

COMPANIES INCORPORATED OUTSIDE INDIA

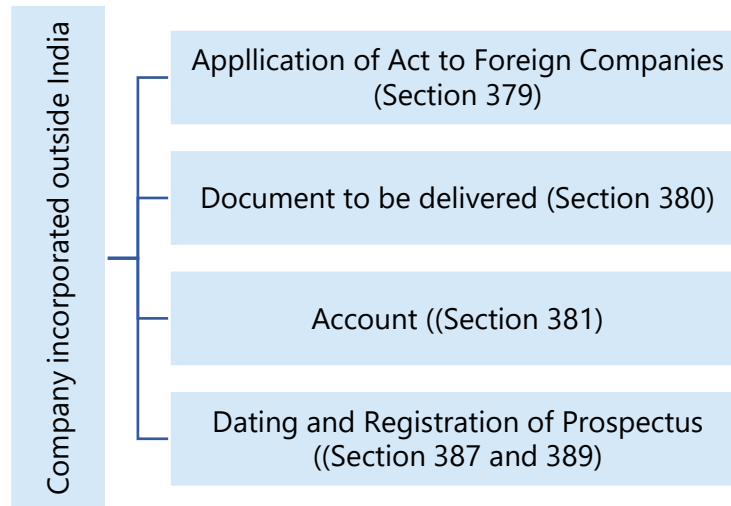


Learning Outcomes

After reading this chapter, you will be able to:

- ❑ Know the meaning of the Foreign Company and application of Act to it.
- ❑ Explain the provisions related to Accounts of Foreign company, service on foreign company.
- ❑ Comprehend the provisions of debentures, annual return, registration of charges, books of account and their inspection in Foreign companies.
- ❑ Analyse dating of prospectus and particulars to be contained therein, provisions as to expert's consent and allotment and registration of prospectus.
- ❑ Know about offer of Indian Depository Receipts.
- ❑ Merger or amalgamation of Company with foreign company.

CHAPTER OVERVIEW



1. INTRODUCTION

Chapter XXII	Consists of sections 379 to 393A as well as the Companies (Registration of Foreign Companies) Rules, 2014.
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Foreign Company [Section 2(42)]: "Foreign company" means any company or body corporate incorporated outside India which-

- has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- conducts any business activity in India in any other manner.

Example 1: ABC Entertainment Limited (Indian Company) having foreign subsidiary UVW Limited rendering satellite services to the group will be covered under the definition of Foreign Company under the Companies Act, 2013.

Example 2: Airline companies who operate through their booking agents in India will be covered under the definition of Foreign Company under the Companies Act, 2013.

According to the ¹Companies (Registration of Foreign Companies) Rules, 2014, “**electronic mode**” means carrying out electronically based, whether main server is installed in India or not, including, but not limited to –

- (a) business to business and business to consumer transactions, data interchange and other digital supply transactions;
- (b) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;
- (c) financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;
- (d) online services such as telemarketing, telecommuting, telemedicine, education and information research; and
- (e) all related data communication services,

whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

Explanation- For the purposes of this clause, electronic based offering of securities, subscription thereof or listing of securities in the International Financial Services Centres set up under section 18 of the Special Economic Zones Act, 2005 shall not be construed as ‘electronic mode’ for the purpose of clause (42) of section 2 of the Act.

Example 3: Zakpak Ltd. is a shipping company incorporated in Japan. The Company has set up a branch office in India after obtaining necessary approvals from RBI. Branch Offices are generally considered as a reflection of the Parent Company’s office. Thus, branch offices of a company incorporated outside India are considered as a place of business for conducting business activity in India and will be required to follow provisions of this chapter and such other provisions as may be specified elsewhere under Companies Act, 2013.

²Facts: Union Minister of State for Corporate Affairs Shri Rao Inderjit Singh in a written reply to a question in Rajya Sabha stated that 320 foreign companies were registered in India between 2018 and 2021.

¹ Rule 2(1)(h) of the Companies (Specification of Definitions Details) Rule, 2014

² Press release dated July 27, 2021 published by Press Information Bureau Delhi



2. APPLICATION OF ACT TO FOREIGN COMPANIES [SECTION 379]

According to this section:

- (i) **Applicability of Act to foreign companies:** Sections 380 to 386 (both inclusive) and sections 392 and 393 shall apply to all foreign companies. It implies that all companies which falls within the definition of foreign company as per section 2(42), shall comply with the provisions of this Chapter.
- (ii) **Requirement of holding of paid up share capital:** Where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company incorporated outside India is held by:
 - (i) one or more citizens of India; or
 - (ii) by one or more companies or bodies corporate incorporated in India; or
 - (iii) by one or more citizens of India and one or more companies or bodies corporate incorporated in India,

whether singly or in the aggregate, such foreign company shall also comply with the provisions of Chapter XXII and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India. [Section 379(2)]

Note: Chapter XXII referred to above deals with the legal provisions for companies incorporated outside India.

Example 4: The shareholding of Emaar Company LLC, incorporated in Dubai and having a place of business in India, is as follows:

1. Hinduja Company Limited (Indian Company): 26%
2. Vaishali Company Limited (Indian Company): 25%
3. Citizens of Dubai: Remaining holding

As per section 379(2), Emaar Company LLC will also be required to comply with the provisions of Chapter XXII as not less than 50% of the shareholders of Emaar Company LLC consists of body corporates incorporated in India. Emaar Company LLC will also be required to comply with other provisions of this Act as may be

prescribed with regard to the business carried on by its place of business in India as if it were a company incorporated in India.

3. DOCUMENTS, ETC., TO BE DELIVERED TO REGISTRAR BY FOREIGN COMPANIES [SECTION 380]

According to section 380 (1) of the Companies Act, 2013,

- (i) Every foreign company shall, within 30 days of the establishment of its place of business in India, deliver to the Registrar for registration:
 - (a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company. If the instrument is not in the English language, a certified translation thereof in the English language;
 - (b) the full address of the registered or principal office of the company;
 - (c) a list of the directors and secretary of the company containing such particulars as may be prescribed;

In relation to the nature of particulars to be provided as above, ³the Companies (Registration of Foreign Companies) Rules, 2014, provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars, for each of the persons included in such list, namely:

- (1) personal name and surname in full;
- (2) any former name or names and surname or surnames in full;
- (3) father's name or mother's name or spouse's name;
- (4) date of birth;
- (5) residential address;
- (6) nationality;

³ Rule 3 of the Companies (Registration of Foreign Companies) Rules, 2014

- (7) if the present nationality is not the nationality of origin, his nationality of origin;
 - (8) passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)
 - (9) income-tax permanent account number (PAN), if applicable;
 - (10) occupation, if any;
 - (11) whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship);
 - (12) other directorship or directorships held by him;
 - (13) Membership Number (for Secretary only); and
 - (14) e-mail ID.
- (d) the **name and address or the names and addresses of one or more persons resident in India** authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
- (e) the **full address of the office of the company** in India which is deemed to be its principal place of business in India;
- (f) **particulars of opening and closing of a place of business** in India on earlier occasion or occasions;
- (g) **declaration** that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
- (h) **any other information** as may be prescribed.
- (ii) **Form, procedure and time for making application and submission of prescribed documents:** According to the Companies (Registration of Foreign Companies) Rules, 2014, the above information shall be filed with the Registrar within 30 days of the establishment of its place of business in India,

in Form *FC-1* along with prescribed fees and documents required to be furnished as provided in section 380(1). The application shall also be supported with an attested copy of approval from the Reserve Bank of India under the Foreign Exchange Management Act or Regulations, and also from other regulators, if any, approval is required by such foreign company to establish a place of business in India or a declaration from the authorised representative of such foreign company that no such approval is required.

(iii) **Office where documents to be delivered** and **fee** for registration of documents:

1. ⁵According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.

2. It shall be accompanied with the prescribed fees⁶.

3. If any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and from the date on which such notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, provided it has no other place of business in India.

(iv) Under section 380(2) every foreign company existing at the commencement of the Companies Act 2013, which has not delivered to the Registrar the documents and particulars specified in section 592(1) of the Companies Act, 1956, it shall continue to be subject to the obligation to deliver those documents and particulars in accordance with the Companies Act, 1956.

(v) **Form, procedure and time within which alteration in documents shall be intimated to Registrar:** Section 380(3) provides that where any alteration is made or occurs in the documents delivered to the Registrar under section 380, the foreign company shall, within 30 days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the

⁵ Rule 8 of the Companies (Registration of Foreign Companies) Rules, 2014

⁶ Rule 12 of the Companies (Registration Offices and Fees) Rules, 2014

alteration in the prescribed form. The Companies (Registration of Foreign Companies) Rules, 2014, has prescribed that the return containing the particulars of the alteration shall be filed in form FC-2 along with prescribed fees.

Illustration 1: *Search & Find Pte. Ltd., incorporated in Singapore. The Company sells its goods through electronic mode on the e-commerce platforms in India, however, it does not have any branch or office in India. Is the Company required to submit the documents as required under Section 380 of the Companies Act, 2013.*

Answer: Yes, as per 2(42) of Companies Act, 2013, any company or body corporate incorporated outside India which (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and (b) conducts any business activity in India in any other manner shall be considered as a foreign company. Accordingly, as Search & Find Pte. Ltd., is conducting its business through electronic mode, it is considered a foreign company as per Companies Act, 2013 and is required to submit the documents mentioned under Section 380 of the Companies Act, 2013.



4. ACCOUNTS OF FOREIGN COMPANY [SECTION 381]

According to this section:

- (i) Every foreign company shall, in every calendar year,—
 - (a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having attached or annexed thereto such documents as may be prescribed, and
 - (b) deliver a copy of those documents to the Registrar.

According to the ⁷Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall prepare financial statement of its Indian

⁷ Rule 4 of the Companies (Registration of Foreign Companies) Rules, 2014

business operations in accordance with Schedule III or as near thereto as possible for each financial year including:

- (1) documents that are required to be annexed should be in accordance with Chapter IX i.e. Accounts of Companies.
- (2) The documents relating to copies of latest consolidated financial statements of the parent foreign company, as submitted by it to the prescribed authority in the country of its incorporation under the applicable laws there.

Note: "financial year" in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up:

Provided that where a company or body corporate, which is a holding company or a subsidiary or associate company of company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Central Government may, on an application made by that company or body corporate in such form and manner as may be prescribed, allow any period as its financial year, whether or not that period is a year.

Provided further that any application pending before the Tribunal as on the date of commencement of the Companies (Amendment) Ordinance, 2018, shall be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement.

It is important to note that a foreign company having its place of business in India may not necessarily follow a financial year ending on the 31st day of March every year provided it has obtained the requisite approvals from the Central Government for the same.

Example 5:

ROK Limited, is a company incorporated outside India having a place of business in India. ROK Limited is a subsidiary of HOK Limited (Holding company), registered in Australia and is required to consolidate its accounts with HOK Limited. Accordingly, if HOK Limited is required to

follow financial year other than 31st day of March every year, ROK can make an application to Central Government to follow the financial year as per HOK Limited.

- (ii) The Central Government is empowered to direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) given above shall not apply, or shall apply subject to such exceptions and modifications as may be specified in notification in that behalf [Section 381(1)].
- (iii) If any of the specified documents are not in the English language, a certified translation thereof in the English language shall be annexed. [Section 381 (2)]
- (iv) Every foreign company shall send to the Registrar along with the documents required to be delivered to him, a copy of a list in the prescribed form, of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in section 381(1) is made.

⁸According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall file with the Registrar, along with the financial statement, in Form FC-3 with such fee as provided under Companies (Registration Offices and Fees) Rules, 2014 a list of all the places of business established by the foreign company in India as on the date of balance sheet.

According to the ⁹Companies (Registration of Foreign Companies) Rules, 2014, if any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and as from the date on which notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, if it does not have other place of business in India.

- (v) According to the ¹⁰Companies (Registration of Foreign Companies) Rules, 2014,

⁸ Rule 6 of the Companies (Registration of Foreign Companies) Rules, 2014

⁹ Rule 8 of the Companies (Registration of Foreign Companies) Rules, 2014

¹⁰ Rule 4 of the Companies (Registration of Foreign Companies) Rules, 2014

(a) Further, every foreign company shall, along with the financial statement required to be filed with the Registrar, attach thereto the following documents; namely:-

- (1) Statement of related party transaction
- (2) Statement of repatriation of profits
- (3) Statement of transfer of funds (including dividends, if any)

The above statements shall include such other particulars as are prescribed in the Companies (Registration of Foreign Companies) Rules, 2014.

(b) All these documents shall be delivered to the Registrar within a period of 6 months of the close of the financial year of the foreign company to which the documents relate.

Provided that the Registrar may, for any special reason, and on application made in writing by the foreign company concerned, extend the said period by a period not exceeding three months.

Example 6: Mukesh & Jordan LLC is a foreign company and is required to file its financial statements within six months of the close of the financial year with Registrar on an annual basis alongwith following additional documents:

- (1) Statement of related party transaction
- (2) Statement of repatriation of profits
- (3) Statement of transfer of funds (including dividends, if any)

However, where the Central Government has exempted or specified different documents for any foreign company or a class of foreign companies, then documents as specified shall be submitted.

(vi) **Audit of accounts of foreign company:** According to the ¹¹Companies (Registration of Foreign Companies) Rules, 2014,

(a) **Every foreign company shall get its accounts, pertaining to the Indian business operations** prepared in accordance with section 381(1) and Rules thereunder, shall be audited by a practicing Chartered

¹¹ Rule 5 of the Companies (Registration of Foreign Companies) Rules, 2014

Accountant in India or a firm or limited liability partnership of practicing chartered accountants.

- (b) **The provisions of Chapter X** i.e. Audit and Auditors and rules made there under, as far as applicable, shall apply, *mutatis mutandis*, to the foreign company.



5. DISPLAY OF NAME, ETC., OF FOREIGN COMPANY [SECTION 382]

Every foreign company shall—

- (a) conspicuously exhibit on the outside of every office or place where it carries on business in India, the name of the company and the country in which it is incorporated, in letters easily legible in English characters, and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situate;
- (b) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, bill-heads and letter paper, and in all notices, and other official publications of the company; and
- (c) if the liability of the members of the company is limited, cause notice of that fact—
- (i) to be stated in every such prospectus issued and in all business letters, bill-heads, letter paper, notices, advertisements and other official publications of the company, in legible English characters; and
- (ii) to be conspicuously exhibited on the outside of every office or place where it carries on business in India, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situated.

6. SERVICE ON FOREIGN COMPANY [SECTION 383]

Any process, notice, or other document required to be served on a foreign company shall be deemed to be sufficiently served, if addressed to any person whose name and address have been delivered to the Registrar under section 380 and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode.

7. DEBENTURES, ANNUAL RETURN, REGISTRATION OF CHARGES, BOOKS OF ACCOUNT AND THEIR INSPECTION [SECTION 384]

- (i) The provisions of section 71 (Issue of Debentures) shall apply *mutatis mutandis* to a foreign company.
- (ii) The provisions of section 92 (Preparation and filing of Annual return) shall, subject to such exceptions, modifications and adaptations as may be made therein by rules made under this Act, apply to a foreign company as they apply to a company incorporated in India. Further, as per Rule 3 of the Companies (Corporate Social Responsibility Policy) Rules 2014, a foreign company which fulfils the criteria specified under Section 135(1) of the Companies Act 2013 is required to comply with Section 135 of the Companies Act, 2013, subject to such exceptions, modifications and adaptations as may be made therein by rules made under this Act, apply to a foreign company as they apply to a company incorporated in India.

¹²According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall prepare and file an annual return in Form FC-4 along with prescribed fees, within a period of 60 days from the last day of its financial year, to the Registrar containing the particulars as they stood on the close of the financial year.

- (iii) The provisions of section 128 (Books of account, etc., to be kept by company) shall apply to a foreign company to the extent of requiring it to keep at its principal place of business in India, the books of account referred to in that section, with respect to monies received and spent, sales and purchases made, and assets and liabilities, in the course of or in relation to its business in India.
- (iv) The provisions of Chapter VI (Registration of Charges) shall apply *mutatis mutandis* to charges on properties which are created or acquired by any foreign company.
- (v) The provisions of Chapter XIV (Inspection, inquiry and investigation) shall apply *mutatis mutandis* to the Indian business of a foreign company as they apply to a company incorporated in India.

8. FEE FOR REGISTRATION OF DOCUMENTS [SECTION 385]

There shall be paid to the Registrar for registering any document required by the provisions of this Chapter to be registered by him, such fee, as may be prescribed.

¹³According to the Companies (Registration of Foreign Companies) Rules, 2014, the fees to be paid to the Registrar for registering any document relating to a foreign company shall be such as provided in the Companies (Registration Offices and Fees) Rules, 2014.

¹² Rule 7 of the Companies (Registration of Foreign Companies) Rules, 2014

¹³ Rule 8 of the Companies (Registration of Foreign Companies) Rules, 2014



9. INTERPRETATION [SECTION 386]

For the purposes of the foregoing provisions of this Chapter, the expression:

- (a) "Certified" means certified in the prescribed manner to be a true copy or a correct translation;
- (b) "Director", in relation to a foreign company, includes any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act; and
- (c) "Place of business" includes a share transfer or registration office.

Illustration 2: *Examine with reference to the provisions of the Companies Act, 2013 whether the following companies can be treated as foreign companies:*

- (i) *A company incorporated outside India having a share registration office at Mumbai.*
- (ii) *Indian citizens incorporated a company in Singapore for the purpose of carrying on business there.*

Answer: Section 2(42) of the Companies Act, 2013 defines a "foreign company" as any company or body corporate incorporated outside India which:

- (a) Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b) Conducts any business activity in India in any other manner.

According to section 386 of the Companies Act, 2013, for the purposes of Chapter XXII of the Companies Act, 2013 (Companies incorporated outside India), expression "Place of business" includes a share transfer or registration office.

Further, to qualify as a 'foreign company' a company must have the following features:

- (a) it must be incorporated outside India; and
- (b) it should have a place of business in India.

- (c) That place of business may be either in its own name or through an agent or may even be through the electronic mode; and
- (d) It must conduct a business activity of any nature in India.
 - (i) Therefore, a company incorporated outside India having a share registration office at Mumbai will be treated as a foreign company provided it conducts any business activity in India.
 - (ii) In the case of a company incorporated in Singapore for the purpose of carrying on business in Singapore, it will not fall within the definition of a foreign company. Its incorporation outside India by Indian citizen is immaterial. In order to be a foreign company it has to have a place of business in India and must also conduct a business activity in India.

10. DATING OF PROSPECTUS AND PARTICULARS TO BE CONTAINED THEREIN [SECTION 387]

According to this section:

- (i) **Prospectus to be dated and signed [Section 387(1)]:** No person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless the prospectus is dated and signed, and—
 - (a) contains particulars with respect to the following matters, namely:—
 - (1) the instrument constituting or defining the constitution of the company;
 - (2) the enactments or provisions by or under which the incorporation of the company was effected;
 - (3) address in India where the said instrument, enactments or provisions, or copies thereof, and if the same are not in the English

- language, a certified translation thereof in the English language can be inspected;
- (4) the date on which and the country in which the company would be or was incorporated; and
 - (5) whether the company has established a place of business in India and, if so, the address of its principal office in India; and
- (b) states the matters specified under section 26 (Matters to be stated in prospectus).

Provided that points (1), (2) and (3) of point (a) above shall not apply in the case of a prospectus issued more than 2 years after the date at which the company is entitled to commence business.

Example 7: Mir Company LLC, a company incorporated in Dubai, on 28th April 2019. Mir Company LLC has established a place of Business in Mumbai in the year 2022. Now the place of business in India proposes to offer subscription to securities of Mir Company LLC. Now the place of business in India before going with the subscription will have to file a prospectus dated and signed and the prospectus shall not be required to contain the particulars mentioned in points (1), (2) and (3) of point (a) above as the prospectus will be getting issued after a period of more than 2 years since the Mir Company LLC has commenced its business.

- (ii) No waiver of compliance in prospectus [Section 387(2)]:** Any condition requiring or binding an applicant for securities to waive compliance with any requirement imposed by virtue of section 387(1) or purporting to impute him with notice of any contract, documents or matter not specifically referred to in the prospectus, shall be void.

It is to be understood that section 387 (2) does not provides any exception with respect to the non-compliance of the requirements stated under section 387 (1) by any person responsible for issuing or circulating prospectus.

- (iii) Form of application for securities to be issued along with prospectus [Section 387(3)]:** No person shall issue to any person in India a form of application for securities of such a company or intended company as is mentioned in section 387(1), unless the form is issued with a prospectus

which complies with the provisions of this Chapter (Chapter XXII) and such issue does not contravene the provisions of section 388:

Exception: If it is shown that the form of application was issued in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to securities.

- (iv) Section 387(4) further provides that the provisions of section 387—
- (a) shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to securities of the company, whether an applicant for securities will or will not have the right to renounce in favour of other persons; and
 - (b) except in so far as it requires a prospectus to be dated, to the issue of a prospectus relating to securities which are or are to be in all respects uniform with securities previously issued and for the time being dealt in or quoted on a recognised stock exchange,

but, subject as aforesaid, section 387 shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently.

According to section 387(4), the provisions of section 387 shall not apply to the issue of prospectus or form of application relating to securities of the company to existing member or debenture holders of a company; and

The provisions of section 387 shall not apply in respect of issue of prospectus dealing with offer for securities which are uniform in all respects with securities previously issued and such previously issued securities are listed on a recognised stock exchange. However, provisions relating to dating of prospectus shall continue to apply.

- (v) Nothing in Section 387 shall limit or diminish any liability which any person may incur under any law for the time being in force in India or under the Companies Act, 2013 apart from Section 387.

11. PROVISIONS AS TO EXPERT'S CONSENT AND ALLOTMENT [SECTION 388]

According to this section:

- (i) No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not been established, or when formed will or will not establish, a place of business in India,—
 - (a) if, where the prospectus includes a statement purporting to be made by an expert, he has not given, or has before delivery of the prospectus for registration withdrawn, his written consent to the issue of the prospectus with the statement included in the form and context in which it is included, or there does not appear in the prospectus a statement that he has given and has not withdrawn his consent as aforesaid; or
 - (b) if the prospectus does not have the effect, where an application is made in pursuance thereof, of rendering all persons concerned bound by all the provisions of section 33 (Issue of application forms for securities) and section 40 (Securities to be dealt with in stock exchanges), so far as applicable.
- (ii) For the purposes of this section, a statement shall be deemed to be included in a prospectus, if it is contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

12. REGISTRATION OF PROSPECTUS [SECTION 389]

According to this section:

No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will

not establish, a place of business in India, unless before the issue, circulation or distribution of the prospectus in India;

- ✓ a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar; and
- ✓ the prospectus states on the face of it that a copy has been so delivered, and
- ✓ there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by section 388 and such documents as may be prescribed.

¹⁴According to the Companies (Registration of Foreign Companies) Rules, 2014, the following documents shall be annexed to the prospectus, namely:

- (a) any consent to the issue of the prospectus required from any person as an expert;
- (b) a copy of contracts for appointment of managing director or manager and in case of a contract not reduced into writing, a memorandum giving full particulars thereof;
- (c) a copy of any other material contracts, not entered in the ordinary course of business, but entered within preceding 2 years;
- (d) a copy of underwriting agreement; and
- (e) a copy of power of attorney, if prospectus is signed through duly authorized agent of directors.

¹⁴ Rule 11 of the Companies (Registration of Foreign Companies) Rules, 2014



13. OFFER OF INDIAN DEPOSITORY RECEIPTS [SECTION 390]

For the purposes of this section, and according to the ¹⁵Companies (Registration of Foreign Companies) Rules, 2014, Indian Depository Receipts (IDR) means any instrument in the form of a depository receipt created by a Domestic Depository in India and authorized by a company incorporated outside India making an issue of such depository receipts.

According to section 390, notwithstanding anything contained in any other law for the time being in force, the Central Government may make rules applicable for—

- (i) the offer of Indian Depository Receipts (IDR);
- (ii) the requirement of disclosures in prospectus or letter of offer issued in connection with IDR;
- (iii) the manner in which the IDR shall be dealt with in a depository mode and by custodian and underwriters; and
- (iv) the manner of sale, transfer or transmission of IDR,

by a company incorporated or to be incorporated outside India, whether the company has or has not established, or will or will not establish, any place of business in India.

According to Rule 13 of the Companies (Registration of Foreign Companies) Rules, 2014, no company incorporated or to be incorporated outside India, whether the company has or has not established, or may or may not establish, any place of business in India shall make an issue of Indian Depository Receipts (IDRs) unless it complies with the conditions mentioned under this rule, in addition to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 and any directions issued by the Reserve Bank of India.

¹⁵ Rule 13 of the Companies (Registration of Foreign Companies) Rules, 2014

The Rules relating to offer, disclosure requirements and manner of transfer, sale etc., related to IDR are contained in Companies (Registration of Foreign Companies) Rules, 2014.

Standard Chartered PLC was the first global company to file for an issue of IDR in India in 2010.

Application of Chapter XV (Compromises, Arrangements and Amalgamations): Section 234 of the Companies Act, 2013 deals with merger or amalgamation of company with foreign company.

Section 234(1) states that the provisions of Chapter XV unless otherwise provided under any other law for the time being in force, shall apply *mutatis mutandis* to schemes or mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. Provided that the Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

Section 234(2) states that subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

Explanation: For the purposes of sub-section (2) above, the expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

14. APPLICATION OF SECTIONS 34 TO 36 AND CHAPTER XX [SECTION 391]

Section 391 of the Companies Act, 2013 provides for Application of sections 34 to 36 and Chapter XX. According to this section:

According to sub-section (1), the provisions of sections 34 to 36 (both inclusive) shall apply to—

- (i) the issue of a prospectus by a company incorporated outside India under section 389 as they apply to prospectus issued by an Indian company;
- (ii) the issue of IDR by a foreign company.

Section 34 deals with criminal liability for mis-statements in prospectus.

Section 35 deals with Civil Liability for mis-statement in prospectus.

Section 36 deals with punishment for fraudulently inducing persons to invest money.

Sub-section (2) provides that, subject to the provisions of section 376 (Power to wind up Foreign companies although dissolved), the provisions of Chapter XX (i.e. Chapter on Winding up) shall apply *mutatis mutandis* for closure of the place of business of a foreign company in India as if it were a company incorporated in India in case such foreign company has raised monies through offer or issue of securities under this Chapter which have not been repaid or redeemed.

15. PUNISHMENT FOR CONTRAVENTION [SECTION 392]

Without prejudice to the provisions of section 391, if a foreign company contravenes the provisions of Chapter XXII of the Companies Act, 2013 (i.e. Chapter on Companies incorporated outside India), the foreign company shall be punishable with fine which shall not be less than 1,00,000 rupees but which may extend to 3,00,000 rupees and in the case of a continuing offence, with an additional fine which may extend to 50,000 rupees for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to **5,00,000 rupees**.

Thus, the punishment for contravention may be summed up as under:

1. Fine on defaulting foreign company in the range of 1 lac rupees to 3 lac rupees.
2. In case of continuing default an additional fine on the foreign company to the tune of 50,000 rupees per day after the first during which the contravention continues.

3. Punishment for every officer of the foreign company who is in default shall be imposition of a fine of a minimum amount of 25,000 rupees, but which may extend to 5,00,000 rupees.



16. COMPANY'S FAILURE TO COMPLY WITH PROVISIONS OF THIS CHAPTER NOT TO AFFECT VALIDITY OF CONTRACTS, ETC [SECTION 393]

Any failure by a company to comply with the provisions of Chapter XXII of the Companies Act, 2013, shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof. However, the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until the company has complied with the provisions of the Companies Act, 2013, applicable to it.



17. RULE 12 OF COMPANIES (REGISTRATION OF FOREIGN COMPANIES) RULES, 2014

Action for Improper Use or Description as Foreign Company: It states that if any person or persons trade or carry on business in any manner under any name or title or description as a foreign company registered under the Act or the rules made thereunder, that person or each of those persons shall, unless duly registered as foreign company under the Act and rules made thereunder, shall be liable for investigation under section 210 of the Act and action consequent upon that investigation shall be taken against that person.



18. EXEMPTIONS UNDER THIS CHAPTER

The Central Government may, by notification, exempt any class of-

- (a) foreign companies;

- (b) companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India,

in so far as they relate to the offering for subscription in the securities, requirements related to the prospectus, and all matters incidental thereto in the International Financial Services Centres set up under section 18 of the Special Economic Zones Act, 2005.

SUMMARY

- Foreign company” means any company or body corporate incorporated outside India which-
 - (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
 - (b) conducts any business activity in India in any other manner.
- Every foreign company shall, in every calendar year,—
 - (a) make out a balance sheet and profit and loss account in prescribed format, and
 - (b) deliver a copy of those documents to the Registrar.
- The punishment for contravention is as under:
 1. Fine on defaulting foreign company in the range of 1 lac rupees to 3 lac rupees.
 2. In case of continuing default an additional fine on the foreign company to the tune of 50,000 rupees per day after the first during which the contravention continues.
 3. Punishment for every officer of the foreign company who is in default shall be imposition of a fine of a minimum amount of 25,000 rupees, but which may extend to 5,00,000 rupees.

TEST YOUR KNOWLEDGE

Multiple Choice Questions

1. *Jackson Communications LLC, incorporated in Arizona, USA, has established a principal place of business at Kolkata, West Bengal. It is required to deliver requisite documents to the specified authority. You are required to select an appropriate option from the four given below which indicates the number of days within which such documents shall be delivered:*
 - (a) *Jackson Communications LLC shall, within 10 days of the establishment of a principal place of business in India, deliver the requisite documents to the specified authority.*
 - (b) *Jackson Communications LLC shall, within 15 days of the establishment of a principal place of business in India, deliver the requisite documents to the specified authority.*
 - (c) *Jackson Communications LLC shall, within 30 days of the establishment of a principal place of business in India, deliver the requisite documents to the specified authority.*
 - (d) *Jackson Communications LLC shall, within 45 days of the establishment of a principal place of business in India, deliver the requisite documents to the specified authority.*

2. *Morgen Stern Digi Cables GmbH incorporated in Berlin, Germany, established a place of business at Mumbai to conduct its business of data interchange and other digital supply transactions online. However, Morgen Stern Digi Cables GmbH failed to deliver certain documents to the jurisdictional Registrar of Companies within the prescribed time period in compliance with the respective statutory provisions. Which option, out of the four given below, shall correctly indicate the amount of fine with which Morgen Stern Digi Cables GmbH shall be punishable for its failure to deliver certain documents:*
 - (a) *Morgen Stern Digi Cables GmbH is punishable with fine which shall not be less than 50,000 rupees but which may extend to 5,00,000 rupees and in the case of a continuing offence, with an additional fine upto 25,000 rupees for every day after the first during which the contravention continues.*
 - (b) *Morgen Stern Digi Cables GmbH is punishable with fine which shall not be less than 1,00,000 rupees but which may extend to 5,00,000 rupees and in*

the case of a continuing offence, with an additional fine upto 20,000 rupees for every day after the first during which the contravention continues.

- (c) *Morgen Stern Digi Cables GmbH is punishable with fine which shall not be less than 2,00,000 rupees but which may extend to 5,00,000 rupees and in the case of a continuing offence, with an additional fine upto 50,000 rupees for every day after the first during which the contravention continues.*
 - (d) *Morgen Stern Digi Cables GmbH is punishable with fine which shall not be less than 1,00,000 rupees but which may extend to 3,00,000 rupees and in the case of a continuing offence, with an additional fine upto 50,000 rupees for every day after the first during which the contravention continues.*
3. *Radix Healthcare Ltd., a company registered in Thailand, although has no place of business established in India, yet it is engaged in online business through remote delivery of healthcare services in India. Select the incorrect statement from those given below as to the nature of the Radix Healthcare Ltd. in the light of the applicable provisions of the Companies Act, 2013:*
- (a) *Radix Healthcare Ltd. is not a foreign company as it has no place of business established in India.*
 - (b) *Radix Healthcare Ltd. is a foreign company being involved in business activity through telemedicine.*
 - (c) *Radix Healthcare Ltd. is a foreign company for conducting business through electronic mode.*
 - (d) *Radix Healthcare Ltd. is a foreign company as it conducts business activity in India.*
4. *5K Cosmetic Shop plc., a company incorporated in Switzerland, is involved in digital supply services through electronic mode, the server of which is located outside India. The company follows calendar year as its financial year. Every year the company is required to prepare a balance sheet and profit and loss account. You are required to choose the correct timeline within which such documents shall be filed with the Registrar of Companies considering the provisions of Chapter XXII of the Companies Act, 2013:*
- (a) *Within a period of 30 days from the close of the financial year of 5K Cosmetic Shop plc.*
 - (b) *Within a period of 3 months from the close of the financial year of 5K Cosmetic Shop plc.*

- (c) *Within a period of 60 days from the close of the financial year of 5K Cosmetic Shop plc.*
- (d) *Within a period of 6 months from the close of the financial year of 5K Cosmetic Shop plc.*

Descriptive Questions

1. (i) *ABC Ltd., a foreign company having its Indian principal place of business at Kolkata, West Bengal is required to deliver various documents to Registrar of Companies under the provisions of the Companies Act, 2013. You are required to state, where the said company should deliver such documents.*

(ii) *In case, a foreign company does not deliver its documents to the Registrar of Companies as required under section 380 of the Companies Act, 2013, state the penalty prescribed under the said Act, which can be levied*
2. *DEJY is a Company Limited incorporated in Singapore desires to establish a branch office at Mumbai. You being a practicing Chartered Accountant have been appointed by the company as a liaison officer for compliance of legal formalities on behalf of the company. Examining the provisions of the Companies Act, 2013, answer the following:*

(i) *Whether branch office will be considered as a company incorporated outside India.*

(ii) *If yes, state the documents you are required to furnish on behalf of the company, on the establishment of a branch office at Mumbai.*
3. *Galilio Ltd. is a foreign company in Germany, and it has established a place of business in Mumbai. Explain the relevant provisions of the Companies Act, 2013 and rules made thereunder relating to preparation and filing of financial statements, as also the documents to be attached alongwith the financial statements by the foreign company.*
4. *In the light of the provisions of the Companies Act, 2013, examine whether the following Companies can be considered as a 'Foreign Company':*

- (i) *Red Stone Limited is a Company registered in Singapore. The Board of Directors meets and executes business decisions at their Board Meeting held in India.*
- (ii) *Xen Limited Liability Company registered in Dubai has installed its main server in Dubai for maintaining office automation software by Cloud Computing for its client in India.*
5. *Abroad Ltd., a foreign company without establishing a place of business in India, proposes to issue prospectus for subscription of securities in India. Being a consultant of the company, advise on the procedure of such an issue of prospectus by Abroad Ltd.*
6. *Jackson & Jackson LLC, incorporated in Germany, is proposing to establish a business in Mumbai, India. Its official documents are in German language. Whether Jackson & Jackson LLC can file the required documents with Registrar in the same language.*
7. *Swift Pharmaceuticals, a Company registered in Singapore, has started its business in India during the financial year 2016. The Company has submitted all the required documents with registrar within the due date. On March 1, 2024, Swift Pharmaceuticals has shifted its principal office in Singapore. Does the Company required to undertake any steps due to change in address of principal office.*

ANSWERS

Answer to MCQ based Questions

1.	(c) Jackson Communications LLC shall, within 30 days of the establishment of a principal place of business in India, deliver the requisite documents to the specified authority.
2.	(d) Morgen Stern Digi Cables GmbH is punishable with fine which shall not be less than 1,00,000 rupees but which may extend to 3,00,000 rupees and in the case of a continuing offence, with an additional fine upto 50,000 rupees for every day after the first during which the contravention continues.

3.	(a) Radix Healthcare Ltd. is not a foreign company as it has no place of business established in India.
4.	(d) Within a period of 6 months from the close of the financial year of 5K Cosmetic Shop plc.

Answer to Descriptive Questions

1. (i) The Companies Act, 2013 vide section 380 state that every foreign company is required to deliver to the Registrar for registration, within 30 days of the establishment of office in India, documents which have been specified therein. According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.
- (ii) The Companies Act, 2013 lays down the governing provisions for foreign companies in Chapter XXII which is comprised of sections 379 to 393. The penalties for non-filing or for contravention of any provision for this chapter including for non-filing of documents with the Registrar as required by section 380 and other sections in this chapter are laid down in section 392 of the Act which provides that if a foreign company contravenes the provisions of this Chapter, the foreign company shall be punishable with a fine which shall not be less than 1,00,000 but which may extend to 3,00,000 and in the case of a continuing offence, with an additional fine which may extend to 50,000 for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with fine which shall not be less than 25,000 but which may extend to 5,00,000.
2. (i) According to section 2(42) of the Companies Act, 2013, "Foreign company" means any company or body corporate incorporated outside India which-
 - (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
 - (b) conducts any business activity in India in any other manner.

Further, branch offices are generally considered as reflection of the Parent Company' office. Thus, branch offices of a company incorporated outside India are considered as a place of business for conducting business activity in India and will be required to follow provisions of this chapter and such other provisions as may be specified elsewhere under Companies Act, 2013.

- (ii)** Under section 380(1) of the Companies Act, 2013 every foreign company shall, within 30 days of the establishment of place of business in India, deliver to the Registrar for registration the following documents:
- (a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company. If the instruments are not in the English language, a certified translation thereof in the English language;
 - (b) the full address of the registered or principal office of the company;
 - (c) a list of the directors and secretary of the company containing such particulars as may be prescribed;

In relation to the nature of particulars to be provided as above, the Companies (Registration of Foreign Companies) Rules, 2014, provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars, for each of the persons included in such list, namely:

- (1) personal name and surname in full;
- (2) any former name or names and surname or surnames in full;
- (3) father's name or mother's name or spouse's name;
- (4) date of birth;
- (5) residential address;
- (6) nationality;
- (7) if the present nationality is not the nationality of origin, his nationality of origin;

- (8) passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)
 - (9) income-tax permanent account number (PAN), if applicable;
 - (10) occupation, if any;
 - (11) whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship);
 - (12) other directorship or directorships held by him;
 - (13) Membership Number (for Secretary only); and
 - (14) e-mail ID.
- (d) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
- (e) the full address of the office of the company in India which is deemed to be its principal place of business in India;
- (f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;
- (g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
- (h) any other information as may be prescribed.

According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.

3. Preparation and filing of financial statements by a foreign company:

According to section 381 of the Companies Act, 2013:

- (i) Every foreign company shall, in every calendar year,—
 - (a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having attached or annexed thereto such documents as may be prescribed, and
 - (b) deliver a copy of those documents to the Registrar.

According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall prepare financial statement of its Indian business operations in accordance with Schedule III or as near thereto as possible for each financial year including:

- (1) documents that are required to be annexed should be in accordance with Chapter IX i.e. Accounts of Companies.
 - (2) The documents relating to copies of latest consolidated financial statements of the parent foreign company, as submitted by it to the prescribed authority in the country of its incorporation under the applicable laws there.
- (ii) The Central Government is empowered to direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) of section 381(1) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in notification in that behalf.
 - (iii) If any of the specified documents are not in the English language, a certified translation thereof in the English language shall be annexed. [Section 381 (2)]
 - (iv) Every foreign company shall send to the Registrar along with the documents required to be delivered to him, a copy of a list in the prescribed form, of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in section 381(1) is made.

According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall file with the Registrar, along with the financial statement, in Form FC-3 with such fee as provided under Companies (Registration Offices and Fees) Rules, 2014 a list of all the places of business established by the foreign company in India as on the date of balance sheet.

According to the Companies (Registration of Foreign Companies) Rules, 2014, if any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and as from the date on which notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, if it does not have other place of business in India.

(v) According to the Companies (Registration of Foreign Companies) Rules, 2014,

(a) Further, every foreign company shall, along with the financial statement required to be filed with the Registrar, attach thereto the following documents; namely:-

- (1) Statement of related party transaction
- (2) Statement of repatriation of profits
- (3) Statement of transfer of funds (including dividends, if any)

The above statements shall include such other particulars as are prescribed in the Companies (Registration of Foreign Companies) Rules, 2014.

(b) All these documents shall be delivered to the Registrar within a period of 6 months of the close of the financial year of the foreign company to which the documents relate.

4. According to section 2(42) of the Companies Act, 2013, "Foreign company" means any company or body corporate incorporated outside India which-

- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b) conducts any business activity in India in any other manner.

According to the Companies (Registration of Foreign Companies) Rules, 2014, “**electronic mode**” means carrying out electronically based, whether main server is installed in India or not, including, but not limited to-

- (a) business to business and business to consumer transactions, data interchange and other digital supply transactions;
- (b) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;
- (c) financial settlements, web-based marketing, advisory and transactional services, database services and products, supply chain management;
- (d) online services such as telemarketing, telecommuting, telemedicine, education and information research; and
- (e) all related data communication services,

Whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

- (i) In the given situation, Red Stone Limited is registered in Singapore. However, it does not have a place of business in India whether by itself or through an agent, physically or through electronic mode; and does not conduct any business activity in India in any other manner. Mere holding of board meetings and executing business decisions in India cannot be termed as conducting business activity in India. Hence, M/s Red Stone Limited is not a foreign company as per the Companies Act, 2013.
 - (ii) In the given situation, Xen Limited Liability Company is registered in Dubai and has installed its main server in Dubai for maintaining office automation software by Cloud Computing for its client in India. Thus, it can be said that M/s Xen Limited Liability Company has a place of business in India through electronic mode and is conducting business activity in India. Hence, Xen Limited Liability Company is a foreign company as per the Companies Act, 2013.
5. As per section 389 of the Companies Act, 2013, no person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the

company has or has not established, or when formed will or will not establish, a place of business in India, unless before the issue, circulation or distribution of the prospectus in India, a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar and the prospectus states on the face of it that a copy has been so delivered, and there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by section 388 and such documents as may be prescribed under Rule 11 of the Companies (Incorporated outside India) Rules, 2014.

Accordingly, the Abroad Ltd. a foreign company shall proceed with the issue of prospectus in compliance with the above stated provisions of section 379 of the Act.

6. Every foreign company shall, within 30 days of the establishment of its place of business in India, deliver the documents to the Registrar as per Section 380 of the Companies Act, 2013. Further, if the original instruments/ documents are not in the English language, a certified translation in the English language is required for the same and submitted to Registrar.
7. Section 380 (3) provides that where any alteration is made or occurs in the documents delivered to the Registrar under section 380, the foreign company shall, within 30 days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in the prescribed form. The Companies (Registration of Foreign Companies) Rules, 2014, has prescribed that the return containing the particulars of the alteration shall be filed in form *FC-2* along with prescribed fees. Accordingly, Swift Pharmaceuticals is required to submit the full address of the new registered or principal office of the company by March 30, 2024.