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Key provisions of Companies Bill 2012

Borivali Central CPE SC & WIRC-ICAI
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Agenda – topics covered

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Dividends

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- ### Dividends [123 (205)]...
- Declaration / payment of dividend only out of,
- Profits for the year
 - Profits of preceding year(s)
 - Money provided by government pursuant to guarantee
- PwC 4

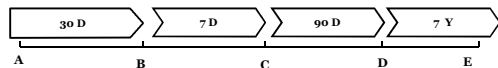
- ### ...Dividends [123 (205)]...
- Transfer to reserves – discretionary
 - Can be paid in electronic mode
 - No dividend if there is non-compliance relating to
 - Prohibition on acceptance of deposits
 - Repayment of deposits

Note: Default in redemption of irredeemable preference shares – not a disqualification
 - Dividend only after providing for depreciation as per Schedule II
 - Power of government in public interest to dispense with depreciation requirement – no more available
- PwC 5

- ### ...Dividends [123 (205)]...
- Inadequate profits
 - Dividend out of accumulated profits
 - Only out of free reserves
 - Interim dividend
 - Out of P/L surplus
 - Profits of financial year
 - Loss in preceding quarter – limited to average of last 3 FYs
- PwC 6

...Dividends [124 (205)]

- Unpaid dividend
 - Unclaimed within 30D
 - Transfer to specified account in scheduled bank within 7D
 - Within 90D detailed statement on website in specific format
 - Unclaimed for 7Y – IEPF
 - Shares also transferred to IEPF



- A → B – To pay Dividend
- B → C – Transfer to special account
- C → D – Upload details on website
- D → E – Transfer to IEPF

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Financial statements and accounts

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Maintenance of books of account [128 (209)]

- Maintained at registered/other office
- Accrual/double entry
- Cognisance to electronic mode
- Branch office – in/out of India
- Inspection requirement
- Preservation period – 8 years
 - Investigation – longer period – Central Government
- Duty of MD/WTD/CFO/others
- Non-compliance – 1 year/50-500K/both

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Financial statement – defined [2(40)]

- Balance sheet
- Profit and loss account
- Cash flow statement
- Explanatory notes

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Financial statements [129 (200-202)]

- Comply with accounting standards
- Not applicable - insurance/banking/electricity
- Consolidation of holding with subsidiary/associate/JV company
- Separate statement – salient features – subsidiary
- Non-compliance with AS – deviation/reasons/financial effect
- Exemption from requirement
- Non-compliance – MD/WTD/CFO – 1 Y/50-500K/both

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Consolidation of FS [129(3)]

- Mandatory for all companies
- Intermediary unlisted parent – no carve out provided
- Consideration of associate/JV only when subsidiary – not clear
- Issue of difference in definition as under CB12 and AS
 - Control
 - Significant influence
 - Subsidiary

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Reopening/recast of financial statement [130]

- No re-opening/recast permissible
- Permissible only when,
 - Application made by Central Government/IT/ SEBI/other
 - Court order
- Revised/recast accounts shall be final

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Voluntary revision of financial statement [131]

- Only when BoD finds that financial statements/ board report is not compliant
- Only 3 preceding FYs
- Prior approval of Tribunal
- Tribunal order to be filed with RoC
- Revision only once
- Detailed reasons in Board report
- Where FS already circulated
- Central Government to make rules

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Central Government to prescribe AS [133(211)]

- Central Government can prescribe AS
- Recommended by ICAI
- NFRA to be consulted and its recommendations accepted

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Board Report – requirements [134(215-217)] ...

- Signing of financial statements
- Board Report to *include*
 - Annual return extract
 - Number of Board meetings
 - Directors' responsibility statement (DRS)
 - Independent Directors' declaration
 - Company policy on Directors' appointment/ remuneration
 - Explanation/comment on qualification by auditors/CS
 - Particulars of loans, guarantee, investments, etc.
 - Related party transactions

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... Board Report – requirements [134(215-217)] ...

- State of company's affairs
- Transfer to reserves
- Proposed dividend
- Post balance sheet events
- Energy conservation
- Risk management policy
- CSR initiatives
- Formal annual evaluation of Board/committees
- Directors' responsibility statement

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...Board Report – requirements [134(215-217)] ...

- DRS to certify AS observance
- DRS to certify internal financial controls
- Comply with all other applicable laws
- Non-compliance
 - Company – fine 50K – 25L
 - Every officer – 3Y/50-500 K/ both

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Members' right to annual report [136(219)]...

- Members' right to receive 21D before AGM
 - FS/CFS
 - Audit report
 - FS annexure
- Exception – listed company – unless full set called for by member(s)
 - Available for inspection at registered office before 21D
 - Statement of salient features sent 21D before
- Listed company – FS – CFS – website
- Company with subsidiary
 - Separate audited accounts on website
 - Provide copy to members if asked for

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...Member's right to annual report [136(219)]

- Inspection right to member
- Contravention
 - Company – 25K
 - Every officer – 5K

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CSR [135] ...

- Applicable to every company having
 - NW 500 cr +
 - Turnover 1000 cr +
 - NP 5 cr +
- CSR committee of BOD
 - 3+ Directors
 - 1+ independent director
- Duties of CSR committee
 - CSR policy
 - Quantum recommendation
 - Monitor CSR policy

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... CSR [135]

- CSR activities – Schedule VII
- CSR spends to be at least 2% of average NP during last 3 FY
 - Failure – Board to report with reasons

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Financial statement to be filed with RoC [137(220)]

- File within 30 days of Annual General Meeting (AGM)
- Unadopted financial statements – within 30 days of AGM
 - RoC – provisional
 - Adopted in adjourned AGM– within 30 days
- OPC – 180 days from FY
- No AGM – within 30 days of due date of AGM alongwith facts/reasons
- Non-compliance
 - Company – 1000 pd upto 10L
 - MD/CFO/other – 6M/1-5L/both

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Compulsory internal audit [138]

- Prescribed classes of companies
- Internal auditor to be appointed
- Can be CA/ICWA/other decided by the BoD
- Central Government can prescribe rules for manner and interval

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Audit and Auditors

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National Financial Reporting Authority (NFRA) [132(210A)]...

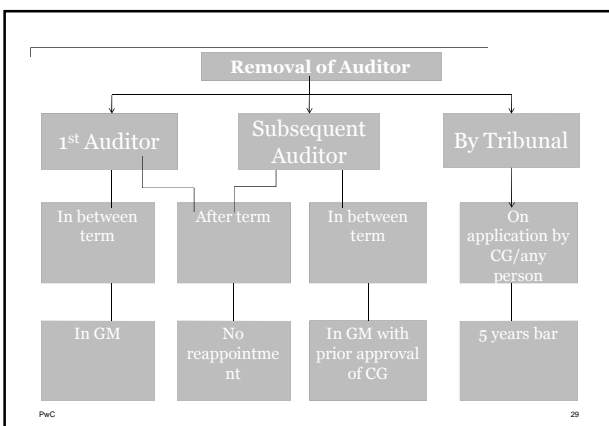
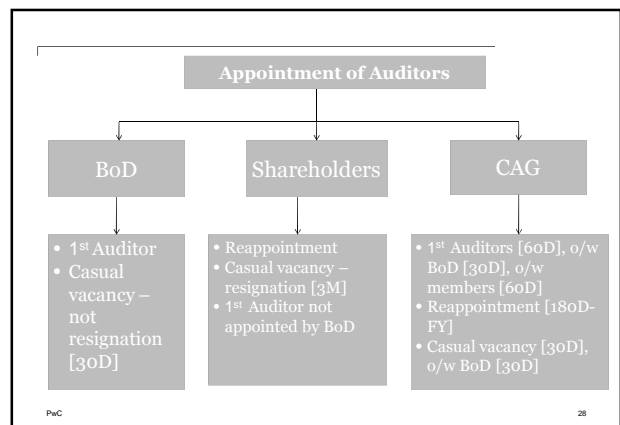
- To be notified by Central Government – Accounting/Auditing Standards (AAS)
- Wide powers to NFRA
 - Formulation of AAS
 - Monitor/enforce compliance with AAS
 - Oversee quality of service of professionals
 - Suggest measures to improve quality of services
- Constitution of NFRA
 - Independence of members

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...National Financial Reporting Authority (NFRA) [132(210A)]

- Quasi-judicial powers to NFRA
 - Investigation
 - Power as a civil court
 - Power to impose penalty
- Appeal against NFRA order
 - to appellate authority
 - to be constituted by CG

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Appointment of auditors [139(224)]

- Auditors' appointment for 5 years at each AGM
- Ratification at each AGM
- Auditors to give certificate of qualification
- If audit committee – all appointments based on its recommendations

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Rotation [139(2)] ...

- Compulsory rotation
 - Transition – to comply within three years from commencement of new Companies Act
- Applicable to
 - Listed companies
 - Class/classes of companies to be prescribed
- Rotation criteria
 - Individual – one term of five consecutive years
 - Audit firm – two terms of five consecutive years

Total breather period-8/13 years ?

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... Rotation of auditors [139(2)]

- Reappointment holiday/cool-off period
 - Individual – five years from completion of term
 - Audit firm – five years from completion of term
 - Common partner(s) of audit firm – five years from completion of term
- Additional conditions – company can impose
 - Audit partner / team rotation
 - Joint auditor
- Central government can prescribe rules for rotation
- Audit 'firm' includes LLP

ICAI Code of Ethics:
7 years partner rotation/2 years break

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Rotation of auditors [139(2)]- issues

- Rotation of individual as auditors – whether includes team
- Restriction on common partner firms
 - If no common partner but part of the same group/network
 - No common partner – same address
 - No common partner – but common relative as defined in section 6 of the Companies Act 1956/section 2(77) of Companies Bill 2012
- Reappointment holiday – constitution as at completion of term is relevant or at any other time
- Rotation of existing auditors
- Reappointment of auditor in next AGM appointed on casual vacancy – disqualified ?

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Removal, resignation [140(225)]

- Rotation term completion – no special notice to remove
- Removal of auditor before expiry of term
- Removed auditors' representation – not sent to members – company to file with RoC – no time limit prescribed
- 5 years transition for auditors removed by Tribunal
- Auditor also includes firm of auditors

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Eligibility, qualification, disqualification [141(224, 226)]

- Disqualification criteria
- Holding any security of company/subsidiary/holding/associate / subsidiary of holding
 - Relative - less than INR 1000
- Indebted to same category of above companies – prescribed amount
- Provide guarantee/security to same category of companies – prescribed amount

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Eligibility, qualification, disqualification [141(224, 226)]

- Direct/indirect business relationship with same category of companies
- Relative - director/employee director/KMP
- Court conviction on fraud in last 10 years
- Majority (not all) partners of a firm should be qualified for appointment
- No of companies as auditor = 20

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Remuneration to auditors [142(224)]

- To be fixed in AGM
 - Can be determined in any other manner
- First auditor – BoD decides
- Remuneration includes facility provided to auditor
- Remuneration includes other services provided at request of company

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Powers, duty of auditors [143(227)] ...

- Access to subsidiary company's records – consolidation purpose
- Auditors report to include
 - Qualification on maintenance of accounts
 - Internal financial controls
- Compliance with auditing standards
- Reasons to be provided for qualifications
- Auditors to inquire and report upon loss on sale of securities – only non-investment/banking companies

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... Powers, duty of auditors [143(227)]

- For government company – report on directions of CAG
- Branch audit – duties and powers to be prescribed
- Additional reporting matters to be prescribed by NFRA
- Immediate fraud reporting to Central Government
 - Non-compliance (by CA/CS/ICWA) – 1-25L
- Duties on auditor equally applicable to ICWA/CS

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Restriction on other services by Auditor [144]...

- Services by auditor
 - Approved services
 - Restricted services
- Approved services
 - Approved by Board of Directors
 - Approved by Audit Committee

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... Restriction on other services by Auditor [144]...

- Restricted services
 - accounting and book keeping services
 - internal audit
 - design and implementation of any financial information system
 - actuarial services
 - investment advisory services
 - investment banking services
 - rendering of outsourced financial services
 - management services
 - any other kind of services as may be prescribed

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... Restriction on other services by Auditor [144]...

- Transition period applicability
 - To comply before closure of 1st financial year
- Restriction also on rendering services directly or indirectly to holding / subsidiary company
- Direct/indirect – 'individual' – includes
 - Individual
 - Through relative
 - Any other person connected or associated with such individual
 - Through any other entity in which such individual has significant influence or control
 - Through any other entity whose name or trade mark or brand is used by the individual

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... Restriction on other services by Auditor [144]

- Direct/indirect – ‘firm’– includes
 - Either itself
 - Through any of its partners
 - Through its parent, subsidiary or associate entity
 - Any other entity in which the firm/partner has significant influence or control
 - Any other entity whose name or trademark or brand is used by the firm/partner(s)
- Significant influence defined [section 2(6)E]
 - Control of 20% of total share capital
 - Control of business decision under an agreement

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Restriction on other services by Auditor [144] - Issues

- Anomaly of link of “such service”–section becomes inoperative
- What is ‘management services’
- Existing contract of other services – transition period – how to reconcile

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ICAI Guidelines on restriction on other services ...

- Applicable to listed companies/PSUs/government companies/public companies with more than INR 50 crore turnover
- Restriction = fees not to exceed statutory audit fees
- Restriction can also be more stringent if appointing authority decides
- Restriction applicable to statutory auditor/associate concerns put together
- Restriction applicable to management consultancy/other professional services

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... ICAI Guidelines on restriction on other services

- Restriction not applicable to
 - Audit under any statute
 - Certification work required to be done by the statutory auditors
 - Any representation before an authority
- Associate concern defined to include proprietor/partner/relative who is director/partner/holding substantial interest

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Auditor to sign report [145 (229, 230)]

- Signing - in regular course
- Qualifications having adverse effect
 - Shall be read in AGM
 - Open for inspection

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Auditors to attend AGM [146 (231)]

- AGM notices to be forwarded to auditor
- Auditor to attend AGM
 - Unless exempted by company
 - Can attend through authorised representative (AR)
 - AR to be qualified to be auditor
- Right to be heard at AGM

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Non-compliance [147 (232, 233)] ...

- Default by company – 25–500K
 - Officer – 1 year/10-100k/both
- Default by auditor – 25–500 k
 - Willfully – knowingly contravened – 1 year / 1–25 L/ both
 [Appointment 139, powers duties 145, other services 144, signing 145]
- Conviction of auditor
 - Additional penal provision
 - Refund remuneration
 - Pay damages

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... Non-compliance [147 (232, 233)]

- Default by firm/partners
 - Acted in fraudulent manner
 - Abetted or colluded
 - Company/director
 - Jointly severally liable
 - Whether civil or criminal

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Directors –Meetings & Powers**Board Meetings [173 (285)]...**

- Frequency of BM
 - First BM within 30D of incorporation
 - Minimum 4 BM every year
 - Gap between BMs not more than 120D
 - OPC / small / dormant company hold 1 BM per ½ CY – gap more than 90D
- Participation and quorum at BM
 - Video or audio-video BM permissible
 - CG can specify matters which cannot be in VC/AV meetings
 - Quorum not applicable in OPC
 - More than 2/3rd interested directors – quorum
 - No quorum – no meeting – adjourned meeting

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Board Meetings [173, 175 (285 – 289)]

- Notice period of BM
 - Not less than 7D
 - Less than 7D – 1 ID present
 - If ID absent – decision to be circulated to all directors and ratified by at least 1 ID
- 1/3rd Board requires for a resolution to be by circulation – chairperson puts resolution to decide at BM

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Board Meetings [173(3)(P2), 174(1)]

- Absence of independent directors - decisions taken at a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least 1 ID, if any
- Quorum - one third of its total strength or 2 directors, whichever is higher
 - the participation of the directors by video conferencing or by other audio visual means shall also be counted for the purposes of quorum
- Vacation of office by Director – absent from Board meeting

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Resolution by Circulation [175]

- If approved by a majority of the directors or members, who are entitled to vote on the resolution
- Not less than one-third of the total number of directors of the co may require that any resolution under circulation must be decided at a board meeting
- Resolution shall be noted at a subsequent meeting

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Powers of Board [179, 181 (291 - 293)]...

- Additional powers given to Board
 - Issue securities/debentures – India/abroad
 - Approve financial statement/director's report
 - diversify business
 - Approve amalgamation/merger/reconstruction
 - Takeover/acquire control/substantial stake in another company
- Bod can make *bona fide* charity
 - GM prior permission
 - More than 5% of average NP 3FY

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...Powers of Board [180,182 (293,293A)]

- Powers exercised by the Board on consent of company by passing special resolution
 - sale/lease/dispose of whole or substantially whole of the undertaking
 - investment in trust securities
 - borrow money exceeding specified limit
 - remission in repayment of any debts by Director
- Contribution to political party by any non-government company
 - 7 1/2% of average net profit for 3 preceding FYs
 - Board resolution
 - Disclosure requirement
 - Contravention - 5 times (company) and officer 6M + 5 times

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Audit Committee [177 (292A)] ...

- Every listed/prescribed company to form AC
- Composition – 3D (ID – majority)
- Transition – 1 Y
- Auditor / KMP – right to be heard at AC meeting
- Establishment of vigil mechanism
 - Listed / class(es) of companies
 - Mechanism details disclosed on website and Board report
 - Safeguard against victimisation
 - Direct access to AC chairperson

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... Audit Committee [177 (292A)]

- Role of Audit Committee widened
 - monitoring auditors' independence
 - their performance evaluation
 - approval or modification of related-party transactions
 - scrutiny of loans and investments
 - valuation of assets and evaluation of internal controls and risk management
 - establish a vigil mechanism
 - protection for any whistle-blower
 - Examination of FS and audit report

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Other BoD Committees [178]...

- Listed/prescribed companies
 - Nomination and remuneration committee (NRC)
 - 3+ NED
 - 50%+ ID
 - Company chairman
- Role of NRC
 - Find directors
 - Recommend to BoD
 - Appointment and removal
 - Evaluation of every director's performance

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...Other BoD Committees [178]

- Formulate policy and criteria for appointment
- Remuneration policy
- Policy in BoD report
- Stakeholders relationship committee
 - 1000+ share/debenture/deposit/security holders
 - Grievances of security shareholders
- Committee chairman to attend board meetings
 - Can authorise any other person
- Contravention
 - Company 1-5L
 - Officer 1Y or 25-100K or both

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Disclosure of interest by directors [184(299, 300)]

- Annual disclosure of interest
 - Change in between – next board meeting
- 2% interest in a company or partner, etc. – contract / arrangement
- Non-disclosure – voidable
- Contravention – director – 1Y or 50K – 100K or both

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Loans to directors [185(295, 296)]

- No loan / guarantee / security to any director
- Exception – MD/WTD – terms of service or scheme under special resolution
- Exception – ordinary course of business – bank rate
- Defined : “To any other person in whom director is interested”
- Contravention
 - Company – 5-25L
 - Director 6M or 5-25L or both

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Related Party – Defined 2(76)...

- A director or his relative
- A key managerial personnel or his relative
- A firm, in which a director, manager or his relative is a partner
- A private company in which a director or manager is a member or director
- A public co in which a director or manager is a director or holds along with his relatives, more than 2% of its paid-up share capital

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... Related Party – Defined 2(76)

- Any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager
- Any person on whose advice, directions or instructions a director or manager is accustomed to act
- Any company which is (A) a holding, subsidiary or an associate co of such co; or (B) a subsidiary of a holding co to which it is also a subsidiary

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Related Party Transactions [188 (297,314)]...

- New transactions liable to be treated as RPT,
 - Sale, lease, buy of property
 - Appointment of agents
 - Appointment to office or place of profit
 - Undertaking subscription of security / derivatives
- Approval by a resolution at BM – prescribed transactions to be approved by special resolution
- Ratification – 3 M
- No member of the company to vote – if such member is a related party

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...Related Party Transactions [188 (297,314)]

- No CG approval required for RPT
- Reference to be made in Board report with reasons to enter into RPT
- Without approval – concerned director to indemnify company for any loss

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Loan and investment by company [186 (372A)]

- No more 'inter-corporate' loan and investment
- Investment not more than 2 layers of investment companies
- Rate of interest on inter-corporate loans – government securities
- Disclosure in financial statements – purpose/investment/guarantee
- Exemption withdrawn for,
 - Private company
 - Investment / loan / guarantee by holding company to subsidiary company

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Multilayer Investment Companies

- A co shall unless otherwise prescribed, make investment through not more than 2 layers of investment companies
- Exemption :
 - acquisition of a foreign company which has investment subsidiary beyond 2 layers as per the applicable foreign law; OR
 - a subsidiary co making investment to comply with any applicable law

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Loan/Investment – Directly or indirectly

- Give any loan to any person or other body corporate
- Give any guarantee or provide security in connection with a loan to any other body corporate or person
- Acquire by way of subscription, purchase or otherwise, the securities of any other body corporate

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Quantum

- 60% of its paid-up share capital, free reserves and securities premium account OR
- 100% its free reserves and securities premium account
whichever is more
- Beyond above - prior approval by special resolution

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Other requirements

- Disclosure in financial statements giving full particulars
- Unanimous Board Resolution
- Previous approval of public FI if exceeds 60%/100% ceiling and default in repayment
- Rate of interest: lower than the prevailing yield of one year, three year, five year or ten year government security closest to the tenor of the loan
- Default in repayment of any deposits or interest

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Exemption

- Loan made, guarantee given or security provided by
 - a banking co
 - an insurance co
 - a housing finance co in the ordinary course of its business
 - a co engaged in the business of financing of companies
 - of providing infrastructural facilities
- Any acquisition by
 - NBFC
 - Co whose principal business is acquisition of securities;
 - Rights issue

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Share capital and debentures

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Kinds of share capital [43, 47]

- Equity
 - With voting rights
 - With differential voting rights
- Preference
 - Voting rights when dividends unpaid
- No change in provisions for 2+Y

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Share premium [52]

- Utilisation of share premium account
 - Issue of bonus shares
 - Write-off of expenses
 - Buyback of shares/securities

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Issue of shares at a discount [53]

- Prohibited
- If issued – void
- Contravention
 - Fine – 5L
 - 6M or 1-5L or both
- Sweat equity shares excepted

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Issue of sweat equity shares [54]

- Authorised by special resolution
- Special resolution to contain specific information
- Not in first year of company
- If company is listed – SEBI Regulations otherwise rules as maybe prescribed
- Sweat equity shares defined
 - Issued to directors/employees
 - At discount or non-cash
 - Providing know-how or making available rights in intellectual property

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Preference shares [55]

- Irredeemable preference shares prohibited
- Redeemable – maximum 20Y
 - Infrastructure projects – more than 20Y – redemption annually at option of shareholders
- Redemption only out of profits
 - CRR account

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Issue of bonus shares [63]...

- Issue out of
 - Free reserves
 - Securities premium account
 - CRR account
 - Not out of revaluation reserve
- Not in lieu of dividend
- Bonus issue requirement
 - Authorised by Articles
 - Authorised by GM
 - Not default – fixed deposits/debt securities

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...Issue of bonus shares [63]

- No default – PF/gratuity/bonus
- Partly paid made fully paid
- Additional conditions as may be prescribed

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Buyback of shares [68, 69, 70]...

- Broadly same provisions
- Buyback out of free reserves, securities premium account, fresh issue
- Not out of earlier issue of same kind
- Authorised by Articles
- Special resolution
- 25% restriction for each FY
 - 10% through BoD resolution
- Post buyback debt equity not more than one is to two
- Fully paid up
- Listed company – SEBI Regulations

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...Buyback of shares [68, 69, 70]

- Rules as maybe prescribed
- Notice for buyback – special resolution
- 1Y time limit to complete buyback
- Buyback modes – proportionate, open market, stock option/sweat equity
- Declaration of solvency – RoC – SEBI
- Extinguish bought back shares
- Cool-off period to issue same kind of shares – 6M
- Default – penalty
- CRR account

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Debentures [71 (117, 117A, 117B, 117C, 118, 119)]...

- Debenture issue permissible
- FCD/PCD under special resolution
- No voting rights
- Secured debentures – T&C to be prescribed
- DRR to be created for redemption out of profits
- Debentures trustee requirement
 - Prospectus/offer/invitation of offer 500+ members
- Interest and redemption as per T&C of issue
- Debenture trustee – petition to Tribunal
 - In adequacy of assets for redemption

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...Debentures [71 (117, 117A, 117B, 117C, 118, 119)]

- Debenture redemption – default – consequence
- Tribunal order for debenture redemption
- Officer – 3Y or 2L-5L or both

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Way forward

- Onerous provisions
 - Professionals
 - BoD - report, responsibility
 - ID
- Tougher auditors
 - Whistle blower role
- Role of NFRA
- Subsidiary definition

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