creditors, constitutes a creditors committee, runs the debtor's business during the moratorium period and helps the creditors in reaching a consensus for a revival plan. In liquidation, the insolvency professional acts as a liquidator and bankruptcy trustee.

Answer 6(c)

Section 2(jb) of the Recovery of Debts (and Bankruptcy) Act, 1993 defines 'Property' as :

(a) Immovable property;

(b) Movable property;

(c) Any debt or any right to receive payment of money whether secured or unsecured;

(d) Receivables, whether existing or future; and

(e) Intangible assets, being know how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature, as may be prescribed by the central government in consultation with RBI.

Answer 6(d)

Financial Asset

'Financial asset' under section 2(l) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 means debt or receivable and includes:

— a claim to any debt or receivables or part thereof whether secured or unsecured; or

— any debt or receivables secured by, mortgage of, or charge on, immovable property; or

— a mortgage, charge, hypothecation or pledge of movable property; or

— any right or interest in the security, whether full or part underlying such debt, receivables, or beneficial interest in property movable or immovable or debt

receivables, whether such interest is existing, future, accruing, conditional or contingent or any financial assistance.

Answer 6A(i)

Measures that can be taken by Assets Reconstruction or Securitisation Company for the purposes of asset reconstruction having regard to the guidelines framed by the Reserve Bank in this behalf are:

— Proper management of the business of the borrower, by change in, or takeover of the management of the business of the borrower;

— Sale or lease of a part or whole of the business of the borrower;

— Rescheduling of payment of debts payable by the borrower;

— Enforcement of security interest in accordance with the provisions of the Act;

— Settlement of dues payable by the borrower;

— Taking possession of secured assets in accordance with the provisions of the Act;

— To convert any portion of debt into share of a borrower company.

Provided that conversion of any part of debt into shares of a borrower company shall be deemed always to have been valid, as if the provisions of this clause were in force at all material times.

Answer 6(A)(ii)

Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 provides for assistance for taking possession of secured asset from the Chief Metropolitan Magistrate or the District Magistrate.

In simple terminology, the essence and meaning of Section 14 of the Act is that a secured creditor may seek the help and assistance of the Chief Metropolitan Magistrate or the District Magistrate for the purpose of taking over of the possession of the secured asset or property instead of resorting to recovery of the asset by means of self-help.

Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing to the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction any such secured asset or other documents relating thereto, may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him.

— Take possession of such asset and documents relating thereto; and

— Forward such asset and documents to the secured creditor.

An application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor.

On receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall satisfy the comments

of the affidavit and pass suitable orders for the purpose of taking possession of the secured assets.

Answer 6(A)(iii)

Right to lodge a 'Caveat'

Section 18C of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 deals with Right to lodge a caveat. Section 18C(1) states that where an application or an appeal is expected to be made or has been made under section 17 or section 17A or section 18 or section 18B, the secured creditor or any person claiming a right to appear before the Tribunal or the Court of District Judge or the Appellate Tribunal or the High Court, as the case may be, on the hearing of such application or appeal, may lodge a caveat in respect thereof.

Where a caveat has been lodged

(a) the secured creditor by whom the caveat (hereafter referred to as the caveator) has been lodged shall serve notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be made under sub-section (1);

(b) after a caveat has been lodged under sub-section (1), any application or appeal is filed before the Tribunal or the court of District Judge or the Appellate Tribunal or the High Court, as the case may be, the Tribunal or the District Judge or the Appellate Tribunal or High Court, as the case may, shall serve a notice of application or appeal filed by the applicant or the appellant on the caveator.

Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of the period of ninety days from the date on which it was lodged unless the application or appeal referred to in sub-suction (1) has been made before the expiry of the said period.

Answer 6(A)(iv)

Demand Notice

A demand notice under the Security Interest (Enforcement) Rules, 2002 is a formal notice demanding that the person to whom the notice is addressed perform an alleged legal obligation such as paying a sum of money or acting on a contractual commitment.

Service of demand notice

Rule 3(1) provides that the service of demand notice as referred to in sub-section (2) of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 shall be made by delivering or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgement due, addressed to the borrower or his agent empowered to accept the service or by Speed Post or by courier or by any other means of transmission of documents like fax message or electronic mail service.

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