

Keys for Successful Operation of Companies in India

Tokyo, 12th November, 2013

Companies Act, 2013

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The Legislative History

Concept Paper on New Companies Bill

04th August, 2004 : Draft on MCA Website

02nd December, 2004 : J J Irani Committee

Lok Sabha : Lower House of Parliament

Bill passed on 18th December, 2012

Bills : Prepared & Introduced

2008 : Companies Bill : Lapsed

2009 : Companies Bill : Standing Committee

2011 : Revised Companies Bill : Standing Committee

2012 : Final Bill Presented to Parliament

Rajya Sabha: Upper House of Parliament

Bill passed on 08th August, 2013

Assent of the President of India and Notified in Official Gazette

Bill received the Presidential assent on 29th August, 2013 and was notified on 30th August, 2013.

Sections Notified: 98 Sections of 2013 Act have come into effect as on 12th September, 2013.

For Sections which are not notified, provisions provided under 1956 Act, will continue to be in force till corresponding Sections under 2013 Act are notified.

The Process Ahead

Remaining provision of 2013 Act shall come into force on the date such Sections are notified.

Draft Rules and Regulations : The Ministry of Corporate Affairs (MCA) has uploaded draft rules in respect of provisions under the 2013 Act, for public comments.

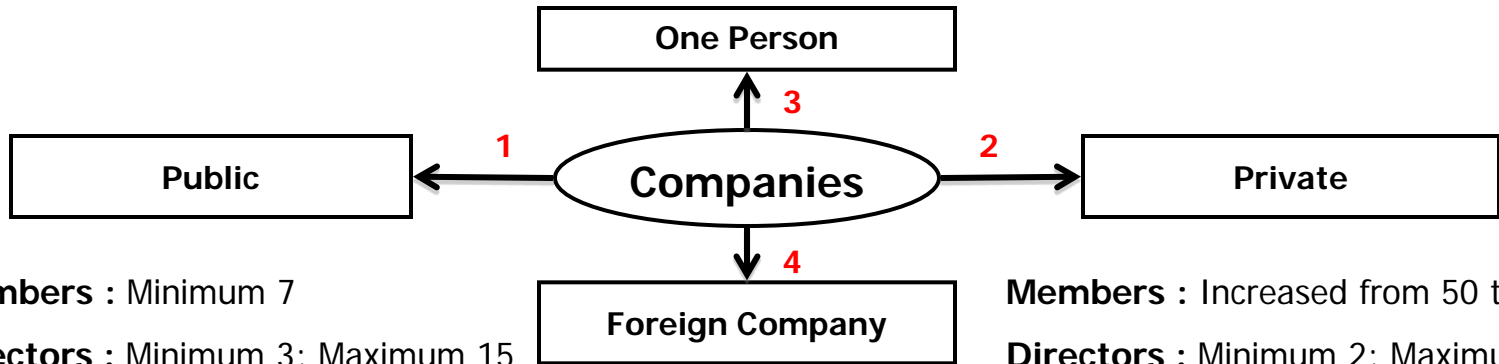
Draft Rules under 2013 Act in Public Domain

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| Ch. I: Preliminary (including definitions); | Ch. XV: Compromises, Arrangements & |
| Ch. II: Incorporation of Company; | Amalgamations; |
| Ch. III: Prospectus & Allotment of Securities; | Ch. XVI: Prevention of Oppression & Mismanagement; |
| Ch. IV: Share Capital & Debentures; | Ch. XVII: Registered Valuers; |
| Ch. V: Acceptance of Deposits by Companies; | Ch. XVIII: Removal of name of Co. from Register of |
| Ch. VI: Registration of Charges; | Companies; |
| Ch. VII: Management & Administration; | Ch. XIX: Revival & Rehabilitation of Sick Company; |
| Ch. VIII: Declaration & Payment of Dividend; | Ch. XXI: Company Authorised to Register & Winding |
| Ch. IX: Accounts of Companies; | up of Unregistered Companies; |
| Ch. X: Audit & Auditors; | Ch. XXII: Company Incorporate Outside India; |
| Ch. XI: Appointment & Qualifications of Directors; | Ch. XXIV: Registration Offices and Fees; |
| Ch. XII: Meetings of Board & its Powers; | Ch. XXVI: NIDHIS; |
| Ch. XIII: Appointment & Remuneration of Managerial Personnel; | Ch. XXVII: NCLT and Appellate Tribunal; |
| Ch. XIV: Inspection, Inquiry & Investigation; | Ch. XXVIII: Special Court; |
| | Ch. XXIX: Miscellaneous. |

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- Ch. XX : Winding Up;
- Ch. XXIII: Government Companies;
- Ch. XV: Companies to Furnish Information or Statistics.

The Process Ahead

Incorporation – Types of Companies *Public / Private*



Members : Minimum 7

Directors : Minimum 3; Maximum 15

Members : Increased from 50 to 200

Directors : Minimum 2; Maximum 15

Foreign Company: Definition of ‘Foreign Company’ enlarged to include place of business through (i) an agent; (ii) physically or electronically; and (iii) conducts any business activity in India in any other manner.

Memorandum of Association : Bifurcation into Main and Ancillary no longer required / permitted.

Disclosure Affidavit : By each Subscriber; and Person (s) named as First Directors.

Stating : (i) Not convicted of any offence in connection with promotion, formation or management of any Company; and (ii) Not found guilty of any fraud or misfeasance or breach of any duty to any Company, during preceding five years.

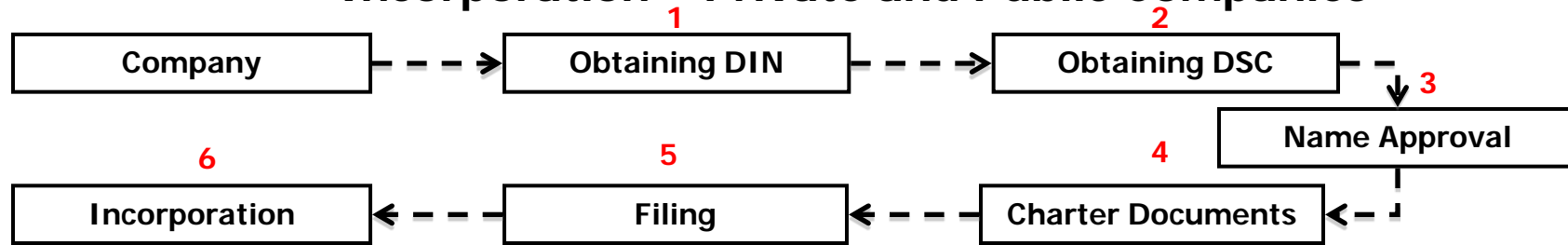
Certificate: Of Compliance with provisions of Act

By Professional : (i) Practicing Advocate; (ii) Company Secretary; or (iii) CA; **AND** Person named as Director; Manager; or Secretary in the Articles.

Subscribers / First Directors :

Proof of : Identity; Residential Address; Nationality.
Declaration of : Interest in other Firms; and Body Corporate.

Incorporation – Private and Public Companies



- 1. Directors Identification Number (DIN)** – Every individual shall make an application electronically in form and manner (Form DIN-I) as prescribed for allotment of DIN.
Identity Proof: Income Tax PAN and Passport (*Passport mandatory for Foreign Nationals*).
Residence Proof : Passport, election card, driving license, electricity bill and bank account statement (Address proof in case of Foreign National not older than 1 year from date of filing).
In case of foreign nationals, translation of documents by notary of her home country. Further, supporting documents should be attested by the Consulate of the Indian Embassy / Foreign Public Notary.
- 2. Digital Signatures (DSC)** to be obtained from any DSC - A licensed Certifying Authority (CA) issues the digital signature.
- 3.** Application for **name availability** and reserving desired name to be made to the ROC in form (Form-1A) along with prescribed fee. Available name is reserved for 60 days.
- 4.** Drafting of Charter documents (MoA and AoA) and filing the same with the ROC.
- 5.** Filing of Form 1, Form 18 and Form 32.
- 6.** Once forms are approved by ROC, the Company will be incorporated and **Certificate of Incorporation** will be issued. Further, a company shall not commence any business unless a declaration (in prescribed format) is filed by its Director.

Incorporation – Types of Companies

One Person

What is ?

Private Limited Company which has only one “Person” as a Member.

Who can form ?

A “Person”.

“person” means only natural person who is an Indian Citizen and resident in India (more than 182 days).

How to form ?

Procedure remains the same – except some exceptions :

1. MoA must name a person who shall become Member if, and when, original Member is not available (i.e. nominee).
2. Written consent of such nominated person must be filed with Registrar’s Office.
3. Change, of nominated person, must be intimated to ROC.

Exemptions !!

1. Not required to hold any General Meetings or Annual General Meetings.
2. One Board Meeting to be held in each half of a calendar year – gap between meetings not to exceed 90 days (subject to exception of one Director on Board).

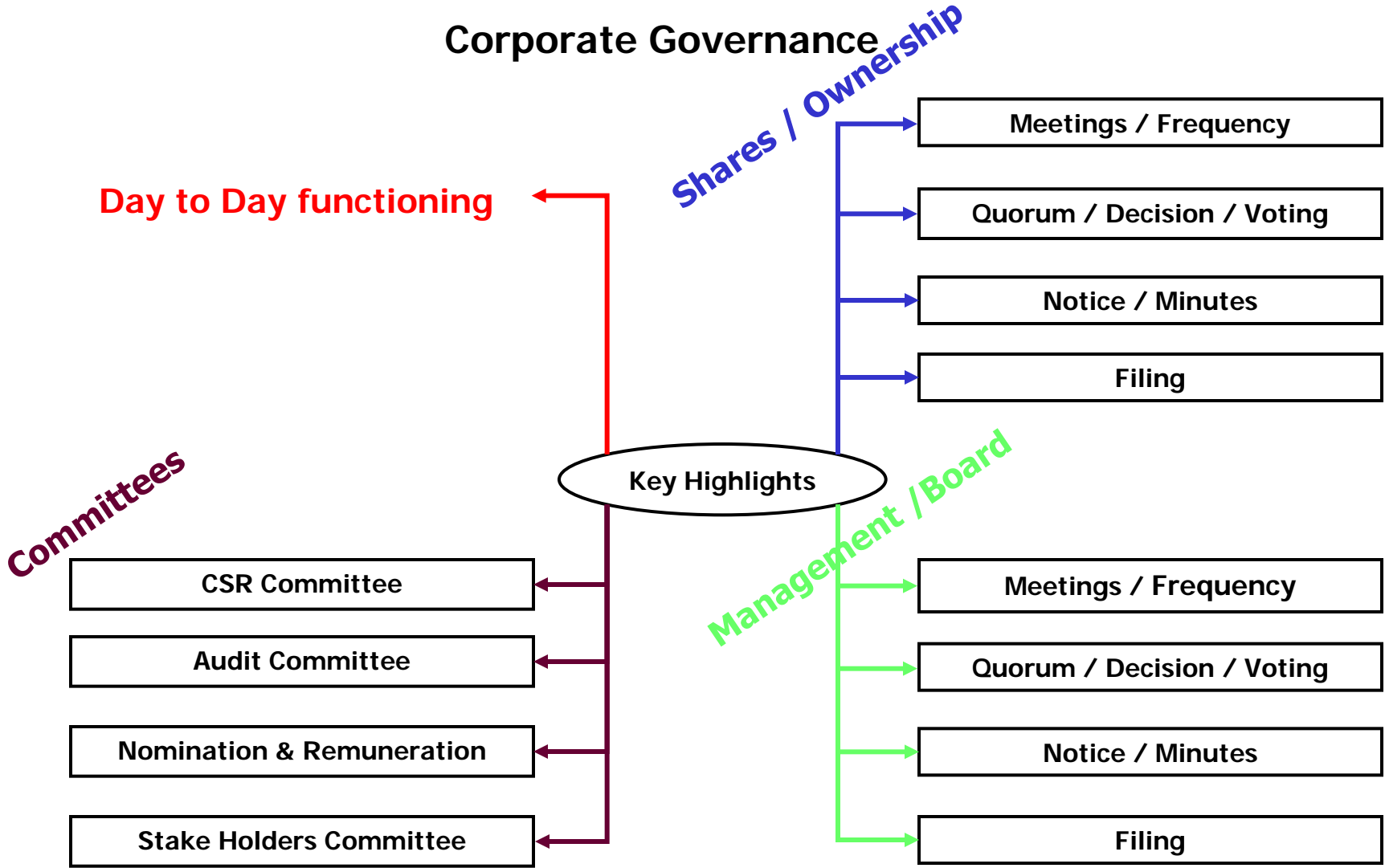
Workings !!

1. Resolutions to be passed by mere entry in the Minutes Book.

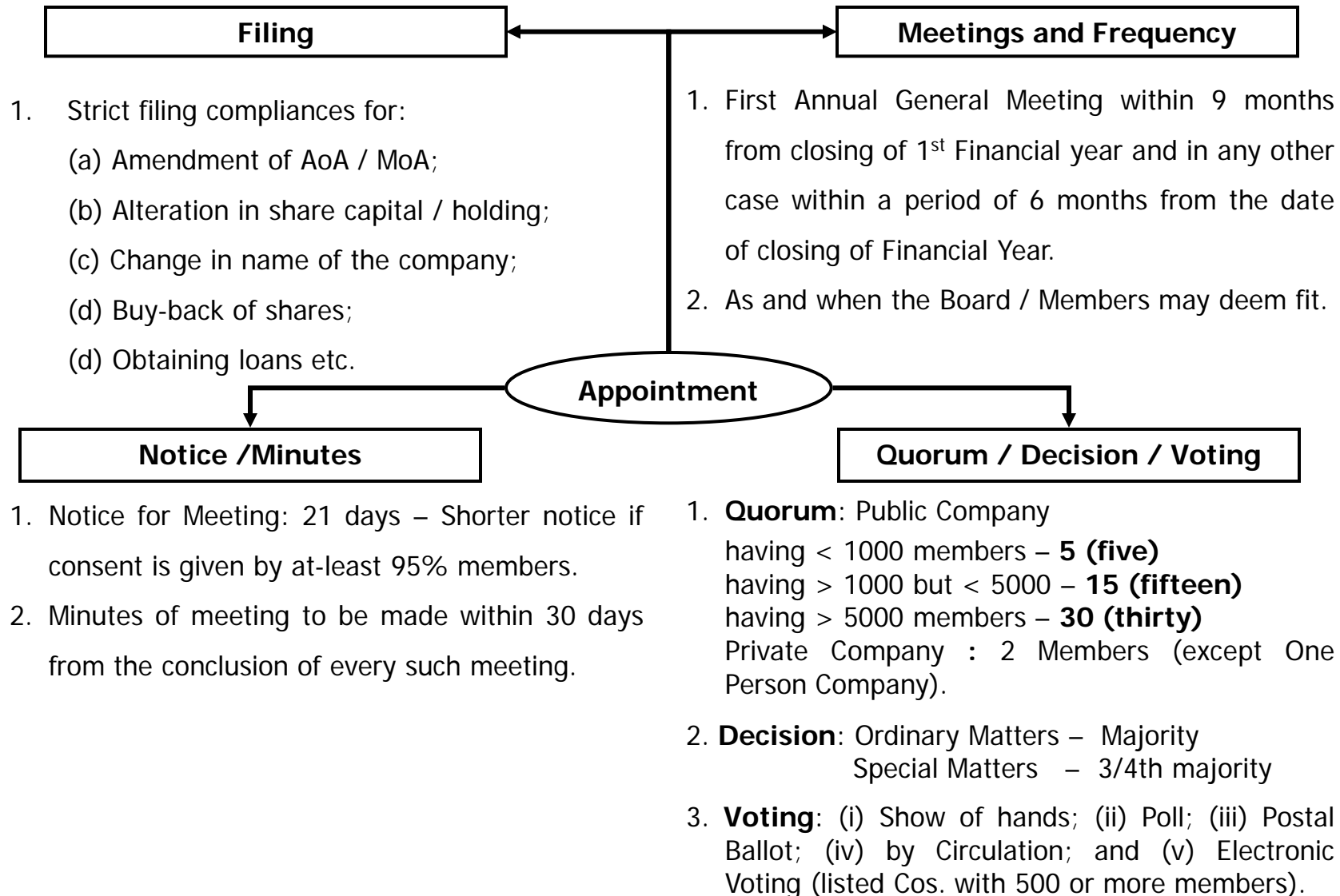
Advantages / Purpose / Limitation ?

1. Seeks to provide liability limitation with respect to the unique “Sole Proprietorship” Concept in India.
1. Provides a very simple and efficient platform.
2. Foreign person is not permitted to incorporate a “One Person Company”.

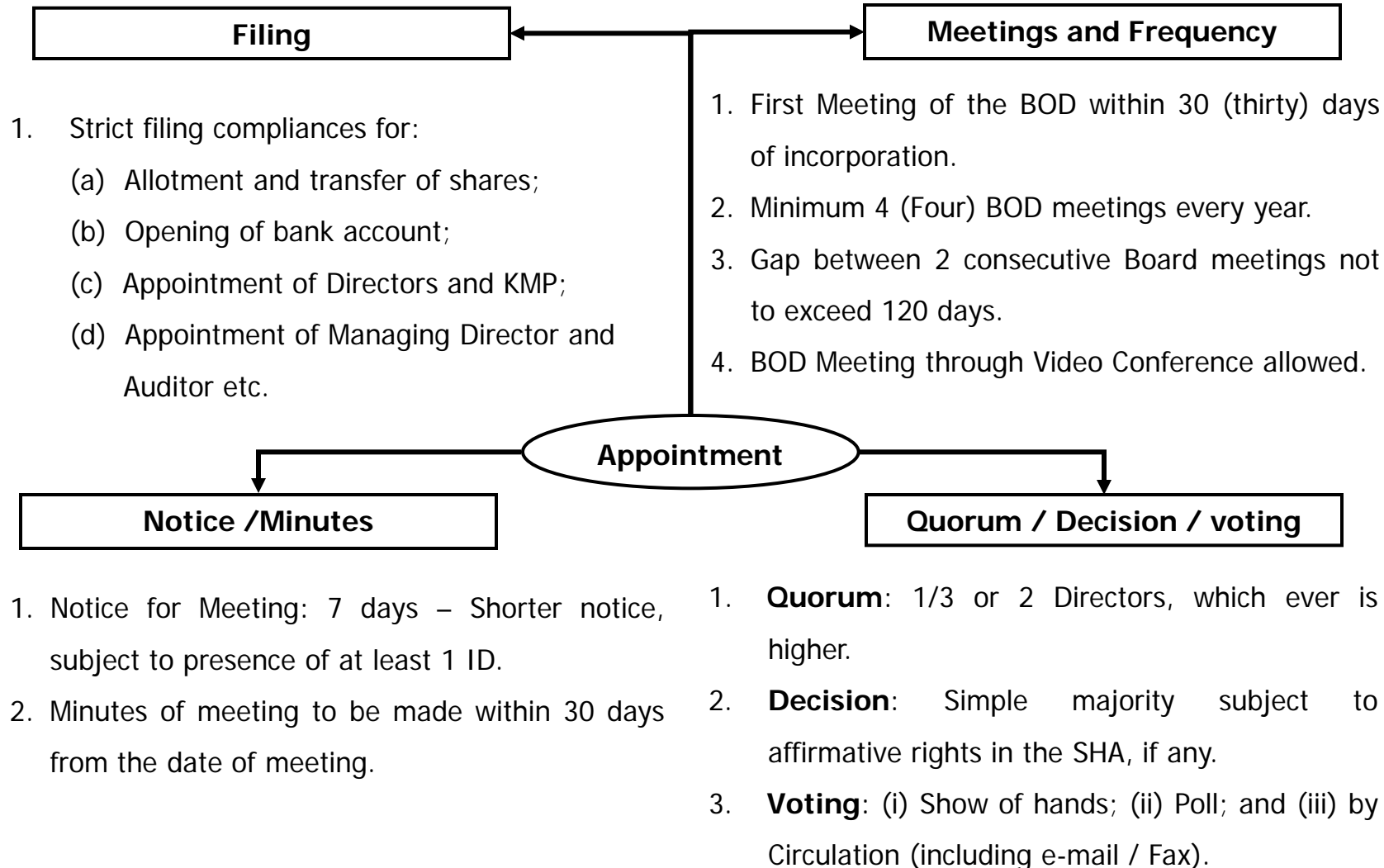
Corporate Governance



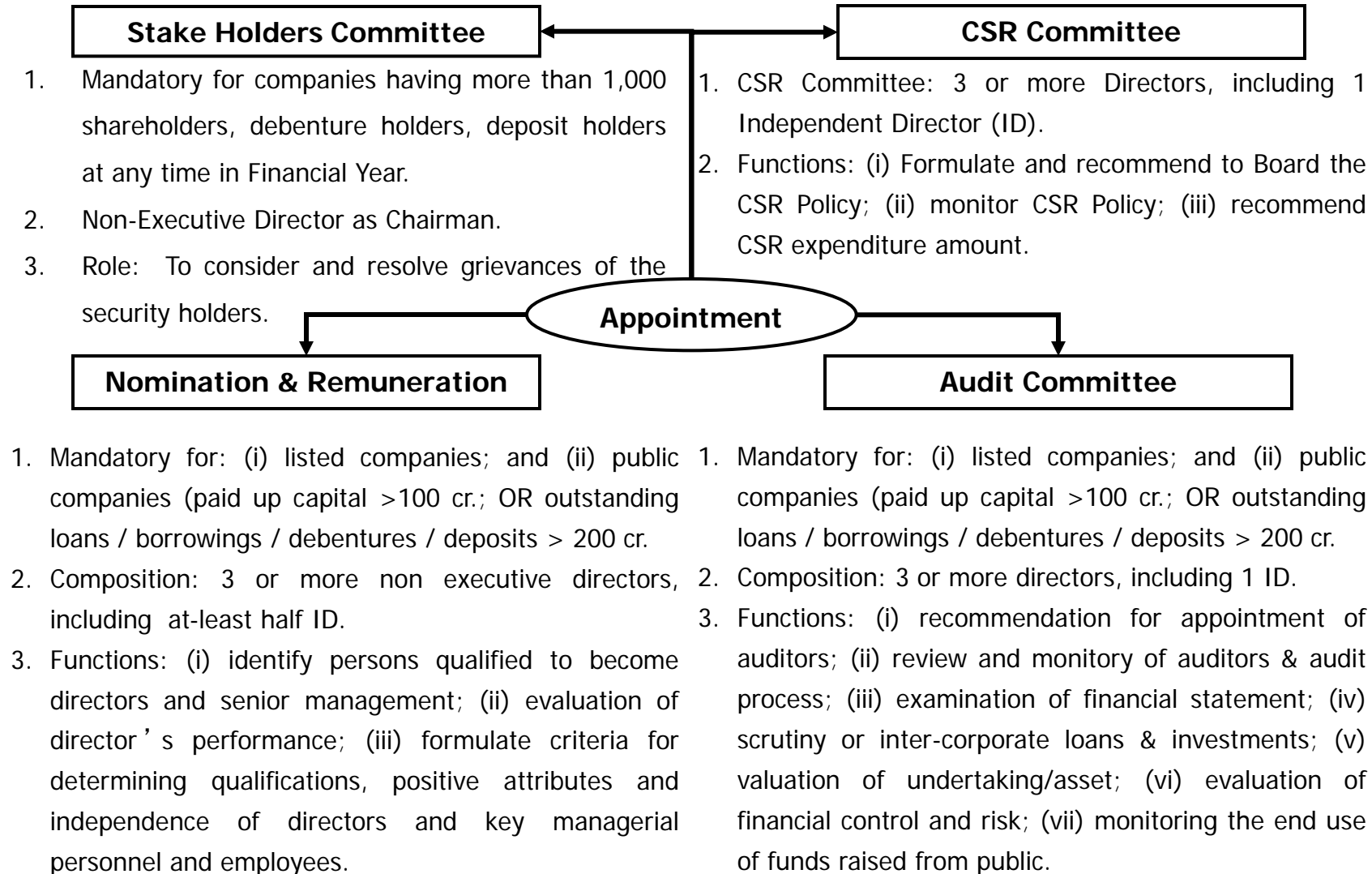
Shares / Ownership



Management and Board



Committees



Directors

LIABILITY:

When it Accrues

Scope

Limitation

Fraud

FRAUD

REMOVAL

Removal

Resignation

Vacation

Compliances

APPOINTMENT

Eligibility

Process

Disqualifications

Compliances

Key Highlights

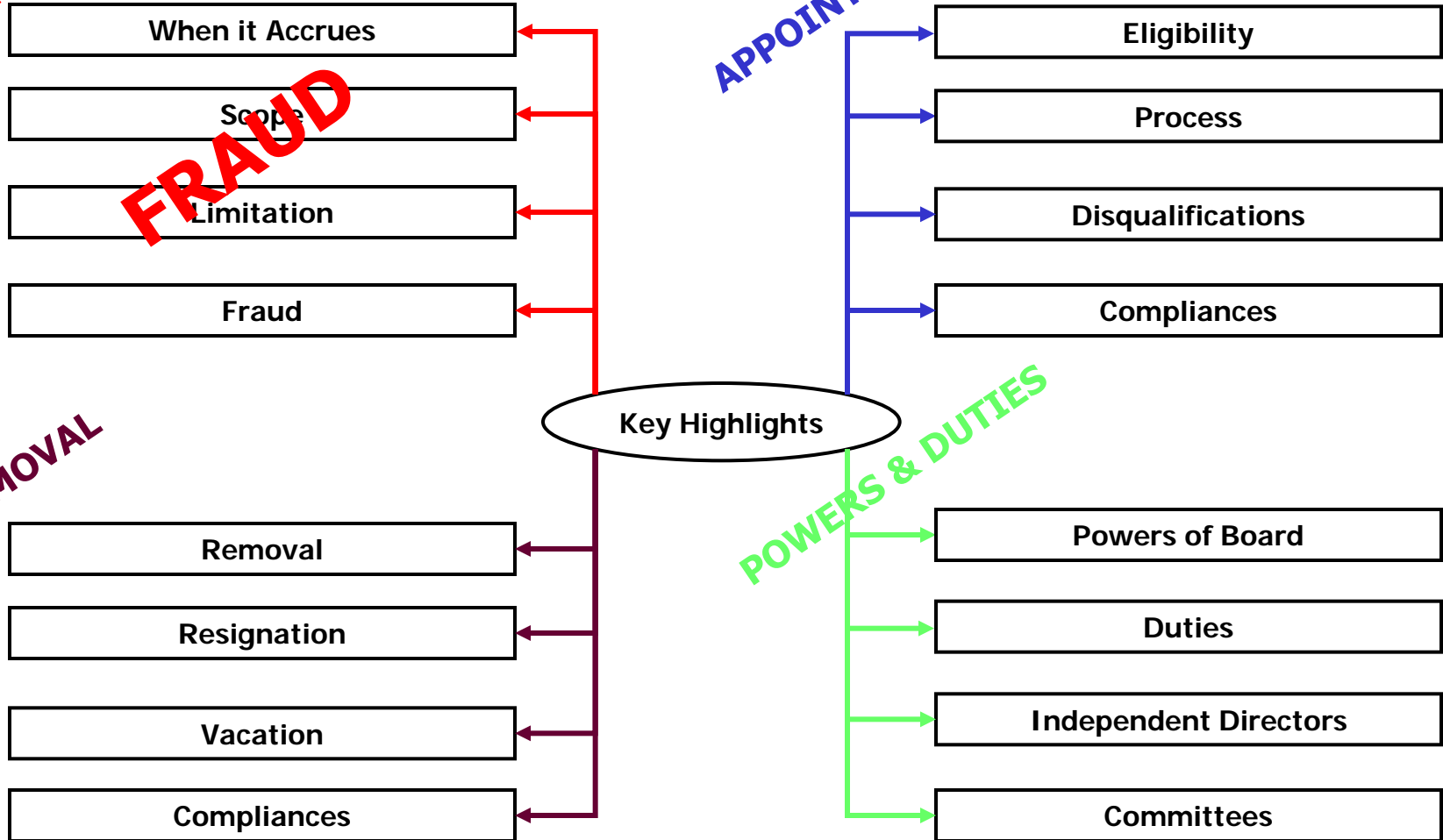
POWERS & DUTIES

Powers of Board

Duties

Independent Directors

Committees



Directors

Appointment

Compliances

Following must be filed before Registrar's Office, within 30 days :

1. DIN of Director;
2. Written Consent of Director;
3. Resolution of Company appointing Director;
4. Prescribed Form.

Eligibility

1. Any natural person – Indian or Foreign; however, one Director has to be a Resident of India;
2. Directors Identification Number (DIN);
3. Written consent to act as Director; and
4. Declaration of non – disqualification.

Appointment

Disqualifications

1. Unsound Mind / Insolvent;
2. Moral turpitude or otherwise – six months imprisonment; Related party transaction; or declared disqualified by Court / Tribunal.
3. Conviction by Court : 7 years – Permanent disqualification.

Process

1. Additional Director – May be appointed by Board, but must be ratified at next General Meeting.
2. Director – Appointed at General Meeting.
3. Nomination – By Member / Director.

Directors

Powers & Duties

Committees

Listed Companies, other prescribed Companies, to constitute following committees :

1. Audit;
2. Nomination and Remuneration;
3. Stakeholders Relationship.

Powers of Board

1. Issue Securities, including Debentures, and make calls in respect thereof;
2. Invest, grant Loans or extend Guarantees; OR borrow monies;
3. Authorise buy – back of Securities; and
4. Diversify; amalgamation & reconstruction.

Powers & Duties

Duties

1. Act in good faith to promote objects of Company;
2. Exercise due & reasonable care, skill, diligence and independent judgment;
3. Avoid direct or indirect conflict with interests of Company.

Restrictions

- Powers subject to consent by Special Resolution :
1. Deal with whole / substantially the whole of the undertaking;
 2. Limits of borrowing – Net Worth;
 3. Certain Investments.

Directors

Removal

Compliances

Following must be filed before Registrar's Office, within 30 days :

By Company:

1. Resolution of Company removing Director;
2. Prescribed Form.

By Director:

1. Resignation Letter.

Removal

1. Special Notice, with complete reasons, of meeting proposing to remove Director.
2. Full opportunity to Director with respect to proposed Special Notice.
3. Ordinary Resolution at meeting will authorise decision.

Removal

Vacation

1. Disqualification or Removal leading to vacation;
2. Absents himself from meetings of the Board for period of more than 12 months;
3. Ceases to hold Office because of which he was made Director.

Resignation

1. Notice in writing to Company;
2. Effective from date of receipt of Notice by Company or date specified in the Notice, whichever is later.

Directors

Liabilities

Fraud

Without prejudice to any other liability :

1. Imprisonment : 6 months to 10 years; and
2. Fine: Amount Involved to three times the Amount Involved.

PROVIDED

Where Public Interest is involved – minimum imprisonment shall be 3 years.

When it Accrues

1. Upon contravention of any provision of the Act or the Rules framed thereunder.
2. Imprisonment for a term which may extend to 3 years or with fine which shall not be less than 5,000 and may extend to 5 lakhs, or with both.

Liabilities

Limitation

1. Liability carries through even after resignation for offences during the term of holding Office.

Scope

1. Whole Time / Managing Director;
2. Directors – With Knowledge / Without Objection;
3. Independent / Non – Executive Directors – With Knowledge / With Consent.

Important Issues

Investment/Loan by Companies

Restriction:

No Company, Public or Private, can invest through more than 2 layers of subsidiaries.

Scope:

- Includes loans/investment to “any person”;
- Not applicable to acquisition of foreign company having subsidiaries beyond 2 layers as per relevant law.

Restriction:

No Company shall give loan/ guarantee/ security exceeding 60% of paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more.

Scope:

- Includes loans/investment to “any person”;
- No exception in respect of loans by holding company to its WOS.

Corporate Social Responsibility

Applicable to:

Every company having –

- net worth \geq INR 500 Crore, or
- turnover \geq INR 1,000 Crore; or
- a net profit \geq INR 5 Crore.

during any Financial Year.

Requirement:

- Constitute CSR Committee: 3 or more directors, including 1 Independent Director;
- Board to frame CSR Policy – to be disclosed in its Report;
- Spend in each Financial Year at least 2% of the average net profits made during three immediately preceding Financial Years.

Non-compliance:

Board shall, in its Report, specify reasons for not spending the amount.

Important Issues

Accounts & Audit

Accounts:

- Books of Account may be kept in electronic form.
- Financial statement, along with consolidated financial statement of subsidiaries and associate companies, to be laid before members at AGM.

Audit:

- Mandatory rotation of auditors of listed and prescribed companies – not to appoint or re-appoint –
 - (a) an individual as auditor for more than 5 consecutive years; and
 - (b) an audit firm as auditor for more than 10 consecutive years.
- All AGMs shall be mandatorily attended by the Auditor.
- Partner of audit firm liable for fraud.

Cross-Border Mergers

Scope:

- Merger of Indian company into foreign company and vice versa allowed.
- Applies only to foreign companies incorporated in such jurisdictions as may be prescribed.

Procedure:

- Provisions applicable to mergers between Indian companies will be applicable to such merges.
- prior approval of Reserve Bank of India (RBI) is required for all cross-border mergers.
- Central Govt has been empowered to make rules for governing such mergers in consultation with RBI.

Offences and Penalties

**Imprisonment and
Fine (< 3 years)**

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|------------------------------|
| Failure to vacate office |
| Prospectus not as prescribed |
| Failure to disclose interest |
| Tampering with minutes |

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|---------------------------------|
| Failure to file annual return |
| Failure to register charge |
| Fin Statement not as prescribed |
| Failure to distribute dividend |

**Imprisonment and
Fine (> 3 years)**

| |
|-------------------------------------|
| Fraud |
| False statement |
| False evidence |
| False particulars for incorporation |

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|--------------------------------|
| Insider Trading |
| Fraudulent conduct of business |
| Mis-statement in Prospectus |
| False statement of solvency |

**Fine
(INR 5,000 to 5 Lakh)**

| |
|-----------------------------------|
| Breach of duties |
| Failure to rectify company's name |
| Failure to hold AGM |
| Failure to appoint KMP |

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|--|
| Register of Members not maintained |
| Directorship in more than 20 Companies |
| Failure to inform ROC of DIN |

Adjudication and Compounding of Offences

Adjudication

1. All offences are triable only by the Special Court.
2. Until Special Court is established, offenses shall be triable by Court of Session.
3. Special Court may take cognizance of offence without the accused being committed for trial.
4. Special Court may conduct summary trial for offence punishable for imprisonment < 3 years.
5. In case of conviction in summary trial no sentence for imprisonment > 1 year shall be passed.
6. Provisions of Code of Criminal Procedure to apply for proceedings before Special Court.
7. Except offences under S. 7(5), 7(6), 34, 36, 38(1), 46(5), 56(7), 66(10), 140(5), 206(4), 213, 229, 251(1), 339(3) and 448, all other offences to be non-cognizable.

Cognizable Offence: Arrest by Police without court mandated warrant.

1. Offences Punishable with fine only:
Compounding by (i) Tribunal; or (ii) Regional Director or any authorized officer where fine for offence < 5 Lac.
2. Offences Punishable with imprisonment or fine or with both:
Compoundable with permission of Special Court.

Allowed

Compounding

Not Allowed

1. Any offence punishable with imprisonment only or with imprisonment and also with fine.
No compounding if any offence is committed within a period of 3 years from the date similar offence was compounded.



THANK YOU

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