

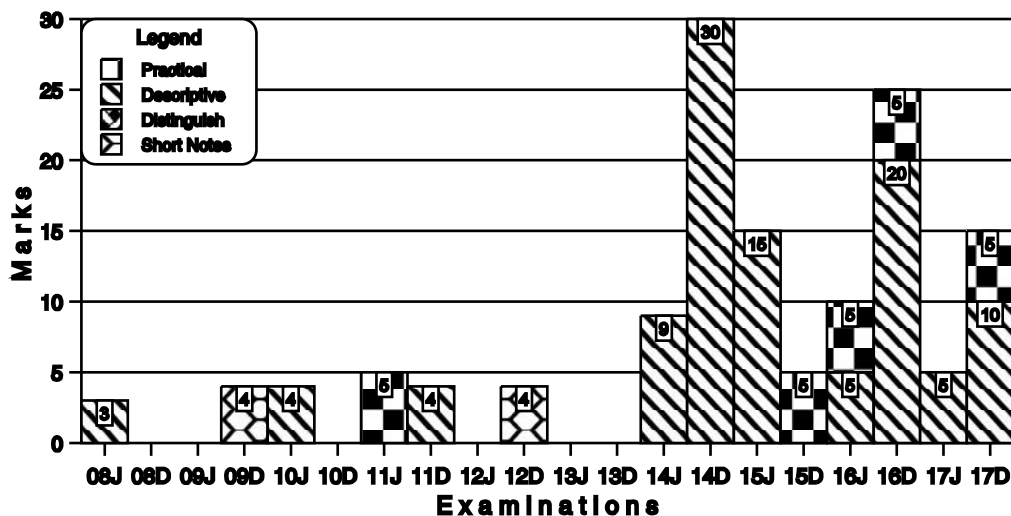
# 1

## SECRETARIAL AUDIT AND SECRETARIAL STANDARDS- AN OVERVIEW

### THIS CHAPTER INCLUDES

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| <ul style="list-style-type: none"> <li>• Secretarial Audit – Concept</li> <li>• Objective, Scope of Secretarial Audit</li> <li>• Benefits and Beneficiaries</li> <li>• Secretarial Audit Process</li> <li>• Professional Responsibilities and Penalties</li> </ul> | <ul style="list-style-type: none"> <li>• Secretarial Standards – Concepts</li> <li>• Secretarial Standards Under the Companies Act, 2013</li> <li>• Secretarial Audit Report – Format</li> </ul> |
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Marks of Short Notes, Distinguish Between, Descriptive & Practical Questions



## CHAPTER AT A GLANCE

Topic	Major Highlight
<b>Secretarial Audit</b>	It is the process of verification of compliance with rules, procedures, maintenance of books, records etc. by an independent professional to monitor compliance with various legal requirements.
<b>Secretarial Standard</b>	The term 'Secretarial Standard' is defined as an explanation to <b>Section 205</b> of the <b>Companies Act, 2013</b> to mean secretarial standards issued by the Institute of Company Secretaries of India constituted <b>under section 3</b> of the <b>Company Secretaries Act, 1980</b> and approved by the Central Government.
<b>Dividend</b>	Dividend includes any interim dividend.
<b>Secretarial Standards Board (SSB)</b>	The Secretarial Standards Board (SSB) formulates Secretarial Standards taking into consideration the applicable laws, business environment and the best secretarial practices prevalent.

### **SECRETARIAL AUDIT [SECTION 204]:**

**Section 204(1) of the Companies Act, 2013** provides for mandatory secretarial audit for every listed company and companies belonging to other prescribed class of companies. Such companies are required to annex a secretarial audit report with its Board's report. As per **Rule 8** of the **Companies (Meetings of Board and its powers) Rules, 2014**, read with **Section 179 of the Companies Act, 2013** secretarial auditor is required to be appointed by means of resolution at a duly convened board meeting.

**Rule 9** of the **Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014**, has prescribed the following class of companies for the purposes of the above said section:

- (a) every public company having a paid-up share capital of fifty crore rupees or more; or
- (b) every public company having a turnover of two hundred fifty crore rupees or more.

**“Turnover” means the aggregate value of the realisation of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year. [Section 2(91)]**

Company Secretary in practice has been exclusively recognised for conducting secretarial audit. The section further provides that Secretarial Audit Report is to be submitted in a format prescribed under rules. As per **sub-rule (2) of Rule 9**, the format of the Secretarial Audit Report shall be in Form No. MR.3.

**Section 134** and **Sub-section (3) of Section 204** provides that the Board of Directors, in its report, shall explain in full any qualification or observation or other remarks made by the company secretary in practice in the secretarial audit report.

**Penalty:** If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section, the company, every officer of the company or the company secretary in practice, who is in default, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees [**Section 204(4)**].

**Question:**

Mr. Ravi, a practicing chartered accountant who is also a qualified company secretary, desires to take up the work of practicing company secretary, in addition to the audit of the accounts of the companies. Discuss the legal position.

**Answer:**

As per **Reg. 168**, a company secretary in practice cannot in any business or profession other than the profession of the company secretary unless it is permitted by a general or specific resolution of the Council.

However, he may act as a secretary, trustee, executor, administrator, arbitrator, receiver, appraiser, valuer, internal auditor, management auditor (but not financial auditor), management consultant, or as a representative on financial matters including taxation and may take up an appointment that may be made by the Central or any State Government, Courts of Law, Labour Tribunals, or any other statutory authority.

**FUNCTIONS OF THE COMPANY SECRETARY:**

**Section 205** specifies the functions to be performed by the Company Secretary in carrying out the Secretarial Audit. These include:

1. Reporting to the Board about compliance with the provisions of this Act, the rules made there under and other laws applicable to the company;
2. Ensuring that the company complies with the applicable secretarial standards.
3. Discharging such other duties as may be prescribed.

**OBLIGATION OF THE COMPANY:**

**Section 204(2)** provides that it shall be the duty of the company to give all assistance and facilities to the Company Secretary in practice, for auditing the secretarial and related records of the company.

**Section 204(3)** provides that the Board of Directors, in their report made in terms of **Section 134(3)**, shall explain in full any qualification or observation or other remarks made by Company Secretary in Practice in his report under this section.

**Objectives of Secretarial Audit:**

The objectives of Secretarial Audit may be briefed as under:

1. To check & Report on Compliances
2. To Point out Non-Compliances and Inadequate Compliances
3. To protect the interest of the customers, employees, society etc.
4. To avoid any unwarranted legal actions by law enforcing agencies and other persons as well.

**Secretarial Audit and Company Secretary in Practice:**

Company secretary in practice has been exclusively recognised for conducting secretarial audit. In terms of **Section 204(1)**, only a member of the Institute of Company Secretaries of India holding certificate of practice (company secretary in practice) can conduct Secretarial Audit and furnish the Secretarial Audit Report to the company.

In order to provide guidance to its members who are in practice to adopt a robust and efficient process of Secretarial Audit, the Institute of Company Secretaries of India has issued this guidance note.

**Appointment of Secretarial Auditor:**

As per **Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014**, secretarial auditor is required to be appointed by means of resolution at a duly convened board meeting of the company.

**Time of appointment:**

It is advisable that the Secretarial Auditor is appointed at beginning of the year as secretarial audit entails checking of compliances on a continuous basis. As a good practice, the Secretarial Auditor should submit a report to the Board at the end of each quarter as to the compliances of the company.

**Notice of Annual General Meeting:**

Para 1.2.1 of draft Secretarial Standard on General Meetings requires that the notice in writing of every Meeting shall be given to every Member of the company. Such Notice shall also be given to the Directors and Auditors of the company, to the Secretarial Auditor, to Debenture Trustees, if any, and, wherever applicable or so required, to other specified persons.

**Rights and duties of Secretarial Auditor under the Companies Act, 2013:**

**Section 143 of the Companies Act, 2013** deals with powers and duties of Auditors. **Sub-section (14)** of the section provides that the provisions of this section shall mutatis mutandis apply to the Company Secretary in Practice conducting Secretarial Audit **under section 204**.

**Approach to Secretarial Audit:**

The object of the Secretarial Auditor's Report is to undertake evaluation and form an opinion and to report to the shareholders as to whether, and if so, to what extent, the company has complied with the laws comprising various statutes, rules, regulations, guidelines about the board processes

and existence of compliance management system. This requires knowledge of the corporate laws, economic laws, securities laws, FEMA, and other laws specifically applicable to the company, corporate governance provisions, Secretarial Standards etc. To be able to give an effective report, a Company Secretary in Practice is expected to have the following:

- (1) Knowledge
- (2) Team
- (3) Documentation & back-up
- (4) Third party supporting and evidences
- (5) Adhering to the timelines
- (6) Honesty and impartiality
- (7) Maintaining Audit Diary
- (8) Back- up papers to be maintained.

**Benefits and Beneficiaries of Secretarial Audit:**

**The Benefits:**

The benefits of secretarial audit includes the following:

- (a) It can be an effective due diligence exercise for the prospective acquirer of a company or controlling interest or a joint venture partner.
- (b) It assures the owners that management and affairs of the company are being conducted in accordance with requirements of laws, and that the owners stake is not being exposed to undue risk.
- (c) It ensures the Management of a company that those who are charged with the duty and responsibility of compliance with the requirements of law are performing their duties competently, effectively and efficiently.
- (d) Instilling professional discipline and self-regulations.
- (e) Reduces the work load of the regulators due to better and timely compliances.

**The beneficiaries:**

The major beneficiaries of Secretarial Audit include:

- (a) Promoters
- (b) Management
- (c) Non-executive directors
- (d) Government authorities/regulators
- (e) Investors
- (f) Other Stakeholders

**Crucial area of the Secretarial Audit Report:**

There are certain clauses prescribed under the Secretarial Audit, in which probability for defaults that may be committed by the company and its director is more, due to various reasons, therefore proper care must be taken specifically in the matter of following heads:

**Companies Act, 2013:**

1. Appointment of the KMP
2. Information filed with the ROC for change in the promoters and top 10 shareholders
3. Issuance of share certificate for the shares allotted in the earlier years
4. Acceptance of deposits from the members and general public
5. Unsecured loans obtained from the various sources
6. Loan given or guarantee or security provided to directors and their related concerns
7. Approval of contracts in which directors are interested
8. Appointment in the office or place of profit
9. Registration of creation, modification and satisfaction of charges
10. Transfer of amount of dividend in a separate bank account
11. Remittance of security deposits collected from the employees
12. Payment of dividend
13. Payment of managerial remuneration, etc.

**SEBI Rules & Regulations:**

1. The **Depositories Act, 1996**
2. The SEBI (Substantial Acquisition of Shares and Takeovers), 2011
3. The SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009

**Other Laws:**

1. **Foreign Exchange Management Act, 1999** and the rules and regulations made there under to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings
2. Other laws (depending upon the nature of industry in which company deals)
3. All Secretarial Standards issued by the Institute of Company Secretaries of India.

**Penalty for Incorrect Audit Report:**

Any failure or lapse on the part of secretarial auditor may attract penalty for incorrect report and disciplinary action for professional or other misconduct under the provisions of the **Company Secretaries Act, 1980**.

Further **Section 448 of Companies Act, 2013** deals with penalty for false statements. The section provides that if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement,— (a) which is false in any material particulars, knowing it to be false; or (b) which omits any material fact, knowing it to be material, he shall be liable **under section 447**. **Section 447** deals with punishment for fraud which provides that any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. In case, the fraud in question involves public interest, the term of imprisonment shall not be less than three years. In view of this, a company secretary in practice will be attracting the penal provisions of **Section 448**, for any false statement in any material particulars or omission of any material fact in the Secretarial Audit Report. However, a person will be penalised **under section 448** in case he makes a statement, which is false in any material particulars, knowing it to be false, or which omits any material fact knowing it to be material.

**Q.1** What are the laws specifically mentioned in MR-3 which need to be examined while conducting the Secretarial Audit?

**A.1** In terms of Form MR-3, the Secretarial Auditor needs to examine and report on the compliance of the following five specific laws:

- (i) The **Companies Act, 2013** (the Act) and the rules made thereunder;
- (ii) The **Securities Contracts (Regulation) Act, 1956 (“SCRA”)** and the rules made thereunder;
- (iii) The **Depositories Act, 1996** and the Regulations and Bye-laws framed thereunder;



- (iv) **Foreign Exchange Management Act, 1999** and the rules and regulations made thereunder to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings;
- (v) The following Regulations and Guidelines prescribed under the **Securities and Exchange Board of India Act, 1992 (“SEBI Act”)**:-
  - (a) The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.
  - (b) The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 w.e.f. 15<sup>th</sup> January, 2015.)
  - (c) The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.
  - (d) The Securities and Exchange Board of India (Share Based Employee Benefits) Regulations, 2014 w.e.f 28<sup>th</sup> October, 2014.
  - (e) The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008.
  - (f) The Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 regarding the Companies Act and dealing with client.
  - (g) The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009; and
  - (h) The Securities and Exchange Board of India (Buyback of Securities) Regulations, 1998; In addition, the form MR-3, point.
- (vi) also refers to “Other laws as may be applicable specifically to the company.

**Q.2** Is Secretarial Audit applicable to a private company which is a subsidiary of a public company?

**A.2** **Section 2(71)** of the **Companies Act, 2013** defines a “Public Company” as one

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- (a) Which is not a private company;
- (b) Has a minimum paid-up share capital of five lakh rupees or such higher paid-up capital as may be prescribed.

**Note: This limit has been removed by Companies Amendment Act, 2015.**

The proviso to the definition states that "Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

By this definition, it can be inferred that Secretarial Audit would be applicable to a private company which is a subsidiary of a public company, and which falls under the prescribed class of companies.

**SECRETARIAL STANDARDS UNDER THE COMPANIES ACT, 2013:**

The term 'Secretarial Standard' is defined as an explanation to **Section 205** of the **Companies Act, 2013** to mean secretarial standards issued by the Institute of Company Secretaries of India constituted **under section 3** of the **Company Secretaries Act, 1980** and approved by the Central Government. Thus, for the first time, Secretarial Standards have been accorded statutory recognition under the **Companies Act, 2013**.

The **Companies Act, 2013** has recognised the need for every company to observe Secretarial Standards. **Section 118 (10)** of the **Companies Act, 2013** requires every company to observe secretarial standards with respect to General and Board Meetings. Also, as per **Section 205(1)(b)**, it is the duty of the company secretary to ensure that the company complies with the applicable secretarial standards. Therefore, the companies are required to ensure the observance of all the secretarial standards once these are issued by the Institute of Company Secretaries of India and approved by the Central Government.

So far, the ICSI has issued ten Secretarial Standards, viz.

SS-1: Secretarial Standard on Meetings of the Board of Directors

SS-2: Secretarial Standard on General Meetings

SS-3: Secretarial Standard on Dividend

SS-4: Secretarial Standard on Registers and Records

SS-5: Secretarial Standard on Minutes

SS-6: Secretarial Standard on Transmission of Shares and Debentures

SS-7: Secretarial Standard on Passing of Resolutions by Circulation

SS-8: Secretarial Standard on Affixing of Common Seal

SS-9: Secretarial Standard on Forfeiture of Shares and

SS-10: Secretarial Standard on Board's Report.

**The “Secretarial Standard on Meetings of the Board of Directors” (SS-1) & “Secretarial Standard on General Meetings” (SS-2), formulated by the Secretarial Standards Board of the Institute of Company Secretaries of India (ICSI) and issued by the Council of the ICSI, has been approved by the Central Government. Adherence to SS-1 & SS-2 are mandatory in terms of sub-section (10) of Section 118 of the Companies Act, 2013. SS-1 applies to Meetings of the Board of Directors and its Committees, in respect of which Notices are issued on or after 1st July, 2015. SS-2 applies to all types of General Meetings, in respect of which Notices are issued on or after 1st July, 2015.**

## SHORT NOTES

**2009 - Dec [8]** Write a note on the following :

(v) Secretarial Standards.

**(4 marks)**

**Answer:**

### **SECRETARIAL STANDARDS UNDER THE COMPANIES ACT, 2013**

The term ‘Secretarial Standard’ is defined as an explanation to **Section 205** of the **Companies Act, 2013** to mean secretarial standards issued by the Institute of Company Secretaries of India constituted **under section 3** of the **Company Secretaries Act, 1980** and approved by the Central Government. Thus, for the first time, Secretarial Standards have been accorded statutory recognition under the **Companies Act, 2013**.

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of the company secretary to ensure that the company complies with the applicable secretarial standards. Therefore, the companies are required to ensure the observance of all the secretarial standards once these are issued by the Institute of Company Secretaries of India and approved by the Central Government.

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SS-9: Secretarial Standard on Forfeiture of Shares;

SS-10: Secretarial Standard on Board's Report.

### **SECRETARIAL STANDARDS UNDER THE COMPANIES ACT, 2013**

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SS-10: Secretarial Standard on Board's Report.

### **FUNCTIONS OF THE COMPANY SECRETARY**

**Section 205** specifies the functions to be performed by the Company Secretary in carrying out the Secretarial Audit. These include-

1. Reporting to the Board about compliance with the provisions of this Act, the rules made there under and other laws applicable to the company;
2. Ensuring that the company complies with the applicable secretarial standards;
3. Discharging such other duties as may be prescribed.

### **OBLIGATION OF THE COMPANY**

**Section 204(2)** provides that it shall be the duty of the company to give all assistance and facilities to the Company Secretary in practice, for auditing the secretarial and related records of the company.

**Section 204(3)** provides that the Board of Directors, in their report made in terms of **Section 134(3)**, shall explain in full any qualification or observation or other remarks made by Company Secretary in Practice in his report under this section.

**2012 - Dec [7]** Write a note on the following:

- (ii) Secretarial audit

**(4 marks)**

**Answer:**

### **Secretarial Audit [Section 204]**

**Section 204(1)** of the **Companies Act, 2013** provides for mandatory secretarial audit for every listed company and companies belonging to other prescribed class of companies. Such companies are required to annex a

secretarial audit report with its Board's report. As per **Rule 8** of the **Companies (Meetings of Board and its powers) Rules, 2014**, read with **Section 179** of the **Companies Act, 2013** secretarial auditor is required to be appointed by means of a resolution at a duly convened board meeting.

**Rule 9** of the **Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014**, has prescribed the following class of companies for the purposes of the above said section:

- (a) every public company having a paid-up share capital of fifty crore rupees or more; or
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Company Secretary in practice has been exclusively recognised for conducting secretarial audit. This section further provides that Secretarial Audit Report is to be submitted in a format prescribed under rules. As per **sub-rule (2)** of **Rule 9**, the format of the Secretarial Audit Report shall be in Form No. MR.3.

**Section 134** and **Sub-section (3)** of **Section 204** provides that the Board of Directors, in their report, shall explain in full any qualification or observation or other remarks made by the company secretary in practice in the secretarial audit report.

**Penalty:** If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section, the company, every officer of the company or the company secretary in practice, who is in default, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees [**Section 204(4)**].

**Example:**

**Question:**

Mr. Ravi, a practicing chartered accountant who is also a qualified company secretary, desires to take up the work of practicing company secretary, in addition to the audit of the accounts of the companies. Discuss the legal position.

**Answer:**

**Reg. 168**, prohibits a company secretary in practice from engaging in any

business or profession other than the profession of the company secretary unless it is permitted by a general or specific resolution of the Council.

However, he may act as a secretary, trustee, executor, administrator, arbitrator, receiver, appraiser, valuer, internal auditor, management auditor (but not financial auditor), management consultant, or as a representative on financial matters including taxation and may take up an appointment that may be made by the Central or any State Government, Courts of Law, Labour Tribunals, or any other statutory authority.

**2014 - Dec [7]** (b) Write a note on the following:

- (iii) Overseas investment by proprietorship concern/unregistered partnership.

**[Old Syllabus] (4 marks)**

**Answer:**

**Overseas Direct Investments by proprietorship concern / unregistered partnership firm in India**

The following terms and conditions are required to be complied with for considering the proposal of ODI, by a proprietorship concern / unregistered partnership firm in India, by the Reserve Bank under the approval route:

- (a) The proprietorship concern / unregistered partnership firm in India is classified as 'Status Holder' as per the Foreign Trade Policy issued by the Ministry of Commerce and Industry, Govt. of India from time to time.
- (b) The proprietorship concern / unregistered partnership firm in India has a proven track record, i.e., the export outstanding does not exceed 10% of the average export realisation of the preceding 3 years and a consistently high export performance.
- (c) The Authorised Dealer bank is satisfied that the proprietorship concern /unregistered partnership firm in India is KYC (Know Your Customer) compliant, engaged in the proposed business and has turnover as indicated.
- (d) The proprietorship concern / unregistered partnership firm in India has not come under the adverse notice of any Government agency like the Directorate of Enforcement, Central Bureau of Investigation, Income Tax Department, etc. and does not appear in the exporters' caution list of the

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Reserve Bank or in the list of defaulters to the banking system in India and

- (e) The amount of proposed investment (or financial commitment) outside India does not exceed 10 per cent of the average of last 3 years' export realisation or 200 per cent of the net owned funds of the proprietorship concern / unregistered partnership firm in India, whichever is lower.

## **DISTINGUISH BETWEEN**

**2014 - June [2]** (b) Distinguish between the following:

- (ii) 'Foreign direct investment as per OECD' an 'foreign direct investment as per UNCTAD'. **[Old Syllabus] (5 marks)**

**Answer:**

### **Foreign Direct Investment as per OECD**

The OECD FDI regulatory restrictiveness indexes presented here demonstrate that the services sector tend to have higher FDI restrictions across countries, followed by primary sectors. The manufacturing sector remains the most open economic sector.

### **Foreign Direct Investment as per UNCTAD**

FDI refers to an investment made to acquire lasting interest in enterprises operating outside of the economy of the investor. Further, in cases of FDI, the investor's purpose is to gain an effective voice in the management of the enterprise. The foreign entity or group of associated entities that makes the investment is termed the "direct investor".

## **DESCRIPTIVE QUESTIONS**

**2008 - June [3]** (c) Name the secretarial standards issued by the Institute of Company Secretaries of India. **(3 marks)**

**Answer :**

Secretarial Standards issued by the Institute of Company Secretaries of India



**SS-1:** Secretarial Standard on Meetings of the Board of Directors

**SS-2:** Secretarial Standard on General Meetings

**SS-3:** Secretarial Standard on Dividend

**SS-4:** Secretarial Standard on Registers and Records

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**SS-7:** Secretarial Standard on Passing of Resolutions by Circulation

**SS-8:** Secretarial Standard on Affixing of Common Seal

**SS-9:** Secretarial Standard on Forfeiture of Shares and

**SS-10:** Secretarial Standard on Board's Report.

**2010 - June [7]** (a) Answer the following with reference to Secretarial Standard-7 on passing of Board resolution by circulation process :

- (i) Who is authorised to decide that certain resolutions (other than those specified in Section 175) are to be taken up for consideration by circulation as against in a meeting? **(2 marks)**
- (ii) What procedure is to be followed for passing a resolution by circulation? Are interested directors eligible to receive the proposed resolution and related papers? **(2 marks)**

**Answer :**

- (i) a. Check whether the decision of obtaining approval of the Board for a particular business by means of a resolution by circulation had been taken by an authorised person as per the Standard.
- b. Check that no resolution was taken up for passing by circulation in cases where it was required by the requisite number of Directors to be taken up at a Board Meeting.

**Question:**

In course of administration of the affairs of a limited company, Chairman of its Board of Directors came across a matter, which required the approval by way of a board resolution. In the prevailing circumstances, it is not possible to convey and hold a Board Meeting. The Chairman approaches you to advise him of the way and the relevant procedure to obtain such approval without holding the Board Meeting. You are required to advise him on the matter as per the provisions of the Companies Act,

2013.

**Answer:**

The Chairman may be advised to secure approval by passing resolution by circulation if the proposed matter is not covered exclusive at board meeting. **Section 175** of the **Companies Act, 2013** provides a solution to such eventualities in the form of passing a resolution by circulation. Therefore, the Chairman and Board of Directors of the company are advised to pass the resolution by circulation.

However, following points should be considered by the Chairman and Board of Directors of the company regarding passing a resolution by circulation:

- The matters which are expressly stated to be passed through board meeting cannot be passed by way of circular resolution and can be passed only at the Board Meeting.
- Where one third directors require that any resolution under circulation must be decided at board meeting, chairman should put resolution to be decided at board meeting.

The following procedure needs to be followed for the purpose of passing a resolution by circulation:

- Send the draft of the resolution together with the necessary papers, if any, to all the directors at their registered address in India. It is send either by hand delivery or by post or by courier or through electronic means.
- Obtain one copy of the draft resolution duly signed by the directors, whether approving the resolution or disapproving the same.
- It may be noted that the resolution shall be deemed to be passed by the Board if majority of directors who are entitled to vote on the matter approve the resolution by signing one copy and returning the same to the company.
- The resolution passed by circulation shall be placed before the next Board Meeting for confirmation.
- The resolution shall be recorded in the minutes of the next Board Meeting.

**Answer:**

- (ii) Procedure
- a. Check that the resolution passed by circulation alongwith necessary papers had been circulated to all the directors of the company.
  - b. Check whether the procedure laid down by the Standard in respect of sending of draft resolution and necessary papers, contents of the note thereof, mode of circulation etc. had been duly followed.
  - c. Check whether the note indicated the last date by which the Director had to respond and manner thereof.

**2011 - Dec [5]** (c) What are the advantages for companies for adopting the secretarial standards issued by The Institute of Company Secretaries of India? **(4 marks)**

**Answer :**

- (i) The Institute of Company Secretaries of India (ICSI), recognising the need for integration, harmonisation and standardisation of diverse secretarial practices, has constituted the Secretarial Standard Board (SSB) with the objective of formulating secretarial standards.
- (ii) The adoption of secretarial standards will have a substantial impact on the improvement of quality of secretarial practices being followed by companies.
- (iii) By following the secretarial standards in letter and spirit companies will be able to ensure adoption of uniform, consistent and best secretarial practices with corporate sector.
- (iv) Uniformity of best practices, consistently applied will result in furthering the shareholder's democracy by laying down principles for better corporate disclosures thus adding value to the general endeavour to strive for good Governance.

**2014 - June [1]** (a) Examine and comment on the following:

- (ii) The ultimate goal of the Secretarial Standards is to promote good corporate practices leading to better corporate governance.

**(5 marks)**

**Answer:**

**The Statement is Correct:** The ultimate goal of the Secretarial Standards is to promote good corporate practices leading to better corporate governance. The Standards are for good secretarial practices and desirable corporate governance with a view to ensuring shareholders democracy and utmost transparency, integrity and fair play, going beyond the minimum requirements of law. The adoption of the Secretarial Standards by the corporate sector will, over the years have a substantial impact on the improvement of quality of secretarial practices being followed by companies, making them comparable with the best practices in the world.

**2014 - June [1] {C}** Examine and comment on the following.

- (v) Proprietorship concerns and unregistered firms are not allowed to set-up a joint venture/wholly -owned subsidiary outside India.

**[Old Syllabus] (4 marks)**

**Answer:****The Statement is not Correct**

With a view to enabling recognized star exporters with a proven track record and a consistently high export performance to reap the benefits of globalization and liberalization, proprietorship concerns and unregistered partnership firms are allowed to set up JVs / WOS outside India with the prior approval of the Reserve Bank subject to satisfying certain eligibility criteria. An application in form ODI may be made to The Chief General Manager, Reserve Bank of India, Foreign Exchange Department, Overseas Investment Division, Central Office, Amar Building, 5<sup>th</sup> Floor, Fort, Mumbai 400001, through the AD Category - I bank. AD Category - I banks may forward the applications to the Reserve Bank along with their comments and recommendations for consideration.

**2014 - June [1A] (Or)** (iii) Explain the objects, scope and benefits of Secretarial Audit. **(5 marks)**

**Answer:****The Objectives of Secretarial Audit**

The Objectives of Secretarial Audit may be briefed as under.

- To Check & Report on Compliances

- To Point out Non-Compliances and Inadequate Compliances
- To Protect the interest of the Customers, Employees, Society etc.
- To avoid any unwarranted legal actions by law enforcing agencies and other persons as well.

### Scope of Secretarial Audit

The Scope of Secretarial Audit comprises verification of the compliances under the enactments, rules, regulations, notifications and guidelines.

### The Benefits:

The benefits of secretarial audit includes the following:

- (a) It can be an effective due diligence exercise for the prospective acquirer of a company or controlling interest or a joint venture partner.
- (b) It assures the owners that management and affairs of the company are being conducted in accordance with requirements of laws and that the owners stake is not being exposed to undue risk.
- (c) Secretarial Audit being proactive measure for compliance with a plethora of laws, it will have a salutary effect of substantially lessening the burden of the law-enforcement authorities.
- (d) Instilling professional discipline and self-regulations.

**2014 - June [6]** (b) State the provisions of the Foreign Exchanges Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 relating to:

- (i) Eligibility
- (ii) Restrictions/prohibitions
- (iii) Approvals required.

[Old Syllabus] (6 marks)

### Answer:

#### (i) ELIGIBILITY

An Indian party is eligible to make direct investment in Joint Venture or Wholly Owned Subsidiary outside India. As per **Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004** Indian party includes:

- (i) A company incorporated in India;
- (ii) Body created under an Act of Parliament;
- (iii) Partnership Registered under **Indian Partnership Act, 1932**;
- (iv) Any other entity as may be notified by the Reserve Bank.

In case of partnership, individual partner can hold foreign securities for and on behalf of the firm, only if host country regulations or operational requirements warrant such holding.

**(ii) RESTRICTIONS/PROHIBITIONS**

- (a) Indian parties are prohibited from making direct investment in a foreign entity engaged in real estate /banking business. It may be noted that Indian Banks operating in India can set up WOS abroad, provided they obtain clearance under **Banking Regulation Act, 1949**.
- (b) Investment in Pakistan is not permitted under Automatic Route.
- (c) A person resident in India is not permitted to make Overseas Direct Investments unless RBI's prior approval is obtained. However, he may purchase a foreign security out of funds held in Resident Foreign Currency (RFC) account maintained in accordance with the **Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2015**.

**(iii) APPROVALS REQUIRED**

- (a) Approval from Board of Directors.
- (b) Shareholders of the Company.
- (c) Approval from Department of Economic Affairs, Ministry of Finance, if required.
- (d) Approval from Reserve Bank of India (pre/post facto).

**2014 - June [8]** Critically examine and comment on the following:

- (ii) Company Secretary as compliance officer in monitoring shares transfers. **[Old Syllabus] (4 marks)**

**Answer:**

**Company Secretary as Compliance Officer in monitoring share transfers**

In pursuance of prescribed Regulation of the **SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015** a listed company has to appoint a Company Secretary as a Compliance Officer who will be responsible for monitoring the share transfer process and report to the company's board in each meeting. As a Compliance Officer, the Company

Secretary is required to directly liaise with the authorities such as SEBI, Stock Exchanges, ROC etc. and investors with respect to implementation of various clauses, rules, regulations and other directives of such authorities and investor service and complaints related matters.

Therefore, it is imperative for Company Secretaries to be conversant with the legal and procedural aspects of transfer of shares/debentures.

**2014 - Dec [1]** (b) Bright Vision Ltd. wishes to appoint a secretarial auditor. Prepare a brief note for the Chairman of the company about the prerequisites for carrying out a secretarial audit. **(5 marks)**

**Answer:**

To

The Chairman

Bright Vision Ltd.

Subject: Prerequisites for carrying out a Secretarial Audit

Dear Sir,

**Section 204** of the **Companies Act, 2013** provides for mandatory secretarial audit for every listed company and companies belonging to other prescribed class of companies.

Such companies are required to annex a secretarial audit report with its Board's report.

As per **Rule 9** of the **Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014**, the prescribed class of companies is as under:

- (a) every public company having a paid-up share capital of ₹ 50 Crores or more; or
- (b) every public company having a turnover of ₹ 250 crores or more.

Company Secretary in practice has been exclusively recognised for conducting secretarial audit. The section further provides that Secretarial Audit Report is to be submitted in a format prescribed under rules. As per **sub-rule (2)** of **Rule 9**, the format of the Secretarial Audit Report shall be in Form No. MR. 3.

**Section 134** and **sub-section (3)** of **Section 204** provides that the Board of Directors, in its report, shall explain in full any qualification or observation or other remarks made by the company secretary in practice in the Secretarial Audit report.

Yours' faithfully

XYZ

**2014 - Dec [1A] (Or)** (i) Point out the penalties for failure to furnish information/return, etc., under the Depositories Act, 1996. **(5 marks)**

(ii) As per the Secretarial Standards issued by the ICSI, what are the requirements to be taken into account while forfeiting the shares? **(5 marks)**

(iii) The shares of Agile Ltd. were listed on a recognised stock exchange. The stock exchange delisted the shares of the company. The aggrieved company approaches you as a Practicing Company Secretary for advice. State the remedies available under the provisions of the Securities Contracts (Regulation) Act, 1956. **(5 marks)**

(iv) As a Practicing Company Secretary, describe the procedure for appeal to the Securities Appellate Tribunal under the Depositories Act, 1996. **(5 marks)**

(v) The Institute of Company Secretaries of India wants to issue a new Secretarial Standard. Describe the procedure involved in issuing of Secretarial Standards. **(5 marks)**

**Answer:**

(i) **Penalty for failure to furnish information, return, etc. under the Depositories Act, 1996**

**Any person, who is required under this Act or any rules or regulations or bye-laws made thereunder:**

(a) to furnish any information, documents, books, returns or report to the Board, fails to furnish the same within the time specified therefore, he shall be liable to a penalty [which shall not be less than ₹ 1 lakh but which may extend to ₹ 1 lakh for each day during which such failure continues subject to a maximum of ₹ 1 crore] for each such failure;



- (b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations or bye-laws, fails to file return or furnish the same within the time specified therefor, he shall be liable to a penalty [which shall not be less than ₹ 1 lakh but which may extend to ₹ 1 lakh for each day during which such failure continues subject to a maximum of ₹ 1 crore];
- (c) to maintain books of account or records, fails to maintain the same, he shall be liable to a penalty [which shall not be less than ₹ 1 lakh but which may extend to ₹ 1 lakh for each day during which such failure continues subject to a maximum of ₹ 1 crore].

**Answer:**

(ii) **1. Authority**

- The Articles should contain a provision for forfeiture of shares.
- Forfeiture of shares requires approval of the Board in a duly convened meeting.

**2. Procedure**

• **Non – Payment of Calls**

A forfeiture of shares held by a member should be made under the authority of the Board, if a call on the shares, together with interest accrued thereon, in accordance with the terms of issue of the shares, remains unpaid after the day appointed for payment thereof.

• **Notice**

If a member fails to pay any call, on or before the day of payment thereof, the company should during such time at which part of the call or instalment remains unpaid, serve a notice on the member asking for the payment of the call remaining unpaid, together with interest which may have accrued.

Notice should be served by the company on the defaulting member by registered post acknowledgment due.

The notice should be sent at the address registered with the company.

• **Contents of Notice**

The notice should state the amount of the call due and the interest accrued thereon.

The Notice should also specify a day not being earlier than the expiry of 21 days from the date of posting of the notice on or before which the payment required by the notice is to be made; and state that in the event of non-payment on or before the day so specified, the shares in respect of which the call was made including the amount already paid thereon will be forfeited.

If the notice is not given, the forfeiture cannot be effected.

- **Forfeiture on non - payment**

If the amount payable specified in the notice was not paid within the stipulated date, any share in respect of which the notice has been given may at any time thereafter be forfeited.

Any entitlement of the defaulting member for dividends on his partly paid up shares may be adjusted against his dues on calls.

### **3. Requirements of Forfeiture**

- The Board at a duly convened meeting should approve the forfeiture and authorize any director or manager or the secretary to make a declaration of such forfeiture.
- An authenticated list of shares to be forfeited together with the names of shareholders thereof should be placed before the Board for this purpose.
- The date of approval by the Board is the date of forfeiture.
- Upon forfeiture, any director or manager or the secretary, authorized by the Board of the company shall make a declaration specifying the particulars of shares forfeited.
- The declaration shall be conclusive evidence of forfeiture as against all persons claiming to be entitled to the shares of the company which have been forfeited.
- The Board should issue individual notices to the defaulting members whose shares have been forfeited.
- Entries in the register of members should be made with regard to forfeited shares.

- Share certificates in relation to forfeited shares shall stand cancelled upon forfeiture.
- There should be a reference to the forfeiture of shares in the report of the directors to the shareholders.
- In case of listed companies, notice of forfeiture of shares and actual forfeiture should be intimated to the stock exchange.

#### **4. Annulment of forfeiture**

- The Board can annul the forfeiture by passing a resolution before the reissue of forfeited shares.
- On annulment, the name of the member should be restored in the register of members for those shares.
- In case of shares issued in physical form, fresh share certificates should be issued for those shares.
- The forfeiture can be annulled by the Board at its discretion, if the member pays all outstanding calls due on the shares together with interest.
- The member whose shares have been forfeited should be duly informed by the Board on revoking the forfeiture and restoring the name of the member on the register of members.

#### **5. Effect of Forfeiture**

- A person whose shares have been forfeited would cease to be a member of the company, in respect of those shares.
- A person whose shares have been forfeited would notwithstanding the forfeiture, remain liable to pay to the company all moneys, which at the date of forfeiture were payable by him to the company in respect of the shares.
- The liability of the defaulting member shall not cease till the company receives the full payment which is due in respect of shares. The name of the defaulting member will be placed as a past member on the list of contributories if a winding up of the company commences within one year of the date of forfeiture.

#### **6. Re-issue**

- A forfeited share may be re-issued or otherwise disposed of on such terms and in such a manner as the Board may think fit.

- Re-issue of forfeited shares is a sale of shares and it does not amount to an allotment. The company should duly record the particulars of the members who acquire those shares as if it was a transfer of shares.
- The directors would fix a price for the forfeited share that should not be lower than the amount of the call(s) due and unpaid on the share at the time of forfeiture.
  
- In the case of a company whose shares are listed at a recognized stock exchange, re-issue of forfeited shares shall be as per Guidelines for Preferential Issue of the Securities and Exchange Board of India and the listing agreement.
- **Effect of Re-issue**
  - On re-issue the transferee should be registered as the holder of the share.
  - A new share certificate should be issued in the name of the transferee who shall be registered as the holder of the shares.
  - The title of the transferee should not be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

**Answer:**

(iii) **Delisting of Securities**

**21A**

- (1) A recognised stock exchange may delist the securities, after recording the reasons thereof, from any recognised stock exchange on any of the ground or grounds as may be prescribed under this Act :
- Provided that the securities of a company shall not be delisted unless the company concerned has been given a reasonable opportunity of being heard.
- (2) A listed company or an aggrieved investor may file an appeal before the Securities Appellate Tribunal against the decision of the recognised stock exchange for delisting the securities within 15 days from the date of the decision of the recognised stock exchange for delisting the securities and the provisions of

**Sections 22B to 22E** of this Act, shall apply, as far as may be, to such appeals:

Provided that the Securities Appellate Tribunal may, if it is satisfied that the company was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding one month.

**Answer:**

**(iv) Appeal to Securities Appellate Tribunal**

**23A**

- (1) Save as provided in **sub-section (2)**, any person aggrieved by an order of the Board made, on and after the commencement of the **Securities Laws (Second Amendment) Act, 1999**, under this Act, or the regulations made thereunder, [or by an order made by an adjudicating officer under this Act] may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.
- (2) Every appeal under **sub-section (1)** shall be filed within a period of 45 days from the date on which a copy of the order made by the Board is received by the person referred to in **sub-section (1)** and it shall be in such form and be accompanied by such fee as may be prescribed : Provided that the Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of 45 days if it is satisfied that there was sufficient cause for not filing it within that period.
- (3) On receipt of an appeal under **sub-section (1)**, the Securities Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
- (4) The Securities Appellate Tribunal shall send a copy of every order made by it to the Board and parties to the appeal.
- (5) The appeal filed before the Securities Appellate Tribunal under **sub-section (1)** shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the

appeal finally within 6 months from the date of receipt of the appeal.

**Answer:**

**(v) Procedure for issuing Secretarial Standards**

**The following procedure shall be adopted for formulating and issuing Secretarial Standards:**

1. SSB, in consultation with the Council, shall determine the areas in which Secretarial Standards need to be formulated and the priority in regard to the selection thereof.
2. In the preparation of Secretarial Standards, SSB may constitute Working Groups to formulate preliminary drafts of the proposed Standards.
3. The preliminary draft of the Secretarial Standard prepared by the Working Group shall be circulated amongst the members of SSB for discussion and shall be modified appropriately, if so required.
4. The preliminary draft will then be circulated to the members of the Central Council as well as to Chairmen of Regional Councils/Chapters of ICSI, various professional bodies, Chambers of Commerce, regulatory authorities such as the Ministry of Corporate Affairs, the Department of Economic Affairs, the Securities and Exchange Board of India, Reserve Bank of India, Department of Public Enterprises and to such other bodies/organisations as may be decided by SSB, for ascertaining their views, specifying a time-frame within which such views, comments and suggestions are to be received.
5. On the basis of the preliminary draft and the discussion with the bodies/organisations referred to in 4 above, an Exposure Draft will be prepared and published in the "Chartered Secretary", the journal of ICSI and also put on the Website of ICSI to elicit comments from members and the public at large.
6. The draft of the proposed Secretarial Standard will generally include the following basic points:
  - (a) Concepts and fundamental principles relating to the subject of the Standard;

- (b) Definitions and explanations of terms used in the Standard;
  - (c) Objectives of issuing the Standard;
  - (d) Disclosure requirements; and
  - (e) Date from which the Standard will be effective.
7. After taking into consideration the comments received, the draft of the proposed Secretarial Standard will be finalised by SSB and submitted to the Council of ICSI.
8. The Council will consider the final draft of the proposed Secretarial Standard and finalise the same in consultation with SSB. The Secretarial Standard on the relevant subject will then be issued under the authority of the Council.

**2014 - Dec [3]** (d) Mention the pre-requisites to secretarial audit.

**[Old Syllabus] (4 marks)**

**Answer:**

**Section 204(1)** of the **Companies Act, 2013** provides for mandatory secretarial audit for every listed company and companies belonging to other prescribed class of companies. Such companies are required to annex a secretarial audit report along with their Board's report. As **per Rule 8** of the **Companies (Meetings of Board and its powers) Rules, 2014**, read with **Section 179** of the **Companies Act, 2013** secretarial auditor is required to be appointed by means of a resolution passed at a duly convened board meeting.

**Rule 9** of the **Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014**, has prescribed the following class of companies for the purposes of the above said section:

- (a) every public company having a paid-up share capital of ₹ 50 crores or more; or
- (b) every public company having a turnover of ₹ 250 crores or more.

Secretarial Audit is the process of independent verification, examination of level of compliances of applicable Corporate Laws to a company. The audit process if, properly devised ensures timely compliance and eliminates any un-intended non compliance of various applicable rules and regulations. An action plan by the Corporate Secretarial Department is to be designed so as to ensure that all event based and time based compliances are considered

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and acted upon. Secretarial Audit is to be on the principle of “Prevention is better than cure” rather than as a post mortem exercise and to find faults. Broadly, the need for Secretarial Audit are:

- Effective mechanism to ensure that the legal and procedural requirements are duly complied with.
- Provides a level of confidence to the directors, officers in default, Key Managerial Personnel etc.
- Directors can concentrate on important business matters as Secretarial Audit ensures legal and procedural requirements are complied with.
- Strengthen the image and goodwill of a company in the minds of regulators and stakeholders,
- Secretarial Audit is an effective compliance risk management tool.
- It helps the investor in analyzing the compliance level of companies, thereby increases the reputation.
- Secretarial Audit is an effective governance tool.

**2015 - June [1]** (a) “Secretarial Standards Board is doing multifarious functions.” Comment. **(5 marks)**

**(c)** “Secretarial audit is prevention rather than post-mortem.” In the light of this statement explain the need of secretarial audit particularly with reference to corporate law compliances. **(5 marks)**

**Answer:**

**(a)** The scope of SSB is to identify the areas in which Secretarial Standards need to be issued by the Council of ICSI and to formulate such Standards, taking into consideration the applicable laws, business environment and best secretarial practices. SSB will also clarify issues arising out of such Standards and issue guidance notes for the benefit of members of ICSI, corporates and other users.

The main functions of SSB are:

- (i) Formulating Secretarial Standards;
- (ii) Clarifying issues arising out of the Secretarial Standards;
- (iii) Issuing Guidance Notes; and
- (iv) Reviewing and updating the Secretarial Standards/Guidance Notes at periodic intervals.



**Answer:**

(c) Secretarial Audit is the process of independent verification, examination of level of compliance of applicable Corporate Laws to a company. The audit process if properly devised ensures timely compliance and eliminates any un-intended non compliance of various applicable rules and regulations. An action plan of the Corporate Secretarial Department is to be designed so as to ensure that all event based and time based compliances are considered and acted upon. Secretarial Audit is to be on the principle of “Prevention is better than cure” rather than post mortem exercise and to find faults. Broadly, the need for Secretarial Audit is:

- Effective mechanism to ensure that the legal and procedural requirements are duly complied with.
- Provides a level of confidence to the directors, officers in default, Key Managerial Personnel etc.
- Directors can concentrate on important business matters as Secretarial Audit ensures legal and procedural requirements.
- Strengthen the image and goodwill of a company in the minds of regulators and stakeholders.
- Secretarial Audit is an effective compliance risk management tool.
- It helps the investor in analyzing the compliance level of companies, thereby increases the reputation.
- Secretarial Audit is an effective governance tool.

**2015 - June [1A] (Or)** (ii) “Compliance of secretarial standards is good for governance.” Explain. **(5 marks)**

**Answer:**

The ultimate goal of the Secretarial Standards is to promote good corporate practices leading to better corporate governance. The Standards are for good secretarial practices and desirable corporate governance with a view to ensuring shareholders democracy and utmost transparency, integrity and fair play, going beyond the minimum requirements of law. The adoption of the Secretarial Standards by the corporate sector will, over the years have a substantial impact on the improvement of quality of secretarial practices being followed by companies, making them comparable with the best

practices in the world. Many companies today are voluntarily adopting the Secretarial Standards in their functioning. The annual reports of several companies released during the last few years include a disclosure with regard to the compliance of the Secretarial Standards.

**2016 - June [1A] (Or)** (i) You are the Secretarial Auditor of Admire Ltd. State the matters to be considered by you while preparing the audit report.

**(5 marks)**

**Answer:**

- (i) Periodical Secretarial Audit Report is submitted to the Board of Directors for corrective action, the audit report is prepared in MR-3.
- (ii) The report is addressed to the members but is to be submitted to the board.
- (iii) The report shall contain the opinion of the statutory compliance examined by the auditor and shall state whether in his opinion the company is carrying out due compliance of the applicable provisions.
- (iv) Qualifications/ reservation or adverse remarks, if any, should be stated by the Secretarial Auditor at the relevant places in his report in bold type or in italics.
- (v) If the Secretarial Auditor is unable to express an opinion on any matter, he must mention it. If the scope of work required to be performed is restricted on account of restriction imposed by the company, the report should mention such limitation.

**2016 - Dec [1]** (d) Explain the establishment, objectives, scope and functions of the Secretarial Standards Board. **(5 marks)**

**(e)** Secretarial audit is a process to check compliance with the provisions of all applicable laws including rules, regulations and procedures. Draw a labelled block diagram explaining the process. **(5 marks)**

**Answer:**

**(d) SECRETARIAL STANDARDS UNDER THE COMPANIES ACT, 2013:**

The term 'Secretarial Standard' is defined as an explanation to **Section 205** of the **Companies Act, 2013** to mean secretarial standards issued by the Institute of Company Secretaries of India constituted **under section 3** of the **Company Secretaries Act, 1980** and approved by the

Central Government. Thus, for the first time, Secretarial Standards have been accorded statutory recognition under the **Companies Act, 2013**. The **Companies Act, 2013** has recognised the need for every company to observe Secretarial Standards. **Section 118 (10)** of the **Companies Act, 2013** requires every company to observe secretarial standards with respect to General and Board Meetings. Also, as per **Section 205(1)(b)**, it is the duty of the company secretary to ensure that the company complies with the applicable secretarial standards. Therefore, the companies are required to ensure the observance of all the secretarial standards once these are issued by the Institute of Company Secretaries of India and approved by the Central Government.

So far, the ICSI has issued ten Secretarial Standards, viz.

SS-1: Secretarial Standard on Meetings of the Board of Directors

SS-2: Secretarial Standard on General Meetings

SS-3: Secretarial Standard on Dividend

SS-4: Secretarial Standard on Registers and Records

SS-5: Secretarial Standard on Minutes

SS-6: Secretarial Standard on Transmission of Shares and Debentures

SS-7: Secretarial Standard on Passing of Resolutions by Circulation

SS-8: Secretarial Standard on Affixing of Common Seal

SS-9: Secretarial Standard on Forfeiture of Shares;

SS-10: Secretarial Standard on Board's Report.

#### **FUNCTIONS OF THE COMPANY SECRETARY**

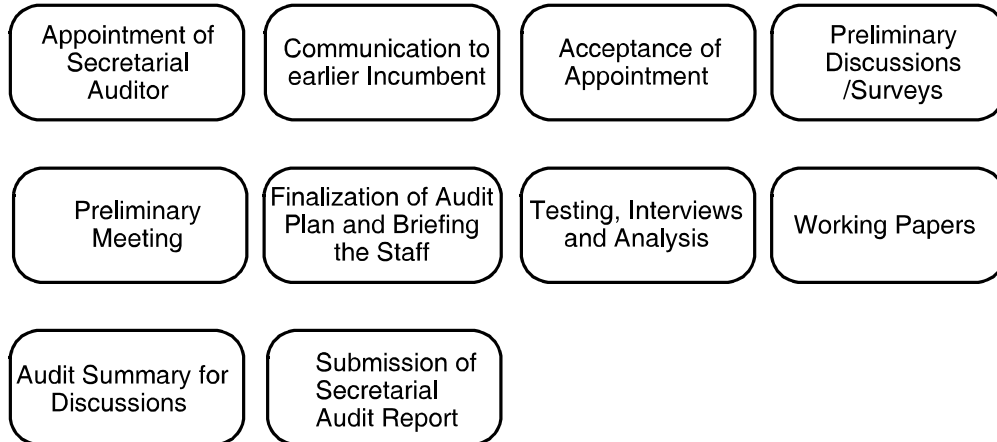
**Section 205** specifies the functions to be performed by the Company Secretary in carrying out the Secretarial Audit. These include-

1. Reporting to the Board about compliance with the provisions of this Act, the rules made there under and other laws applicable to the company;
2. Ensuring that the company complies with the applicable secretarial standards;
3. Discharging such other duties as may be prescribed.

#### **(e) Secretarial Audit - The Process**

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**2016 - Dec [1A] (Or)** (i) What are the principles laid down under the Secretarial Standard on General Meetings (SS-2) with regard to 'conduct of poll' you would adhere to as a Company Secretary? **(5 marks)**

(v) Explain the principles relating to maintenance and recording of minutes of Board Meetings as per Secretarial Standard on Meetings of the Board of Directors (SS-1). **(5 marks)**

**Answer :**

**(i) Principles laid down under the Secretarial Standard on General Meetings (SS-2) with regard to 'conduct of poll' are given below:**

1. When a poll is demanded on any Resolution, the Chairman shall get the validity of the demand verified and, if the demand is valid, shall order the poll forthwith if it is demanded on the question of appointment of the Chairman or adjournment of the Meeting and, in any other case, within forty-eight hours of the demand for poll.
2. In the case of a poll, which is not taken forthwith, the Chairman shall announce the date, venue and time of taking the poll to enable Members to have adequate and convenient opportunity to exercise their vote. The Chairman may permit any Member who so desires to be present at the time of counting of votes.
3. Each Resolution put to vote by poll shall be put to vote separately.
4. **Appointment of Scrutinisers:** The Chairman shall appoint such number of scrutinisers, as he deems necessary, who may include

a Company Secretary in Practice, a Chartered Accountant in Practice, a Cost Accountant in Practice, an Advocate or any other person of repute who is not in the employment of the company, to ensure that the scrutiny of the votes cast on a poll is done in a fair and transparent manner.

5. **Declaration of results:**

- (a) Based on the scrutiniser's report, the Chairman shall declare the result of the poll within two days of the submission of report by the scrutiniser, with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not.
- (b) The result of the poll with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not shall be displayed on the Notice Board of the company at its Registered Office and its Head Office as well as Corporate Office, if any, if such office is situated elsewhere, and in case of companies having a website, shall also be placed on the website.
- (c) The result of the poll shall be deemed to be the decision of the Meeting on the Resolution on which the poll was taken.

(v) **Maintenance of Minutes:**

1. Minutes shall be recorded in books maintained for that purpose.
2. A distinct Minutes Book shall be maintained for Meetings of the Board and each of its Committees.
3. Minutes may be maintained in electronic form in such manner as prescribed under the Act and as may be decided by the Board. Minutes in electronic form shall be maintained with Timestamp.
4. The pages of the Minutes Books shall be consecutively numbered.
5. Minutes shall not be pasted or attached to the Minutes Book, or tampered with in any manner.
6. Minutes of the Board Meetings, if maintained in loose-leaf form, shall be bound periodically depending on the size and volume and coinciding with one or more financial years of the company.

7. Minutes of the Board Meeting shall be kept at the Registered Office of the company or at such other place as may be approved by the Board.

**Recording of Minutes:**

1. Minutes shall contain a fair and correct summary of the proceedings of the Meeting.
2. Minutes shall be written in clear, concise and plain language.
3. Any document, report or notes placed before the Board and referred to in the Minutes shall be identified by initialing of such document, report or notes by the Company Secretary or the Chairman.
4. Where any earlier Resolution(s) or decision is superseded or modified, Minutes shall contain a reference to such earlier Resolution(s) or decision.
5. Minutes of the preceding Meeting shall be noted at a Meeting of the Board held immediately following the date of entry of such Minutes in the Minutes Book.

**2017 - June [1A] (Or)** (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)**

**Answer:**

**Preservation of Secretarial Records**

1. Minutes of all meetings are preserved permanently in physical or in electronic form with Timestamp in the custody of company secretary or any director duly authorised by the Board.
2. Office copies of Notices, Agenda, Notes on Agenda and other related papers are duly preserved in good order in physical or electronic form for the stipulated period.

3. In case of a scheme of arrangement, Minutes of all Meetings of the transferor company, as handed over to the transferee company, are being duly preserved.
4. Office copies of Notices, Agenda, Notes on Agenda and other related papers of the transferor company, as handed over to the transferee company, are being duly preserved for the stipulated period.
5. All Forms, MOA & AOA and other related papers of the company required, as per **Companies Act, 2013**, being duly preserved for the stipulated period.
6. Necessary approval had been taken, where any records had been destroyed.

**2017 - Dec [1]** (d) How would you identify, check and verify the compliance of applicable statutory provisions adherence to good corporate governance during the Secretarial Audit of S.S. Telecom Company Ltd., an unlisted public company. **(5 marks)**

**2017 - Dec [1A] (Or)** (ii) With respect to Secretarial Standards on General Meeting (SS 2), prepare the check points of Secretarial Audit for followings:  
(1) Withdrawal of Resolution  
(2) Rescinding of Resolution  
(3) Modifications to Resolution. **(5 marks)**

## **PRACTICAL QUESTIONS**

**2011 - June [4]** (b) Sunil is a Company Secretary holding certificate of practice. He has accepted the assignment of secretarial audit of XYZ Ltd. for the financial year ended 31<sup>st</sup> March, 2010. He received the notice of his assignment on 15<sup>th</sup> April, 2010 and signed the audit report on 30<sup>th</sup> June, 2010. It is noticed that Sunil ceased to be a Company Secretary in practice from 1<sup>st</sup> June, 2010. Examine the validity of the report dated 30<sup>th</sup> June, 2010 signed by Sunil. **(5 marks)**

**Answer :**

The Board appointed Mr. Sunil as Secretarial Auditor. He was company secretary holding certificate of practice. While Sunil received the notice on 15<sup>th</sup> April 2010 he was practicing company Secretary where as on the date of signing of Secretarial Audit Report he was not company secretary in practice in terms of **Company Secretaries Act, 1980**. Hence report submitted as company secretary in practice was not valid.

**2014 - Dec [3]** (c) Nagma buys 1,200 shares in a company from Garima on the faith of a share certificate issued by the company. Nagma tenders to the company a transfer deed, duly executed, along with Garima's share certificate for transferring the shares in her name. The company discovers that the certificate in the name of Garima has been fraudulently obtained and refuses to register the transfer. Is Nagma entitled to get the shares transferred in her name? Advise. **[Old Syllabus] (4 marks)**

**Answer:**

Where the Article of association of a company gives power to the Board to refuse registration of a transfer of shares such power must be exercised by a resolution of the Board. The Board may refuse to register the transfer as long as they are acting in the interests of the company, but if they exercise their discretion to refuse *malafide*, i.e., they act oppressively or corruptly, Tribunal will interfere and order registration.

The refusal to register transfer of shares on the ground that the transferor had been indulging in acts which were against the interests of the company shall not be tenable. **[Pawan Gupta v. Hicks Thermometers (India) Ltd.]** Hence, in the given case, Nagma is not entitled to get the shares transferred in her name.

**2015 - Dec [1]** (c) Top Ltd. is having a paid-up capital of ₹ 40 crore and turnover of ₹ 300 crore during the financial year 2014-15. The company decided to appoint a Company Secretary in Practice for conducting its secretarial audit. Mention the requirements of the secretarial audit report as per the provisions of the Companies Act, 2013. Examine whether it is mandatory for the company to have such a secretarial audit. **(5 marks)**



**Answer:**

**Secretarial Audit [Section 204]:**

**Section 204(1)** of the **Companies Act, 2013** provides for mandatory secretarial audit for every listed company and companies belonging to other prescribed class of companies. Such companies are required to annex a secretarial audit report with its Board's Report. As per **Rule 8** of the **Companies (Meetings of Board and its powers) Rules, 2014**, read with **Section 179** of the **Companies Act, 2013** secretarial auditor is required to be appointed by means of resolution at a duly convened board meeting.

**Rule 9** of the **Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014**, has prescribed the following class of companies for the purposes of the above said section:

- (a) every public company having a paid-up share capital of fifty crore rupees or more; or
- (b) every public company having a turnover of two hundred fifty crore rupees or more.

Company Secretary in practice has been exclusively recognised for conducting secretarial audit. The section further provides that Secretarial Audit Report is to be submitted in a format prescribed under rules. As per **sub-rule (2)** of **Rule 9**, the format of the Secretarial Audit Report shall be in Form No. MR. 3.

**Section 134** and **Sub-section (3)** of **Section 204** provides that the Board of Directors, in its report, shall explain in full any qualification or observation or other remarks made by the Company Secretary in practice in the secretarial audit report.

Hence, In the given case, Top Ltd. is mandatory to have such a secretarial audit.

**2016 - June [1A] (Or)** (iv) Buma Ltd. has some urgent items which could not be concluded in the Board Meeting. The Board decides to pass the said items by way of resolution by circulation. As the Company Secretary, advise the company about the steps to be taken as laid down in the Companies Act, 2013 and applicable secretarial standard. **(5 marks)**

**Answer:**

**As per Section 175 of the Companies Act, 2013:**

1. No resolution shall be deemed to have been duly passed by the Board or by a Committee thereof by circulation, unless the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be, at their addresses registered with the company in India by hand delivery or by post or by courier, or through such electronic means as may be prescribed and has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

Provided that, where not less than one-third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board.

A resolution under sub-section (1) shall be noted at a subsequent meeting of the Board or the committee thereof, as the case may be, and made part of the minutes of such meeting.

**As per SS-7:**

**Passing of Resolution by Circulation:**

The Act requires certain business to be approved only at meetings of the Board. However, other business that requires urgent decisions can be approved by means of Resolutions passed by circulation. Resolutions passed by circulation are deemed to be passed at a duly convened meeting of the Board and have equal authority.

**1. Authority:**

- The Chairman of the Board or in his absence, the Managing Director or in his absence, the Whole-time Director and where there is none, any Director other than an Interested Director, shall decide, before the draft Resolution is circulated to all the Directors, whether the approval of the Board for a particular business shall be obtained by means of a Resolution by circulation.
- Where not less than one-third of the total Number of Directors for the time being require the Resolution under circulation to be decided at a Meeting, the Chairman shall put the Resolution for consideration at a Meeting of the Board.

**2. Procedure:**

- A Resolution proposed to be passed by circulation shall be sent in draft, together with the necessary papers, individually to all the Directors including Interested Directors on the same day.
- The draft of the Resolution to be passed and the necessary papers shall be circulated amongst the Directors by hand, or by speed post or by registered post or by courier, or by e-mail or by any other recognised electronic means.
- Each business proposed to be passed by way of Resolution by circulation shall be explained by a note setting out the details of the proposal, relevant material facts that enable the Directors to understand the meaning, scope and implications of the proposal, the nature of concern or interest, if any, of any Director in the proposal, which the Director had earlier disclosed and the draft of the Resolution proposed. The note shall also indicate how a Director shall signify assent or dissent to the Resolution proposed and the date by which the Director shall respond.

**3. Approval:**

- The Resolution is passed when it is approved by a majority of the Directors entitled to vote on the Resolution, unless not less than one-third of the total Number of Directors for the time being require the Resolution under circulation to be decided at a Meeting.
- The Resolution, if passed, shall be deemed to have been passed on the last date specified for signifying assent or dissent by the Directors or the date on which assent from more than two-third of the Directors has been received, whichever is earlier, and shall be effective from that date, if no other effective date is specified in such Resolution.

**4. Recording:**

Resolutions passed by circulation shall be noted at the next Meeting of the Board and the text thereof with dissent or abstention, if any, shall be recorded in the minutes of such Meeting.

**5. Validity:**

Passing of Resolution by circulation shall be considered valid as if it had been passed at a duly convened Meeting of the Board.

**2016 - Dec [1A] (Or)** (ii) Keshav Ltd. is an unlisted company with a paid-up share capital of ₹ 35 crore and turnover of ₹ 100 crore. Advise Keshav Ltd., whether it is required to annex to its Board's report, a secretarial audit report by the Company Secretary in Practice. Justify your answer. **(5 marks)**

**Answer:**

**Secretarial Audit [Section 204]:**

**Section 204** of the **Companies Act, 2013** provides for mandatory secretarial audit for every listed company and companies belonging to other prescribed class of companies. Such companies are required to annex a secretarial audit report with its Board's Report. As per **Rule 8** of the **Companies (Meetings of Board and its powers) Rules, 2014**, read with **Section 179** of the **Companies Act, 2013** secretarial auditor is required to be appointed by means of resolution at a duly convened board meeting.

**Rule 9** of the **Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014**, has prescribed the following class of companies for the purposes of the above said section:

- (a) every public company having a paid-up share capital of fifty crore rupees or more; or
- (b) every public company having a turnover of two hundred fifty crore rupees or more.

Company Secretary in practice has been exclusively recognised for conducting secretarial audit. The section further provides that Secretarial Audit Report is to be submitted in a format prescribed under rules. As per **sub-rule (2)** of **Rule 9**, the format of the Secretarial Audit Report shall be in Form No. MR. 3.

**Section 134** and **Sub-section (3)** of **Section 204** provides that the Board of Directors, in its report, shall explain in full any qualification or observation or other remarks made by the Company Secretary in practice in the secretarial audit report.

Hence, In the given case, Keshav Ltd. is not mandatory to have such a secretarial audit.

**2017 - Dec [1]** (b) You are recently appointed as Secretarial Auditor of Alloy Tools Limited, an unlisted public company for Secretarial Audit for financial year 2017-18. What are the specific events / actions having major bearing on the company's affairs in pursuance of the applicable laws, rules, regulations, guidelines, standards etc. are required to be reported while preparing Secretarial Audit Report. **(5 marks)**