

APPOINTMENT AND QUALIFICATIONS OF DIRECTORS



LEARNING OUTCOMES

By the end of this chapter, students will be able to:

- ❑ Comprehend the provisions relating to the appointment of directors, number of directors, resident director, appointment of woman director and others.
- ❑ Explain the Director Identification Number (DIN), its allotment and other matters relating to DIN.
- ❑ Elaborate as to who are Independent Directors, their appointment, qualifications, tenure etc.
- ❑ Specify and recognise the provisions relating to the first director, additional director, alternate director, nominee director and casual vacancy of the director.
- ❑ Explain the provisions relating to small shareholders' director, retirement by rotation, principle of proportional representation for appointment, maximum directorships etc.
- ❑ Describe the disqualifications pertaining to the appointment as director, duties of directors, vacation of office of director, resignation of director, removal of director, etc.



1. INTRODUCTION

According to Section 2(10) of the Companies Act, 2013 (in short 'the Act'), "**Board of Directors**" or "**Board**", in relation to a company, means the collective body of the directors of the company.

According to section 2(34) "**director**" means a director appointed to the Board of a company.

The directors are the individuals who are appointed to manage the business affairs of a company. A company is an artificial person created by law having separate legal existence but without any physical body or mind of its own. It needs to be managed through the human beings. Though the shareholders being owners are physically available to manage their company but as their number grows, all of them together may not be able to manage the affairs; and if they do so it shall be mismanagement and nothing else. That's why the concept of directors has emerged. The directors (within the permissible limit) may be elected from among the shareholders or outsiders.

Legal position of Directors

As regards legal position of directors in relation to a company, they can be considered both agents and trustees. As agents, they bind the company as their principal as soon as they enter into various transactions on its behalf. The law of agency comes into play and it governs the relationship between the company and its directors. At times, the company itself is principal as well as agent in respect of certain acts which cannot be delegated. The Companies Act, 2013 lays down provisions requiring as to when the company needs to act both as principal as well as agent and when the directors need to act as agent of the company. It may be noted that where directors are empowered to take certain decisions, the company cannot negate them or issue directions to the directors directing them to go for a particular decision except that it may replace the directors with the ones of its choice. As trustees, the directors are required to take care of properties, moneys, trade secrets, etc. belonging to the company. In fact, as trustees the directors are in a fiduciary relationship with the company (and not with any individual shareholder) and if such relationship is broken and the company suffers losses because of the illegal acts of the directors, the erring directors will be required to compensate the losses suffered by the company. The office of directorship is an office of trust.

The definition of '**officer**' given in Section 2 (59) of the Act, *inter-alia*, includes '**director**' which means a director, at certain times, is also the officer of the company. Since an officer is an employee of the company, the director as officer is also an employee so far as certain provisions of the Companies Act, 2013 are concerned.

Collective body of the directors

The collective body of the directors is called the '**Board of Directors**' or simply the '**Board**'.

It is the Board which takes decisions at its meetings and not any individual director. This is the reason why a quorum (*i.e.* presence of minimum directors at the Board meetings) is prescribed so that collective decisions are taken. At times, if permitted, the decisions can be taken by the Board without calling a meeting but in that case too they are collective decisions.



2. COMPANY TO HAVE BOARD OF DIRECTORS[SECTION 149]

Section 149 of the Act contains provisions which require that every company shall have to constitute Board of Directors. The provisions of constitution of Board of Directors are stated as under:

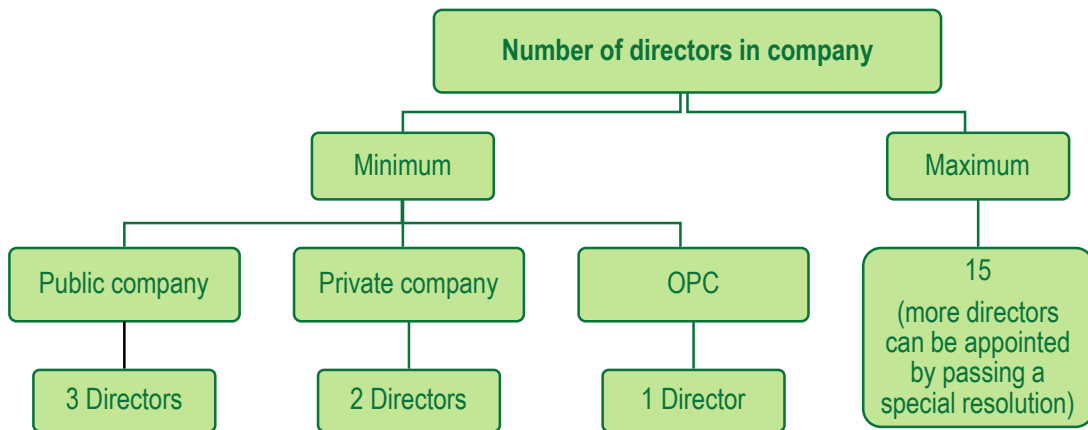
Number of Directors: According to section 149(1) of the Companies Act, 2013, every company shall have a Board of Directors consisting of **individuals as directors**. Thus, any person other than individuals like a body corporate, firm or association of persons cannot be appointed as a director.

Every company shall have-

- (a) **minimum number of directors:**
 - (A) in case of a Public Company-3 Directors,
 - (B) in case of a Private Company-2 Directors, and
 - (C) in case of a One Person Company (OPC)-1 Director
- (b) **maximum number of directors:** 15 Directors



Note: If the company wants to appoint more than 15 directors, it can do so after passing a special resolution.



Exemptions

(A) A **Government company** is exempted:

- (i) from the application of Section 149 (1) (b) which requires a company to have a maximum of fifteen directors only; and
- (ii) from the application of First Proviso to Section 149 (1) which enables a company to appoint more than fifteen directors after passing a special resolution.

However, above exemption is applicable only if such Government company has not committed a default in filing its financial statements under Section 137 or Annual return under

Section 92 with the registrar. [Notification No.G.S.R. 463(E), dated 5thJune, 2015 as amended by Notification No. GSR 582 (E), dated 13-06-2017].

(B) Similar exemption, as above, is also applicable to company incorporated under **Section 8 of the Companies Act, 2013** subject to the condition that such a company has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the registrar. [Notification No. 466 (E), dated 5thJune, 2015 (as amended by Notification No. 584 (E), dated 13th June, 2017)].

- (c) **Woman director:** At least one woman director shall be on the Board of such class or classes of companies as has been prescribed in Rule 3 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 [**Second proviso to section 149(1)**]



Rule 3 provides that the following classes of companies shall appoint at least one woman director-

every listed company

every other public company having

- paid up share capital of 100 crore or more, or
- turnover of 300 crore or more

*Explanation-*For the purposes of having a woman director on the board, it is clarified that the paid up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.

Compliance by a newly incorporated company:A company, which has been incorporated under the Act and is covered by the provisions requiring appointment of a woman director, shall comply with such provisions within a period of six months from the date of its incorporation.

Filling of Intermittent Vacancy of Woman Director:Any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than **immediate next Board Meeting or 3 months** from the date of such vacancy whichever is later.

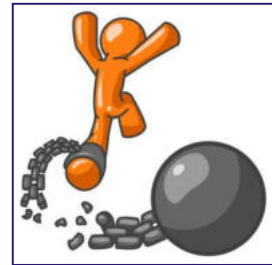
Example 1: Sheetal was occupying the office of woman director in a company but due to her sudden death on 17th March, 2019, the intermittent vacancy so occurred was required to be filled-up at the earliest because she was the only woman director on the board. The immediate Board meeting was held on 25th June, 2019. The vacancy of the women director must be

filled-up latest by 25th June, 2019 or within three months from the date of such vacancy i.e. 16th June, 2019 whichever is later i.e., by 25th June 2019.

- (d) **Resident Director:** Every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two days during the financial year.

However, in case of a newly incorporated company the above requirement shall apply proportionately at the end of the financial year in which it is incorporated. [Section 149(3)]

- (e) **Independent Director:** Specified public companies are required to appoint independent directors on their Board with a view to boost the level of corporate governance. Such Specified companies are the backbone of any economy and therefore, they must be managed in the best possible manner including adhering to the specified legal provisions. An independent director needs to have an independent mindset which should not be unduly influenced by the other members of the Board; and if such members take any decision which is illegal or not in the best interest of the company or economy, it must be hindered by the independent directors at the outset. The provisions relating to independent directors are discussed later in the Chapter.



- (f) **Interested Director:** An interested director is one among the other directors who constitute Board of Directors. In fact, when an existing director becomes interested in a transaction of the company, he is called interested director; and he needs to disclose his interest at the appropriate forum and at appropriate time. The provisions regarding interested director are discussed in another Chapter.

- (g) **Executive and Non-Executive Directors:** The Board of Directors may comprise both executive and non-executive directors. The executive directors are responsible for managing different business operations undertaken by the company. It is their responsibility that the departments which they head operate smoothly. A whole time director and managing director are covered in this category of directors. In contrast, the non-executive directors participate through Board meetings in discussions relating to framing of policies for the efficient management of the company. Professional directors and nominee directors are covered in this category of directors. Independent directors are a type of non-executive directors. They are not as active as executive directors on the board of the company. They are held to be liable only if they knowingly consented to the wrongful acts.



3. APPOINTMENT OF DIRECTORS [SECTION 152]

Section 152 of the Act deals with the matters relating to appointment of directors.

(i) Appointment of First Directors

Where no provision is made in the articles of a company for the appointment of the first directors, the **subscribers to the memorandum** who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed. [Section 152(1)]

In case of a One Person Company (OPC), **an individual being member** shall be deemed to be its first director until the director or directors are duly appointed by the member in accordance with the provisions of this section.[Section 152(1)]

In simple words, usually, articles of the company contain the names of the first directors. In case it is not so, then the individual subscribers to the memorandum are deemed to be the first directors. The corporate bodies, if they are also subscribers, shall not be capable of becoming directors. The first directors shall hold the office until the directors are duly appointed. In fact, the term of first directors is limited to the holding of first Annual General Meeting (AGM). So far as OPC is concerned, the individual member of the OPC is deemed as first director. Thereafter, such member may appoint director or directors as per his requirements.



(ii) Appointment of subsequent Directors

Save as otherwise expressly provided in this Act, every director shall be appointed by the company in general meeting. [refer Section 152(2)]

At a general meeting, the shareholders of the company (*i.e.* the owners) gather and take decisions. Generally, every director shall be appointed by the company in general meeting except where the Companies Act expressly provides some other procedure for appointment of directors.

For **example**, it is expressly provided in the Act that additional directors or alternate directors can be appointed by the Board of Directors if the articles of the company empower Board in this respect¹.

(iii) Other Requirements of Appointment

(a) **Allotment of Director Identification Number (DIN):** A person shall be appointed as a director of a company only when he has been allotted DIN under section 154 or any other number as may be prescribed under section 153. [refer Section 152(3)]

¹ As per Section 161, explained later on.

- (b) **Providing of DIN and furnishing of Declaration by the proposed Director:** Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number (DIN) or such other number as may be prescribed under Section 153. Further, he shall also furnish a declaration that he is not disqualified to become a director under this Act. [refer Section 152(4)]
- (c) **Written Consent to act as Director:** A person appointed as a director shall not act as a director unless he gives his written consent to hold the office as a director. The consent shall be furnished to the company on or before his appointment as a director in Form DIR-2.

The company shall file the consent of the director with the Registrar within 30 days of such appointment in Form DIR-12 along with the prescribed fee as prescribed [refer Section 152 (5) and Rule 8 of the Companies (Appointment and Qualifications of Directors) Rules, 2014].

Provided further that in case the person seeking appointment is a national of a country which shares land border with India, necessary security clearance from the Ministry of Home Affairs, Government of India shall also be attached along with the consent.

Example 2: Mr. Naresh wants to appoint himself as director in Global Services Private Limited. Mr. Naresh is required to apply for DIN (if he does not have the DIN) thereafter, he can be appointed as a director in Global Services Private Limited by giving written consent in Form DIR-2 to the company.

Global Services Private Limited shall have to file the consent of Mr. Naresh with the Registrar within 30 days of such appointment in Form DIR-12.

- (d) **Explanatory Statement in case of appointment of Independent Director:** In case an independent director is appointed in the general meeting, an explanatory statement for such appointment annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfills the conditions specified in this Act for such an appointment [refer Proviso to Section 152 (5)].

Exemptions

Non-applicability of Section 152 (5):

(1) Section 152 (5) regarding 'furnishing of consent to act as a director' shall not apply in case of **Government company** where appointment of the director is done by the Central Government or State Government. [Notification No. G.S.R. 463(E), dated 5th June, 2015 as amended by Notification No. GSR 582 (E), dated 13-06-2017].

(2) Similar exemption from Section 152(5) is also applicable to a **section 8 company**. [Notification No. 466 (E), dated 5th June, 2015 as amended by Notification No. 584 (E), dated 13th June, 2017].

Note: In both the above cases, the exemption is applicable only if the company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

(iv) **Retirement of Directors by Rotation [Section 152(6)]**

Section 152 (6) deals with retirement of directors by rotation. The reason behind incorporation of such a provision in the Statute is that at no stage a self-perpetuating management should take control of the company. Under the model of self-perpetuating management, the Board of Directors is allowed to control its own composition *i.e.* such board can dictate the terms like how long a director can serve, and even it can elect and re-elect directors itself. This type of model may not be conducive to the healthy growth of the company. In effect, shareholders are the owners of the company but they cannot usurp the powers of the directors and interfere in the matters of managing the company. The concept of rotational directors enables them not to re-elect a retiring director for whom they have an unfavourable opinion.

The provisions of Section 152 (6) are stated as under:

- (a) **Appointment of Rotational director & no. of directors liable to retire by rotation:** Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of public company shall—
- (A) be persons whose period of office is liable to determination by retirement of directors by rotation; and
 - (B) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.
- (b) **Appointment of non-rotational directors:** The remaining directors in the case of any such company shall, in default of, and subject to any regulations in the articles of the company, also be appointed by the company in general meeting.
- (c) **Retirement from office of rotational director:** At the first annual general meeting of a public company held next after the date of the general meeting at which the first directors are appointed and at every subsequent annual general meeting, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.

It is to be noted that the provision regarding 'retirement by rotation' is applicable to a public company or a private company which is subsidiary of a public company. In other words, a private limited company which is not a subsidiary of a public company, is exempted and therefore, if the articles permit it can appoint all its directors as non-rotational directors or permanent directors.

The articles of a public company may provide for the retirement of all the directors at every annual general meeting. If such is not the case, then not less than two-thirds of the total number of directors of that public company shall be the persons who are liable to retire by rotation. In other words, the articles must provide that minimum two-thirds of the total number of directors shall be liable to retirement by rotation. Such directors are called rotational directors.

The term “**total number of directors**” shall not include independent directors, whether appointed under the Companies Act, 2013 or any other law for the time being in force, on the Board of a company. Thus, independent directors are not liable to retire by rotation and therefore, they are non-rotational directors.

²Further, any person appointed as a nominee director being nominated by any institution in pursuance of the provisions of any law or any agreement (like when a financial institution that has been created by an Act of Parliament nominates a person as its nominee director on the Board of a company which has availed financial assistance from such institution) cannot be considered as a director liable to retire by rotation. Nominee director may also be appointed by the Central Government or the State Government by virtue of its shareholding in a Government company.

One-third of directors to retire at AGM: Once the number of directors who are liable to retire by rotation is determined, only one-third out of that number shall retire. If such number is neither three nor a multiple of three, then, the number nearest to one-third, shall be considered and such of the directors shall retire from office.

Example 3: Khatkhata Advisory Limited constituted its board with 12 directors in which 2 directors are independent directors and 1 director is a nominee director. As per the provision of section 152 of the Companies Act, 2013, the concept of retirement by rotation of rotational directors shall be applicable to public company. Therefore, Khatkhata Advisory Limited shall be required to calculate the number of rotational directors which is liable to retire by rotation.

Total number of directors who are holding their office is 12 directors. It should be noted that at least $\frac{2}{3}$ rd of total number of directors shall be liable to retire by rotation. However, independent director and nominee director shall not be counted in “total number of the directors”. Thus, 12 Directors less 3 Directors i.e. 9 directors shall be counted for “total number of the directors”.

Here, 6 directors ($9 \times \frac{2}{3}$ rd = 6) shall be liable to retire by rotation. Now, $\frac{1}{3}$ rd of directors liable to retire by rotation (i.e. $6 \times \frac{1}{3}$ rd = 2 directors), shall actually retire by rotation at AGM.

² Refer Section 161 (3).

Example 4: A company is having 6 directors.

Directors liable to retire by rotation: $6 \times \frac{2}{3}$ i.e. 4

No. of directors to retire at AGM: $4 \times \frac{1}{3}$, i.e. 1.33 or nearest to $\frac{1}{3}$ rd is 1.

Example 5: A company is having 7 directors.

Directors liable to retire by rotation $7 \times \frac{2}{3}$ i.e. 4.7 or 5 (not less than two-third)

No. of directors to retire at AGM: $5 \times \frac{1}{3}$ i.e. 1.67 or nearest to $\frac{1}{3}$ rd is 2.

Example 6: A company is having 9 directors out of which 3 are independent directors. The 'total number of directors' for the purpose of calculation of number of rotational directors shall be 6 only because 3 independent directors are to be excluded. Rest of the calculations shall be as per Example given above.

- (d) **Directors liable to retire by rotation:** The directors who actually retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment. If two or more directors were appointed on the same day, retirement by rotation will be decided between them by mutual agreement among themselves or by lot as the case may be.

The above provision (d) clarifies the basic question that after the determination of number of directors liable to retire by rotation, who should actually retire at the AGM? For this purpose it is provided that the directors who have been longest in the office since their last appointment are the directors who need to be retired first. However, it may happen that some of those were appointed as directors on the same day. In that case, if there exists any mutual understanding relating to retirement among such directors, that should be followed; otherwise the determination shall be done by draw of lots.

- (e) **Filling of vacancy of rotational director:** At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

Re-appointment: When a director is retired a vacancy is created. To fill that vacancy, the company may re-appoint the retiring director itself at the AGM. If the retiring director is not re-appointed, the company may appoint some other person at his place but in that case provisions of Section 160³ are to be complied with.

The clause regarding appointment of directors for filling the vacancies created by retiring directors is quite important. However, the number of directors should not fall short of minimum directors required in a company at any stage. However, so long as

³ Section 160 is discussed later in the Chapter.

the clause regarding minimum required directors is fulfilled the company may also resolve not to appoint anyone in place of retiring director.

In case Annual General Meeting is not held on due date, then the retirement of rotational directors cannot be postponed to that particular date when the AGM shall be held in future. The directors who are liable to retire must vacate the office of director immediately when the AGM is ought to have been held.

Non-rotational Directors: Remaining 1/3rd or less number of total directors (after determining the number of rotational directors) are not liable to retire by rotation. These are called non-rotational directors. They may also be appointed at the general meeting or as per the provisions contained in the articles of the company.

(v) **Deemed re-appointment of retiring Directors under certain circumstances [Section 152(7)]**

Section 152 (7) provides the way for deemed appointment of a retiring director as under:

- (a) **Adjournment of general meeting:** If the vacancy of the retiring director is not so filled-up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day in the next week, at the same time and place.

In case that day is a national holiday, the meeting shall be adjourned till the next succeeding day which is not a holiday, at the same time and place.

- (b) **Deemed re-appointment:** If at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting with immediate effect.

Exceptions to deemed re-appointment: In the following circumstances, a retiring director shall not be deemed as re-appointed:

- (A) if at that meeting or at the previous meeting, a resolution for the re-appointment of such director has been put to the meeting and lost *i.e.* his re-appointment has not been considered favourably because of non-passing of resolution;
- (B) if the retiring director has, by a notice in writing addressed to the company or its Board of directors, expressed his unwillingness to be so re-appointed;
- (C) if he is disqualified for appointment as per the provisions of the Act;
- (D) if a resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act; or
- (E) if Section 162 is applicable to the case *i.e.* where a single resolution was used to appoint two or more persons as directors without first moving a proposal which was required to be agreed to at the meeting and no vote was being cast

against it. In such a case, Section 162 is contravened and two or more appointments made by a single resolution are void. Consequently, retiring director is not deemed to be re-appointed.

Note: For the purposes of Section 152, the “retiring director” means a director retiring by rotation⁴.

Exemptions

Non-applicability of Sections 152(6) and 152(7): Section 152(6) and 152 (7) of the Act of 2013, shall not apply to:

- (a) a Government company, which is not a listed company, in which not less than fifty-one per cent of paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;
- (b) a subsidiary of a Government company, referred to in (a) above.

subject to the condition that such a company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

[Notification No.G.S.R. 463(E), dated 5thJune, 2015 as amended by Notification No. GSR 582 (E), dated 13-06-2017].



4. DIRECTOR IDENTIFICATION NUMBER (DIN) [SECTION 152 (3) AND SECTIONS 153 TO 159]

“**Director Identification Number**” (DIN)⁵: DIN means an identification number allotted by the Central Government to any individual, intending to be appointed as director or to any existing director of a company, for the purpose of his identification as a director of a company.

It is provided that the Director Identification Number (DIN) obtained by the individuals prior to the notification of the ‘*Specification of Definitions Details Rules*’ shall be the DIN for the purpose of the Companies Act, 2013.

Further, it is to be noted that “Director Identification Number” (DIN) shall include the Designated Partnership Identification Number (DPIN) issued under section 7 of the Limited Liability Partnership Act, 2008 and the rules made thereunder.

Example 7: Mr. Rajesh having DIN 00452568 and already appointed in Raj Industries Private Limited. Now, he wants to appoint himself in M/s. Karnawat Industries LLP as a designated partner.

⁴Explanation to Section 152 (7).

⁵As per Rule 2 (1) (e) of the Companies (Specification of Definitions Details) Rules, 2014

Here, he does not require to apply for DPIN. As per section 7 of the Limited Liability Partnership Act, 2008, DIN can be used as DPIN for Designated Partner.

Requirement of DIN: According to Section 152 (3), no person shall be appointed as a director of a company unless he has been allotted the Director Identification Number (DIN) under section 154 or any other number as may be prescribed under section 153.

Filing of Application for allotment of DIN:Section 153 deals with the filing of application for allotment of DIN. Accordingly, every individual intending to be appointed as director of a company shall make an application for allotment of DIN to the Central Government in the prescribed form and manner and along with prescribed fees.

It is provided that the Central Government may prescribe any identification number which shall be treated as Director Identification Number and in case any individual holds or acquires such identification number, the requirement of Section 153 shall not apply or apply in such manner as may be prescribed.

Further, Rule 9 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 states the following **procedure** for making an **application for allotment of DIN before appointment in an existing company**:

- (1) **Filing of application** : Every applicant, who intends to be appointed as director of an existing company shall make an application electronically in Form DIR-3, to the Central Government⁶ for allotment of a Director Identification Number (DIN) along with the prescribed fees.

It is provided that in case of proposed directors not having DIN, the particulars of maximum three directors shall be mentioned in Form No. INC-32 (SPICe) and DIN may be allotted to maximum three proposed directors through Form INC-32 (SPICe).

Example 8- Mr. Varun, Mr. Ankit and Mr. Parag are planning to incorporate a private limited company. They do not have DIN because they are becoming directors in any company for the first time. Here, they can apply for allotment of DIN along with the form of incorporation of the Company i.e Form INC-32 (SPICe).

- (2) **Providing of electronic system to facilitate submission of application:** The Central Government shall provide an electronic system to facilitate submission of application for the allotment of DIN through the portal on the website of the Ministry of Corporate Affairs.
- (3) (a) **Filling of required information in Form attached with relevant documents:** The applicant shall download Form DIR-3 from the portal, fill in the required particulars

⁶Vide Notification No. S.O. 1354(E) dated 21st May, 2014, issued by MCA, the powers and functions of the Central Government in respect of allotment of Director Identification Number under Sections 153 and 154 stand delegated to the Regional Director, Joint Director, Deputy Director or Assistant Director posted in the office of Regional Director at Noida.

sought therein, verify and sign the form and after attaching copies of the following documents, scan and file the entire set of documents electronically-

- (i) photograph;
 - (ii) proof of identity;
 - (iii) proof of residence;
 - (iiia) board resolution proposing his appointment as director in an existing company
 - (iv) specimen signature duly verified.
- (b) **Submission of digitally signed Form:** Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital Signature Certificate and shall be verified digitally by a company secretary in full time employment of the company or by the managing director or director or CEO or CFO of the company in which the applicant is intended to be appointed as director in an existing company.
- (4) In case the name of a person does not have a last name, then his or her father's or grandfather's surname shall be mentioned in the last name along with the declaration in Form No.DIR-3A.

Allotment of DIN: According to section 154, the Central Government shall allot a Director Identification Number (DIN) to the applicant in the prescribed manner **within one month** from the receipt of application.

Rule 10 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 provides the following **procedure** for rejection or allotment of DIN:

- (i) **Generation of application number-**On the submission of the Form DIR-3 on the portal and on payment of the requisite fees, an application number shall be generated by the system automatically.

Provided that no application number shall be generated in case of the person applying for Director Identification Number is a national of a country which shares land border with India, unless necessary security clearance from the Ministry of Home Affairs, Government of India has been attached alongwith application for Director Identification Number.

- (ii) **Communication of issue of DIN-**After generation of application number, the Central Government shall process the applications received for allotment of DIN and decide on the approval or rejection thereof and communicate the same to the applicant along with the DIN allotted in case of approval by way of a letter by post or electronically or in any other mode, within a period of **one month** from the receipt of such application.
- (iii) **In case of defective/incomplete application-**If the Central Government, on examination, finds such application to be defective or incomplete in any respect, it shall give intimation of such defect or incompleteness, by placing it on the website and by email to the applicant who

has filed such application. The applicant shall be directed to rectify the defects or incompleteness by resubmitting the application **within a period of 15 days** of such placing on the website and email.

It is provided that the Central Government shall –

- (a) reject the application and **direct the applicant to file fresh application** with complete and correct information, where the defect has been rectified partially or the information given is still found to be defective;
 - (b) **treat and label such application as invalid in the electronic record** in case the defects are not removed within the given time; and
 - (c) **inform the applicant** either by way of letter by post or electronically or in any other mode.
- (iv) In case of rejection or invalidation of application, the **fee so paid** with the application shall **neither be refunded nor adjusted** with any other application.

Note 1: All DINs allotted to individual(s) by the Central Government before the commencement of these rules shall be deemed to have been allotted to them under these rules.

Note 2: The DIN so allotted under these rules is valid for the life-time of the applicant and shall not be allotted to any other person.

Procedure for allotment of DIN

- On submission of Form and fees, application no. is generated on the system
- CG shall process such application
- approval or rejection is communicated to the applicant within 1 month from receipt of such application

in case of approval, DIN allotted will be sent through by post/electronically/in any other manner

In case of defective/incomplete application, CG shall place it on website and intimate by email to the applicant

- direct to rectify the defects/incompleteness by resubmitting the application within 15 days of placing on website and email.
- CG shall reject and direct to file fresh application, where defect rectified partially /information given is defective
- In case of non -removal of defect- treat and label as invalid in electronic records.
- inform applicant of rejection /invalidation and no-refund or adjustment of paid fees

Prohibition on obtaining more than one DIN: According to Section 155, no individual, who has already been allotted a DIN under section 154, shall apply for, obtain or possess another DIN.

Example 9: Mr. Tahir was appointed as a director in Bombay Textiles Private Limited with DIN 00658400. Now, He wants to be appointed as a director in another company. Here, Mr. Tahir shall have to use existing DIN for appointment as a director in new company. He can not apply for another DIN.

Director to intimate DIN: According to Section 156, every existing director shall, **within one month** of the receipt of DIN from the Central Government, intimate his DIN to the company or all the companies wherein he is a director.

Company to inform DIN to Registrar: According to section 157 (1), every company shall, **within 15 days** of the receipt of intimation under section 156, furnish the DIN of all its directors to the Registrar or any other officer or authority as may be specified by the Central Government with such fees or additional fees as may be prescribed. Every such intimation shall be furnished in the prescribed form and manner.

According to **Rule 10A** of the Companies (Appointment and Qualifications of Directors) Rules, 2014:

- (1) Every director, functioning as a director in one or more companies on or before the 30th June, 2007 and who has not yet intimated his DIN to such company or companies shall, within one month of the receipt of Director Identification Number from the Central Government, intimate his Director Identification Number to the company or all companies wherein he is a director as per Form DIR-3B.
- (2) The intimation by the company of Director Identification Number of its directors under section 157 shall be furnished in Form DIR-3C within 15 days of receipt of intimation under section 156.

Punishment for failure to furnish the DIN to Registrar: According to Section 157(2) if any company fails to furnish the DIN to Registrar, it shall be liable to a penalty as under:

- ₹ 25,000 and in case of continuing failure, with a further penalty of ₹ 100 for each day after the first during which such failure continues, subject to a maximum of ₹ 1,00,000.
- Further, every defaulting officer of the company shall be liable to a penalty as under:
Minimum penalty of ₹ 25,000 and in case of continuing failure, with a further penalty of ₹ 100 for each day after the first during which such failure continues, subject to a maximum of ₹ 1,00,000.

Obligation to indicate DIN: According to Section 158, every person or company, while furnishing any return, information or particulars as are required to be furnished under the Companies Act, 2013, shall mention the Director Identification Number in such return, information or particulars in case such return, information or particulars relate to the director or contain any reference of any director.

Punishment for contravention of Sections 152, 155 and 156: Section 159 provides that if any individual or director of a company makes any default in complying with any of the provisions of section 152, section 155 and section 156, such individual or director of the company shall be liable to a penalty as under:

- Penalty upto ₹ 50,000 and where the default is a continuing one, with a further penalty up to ₹ 500 for each day after the first during which such default continues.

Cancellation or Surrender or De-activation and Re-activation of DIN:

Rule 11 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 lays down the procedure for cancellation or surrender or deactivation and re-activation of DIN as under:

- (1) The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received along with prescribed fee from any person, cancel or deactivate the DIN in case -

(a) the **DIN is found to be duplicated** in respect of the same person provided the data related to both the DINs shall be merged with the validly retained number;

(b) the **DIN was obtained in a wrongful manner** or by **fraudulent means**;

However, before cancellation or deactivation of DIN pursuant to the clause (b) above, an opportunity of being heard shall be given to the concerned individual.

For this purpose

(i) the term **“wrongful manner”** means if the DIN is obtained on the strength of documents which are not legally valid or incomplete documents are furnished or on suppression of material information or on the basis of wrong certification or by making misleading or false information or by misrepresentation.

(ii) the term **“fraudulent”** means if the DIN is obtained with an intent to deceive any other person or any authority including the Central Government.

(c) of the **death of the concerned individual**;

(d) the **concerned individual** has been **declared as a person of unsound mind** by a competent Court;

(e) if the **concerned individual** has been **adjudicated an insolvent**.

(f) **on an application** made in Form DIR-5 **by the DIN holder to surrender** his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN.

However, before deactivation of any DIN in the above case (f), the Central Government shall verify e-records.

- (2) The Central Government or Regional Director (Northern Region), or any officer authorised by the Central Government or Regional Director (Northern Region) shall, deactivate the Director Identification Number (DIN), of an individual who does not intimate his particulars in e-form DIR-3-KYC within the stipulated time in accordance with Rule 12A.

- (3) The de-activated DIN shall be re-activated only after e-form DIR-3 is filed along with the fee as prescribed under the Companies (Registration Offices and Fees) Rules, 2014.

Intimation of Changes in Particulars specified in DIN Application:

Rule 12 of the Companies (Appointment and Qualifications of Directors) Rules, 2014, provides for the following procedure for intimation of changes in particulars specified in the DIN application:

- (1) **Intimation of change to Central Government:** Every individual who has been allotted a DIN under these rules shall, in the event of any change in his particulars as stated in Form DIR-3, intimate such change(s) to the Central Government within a period of **thirty days** of such change(s) in Form DIR-6 in the following manner, namely:
 - (i) The applicant shall download Form DIR-6 from the portal, fill in the relevant changes, verify the form and attach duly scanned copy of the proof of the changed particulars and submit electronically;
 - (ii) the form shall be digitally signed by a chartered accountant in practice or a company secretary in practice or a cost accountant in practice;
 - (iii) the applicant shall submit the Form DIR-6;
- (2) **Applicant to be informed of change in the electronic database:** The Central Government, upon being satisfied, after verification of such changed particulars from the enclosed proofs, shall incorporate the said changes and inform the applicant by way of a letter by post or electronically or in any other mode confirming the effect of such change in the electronic database maintained by the Ministry.
- (3) **Intimation to concerned Registrar:** The DIN cell of the Ministry shall also intimate the change(s) in the particulars of the director submitted to it in Form DIR-6 to the concerned Registrar(s) under whose jurisdiction the registered office of the company(s) in which such individual is a director is situated.
- (4) **Individual to inform change in particulars to the company/ies:** The concerned individual shall also intimate the change(s) in his particulars to the company or companies in which he is a director **within 15 days** of such change.

In the decided case of *Imraj Ali Molla v. Union of India*, W.P. Nos. 268 and 273 of 2019 March 18, 2020, it was held that since DIN is allocated under section 154 and there is no provision in Act for deactivation of DIN of a director only on ground of disqualification under section 164(2)(a) or section 167(1)(a), action of RoC in deactivating DIN of petitioners on ground of such violation of section 164(2)(a) of a particular company could not confer a right on RoC to deactivate such DIN.

It was laid in *Gaurang Balvantlal Shah v. Union of India*, R/Special Civil Application Nos. 22435 of 2017 and Others, December 18, 2018, that DIN of a director cannot be cancelled or deactivated except under circumstances mentioned in rule 11 of Companies (Appointment of Directors) Rules, 2014.



5. RIGHT OF PERSONS OTHER THAN RETIRING DIRECTORS TO STAND FOR DIRECTORSHIP [SECTION 160]

A person who is not a retiring director is also eligible to stand for directorship. Section 160 of the Act and Rule 13 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 contain provisions in this respect. These are discussed as under:

(i) Requirement of Written Notice:

- (a) **Person who applies his candidature as a director:** A person other than retiring director shall be eligible for appointment as a director in a company at any general meeting (Whether in AGM or EOGM), if he has given a notice in writing under his hand signifying his candidature as a director at least 14 days before the meeting at the registered office of the company.
- (b) **Member who intends to propose other person for directorship:** Instead of above person, some other member of the company who intends to propose such other person as a director can also give a written notice at the registered office of the company signifying his intention to propose the other person as a candidate for directorship at least 14 days before the meeting.

(ii) Requirement of Deposit: The written notice needs to be accompanied with the deposit of ₹ 1,00,000 or such higher amount as may be prescribed.

Exceptions-The requirement of deposit shall not apply in following cases of appointment of directors

- Independent Director
- director recommended by the Nomination and Remuneration Committee, if any under section 178(1)
- director recommended by the Board of Directors, where there is no Nomination and Remuneration Committee.

(iii) Action by the company: The company shall inform its members regarding the candidature of a person for the office of director in accordance with the manner prescribed in Rule 13 of the Companies (Appointment and Qualifications of Directors) Rules, 2014. The same is stated below:

At least 7 days before the general meeting, the company shall inform its members of such candidature-

- (1) **by serving individual notices** through electronic mode to such members who have provided their e-mail addresses for communication purposes and in writing to all other members; and
- (2) **by placing notice** of such candidature on its website, if any.

When there is no need to serve notices individually: It shall not be necessary for the company to serve individual notices if it **advertises such candidature**, not less than 7 days before the meeting:

- (a) at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and
 - (b) at least once in English language in an English newspaper circulating in that district.
- (iv) **Refund of Deposit:** The amount of deposit shall be refunded to such person or, as the case may be, to the member, if the person proposed gets selected as a director or gets more than 25% of the total valid votes cast either on show of hands or on poll.

Explanation – No deposit fees shall be refunded to those candidates who are not appointed as directors or do not get more than 25% of total valid votes in favour of their appointment.

Note 1: For the purposes of Section 160, the expression 'retiring director' means a director retiring by rotation⁷.

Note 2: Not all the directors are retiring directors. Therefore, if an additional director or an alternate director or a nominee director or a director appointed to fill a casual vacancy, is to be appointed as a regular director at the general meeting, the procedure prescribed by Section 160 is required to be followed. Similarly, where a director retires by rotation but instead of re-appointing him, a new person in his place is proposed to be appointed, provisions of Section 160 are attracted.

Clarifications

(1) As per Notification No. G.S.R. 465(E), dated 5th June, 2015, in case of **Nidhis**, the amount of deposit for the purpose of Section 160(1) shall be **“ten thousand rupees”**. In other words, a person (not a retiring director) proposing his candidature as director in Nidhis or some other member proposing such person's candidature shall be required to deposit ₹ 10,000 along with the written notice.

(2) The MCA vide General Circular No. 38/2014, dated 14th October, 2014, has clarified that in case of **Section 8 companies**, their Board of Directors shall decide as to whether the deposit of ₹1,00,000 is to be forfeited or refunded if the person proposed as director fails to secure more than 25% of the valid votes.

⁷Explanation to Section 152 (7).

Exemptions

(1) In terms of Notifications No. 463 (E), dated 5th June, 2015, as amended by Notifications No. 582 (E), dated 13th June, 2017, **Section 160 shall not apply to:**

(a) **A Government company** in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;

(b) **A subsidiary of a Government company**, referred to in (a) above, in which the entire paid up share capital is held by the Government company.

(2) In terms of Notifications No. 464 (E), dated 5th June, 2015 as amended by Notifications No. 583 (E), dated 13th June, 2017, similar exemption from Section 160 is applicable to a **private company**.

(3) In terms of Notifications No. 466 (E), dated 5th June, 2015 as amended by Notifications No. 584 (E), dated 13th June, 2017, similar exemption from Section 160 is also applicable to **Section 8 companies** whose articles provide for election of directors by ballot.

Note: In all the three cases mentioned above exemption from the application of Section 160 is available only if the concerned company has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the Registrar.



6. APPOINTMENT OF DIRECTOR ELECTED BY SMALL SHAREHOLDERS [SECTION 151]

According to Section 151 of the Act, a listed company may have one director elected by the small shareholders. This provision enables the small shareholders to place their representative on the Board of Directors of a listed company so that their voice is also listened effectively.

The term “**small shareholders**” means a shareholder holding shares of nominal value of not more than 20,000 or such other sum as may be prescribed.

Manner of appointment of small shareholders’ director and terms and conditions of such appointment are prescribed by Rule 7 of the Companies (Appointment and Qualifications of Directors) Rules, 2014. These provisions are discussed below:

(i) **Strength of Small Shareholders required for appointment of their Director:** A listed company may, upon notice of not less than:

(a) one thousand small shareholders; or

(b) 1/10th of the total number of such shareholders,

} whichever is lower

have a small shareholders’ director elected by the small shareholders.

However, a listed company may opt to have a director on suo moto representing small shareholders and in such a case the provisions given below in Point (ii), shall not apply for appointment of such director.

- (ii) **Serving of notice by small shareholders:**The small shareholders intending to propose a person as a candidate for the post of small shareholders' director shall give a notice of their intention with the company **at least fourteen days** before the meeting under their signature specifying the name, address, shares held and folio number of the person whose name is being proposed for the post of director and of the small shareholders who are proposing such person for the office of director.

However, if the person being proposed does not hold any shares in the company, the details of shares held and folio number need not be specified in the notice.

- (iii) **Statement to be annexed with notice:**The notice shall be accompanied by a statement signed by the person whose name is being proposed for the post of small shareholders' director stating-

- (a) his Director Identification Number (DIN);
- (b) that he is not disqualified to become a director under the Act; and
- (c) his consent to act as a director of the company.

- (iv) **Small shareholders' director as independent director:**Such director shall be considered as an independent director. Therefore, he should meet the eligibility criteria pertaining to independent director as given under section 149(6) and should give a declaration of his independence in accordance with section 149(7) of the Act.

- (v) **Applicability of section 152:** The appointment of small shareholders' director shall be subject to the provisions of section 152 **except that-**

- (a) such director shall not be liable to retire by rotation;
- (b) such director's tenure as small shareholders' director shall not exceed a period of **three consecutive years**; and
- (c) on the expiry of the tenure, such director shall not be eligible for re-appointment.

- (vi) **Applicability of Section 164:**A person shall not be appointed as small shareholders' director of a company, if he is not eligible for appointment in terms of section 164 which specifies the disqualifications for appointment as a director.

- (vii) **Vacation of office:**A person appointed as small shareholders' director shall vacate the office if -

- (a) the director incurs any of the disqualifications specified in Section 164;

- (b) the office of the director becomes vacant in pursuance of Section 167⁸;
 - (c) the director ceases to meet the criteria of independence as provided in Section 149 (6).
- (viii) **Maximum number of directorships:** No person shall hold the position of small shareholders' director in more than two companies at the same time.

However, the second company in which he has been so appointed shall not be in a business which is competing or is in conflict with the business of the first company.

- (ix) **Cooling period:** A small shareholders' director shall not be appointed in or be associated with such company in any other capacity, either directly or indirectly for a period of **three years** from the date on which he ceases to hold office as a small shareholders' director in a company.



7. APPOINTMENT OF ADDITIONAL DIRECTOR, ALTERNATE DIRECTOR, A DIRECTOR TO FILL CASUAL VACANCY AND NOMINEE DIRECTOR [SECTION 161]

(A) **Additional Director [Section 161(1)]:** According to the section:

- (i) The articles of a company may confer on its Board of Directors the power to appoint any person as an additional director at any time.
- (ii) A person, who fails to get appointed as a director in a general meeting, cannot be appointed as an additional director.
- (iii) Additional director shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

With a view to meet urgent requirements of management, the Board of Directors is empowered to appoint any person as an additional director at any time if such power is granted by the articles. **The notable point is that it is not Section 161 (1) but the articles which confer such power.**

The person to be appointed as additional director should possess DIN and must not be the person who failed to get appointed in a general meeting. This brings to the force the power of shareholders *i.e.* any person discarded as director at a general meeting by the shareholders cannot get appointed by the Board of Directors through back-door entry.

⁸ Section 167 of the Act specifies various grounds, which if attracted, shall make a director liable to vacate his office.

Further, an additional director is not a retiring director. Therefore, his appointment as regular director requires that the provisions of Section 160 are followed.

Term of office of additional director: The term of additional director is limited to the holding of ensuing Annual General Meeting (AGM). Even if the AGM is not held on the last due date, the term ends there itself and it cannot be extended to a date when the AGM, in actuality, shall be held in future after its due date.

(B) Alternate Director [Section 161(2)]: According to this section:

- (i) The Board of Directors of a company may, **if so authorised by its articles or by a resolution passed by the company in general meeting**, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of **not less than three months** from India.
- (ii) No person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act.
- (iii) An alternate director shall not hold office for a period longer than that permissible to the original director in whose place he has been appointed and shall vacate the office if and when the original director returns to India.
- (iv) If the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

The power to appoint an alternate director rests with the Board of Directors. However, such power must be conferred by the articles or by a resolution passed at the general meeting.

An alternate director is appointed in place of a regular director who has gone out of India. The period of absence of such original director from India must be minimum three months or more. A short absence of less than three months does not entitle the Board to appoint an alternate director. Such proposed alternate director should possess DIN.

A person selected for appointment as alternate director must not be the one who is holding any alternate directorship for any other director in the company. In other words, a person who is already an alternate director in the company cannot hold another alternate directorship in that company. Further, the selected person must also not be a director in the same company. Thus, a person already a director cannot at the same time be an alternate director in the same company but a person holding directorship in any other company can be considered for the appointment as alternate director. However, for considering maximum number of directorships of a person under Section 165, the alternate directorship shall also be counted. Thus, a fresh alternate directorship should be taken up by the person concerned only if his

holding of regular as well as alternate directorships does not exceed the maximum limit. Further, he should not be disqualified to hold the office of a director.

Example 10: Mr. Devendra Kumar has been appointed as an alternate director in place of Mr. Gaurav Jain (i.e. Original Director) in Urban Development Private Limited. Now, company wants to appoint Mr. Devendra Kumar as an alternate director in place of Ms. Shaily Jaiswal (i.e. another original director of the same company).

Here, Mr. Devendra cannot be appointed as an alternate director of another original director of the company.

In case, the original director is an independent director and he leaves for a place outside India for three months or more, the person who is to be appointed in his place as alternate director must be qualified to be appointed as an independent director. In other words, the status of independence as well as other requisites of an independent director must form part of such alternate director who is selected for appointment in the absence of an independent director.

A 'would be alternate director' is not exempted from furnishing his consent to act as director. Therefore, he must furnish his consent in DIR-2 to the company on or before his appointment and in turn the company shall file his consent with the Registrar in DIR-12.

Term of office of alternate director: The term of office of an alternate director coincides with the permissible term applicable to the original director in whose place he has been appointed. Thus, the term shall not be longer than the term which is permissible to the original director; and as soon as the original director ceases to be a director (death included) the alternate director follows his steps and is required to vacate the office. Further, the alternate director shall vacate the office immediately on the return of original director to India.

It may happen that the term of original director expires while he is still outside India. In such a case, the provisions relating to automatic deemed re-appointment as envisaged in Section 152 (7) (b) shall apply to the original director and not to the alternate director appointed in his place. Thus, the original director (and not alternate director) shall be deemed as re-appointed at the adjourned AGM if the company does not appoint another person on the expiry of the term of original director.

Appointment of alternate director by original director: The original director who is leaving to a place outside India cannot appoint an alternate director in his place. It is the Board which shall make the appointment because the authority for such appointment vests in the Board. Following example will make the situation clear:

Example 11: Mr. Q, a Director of PQR Limited proceeding on a long foreign tour (period of duration outside India exceeded three months), appointed Mr. Y as an alternate director to act for him during his absence. The articles of the company provide for appointment of alternate directors. Mr. Q claims that he has a right to appoint alternate director.

As per section 161(2), the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India. From the above provision it is clear that the authority to appoint alternate director has been vested in the Board of Directors only and that too subject to empowerment by the articles or by a resolution passed by the company in general meeting.

Therefore, Q, in this case is not authorized to appoint an alternate director and the appointment of Mr. Y is not valid.

(C) Nominee Director [Section 161(3)]: According to this section:

‘Subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.’

Simply stated, a nominee director is not like any other director. He represents the body which makes his nomination for appointment as director in the company. Whenever a company obtains financial assistance from some financial institution or bank, such institution invariably nominates its representative for safeguarding its interests till the loaned amount is completely repaid. The nominee director is expected to ensure that the terms of loan agreements are religiously complied with all the time by the company concerned which has been granted financial assistance. The Board of Directors (subject to the articles) is empowered to appoint a nominee director and the shareholders cannot interfere with such appointment. Further, by virtue of its shareholding in a Government company, the Central Government or the State Government may also nominate a person for appointment as nominee director and the Board shall have to follow the suit without any hinderance on its part.

(D) Casual Vacancy [Section 161(4)]: According to this section:

- (i) if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.
- (ii) Any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

The above provisions are discussed as under:

The term 'casual' means a sudden happening *i.e.* something which happened by chance or unexpectedly or unforeseen but not by efflux of time. A casual vacancy results when the office of any director appointed in the general meeting is vacated before the expiry of his term in the normal course. This is not the vacancy created due to the retirement of a director. It is created because of certain other factors that are not linked with retirement like occurrence of death or attraction of disqualification or tendering of resignation or removal, etc. Further, in this case, the term of the office of director because of which the casual vacancy is created does not get expired in the normal course.

A vacancy which was created due to the fact that the elected director declined to assume the office after his appointment at general meeting cannot be said to result in a casual vacancy. In such a case, when there was no assume of office by the director, how can he vacate it. Thus, there arises no casual vacancy.

Section 161 (4) does not require that articles should expressly empower the Board of Directors for filling a casual vacancy. When a casual vacancy occurs it shall be filled by the Board at its meeting by passing a resolution and not otherwise. The vacancy so filled by the Board shall be approved subsequently by members in the immediate next general meeting. It is to be noted that where articles contain any regulations as regards filling of casual vacancy they need to be followed by the Board; but the subsequent approval of such filling of vacancy by members in the immediate next general meeting is a must.

As we have noticed, the casual vacancy arises when any director appointed in the general meeting vacates his office before the expiry of his term. Thus, such appointment of the director who vacates his office must have been made in the general meeting and when the casual vacancy is filled by the Board and subsequently approved by the members in the immediate next general meeting, the matter ends there. Subsequently, if the casual vacancy so filled is again vacated due to some casual occurrence, then it cannot be said to be a casual vacancy because it arose against an appointment which was not made in the general meeting. Such type of vacancy needs to be filled by the Board by appointing an additional director.

A director appointed to fill a casual vacancy is not a 'casual director'. He enjoys all the powers as well as is required to bear the responsibilities of the director in whose place he is appointed except that where the earlier director was an 'interested director', his 'interest' cannot be attached to the new director filling the casual vacancy.

In case a company has appointed a woman director because of statutory requirement and an intermittent vacancy is created in the office of such woman director, the Board shall fill such casual vacancy at the earliest but not later than immediate next Board meeting or three

months from the date of creation of such vacancy, whichever is later.⁹ Similar is the case with an independent director whose intermittent vacancy must be filled at the earliest but not later than immediate next Board meeting or three months from the date of occurrence of such vacancy, whichever is later.¹⁰ However, there is no such urgency so far as filling of any other casual vacancy is concerned (*i.e.* not of a woman director or of an independent director) because if the Board of Directors feels that the affairs of the company can be managed without appointing anybody, then the Board can postpone such appointment.

Term of office of a director appointed to fill a casual vacancy: The term of office of a director appointed to fill a casual vacancy continues till such time up to which the term of the director because of whom the casual vacancy was created would have continued. Thus, the person filling the casual vacancy shall hold office up to the date up to which the director in whose place he is appointed would have continued in the office which in other words means 'up to the unexpired term of such director'. The 'continuation clause' is applicable because of the Proviso mentioned under Section 161 (4); but for the application of this 'continuation clause' the appointment made by the Board needs to be approved by the members in the immediate next general meeting.



8. APPOINTMENT OF DIRECTORS TO BE VOTED INDIVIDUALLY [SECTION 162]

Section 162 of the Companies Act prohibits appointment of directors by passing a single resolution. Electing more than one person as directors through a single resolution deprives the shareholders from exercising their choice to reject a specific individual. In such a situation, either they will have to vote against or in favour of all the prospective directors *i.e.* it shall be difficult for them to reject a particular person as director unless they reject such resolution *in toto*, thus not appointing all the persons specified in that resolution. That is why, Section 162 requires every individual person to be voted individually for appointment as director. As stated in the box below, if certain conditions are satisfied this provision shall not apply to a Government company and its wholly-owned subsidiary. Further, a private company is also exempted from this provision.

In nutshell, provisions of Section 162 are as under:

- (i) Two or more directors of a company cannot be elected as directors by a single resolution. It implies that **each person shall be appointed as director by a separate resolution.**

⁹As per Second Proviso to Rule 3 of the Companies (Appointment and Qualifications of Directors) Rules, 2014.

¹⁰As per Second Proviso to Rule 4 (1) of the Companies (Appointment and Qualifications of Directors) Rules, 2014.

- (ii) As an **exception**, two or more persons can be appointed as directors by a single resolution if a proposal to move such a resolution (*i.e.* appointing two or more persons as directors by a single resolution) has first been **agreed to at the general meeting without any vote being cast against it**.

Example12: A company held its general meeting at its registered office with twenty members present. At the meeting a proposal was moved to appoint three persons as directors by a single resolution. This proposal was agreed to by the seventeen shareholders who voted in its favour but the remaining three members did not vote at all. Thus, no vote was cast against the proposal. In such a situation, the company can appoint three persons as directors by a single resolution. Such single resolution shall be passed by simple majority *i.e.* as an ordinary resolution.

- (iii) A resolution moved in contravention of the provision stated in point (ii) above shall be void, whether or not objection thereto was raised at the time when it was so moved.
- (iv) A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

Exemptions

Non-applicability of Section 162 of the Act of 2013:

(1) *Notifications No. GSR 463(E), dated 5th June, 2015 as amended by Notification No. GSR 582 (E), dated 13-06-2017 states that Section 162 requiring appointment of each person as director by a separate resolution, shall not apply to:*

- (a) **A Government company** in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;
- (b) **A subsidiary of a Government company**, referred to in (a) above, in which the entire paid up share capital is held by that Government company.

However, above exemption is applicable only if such Government company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

(2) *Similarly, Notifications No. and 464(E), dated 5th June, 2015 as amended by Notification No. GSR 583 (E), dated 13-06-2017 exempts a **private company** from the application of Section 162. However, this exemption is applicable only if such private company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.*



9. OPTION TO ADOPT PRINCIPLE OF PROPORTIONAL REPRESENTATION FOR APPOINTMENT OF DIRECTORS [SECTION 163]

As a general rule, the directors in a company are appointed by simple majority. It implies that the shareholders having voting rights just equal to 51 percent can easily negate the choice of other minority shareholders who have substantial voting rights as high as up to 49 percent in the matter of appointment of directors. Thus, minority shareholders though having sizeable voting rights may not find it possible to appoint even a single director of their own on the Board of Directors. To counter this kind of unpleasant situation which may create confrontation in a company and adversely affect the managerial efficiency. Section 163 chalks out a system by which directors may be appointed by way of proportional representation. The provisions of Section 163 are stated as under:

- (i) Section 163 starts with the phrase 'Notwithstanding anything contained in this Act' which implies that **this section has overriding effect** i.e. it overrides all other provisions of the Companies Act, 2013.
- (ii) The **articles of a company need to contain provisions** for the appointment of directors by proportional representation. The procedure as contained in the articles must be capable enough to enable the minority shareholders to have a proportionate representation on the Board of Directors.
- (iii) The articles need to provide **for the appointment of not less than two-third** (i.e. minimum 2/3rd or more) of the total number of the directors in accordance **with the principle of proportional representation**.
- (iv) Such appointments to be made in accordance with the principle of proportional representation, may use **following methods of voting**:
 - (a) Voting according to the **single transferable vote**. It means, a candidate gets elected if he secures the requisite votes fixed as quota; or
 - (b) Voting according to a system of '**cumulative voting**'; or
 - (c) **Otherwise i.e. adoption of any other transparent and effective method of voting** if it ensures that the Board shall have fair representation of the minority interest, in case methods stated at (a) or (b) are not adopted.
- (v) Such appointments may be made once in every **3 years**.
- (vi) **Casual vacancies of such directors shall be filled as provided in Section 161 (4) i.e.** such casual vacancy shall be filled as per the provisions of the articles; and if there is no such provision, then the Board of Directors may fill the vacancy through a board resolution. Later on, such appointment may be regularized by the shareholders at the immediately held general meeting.

Exemptions

Non applicability of Section 163: Section 163 of the Act, shall not apply to:

- (1) A **Government company** in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;
- (2) A **subsidiary of a Government company**, referred to in (1) above, in which the entire paid up share capital is held by that Government company.

subject to the condition that such Government company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

[Notifications No.GSR 463(E), dated 5th June, 2015 as amended by Notification No. GSR 582 (E), dated 13-06-2017]



10. DISQUALIFICATIONS FOR APPOINTMENT OF DIRECTOR [SECTION 164]

Section 164 of the Companies Act, 2013 contains disqualifications of a director. A person shall not be eligible for appointment as a director of a company if he suffers from any of the specified disqualifications. As such, the law does not specify any professional or educational qualifications of a director or requires him to hold requisite number of qualification shares except that as a general rule, any person desiring to become a director should be competent to contract and should have been allotted a Director Identification Number (DIN).

Various disqualifications are mentioned as under:

- (i) Section 164(1) states that a person shall not be appointed as a director if:
 - (a) he is of **unsound mind** and stands so declared by a competent court;
 - (b) he is an **undischarged insolvent**;
 - (c) he has **applied to be adjudicated as an insolvent and his application is pending**;
 - (d) he has been **convicted** by a court of any offence, whether involving moral turpitude or otherwise, and **sentenced to imprisonment for not less than 6 months** and a period of **5 years has not elapsed** from the date of expiry of the sentence.

However, in case a person has been convicted of any offence and sentenced in respect thereof to **imprisonment for a period of 7 years or more**, he shall not be eligible to be appointed as a director in any company

- (e) an **order disqualifying** him for appointment as a director has been passed by a court or Tribunal and the **order is in force**;

- (f) he has **not paid any calls** in respect of any shares of the company held by him and **6 months have elapsed** from the last day fixed for the payment of the call. It is immaterial whether such shares are held individually by him or jointly with others;
 - (g) he has been **convicted of the offence of dealing with related party transactions** under section 188 at any time **during the last preceding 5 years**; or
 - (h) he has **not complied with section 152 (3)** which requires a director to have a Director Identification Number (DIN).
 - (i) he has **not complied with the provisions of Section 165 (1)** relating to holding of specified number of directorships.
- (ii) Sub-section (2) of Section 164 prescribes **disqualifications which get attached to a person if he is or has been a director of a company which has committed default** as under—
- (a) his company has **not filed financial statements or annual returns** for any continuous period of **3 financial years**; or
 - (b) his company has **failed to repay the deposits** accepted by it or **pay interest** thereon or **to redeem any debentures** on the due date or **pay interest due thereon** or **pay any dividend declared** and **such failure** to pay or redeem **continues for 1 year or more**.

In both the above cases of default, the director concerned shall not be eligible to be re-appointed as a director of such defaulting company or appointed in some other company for period of 5 years from the date on which the said company has committed default.

Where a person is appointed as a director in a defaulted company: However, in case a person is appointed as a director of a company which has committed default as per clause (a) or clause (b) above, he **shall not incur** the disqualification for a period of **six months from the date of his appointment**.

Exemptions

*As per Notification No. GSR 463 (E), dated 5th June, 2015 as amended by Notification No. GSR 582 (E), dated 13th June, 2017, Section 164(2) is not applicable to a **Government company** provided it has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.*

- (iii) **Additional qualifications by private company:** According to Section 164 (3), a private company (not being a subsidiary of a public company) is permitted to provide for additional disqualifications through its articles for appointment of a person as a director besides those specified in sub-sections (1) and (2) of section 164. [*referpoints (i) and (ii) above*]. Thus, it may specify certain qualifications like a graduate shall only be the director or the prospective director should hold certain number of qualification shares, etc.

Note: In terms of Proviso to Section 164 (3), the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification.

- (iv) **Disqualification as prescribed by Section 217 (6)(ii):** Section 217 relates to a company which is under investigation. In case any director of such a company has been convicted of an offence under Section 217, the director shall be deemed to have vacated his office on and from the date on which he is so convicted. On such vacation of office, he shall be disqualified from holding an office in any company.

In Manju Chamundeeswari v. Union of India, W.M.P. NOS. 28025 & 28027 of 2021, it was laid that in terms of rule 11 of Companies (Appointment and Qualifications of Directors) Rules, 2014 neither cancellation nor deactivation of DIN is provided for upon disqualification under section 164(2) and such deactivation would be contrary to section 164(2), read with section 167(1) inasmuch as person concerned would continue to be a director of defaulting company.

The High Court of Kerala held in *Zacharia Maramkandathil Mohan v. Union of India* W.P (C) No. 21628 of 2020, June 16, 2021 the following principles :

- (i) Section 164(2) disqualifying directors of companies for a period of 5 years on failure to submit annual returns/financial statements for 3 consecutive years is not ultra vires Article 14 or Article 19(1)(g) of Constitution .
- (ii) Section 164(2) which had come into force from 1-1-2014 would have prospective and not retrospective effect and defaults contemplated under section 164(2)(a) with regard to non-filing of financial statements or annual returns for any continuous period of three financial years to be counted from financial year 2014-15 only.
- (iii) Disqualification under section 164(2) is of temporary nature, thus, rule 11 of Companies (Appointment and Qualifications of Directors) Rules, 2014 does not empower any authority to cancel or deactivate DIN upon disqualification under section 164(2).



11. MAXIMUM NUMBER OF DIRECTORSHIPS [SECTION 165]

Section 165 of the Act provides for the maximum permissible directorships that a person can hold. The provisions are as under:

- (i) **Maximum number of directorships:** According to Section 165(1), a person, after the commencement of the Companies Act, 2013, shall not hold office as director, including any alternate directorship, in more than 20 companies at the same time.

Further, out of the above limit of 20 companies, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10.

It may be noted that the limit of public companies (*i.e.* 10) shall include directorship in private companies that are either holding or subsidiary company of a public company.

However, the limit of directorships of 20 companies shall not include the directorship in a dormant company; as also in a Section 8 company (refer Exemption mentioned in the box below).

Exemptions

*Section 165(1) [refer point no.(i) above] shall not apply to a **Section 8 company** subject to the condition that such a company has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the Registrar. In other words, a directorship in a Section 8 company shall not be counted for determining the maximum permissible limit.*

[Notification No. 466 (E), dated 5th June, 2015 as amended by Notification No. 584 (E), dated 13th June, 2017].

- (ii) **Lesser number of directorships than maximum:** The members of a company may, by **special resolution**, specify any lesser number of companies in which a director of the company may act as directors. [Section 165(2)]
- (iii) **Prescription of Transition Period of One Year:** Immediately before the commencement of the Companies Act, 2013 (*i.e.* before 01-04-2014), if a person was holding office as director in more companies than the specified limits, he was required, within one year (*i.e.* by 31-03-2015) to:
 - (a) choose not more than the specified limit of companies, in which he wished to continue to hold the office of director;
 - (b) resign his office as director in the other remaining companies; and
 - (c) intimate the choice made by him to each of the companies in which he was director and to the jurisdictional Registrar. [Section 165(3)]

Any resignation so made was to become effective immediately on the dispatch thereof to the company concerned. [Section 165(4)]

After dispatching the resignation of his office as director/non-executive director or after the completion of the transition period of one year (*i.e.* after 31-03-2015), whichever was earlier, no such person would act as director in more than the specified number of companies. [Section 165(5)]

In other words, after the completion of transition period of one year on 31-03-2015, no person is permitted to hold more directorships than the maximum specified.

- (iv) **Punishment for Contravention:** According to Section 165(6), if a person accepts an appointment as a director in contravention of Section 165(1) *i.e.* holding directorship of more than 20 companies or more than 10 public companies (subject to the exemptions, if any), he

shall be liable to a penalty of two thousand rupees for each day after the first during which such violation continues, subject to a maximum of two lakh rupees.



12. INDEPENDENT DIRECTORS

The legal provisions regarding independent directors are discussed below:

(a) **Number of Independent Directors:** Following companies are required to appoint specified number of independent directors:

(i) **Listed Companies:** Every listed public company shall have **at least one-third** of the total number of directors as independent directors. [Section 149(4)]

Note: Any fraction contained in such 1/3rd number shall be rounded off as one.

(ii) **Other Public Companies:** The Central Government is empowered to prescribe certain minimum number of independent directors in case of any class or classes of public companies. Taking a step in this direction, Rule 4(1) of the Companies (Appointment and Qualifications of Directors) Rules, 2014 has been framed which states that the following class or classes of companies shall have **at least two directors** as independent directors:

(1)	all such public companies which have paid up share capital of 10 crore rupees or more; or
(2)	all such public companies which have turnover of 100 crore rupees or more; or
(3)	all such public companies which have, in the aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

Requirement of higher number: Due to composition of its audit committee, if a public company covered under the above rule, is required to appoint a higher number of independent directors, such higher number of directors shall be applicable to it.

As per section 177(2) of Act, the Audit Committee shall consist of a minimum of three directors with independent directors forming a majority.

Intermittent vacancy of an independent director: Any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than **immediate next Board meeting or three months** from the date of such vacancy, whichever is later.

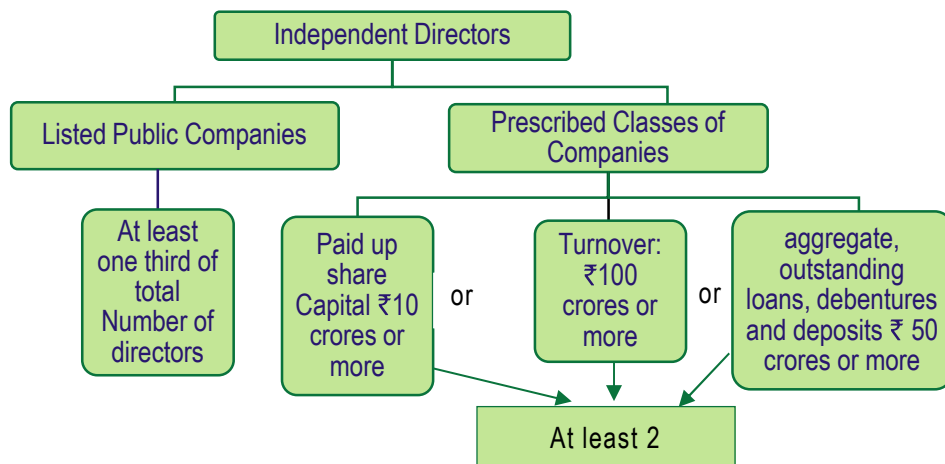
Duration of conditions after non-fulfilment of which no appointment required: A company which was obligated to appoint independent directors, shall not be required to make such appointment if it ceases to fulfill any of the three conditions relating to paid-up share

capital or turnover or outstanding loans, etc. [as laid down above in Rule 4(1)] for **three consecutive years**. It shall again be required to appoint independent directors if it starts meeting any of such conditions.

Clairification: Explanation to Rule 4 (1) clarifies that the paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

Exempted classes of unlisted public companies: According to Rule 4(2), following classes of unlisted public companies shall not be covered under sub-rule (1) of Rule 4:

- (a) a joint venture;
- (b) a wholly owned subsidiary; and
- (c) a dormant company as defined under section 455 of the Act.



If due to composition of audit committee any higher number of independent directors are required, such higher number shall be applicable.

Appointment of independent directors not required: If company ceases to fulfil any of the 3 conditions with respect to requirement of Paid up share capital, Turnover or of aggregate outstanding loans, debentures and deposits for 3 consecutive years.

Joint ventures, wholly owned subsidiaries and dormant companies are not covered under Rule 4 (1) which mentions about mandatory appointment of independent directors.

(b) **Who can become the Independent Director [Section 149(6)]:** In relation to a company, an independent director means a director (other than a managing director or a whole-time director or a nominee director¹¹), and who fulfills the following criteria:

- (1) who, in the opinion of the Board, is a person of **integrity** and possesses relevant **expertise and experience**;

Exemptions

*As per Notification No. G.S.R. 463 (E) dated 5th June, 2015, in case of a **Government company**, the word "Board" shall be substituted by the words "Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the State Government"¹².*

- (2) (A) who is or was not a promoter of the company or its holding, subsidiary or associate company;
- (B) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;
- (3) who has or had **no pecuniary relationship**, other than remuneration as such director or **having transaction not exceeding 10%** of his total income or such amount as may be prescribed, with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the 2 immediately preceding financial years or during the current financial year;

Clarifications issued by MCA

(i) As regards '**pecuniary interest in certain transactions**', the MCA *vide* its General Circular No. 14/2014, dated 09-06-2014 has clarified that in case a transaction entered into by an independent director with the company concerned is at par with any member of the general public and at the same price as is payable/paid by such member of public, **it would not attract the bar of 'pecuniary relationship' under Section 149(6)(c) and therefore, an independent director will not be said to have 'pecuniary relationship' under this Section**, in such cases. This clarification has been issued by the MCA considering the provisions of Section 188 which take away transactions in the ordinary course of business at arm's length price from the purview of related party transactions.

¹¹As per *Explanation* to section 149(7), "**Nominee director**" means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

¹²As per amendment Notification No. GSR 582 (E), dated 13-06-2017, the exceptions, modifications and adaptations mentioned in Notification No. GSR 463 (E), dated 05-06-2015 are applicable to such Government Company which has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the Registrar.

(ii) Further, vide above-referred General Circular, it is also clarified after consultation with SEBI that '**pecuniary relationship**' does not include (a) receipt of remuneration from one or more companies by way of fee provided under Section 197 (5);(b) reimbursement of expenses for participation in the Board and other meetings; and (c) profit related commission approved by the members, in accordance with the provisions of the Companies Act, 2013.

Exemptions

*As per Notification No. 463 (E), dated 5th June, 2015 as amended by Notification No. 582 (E), dated 13-06-2017, Point No. (3) mentioned above [i.e. Section 149(6)(c)] shall not apply in case of a **Government company** if it has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the Registrar.*

- (4) none of whose relatives—
- (i) in the company, its holding, subsidiary or associate company during the **2 immediately preceding financial years** or during the current financial year.
However, the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or two per cent of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed;
 - (ii) **is indebted** to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as prescribed under Sub-rule 2 of Rule 5 (i.e., Rs. 50 Lakhs) of the Companies (Appointment and Qualifications of Directors) Rules, 2014 during the 2 immediately preceding financial years or during the current financial year;
 - (iii) has given a **guarantee** or provided any **security** in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed under Sub-rule 2 of Rule 5 (i.e., ₹ 50 Lakhs) of the Companies (Appointment and Qualifications of Directors) Rules, 2014 during the 2 immediately preceding financial years or during the current financial year; or
 - (iv) **has any other pecuniary transaction or relationship** with the company, or its subsidiary, or its holding or associate company amounting to **2% or more** of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii);

- (5) **who, neither himself nor any of his relatives—**
- (A) holds or has held the position of a **key managerial personnel** or is or has been **employee** of the company or its holding, subsidiary or associate company in any of the **3 financial years** immediately preceding the financial year in which he is proposed to be appointed;
- However, in case of a relative who is an employee, **the restriction under this clause shall not apply for his employment during preceding 3 financial years;**
- (B) **is or has been an employee or proprietor or a partner**, in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed, of—
- (i) **a firm of auditors or company secretaries in practice or cost auditors** of the company or its holding, subsidiary or associate company; or
- (ii) **any legal or a consulting firm** that has or had any transaction with the company, its holding, subsidiary or associate company amounting to **10% or more** of the gross turnover of such firm;
- (C) holds together with his relatives **2% or more of the total voting power** of the company; or
- (D) is a **Chief Executive or director**, by whatever name called, of any non- profit organisation that receives **25% or more** of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds **2% or more of the total voting power** of the company; or
- (6) who possesses such **other qualifications** as are prescribed under Rule 5 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 i.e.:
- (a) An independent director shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business.
- (b) None of the relatives of an Independent director, for the purposes of sub-clauses (ii) and (iii) of clause (d) of section 149(6),—
- (i) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors; or
- (ii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary

or associate company or their promoters, or directors of such holding company,

for an amount of fifty lakhs rupees, at any time during the two immediately preceding financial years or during the current financial year.

- (c) **Declaration by Independent Director [Section 149(7)]:** Every independent director shall give a declaration that he meets the criteria of independence as provided in Section 149 (6) [refer Point No. (b) above] in the following manner:
- (1) at the **first meeting** of the Board in which he participates as a director; and
 - (2) thereafter at the **first meeting of the Board in every financial year**; or
 - (3) whenever there is **any change** in the circumstances which may affect his status as an independent director.
- (d) **Code for independent directors [Section 149(8)]:** The company and independent directors shall abide by the provisions specified in Schedule IV to the Companies Act, 2013. As regards independent directors, Schedule IV specifies guidelines for professional conduct, role and functions, duties, manner of appointment and re-appointment, resignation and removal, provisions regarding separate meetings and evaluation mechanism.
- (e) **Remuneration of Independent Directors [Section 149(9)]:** Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director **shall not be entitled to any stock option** and may receive remuneration by way of-
- (1) fee provided under Section 197(5),
 - (2) reimbursement of expenses for participation in the Board and other meetings and
 - (3) profit related commission as may be approved by the members.

Entitled to:	Not Entitled to:
Fee provided under section 197(5)	Any stock option
Reimbursement of expenses for participation in: <ol style="list-style-type: none"> (i) Board Meetings (ii) Other Meetings 	
Profit related commission as may be approved by the members	

Note: According to Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, sitting fee required to be paid to an independent director shall not be less than the sitting fee which is payable to other directors of the company.

Provided that if a company has no profits or its profits are inadequate, an independent director may receive remuneration, exclusive of any fees payable under sub-section (5) of section 197, in accordance with the provisions of Schedule V.

(f) **Tenure [Section 149(10) & (11)]:** These provisions are stated as under:

- (i) (a) **Term:** Subject to the provisions of section 152 (Appointment of Directors), an independent director shall hold office for a term **up to 5 consecutive years** on the Board of a company.
- (b) **Eligibility for Re-appointment:** He shall be eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

Note: According to First Proviso to Section 169 (1), an independent director re-appointed for second term under Section 149(10) shall be removed by the company only by passing a **special resolution**.

- (ii) **Limit on holding of office:** An independent director shall not hold office for more than 2 consecutive terms.

Cooling period for appointment: However, he shall be eligible for appointment after the expiration of **3 years** of ceasing to be an independent director.

However, during the said period of 3 years he shall not be appointed in or be associated with the company in any other capacity, either directly or indirectly.

Note: It is clarified that for the purposes of sub-sections (10) and (11) of Section 149, any tenure of an independent director on the date of commencement of the Companies Act, 2013 shall not be counted as a term under those sub-sections.

Clarification issued by MCA

Appointment of 'Independent Directors' for less than 5 years [Refer Section 149(10) and (11)]: In terms of General Circular 14/2014, dated 09-06-2014, it is clarified by MCA that section 149(10) of the Act provides for a term of "upto five consecutive years" for an 'Independent Director'. As such while appointment of an 'Independent Director' for a term of less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as a one term under section 149(10) of the Act.

Further, under section 149(11) of the Act, no person can hold office of 'Independent Director' for more than 'two consecutive terms'. Such a person shall have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years. In such a case the person

completing 'consecutive terms of less than ten years' shall be eligible for appointment only after the expiry of the requisite cooling-off period of three years.

- (g) **Liability [Section 149(12)]:** As per section 149(12) of Act, following persons shall be liable for the following acts:

Parties Liable	For said Acts
(i) an independent director	<ul style="list-style-type: none"> • acts of omission or commission by a company which had occurred with his knowledge, • attributable through Board processes • with his consent or connivance, or • where he had not acted diligently
(ii) a non-executive director not being promoter or key managerial personnel	

- (h) **Retirement by rotation [Section 149(13)]:** The provisions of retirement of directors by rotation covered under sub-sections (6) and (7) of section 152 shall not be applicable to appointment of independent directors¹³.

- (i) **Independent Director is different from Nominee Director:** Appointment of a nominee director cannot be taken as a substitute for appointment of an independent director. Though a nominee director is also independent of the other Board members but this independence does not make him an independent director. He is appointed to safeguard the interest of the respective financial institution to which he belongs. His appointment triggers from the fact that his financial institution has given financial assistance to the company and he remains on the Board till the loan amount is repaid satisfactorily. Nominee director's appointment is mandatory only if the financial institution so desires because of the financial assistance given by it to the company; or any Government requires such appointment to represent its interest.

An independent director is appointed by the prescribed companies mandatorily. He is appointed to promote the confidence of the investing bodies, particularly minority shareholders. In fact, the companies in which his appointment is compulsory are much larger than other companies and therefore, they must always be well managed so that the confidence of the stakeholders is not shaken and their investment remains in safe hands. The appointment of independent director is a robust step in this direction. In the matter of good corporate governance, the regulators fall back upon him. The independent director at all times is required to maintain his independence and where circumstances arise which make him lose his independence, such fact must immediately be brought to the knowledge of the Board. The independent directors are required to hold at least one meeting in a financial year, without the attendance of non-independent directors and members of management.

¹³The provisions of retirement of directors by rotation covered under sub-sections (6) and (7) of Section 152 have been discussed later in the Chapter.

Exemptions

*In terms of Notification No.466(E) dated 5th June, 2015, as amended by Notification No. GSR 584 (E), dated 13-06-2017 a **Section 8 Company** is exempted from the provisions of sub-sections (4), (5), (6), (7), (8), (9), (10), (11), clause (i) of sub-section (12) and sub-section (13) of Section 149 of the Act, only if such company has not committed a default in filing its financial statements under Section 137 and Annual Return under Section 92 with the Registrar.*



13. MANNER OF SELECTION OF INDEPENDENT DIRECTORS AND MAINTENANCE OF DATA BANK OF INDEPENDENT DIRECTORS [SECTION 150]

Section 150 of the Act and Rule 6 of the Companies (Appointment and Qualifications of Directors) Rules, 2014, contain provisions regarding the manner of selection of independent directors and maintenance of databank of independent directors. These provisions are stated below:

- (i) **Maintenance of Data Bank of Independent Directors:** According to section 150(1), an independent director may be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, subject to the provisions contained in section 149(6).

Such data bank shall be maintained by any body, institute or association, as may be notified by the Central Government as having the expertise in creation and maintenance of such data bank and put on their website for the use by companies appointing such directors.

Rule 6 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 lays down procedure required for a person who is eligible and willing to be appointed as an independent director. Accordingly-

- (1) Apply online for inclusion of name in the data bank: Every individual -
- (a) who has been appointed as an independent director in a company, on the date of commencement of the Companies (Appointment and Qualifications of Directors) Fifth Amendment Rules, 2019, shall within a period of **thirteen months** from such commencement; or
 - (b) who intends to get appointed as an independent director in a company after such commencement, shall before such appointment,

apply online to the institute for inclusion of his name in the data bank for a period of one year or five years or for his life-time, and from time to time take steps as specified in sub-rule (2), till he continues to hold the office of an independent director in any company:

Provided that any individual, including an individual not having DIN, may voluntarily apply to the institute for inclusion of his name in the data bank.

- (2) **Renewal of period for inclusion of his name in the data bank:** Every individual whose name has been so included in the data bank shall file an application for renewal for a further period of one year or five years or for his life-time, within a period of thirty days from the date of expiry of the period upto which the name of the individual was applied for inclusion in the data bank, failing which, the name of such individual shall stand removed from the data bank of the institute:

Provided that no application for renewal shall be filed by an individual who has paid life-time fees for inclusion of his name in the data bank.

- (3) **Submission of declaration of compliance to the Board:** Every independent director shall submit a declaration of compliance of sub-rule (1) and sub-rule (2) to the Board, each time he submits the declaration required under sub-section (7) of section 149 of the Act.
- (4) **To pass an online proficiency self assessment test:** Every individual whose name is so included in the data bank under sub-rule (1) shall pass an online proficiency self-assessment test conducted by the institute within a period two years from the date of inclusion of his name in the data bank, failing which, his name shall stand removed from the databank of the institute:

Exemptions from online proficiency self-assessment test: Provided that an individual shall not be required to pass the online proficiency self-assessment test when he has served for a total period of not less than three years as on the date of inclusion of his name in the data bank,-

- (A) **as a director or key managerial personnel**, as on the date of inclusion of his name in the databank, in one or more of the following, namely:-
- (a) listed public company; or
 - (b) unlisted public company having a paid-up share capital of rupees ten crore or more; or
 - (c) body corporate listed on any recognized stock exchange or in a country which is a member State of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member State is a member of the International Organization of Securities Commissions; or
 - (d) bodies corporate incorporated outside India having a paid-up share capital of US\$ 2 million or more; or

- (e) statutory corporations set up under an Act of Parliament or any State Legislature carrying on commercial activities; or
- (B) in the **pay scale of Director or equivalent or above** in any Ministry or Department, of the Central Government or any State Government, and having experience in handling,—
 - (i) the matters relating to commerce, corporate affairs, finance, industry or public enterprises; or
 - (ii) the affairs related to Government companies or statutory corporations set up under an Act of Parliament or any State Act and carrying on commercial activities.”
- (C) **in the pay scale of Chief General Manager or above** in the Securities and Exchange Board or the Reserve Bank of India or the Insurance Regulatory and Development Authority of India or the Pension Fund Regulatory and Development Authority and having experience in handling the matters relating to corporate laws or securities laws or economic laws :

Provided further that for the purpose of calculation of the period of three years referred to in the first proviso, any period during which an individual was acting as a director or as a key managerial personnel in two or more companies or bodies corporate or statutory corporations at the same time shall be counted only once.

“Provided also that the following individuals, who are or have been, for at least ten years :—

- (A) an advocate of a court; or
 - (B) in practice as a chartered accountant; or
 - (C) in practice as a cost accountant; or
 - (D) in practice as a company secretary, shall not be required to pass the online proficiency self-assessment test.”.
- (5) **Restoration of names in the databank:** Any individual whose name has been removed from the databank under sub-rule (4), may apply for restoration of his name on payment of fees of one thousand rupees and the institute shall allow such restoration subject to the following conditions, namely :-
- (i) his name shall be shown in a **separate restored category for a period of one year** from the date of restoration within which, he shall be required to pass the online proficiency self-assessment test and thereafter his name shall be included in the databank, only, if he passes the said online proficiency self-assessment test and in such case, the fees paid by him at the time of initial

registration shall continue to be valid for the period for which the same was initially paid; and

In case he **fails to pass the online proficiency self-assessment test within one year from the date of restoration**, his name shall be removed from the data bank and he shall be required to apply afresh under sub-rule (1) for inclusion of his name in the databank.

Explanation: For the purposes of this rule,-

- (a) the expression "institute" means the 'Indian Institute of Corporate Affairs at Manesar' notified under sub-section (1) of section 150 of the Companies Act, 2013 as the institute for the creation and maintenance of data bank of Independent Directors;
 - (b) an individual who has obtained a score of not less than fifty per cent., in aggregate in the online proficiency self-assessment test shall be deemed to have passed such test;
 - (c) there shall be no limit on the number of attempts an individual may take for passing the online proficiency self-assessment test.
- (ii) **Due diligence to be exercised by the company:** Further, the responsibility of exercising due diligence before selecting a person as an independent director from the data bank, shall lie with the company making such appointment [Proviso to Section 150(1)].
 - (iii) **Approval of Appointment in general meeting:** The appointment of independent director shall be approved by the company in general meeting as provided in section 152(2) and the explanatory statement annexed to the notice of the general meeting called to consider the said appointment shall indicate the justification for choosing the appointee for appointment as independent director. [Section 150(2)].
 - (iv) **Data bank to contain list of willing persons who desire to act as Independent Directors:** The data bank shall create and maintain data of persons willing to act as independent director in accordance with Rule 6 of the Companies (Appointment and Qualifications of Directors) Rules, 2014. [Section 150(3)]
 - (v) **Manner & procedure of selection specified by CG:** The Central Government may prescribe the manner and procedure of selection of independent directors who fulfill the qualifications and requirements specified under section 149 [Section 150(4)]

Exemption

*Notification No. 466(E) dated 5th June, 2015 as amended by Notification No. GSR 584 (E), dated 13-06-2017 has exempted a **Section 8 company** from the application of Section 150 of the Act, only if such company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.*



14. DUTIES OF DIRECTORS

Directors appointed in a company have various duties to perform. The foremost duty of the directors is to act honestly and diligently and in the best interest of the company so that the objective of wealth maximization is achieved for the stakeholders. In no case any business opportunity which falls within the ambit of the company be exploited by the directors for their own benefits.

A. Duties as per Section 166: Duties of directors, more particularly statutory duties, have been prescribed for the first time in the Statute. Section 166 specifies the following duties which are required to be accomplished by a director:

- (i) He shall **act in accordance with the articles** of the company, subject to the provisions of the the Companies Act, 2013.
- (ii) He shall **act in good faith** in order to promote the objects of the company for the benefit of its members as a whole. Further, he shall act in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- (iii) He shall **exercise his duties with due and reasonable care**, skill and diligence and shall exercise independent judgment.
- (iv) He shall **not involve** in a situation in which he may have a **direct or indirect interest** that conflicts, or possibly may conflict, with the interest of the company.
- (v) He shall **not achieve any undue gain or advantage** either to himself or to his relatives, partners, or associates. In case such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
- (vi) He shall **not assign his office** and if any assignment is so made, it shall be void.

The assignment of office has been made invalid because of the fact that the shareholders have elected a particular person as director for the management of their company. If such person assigns his office to some other person, the shareholders may not have faith in the other person; and therefore, a person who does not command the faith of the shareholders cannot be given the responsibility to manage the company. In other words, it is required of the original director to carry out his duties of directorship on his own without assigning them to some other person. Delegation of duties to other staff members, wherever permitted, is not akin to assignment of office.

Punishment for not accomplishing statutory duties: If any director of the company contravenes the provisions of Section 166, such director shall be punishable with fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 5,00,000.

B. Some Other Duties¹⁴: They are described as under:

- (i) **To file various documents:** It is the duty of the directors to file various documents required

¹⁴ This list of duties is not exhaustive.

- to be filed with the Registrar within the specified time limits. Similarly, wherever required, the requisite documents must also be filed with other statutory bodies.
- (ii) **To convene General Meetings:** As and when required, Annual General Meeting (AGM)¹⁵ and extraordinary general meetings (EGMs)¹⁶ need to be convened by the directors.
 - (iii) **To attend Board Meetings:** Board meetings is the platform where collective decisions are taken for managing the company profitably. It is statutorily required of a company to hold at least four board meetings every year¹⁷ and the gap between two board meetings must not exceed 120 days. However, a company may, as per the exigencies, hold more meetings than statutorily required and every director is duty-bound to attend them. A director, though, may not attend all the Board meetings held in a year but in case he remains absent from all such meetings held within a period of twelve months either with or without seeking leave of absence, he shall be deemed to have vacated his office¹⁸.
 - (iv) **To disclose interest¹⁹:** In the ordinary course, it is required of a director that his interest should not clash with the interests of the company *i.e.* he should not get himself benefitted from a transaction, the profit of which belongs to the company. If it happens and a director gets interested in a transaction belonging to the company, it is his duty to disclose such interest at the very first Board meeting he attends after becoming interested in the transaction. Thereafter, such interest should be disclosed in the first board meeting held in every financial year. In case there is any change in the disclosure already made by the director, such change needs to be brought in the knowledge of other directors in the first board meeting which he attends after occurring of such change. A detailed disclosure of interest and punishment for non-disclosure is discussed at the appropriate place.
 - (v) **To approve the annual financial statements²⁰:** Before seeking auditor's report, the annual financial statements *i.e.* balance sheet, statement of profit and loss, cash flow statement, etc. including consolidated financial statements, if any, are required to be approved by the directors.
 - (vi) **To approve and attach Board Report²¹:** A report by the Board of Directors containing requisite particulars on the affairs of the company including Directors' Responsibility Statement is required to be attached with the financial statements after its approval.
 - (vii) **To appoint first Auditors²²:** It is the duty of directors to appoint first auditors of the company.

¹⁵ Refer Section 96.

¹⁶ Refer Section 100.

¹⁷ Refer Section 173 (1). A company, if specifically exempted, may hold lesser number of Board Meetings in a year.

¹⁸ Refer Section 167 (1) (b).

¹⁹ Refer Section 184.

²⁰ Refer Section 134.

²¹ Refer Section 134.

²² Refer Section 139.



15. VACATION OF OFFICE OF DIRECTOR [SECTION 167]

Section 167 of the Act contains provisions detailing out as to when the office of a director shall become vacant. As soon as, any such event occurs, the director is required to demit the office of director of the company. These provisions are given as under:

- (i) **Grounds for vacation:** According to Section 167 (1), the office of a director shall become vacant in case:
- (a) he incurs any of the **disqualifications specified in section 164**;
However, if he incurs disqualification under section 164(2), the office of the director shall become vacant in all the companies, except the company which is in default under that sub-section;
 - (b) he **absents himself from all the meetings** of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board;
 - (c) he **acts in contravention of the provisions of section 184** relating to entering into contracts or arrangements in which he is directly or indirectly interested;
 - (d) he **fails to disclose his interest** in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184;
 - (e) he becomes **disqualified by an order** of a court or the Tribunal;
 - (f) he is **convicted by a court** of any offence, whether involving moral turpitude or otherwise and sentenced to imprisonment for 6 months or more.

Exception: The office shall not be vacated by the director in case of orders referred to in clauses (e) and (f)—

- (i) for thirty days from the date of conviction or order of disqualification;
 - (ii) where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or
 - (iii) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of;
- (g) he is **removed in pursuance of the provisions of the Companies Act, 2013** like when he is required to vacate office for disqualification incurred under Section 217 (6)
 - (ii) *i.e.* conviction for committing an offence under Section 217;
 - (h) he, having been **appointed a director by virtue of his holding any office or other employment** in the holding, subsidiary or associate company, **ceases to hold such office or other employment** in that company.

Provision of additional ground for vacation by a private company: According to Section 167(4), a private company may provide any other ground for the vacation of the office of a director in addition to those specified above, through its articles.

- (ii) **Punishment:** Section 167(2) prescribes punishment in case of contravention of section 167(1). Thus, if a person functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in Section 167(1), he shall be punishable with fine of ₹ 1,00,000 extendable to ₹ 5,00,000.
- (iii) **All the Directors vacating the office:** Section 167(3) mentions about the eventuality when all the directors of a company vacate their offices under any of the disqualifications specified in Section 167(1). In that case, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.



16. RESIGNATION OF DIRECTOR [SECTION 168]

Provisions regarding resignation of directors have been included in the Companies Act, 2013 for the first time. Section 168 read with Rule 15 and Rule 16 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 deals with resignation of a director as under:

Notice of resignation in writing may be served to the company by the director

Board takes note on receipt of notice

Co. shall intimate Registrar within 30 days of receipt of notice in Form DIR-12

Fact of such resignation is given in the report of directors placed in the immediately following general meeting

Director forward copy of resignation with reasons to Registrar in 30 days from date of resignation in Form DIR-11 with fees.

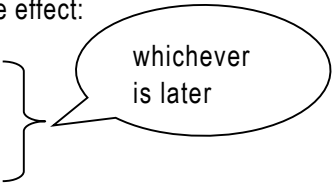
Signing and Filing of Form DIR-11 in case of a Foreign Director: In case a company has already filed Form DIR-12 with the Registrar, a foreign director of such company resigning from his office may **authorise** in writing a practising chartered accountant or cost accountant in practice or

company secretary in practice or any other resident director of the company to sign Form DIR-11 and file the same on his behalf intimating the reasons for the resignation.

Clarification: MCA vide General Circular No. 3/15, dated 3rd March, 2015 has clarified that in the event of deactivation of Digital Signature Certificate (DSC) following *en masse* resignation of all the directors of a company before appointment of new directors in their places, where Form DIR-12 cannot be filed by a company due to lack of an authorized signatory director, the Registrars of Companies within their respective jurisdictions are authorized, on request from the stakeholders, and after due examination, to allow any one of the resigned director who was an authorized signatory director for the purpose of filing DIR-12 only along with additional fees, as applicable and subject to compliance of other provisions of Companies Act, 2013.

Effective date of resignation: The resignation of a director shall take effect:

- (i) from the date on which the notice is received by the company,
- OR**
- (ii) the date, if any, specified by the director in the notice,

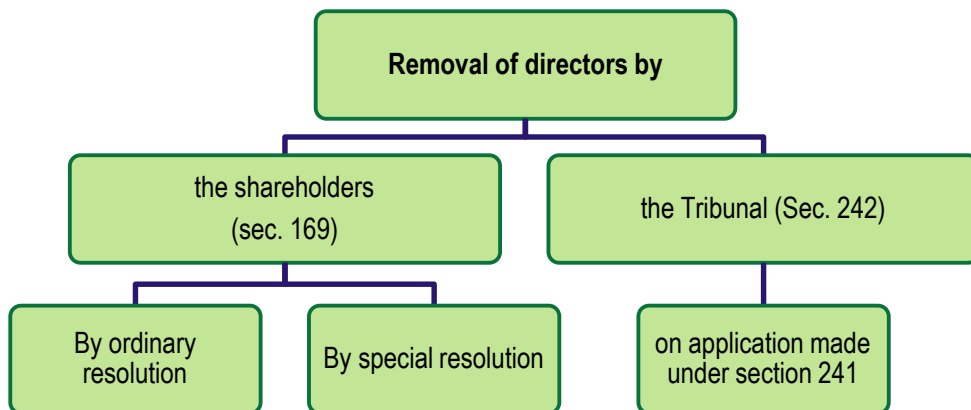


Liability: The director who has so resigned shall be liable even after his resignation for the offences which occurred during his tenure.

All the Directors tendering resignation: In case all the directors of a company resign from their offices, or vacate their offices under section 167, **the promoter** or, in his absence, **the Central Government** shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.

17. REMOVAL OF DIRECTORS [SECTION 169]

A director of a company may be removed before completion of his term as director. Removal of directors is discussed here under the following heads:



I. Removal of Director by the Shareholders: Section 169 of the Act contains provisions for removal of directors by the shareholders. The way shareholders are empowered to appoint a director, in the same way they can also remove a director. The **procedure of removal** may be in the following manner:

(i) **Requirement of Ordinary Resolution²³:** A company may, by **ordinary resolution**, remove a director before the expiry of the period of his office **except the following**:

(a) when a director is appointed by the Tribunal under Section 242.

²⁴(b) when as per Section 163, two-thirds or more of the total number of directors are appointed according to the principle of proportional representation, then such directors cannot be removed.

For example, if a company has eight directors, of which six were appointed according to the principle of proportional representation. In such a case, only two directors which were not appointed following the system of proportional representation, can only be removed by the shareholders.

(ii) **Requirement of Special Resolution in case of removal of re-appointed independent director:** An independent director re-appointed for second term under Section 149(10) shall be removed by the company only by passing a **special resolution**.

Note: Under both the clauses (i) and (ii) above, the director to be removed shall be given a reasonable opportunity of being heard before his removal.

(iii) **Special Notice²⁵:** A special notice as per Section 115 shall be required for proposing any resolution to remove a director.

Special notice under Section 115 is required to be signed by:

(i) members holding not less than 1% of total voting power; or

(ii) members holding shares on which at least Rs. 5,00,000 has been paid in the aggregate.

Such notice shall be sent by the members not earlier than 3 months but at least 14 days before the meeting at which the resolution is desired to be moved.

(iv) **Action by the company²⁶:** On receipt of the special notice of a resolution to remove a director, the company shall forthwith send a copy thereof to the director concerned, and the director,

²³As per Section 169 (1).

²⁴As per Second Proviso to Section 169 (1).

²⁵As per Section 169 (2).

²⁶As per Section 169 (3).

whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting.

- (v) **Representation by the director:**In case the director concerned makes a written representation to the company and requests that it should be notified to members, the company shall, if the time permits it to do so,-
- (a) **state the fact of the representation** having been made by the director in any notice of the resolution given to members of the company; and
 - (b) **send the representation to every member** of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company).

In case, the representation is not sent as aforesaid due to insufficient time or for the company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting.

Representation of director need not be sent²⁷: It is provided that representation need not be sent out and read out at the meeting if, on the application either of the company or of any other aggrieved person, the Tribunal is satisfied that the rights of representation are being abused to secure needless publicity for defamatory matter.

Further, the Tribunal may order the director concerned (notwithstanding that he is not a party to it) to make payment in whole or in part of the costs incurred by the company on the application so made to the Tribunal.

- (vi) **Filling of vacancy²⁸:**The vacancy resulting from the aforesaid removal if he had been appointed by the company in general meeting or by the Board, may be filled in by the appointment of another director at the same meeting at which the director is removed, provided special notice of the proposed appointment has been given.

Non-Filling of vacancy²⁹: If the vacancy is not filled in the same meeting as above, then it may be filled as a casual vacancy provided that the director who was so removed from office shall not be reappointed as a director.

- (vii) **Period of holding of office by new director³⁰:**A director so appointed shall hold office for the remaining period for which the director who has been removed would have held office if he had not been removed.

²⁷As per Proviso to Section 169 (4).

²⁸As per Section 169 (5).

²⁹As per Section 169 (5).

³⁰As per Section 169 (7).

- (viii) **Payment of compensation**³¹: A person so removed as director shall not be deprived of his rights to compensation or damages payable to him in respect of the premature termination of the directorship, or terms of his appointment as director or of any appointment terminating with that as a director. The restrictions imposed by Section 202 are also to be kept under consideration while making payment of compensation for loss of office of directorship.
- (ix) **No restriction imposed by Section 169**³²: Nothing in Section 169 shall be taken as derogating from any power to remove a director under any other provisions of the Companies Act, 2013.

In other words, Section 169 does not impose any restriction on any other power available under some other provisions of the Companies Act, 2013 which allows removal of a director.

II. Removal of Director by the Tribunal: According to Section 242, a director may be removed by the Tribunal where an application has been made to it under Section 241 for prevention of oppression and mismanagement in the company. The Tribunal is also empowered to terminate, set aside or modify any agreement between the company and any of its directors on such terms and conditions which in the opinion of Tribunal are just and equitable.

According to Section 243, a director so removed as per the order of Tribunal shall not be entitled to claim any compensation for loss of his office. Further, he shall not be offered appointment as director for a period of **five years** from the date of the order without first seeking the leave of the Tribunal.



18. REGISTER OF DIRECTORS AND KEY MANAGERIAL PERSONNEL AND THEIR SHAREHOLDING [SECTION 170]

A company is required to maintain a register of directors and key managerial personnel and their shareholding under Section 170 of the Act. These provisions are as under:

Every company shall keep at its registered office a register containing the prescribed particulars of its directors and key managerial personnel. The prescribed particulars shall include details of securities held by each of them in the company or its holding, subsidiary, subsidiary of its holding companies or associate companies. In this respect Rule 17 of the Companies (Appointment and Qualifications of Directors) Rules, 2014, is relevant. It prescribes the following **particulars to be included in the Register**:

- (a) Director Identification Number (optional for key managerial personnel);

³¹As per Section 169 (8) (a).

³²As per Section 169 (8) (b).

- (b) present name and surname in full;
- (c) any former name or surname in full;
- (d) father's name, mother's name and spouse's name(if married) and surnames in full;
- (e) date of birth;
- (f) residential address (present as well as permanent);
- (g) nationality (including the nationality of origin, if different);
- (h) occupation;
- (i) date of the board resolution in which the appointment was made;
- (j) date of appointment and reappointment in the company;
- (k) date of cessation of office and reasons therefor;
- (l) office of director or key managerial personnel held or relinquished in any other body corporate;
- (m) membership number of the Institute of Company Secretaries of India in case of Company Secretary, if applicable; and
- (n) Permanent Account Number (mandatory for key managerial personnel if not having DIN);

In addition to the above details, the company shall also include in the Register the **details of securities held by them** in the company, its holding company, subsidiaries, subsidiaries of the company's holding company and associate companies relating to:

- (a) the number, description and nominal value of securities;
- (b) the date of acquisition and the price or other consideration paid;
- (c) date of disposal and price and other consideration received;
- (d) cumulative balance and number of securities held after each transaction;
- (e) mode of acquisition of securities ;
- (f) mode of holding – physical or in dematerialized form; and
- (g) whether securities have been pledged or any encumbrance has been created on the securities.

Filing of Return in Form DIR-12 with the Registrar:Section 170(2) read with Rule 18 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 requires a company to file a return in Form DIR-12 in respect of its directors and the key managerial personnel after paying the prescribed fee as under:

- (a) within 30 days from the appointment; and
- (b) within 30 days of any change taking place.

Exemption

*Section 170 of the Companies Act, 2013 shall not apply to a **Government company** in which the entire share capital is held by the Central Government, or by any State Government or Governments or by the Central Government or by one or more State Government subject to the condition that such Government company has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the registrar. [Notification No.G.S.R. 463(E), dated 5thJune, 2015 as amended by Notification No. GSR 582 (E), dated 13-06-2017].*



19. MEMBERS' RIGHT TO INSPECT [SECTION 171]

The members of the company have a right to inspect the register of directors and key managerial personnel under Section 171 of the Act. Accordingly:

- (i) **Timing for inspection:** The register of directors and key managerial personnel shall be kept open for inspection during **business hours**. The members shall have the right to take extracts therefrom and copies thereof on request and the same will be provided to them within 30 days free of cost. [Refer Section 171(1)(a)]
- (ii) **Open for inspection:** The register shall also be kept open for inspection at every annual general meeting of the company and shall be made accessible to any person attending the meeting. [Refer Section 171(1)(b)]
- (iii) **Registrar to order in case of refusal:** If any inspection during business hours is refused, or if any copy required as above is not sent within thirty days from the date of receipt of such request, the registrar shall on an application made to him order immediate inspection and supply of copies. [Refer Section 171(2)]

Exemptions

*Section 171 shall not apply to a **Government company** in which the entire share capital is held by the Central Government, or by any State Government or Governments or by the Central Government or by one or more State Government subject to the condition that such Government company has not committed a default in filing its financial statements under Section 137 or Annual return under Section 92 with the registrar. [Notification No.G.S.R. 463(E), dated 5thJune, 2015 as amended by Notification No. GSR 582 (E), dated 13-06-2017].*



20. PUNISHMENT [SECTION 172]

Section 172 of the Act provides that if a company contravenes any of the provisions of Chapter XI containing Sections 149 to 171 and for which no specific penalty or punishment is provided therein, the company and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees, and in case of continuing failure, with a further penalty of five hundred rupees for each day during which such failure continues, subject to a maximum of three lakh rupees in case of a company and one lakh rupees in case of an officer who is in default.

In the decided case of *Jalpower Corporation Ltd. v. Registrar of Companies*, it was held that where there was delay in appointing woman director and application was filed for compounding of offence, same was to be permitted for company and all its directors, though application for compounding was filed by company and two of its directors on payment of penalty by each of directors.

This was decided in as per Section 149, read with section 172 and section 441, of the Companies Act, 2013 and rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014. In the given case, Applicant company appointed woman director after a delay of 180 days. ROC filed complaint before EO. As belated appointment did not cause any prejudice to any creditors of company or public at large, therefore, application was filed by company and two of its directors for compounding of offence.

Here it was held that since offence was committed by company and all its 4 directors, so composition of offence was to be permitted for company and all 4 directors, though application for compounding was filed by company and two of its directors. All directors here had to pay fine and ROC should bring issue of compounding of offence to notice of Special Judge for Economic Offence.

TEST YOUR KNOWLEDGE**Multiple Choice Questions**

1. *Mr. Q, a Director of PQR Limited, is proceeding on a foreign tour covering entire Europe for four months. He proposes to appoint Mr. Y as an alternate Director to act on his behalf during his absence. The Articles of Association of PQR Limited provide for the appointment of alternate Directors. Mr. Q claims that he has a right to appoint alternate Director of his choice. Which of the following options is applicable in the given situation:*
 - (a) *Claim made by Mr. Q to appoint Mr. Y as alternate Director is valid as the Articles of Association of PQR Limited provide for such appointment.*
 - (b) *Claim made by Mr. Q to appoint Mr. Y as alternate Director is not valid as the authority to appoint alternate Director has been vested in the Board of Directors only and that too subject to empowerment by the Articles of Association.*
 - (c) *Mr. Y cannot be appointed as an alternate Director in place of Mr. Q since Mr. Q is proceeding on a foreign tour covering entire Europe for four months only which is less than the required absence of minimum six months.*
 - (d) *Mr. Y cannot be appointed as an alternate Director in place of Mr. Q since Mr. Q is proceeding on a foreign tour covering entire Europe for four months which is more than the required absence of maximum three months.*

2. *In compliance with the Companies Act, 2013, at least one woman director shall be on the Board of the prescribed class or classes of companies. Ms. Riya is keen to seek the office of woman director in a company. Which of the following companies is mandatorily required to appoint a woman director where Ms. Riya can hold such office:*
 - (a) *PQR Limited, an unlisted company, whose paid-up share capital is not exceeding 150 crore rupees as per the last date of latest audited financial statements is mandatorily required to appoint a woman director.*
 - (b) *ABC Limited, a listed company, whose turnover is 250 crore rupees as per the last date of latest audited financial statements is mandatorily required to appoint a woman director.*
 - (c) *XYZ Limited, an unlisted company, whose turnover is not more than 300 crore rupees as per the last date of latest audited financial statements is mandatorily required to appoint a woman director.*
 - (d) *BCZ Limited, an unlisted company whose paid-up share capital is not exceeding 100 crore and turnover is less than 300 crore rupees as per the last date of latest audited financial statements is mandatorily required to appoint a woman director.*

3. *Kutumb Agro Limited (KAL), a newly incorporated company, has not mentioned the names of the first Directors in its Articles of Association. There are eight subscribers to the Memorandum of Association including Parivaar Agro Private Limited. From the following four options, choose the one which indicates as to who shall be deemed to be the first Directors of KAL when nothing is mentioned in the Articles?*
- (a) *All the eight subscribers to the Memorandum of Association of KAL shall be deemed to be the first Directors.*
 - (b) *Except Parivaar Agro Private Limited, all other subscribers to the Memorandum of Association of KAL shall be deemed to be the first Directors.*
 - (c) *The shareholders shall appoint the first Directors in the General Meeting of KAL.*
 - (d) *Out of the eight subscribers to the Memorandum of Association, the first Directors being three individuals shall be nominated by Srinivas, the Chartered accountant who has signed the Memorandum as witness and they shall be deemed to be the first Directors of KAL.*
4. *The turnover of XYZ Components Limited as on the last date of latest audited financial statements is 400 crore rupees. An intermittent vacancy of a woman Director arose on June 15, 2021 due to the resignation of Ms. Swati. The immediate Board Meeting after the resignation of Ms. Swati was held on October 10, 2021. From the following options, choose the one which indicates the date by which the vacancy of the woman Director must be filled by XYZ Components Limited.*
- (a) *July 14, 2021*
 - (b) *August 14, 2021*
 - (c) *September 14, 2021*
 - (d) *October 10, 2021*
5. *Mr. Nagarjuna, one of the directors of MGT Mechanics Limited, due to his own business interests, decided to resign as director and accordingly, sent his resignation letter dated 12th June, 2021 to the company stating that he intends to resign w.e.f. 15th June, 2021. Since no communication in relation to his resignation was received from MGT Mechanics Limited, he sent an e-mail on 17th June, 2021 enquiring about the receipt of his resignation letter by the company but there was no response. However, MGT Mechanics Limited received his resignation letter on 18th June, 2021. Out of the following four options, choose the one which indicates the correct date from which his resignation will be effective:*
- (a) *12th June, 2021*
 - (b) *15th June, 2021*
 - (c) *17th June, 2021*
 - (d) *18th June, 2021*

6. *Mr. Z is proposed to be appointed as the Director in RLP Mechanics Limited. It is noteworthy that Mr. Z already holds directorship in one dormant company, two Section 8 companies, eight public limited companies and nine private limited companies. However, out of nine private limited companies, two are subsidiaries of public limited companies. In the given circumstances, is it possible for Mr. Z to accept another directorship in RLP Mechanics Limited without attracting any invalidity:*
- (a) *It is not possible for Mr. Z to accept another directorship in RLP Mechanics Limited since he is already holding directorships in twenty companies.*
 - (b) *It is not possible for Mr. Z to accept another directorship in RLP Mechanics Limited since he is already holding directorships in eight public limited companies and two such private limited companies which are subsidiaries of public limited companies.*
 - (c) *It is possible for Mr. Z to accept another directorship in RLP Mechanics Limited since Section 8 companies and dormant companies are excluded while calculating the limit of twenty companies.*
 - (d) *It is possible for Mr. Z to accept another directorship in RLP Mechanics Limited since there is no limit on holding any number of directorships.*

Descriptive Questions

1. *The Articles of Association of Rajasthan Toys Private Limited provide that the maximum number of Directors in the company shall not exceed 10. Presently, the company has 8 directors. Its Board of Directors desires to increase the number of directors from 8 to 16. Advise whether under the provisions of the Companies Act, 2013, the Board can do so?*
2. *ADJ Limited has 10 directors on its Board. Two of the directors have retired by rotation at an Annual General Meeting. The place of retiring directors is not so filled up and the meeting has also not expressly resolved 'not to fill the vacancy'. Since the AGM could not complete its business, it is adjourned till the same day in the next week, at the same time and place. At this adjourned meeting also the place of retiring directors could not be filled up, and the meeting has also not expressly resolved 'not to fill the vacancy'.*

Referring to the provisions of the Companies Act, 2013, decide:

- (i) *Whether in such a situation the retiring directors shall be deemed to have been re-appointed at the adjourned meeting?*
- (ii) *What will be your answer in case at the adjourned meeting, the resolutions for re-appointment of these directors were lost?*
- (iii) *Whether such directors can continue in case the directors do not call the Annual General Meeting?*

3. *Prince Ltd. desires to appoint an additional director on its Board of directors. The Articles of the company confer upon the Board to exercise the power to appoint such a director. As such M is appointed as an additional director. In the light of the provisions of the Companies Act, 2013, examine*
- (i) *Whether M can continue as director if the annual general meeting of the company is not held within the stipulated period and is adjourned to a later date?*
 - (ii) *Can the power of appointing additional director be exercised at the Annual General Meeting by the members?*
 - (iii) *As the Company Secretary of the company what checks would you make after M is appointed as an additional director?*
4. *The Board of Directors of XYZ Ltd. filled up a casual vacancy caused by the death of Mr. P by appointing Mr. C as a director on 3rd April, 2019 which was subsequently approved by the members in the immediate next general meeting. Unfortunately Mr. C expired on 15th May, 2019 after working about 40 days as a director. The Board now wishes to fill up the casual vacancy by appointing Mrs. C in the forthcoming meeting of the Board. Advise the Board in this regard keeping in view the provisions of the Companies Act, 2013.*
5. *Mr. John is a director of MNC Ltd., which had accepted deposits from public. The financial position of MNC Ltd. took a southward turn and became bad to worse and ultimately, it failed to repay the deposits which fell due for payment on 10th April, 2018 and such repayment has not been made till 5th May, 2019. Another company JKL Ltd. wants to appoint the said Mr. John as its director at its annual general meeting to be held on 6th May, 2019. You are required to state with reference to the provisions of the Companies Act, 2013 whether Mr. John can be appointed as a director of JKL Ltd.*
6. *XYZ Limited is an unlisted public company having a paid-up share capital of twenty crore rupees as on 31st March, 2019 and a turnover of one hundred fifty crore rupees during the year ended 31st March, 2019. The total number of directors is thirteen.*
- Referring to the provisions of the Companies Act, 2013 answer the following:*
- (i) *State the minimum number of independent directors that the company should appoint.*
 - (ii) *How many independent directors are to be appointed in case XYZ Limited is a listed company?*
7. *Bright Motors (P) Limited at the Annual General Meeting (AGM) held on 30.09.2016 appointed Mr. Anmol as a Non-Executive Director on the Board of the company for a period of three years. On 2nd October, 2017, Mr. Anmol suffered a severe heart failure and expired. The Board of Directors of the company on 16th October, 2017 appointed Mr. Prateek to fill the casual vacancy so created. The appointment of Mr. Prateek was made for a term of three years by the Board. Subsequently at the AGM held on 29-09-2018, Mr. Prateek's appointment was not proposed or approved as the Board was of the view that it is not required. But the CFO*

of the company is of the opinion that the Board of Directors have contravened the provisions of the Companies Act, 2013 in respect of non-approval of the appointment of Mr. Prateek and his office tenure. Decide.

8. Mr. Dhruv is a Director of LT Limited and XT Limited respectively. LT Limited did not file its financial statements for the year ended 31st March, 2016, 2017 & 2018 respectively with the Registrar of Companies (ROC) as mandated under the Companies Act, 2013. LT Limited also did not pay interest on loans taken from a Public Financial Institution from 1st April, 2017 and also failed to repay matured deposits taken from public on due dates from 1st April, 2017 onwards.

Answer the legality of the following in the light of the relevant provision of the Companies Act, 2013:

- (i) Whether Mr. Dhruv is disqualified under Companies Act, 2013 and if so, whether he can continue as a Director in LT Limited? Further can he also seek reappointment when he retires by rotation at the AGM of XT Limited scheduled to be held in September, 2019?
- (ii) Mr. Dhruv is proposed to be appointed as an Additional Director of MN Limited in June 2019. Is he eligible to be appointed as an Additional Director in MN Limited? Decide.
9. You are the CFO and in-charge of legal compliances of large multi-national company in India. The Board of Directors of the Company comprises of directors who are Indian as well as Foreign Nationals. Mr. "X", who is a Director (Business Development) on the Board is very often on business tour abroad. He approached you and wants to know from you the regulatory provisions of the Companies Act, 2013 relating to appointment of Alternate Directors. Analyse the following situations and advise suitably. Mr. X referring to the provisions of the Companies Act, 2013.
- (a) To how many directors can a person be appointed as an alternate director and how many votes does he have in one Board Meeting.
- (b) In case of private company, where an alternate director is appointed in place of a non-executive director whose term is indefinite, then, what will be the tenure of such alternate director, provide the original director does not return to India for a longer period say 3-4 years?
- (c) Can an Executive Director/Whole Time Director/Managing Director appoint alternate directors?
10. Mr. 'R' holds directorship in 10 Public Companies and 11 Private Companies as on 31.05.2019. One of the above Private Company is a dormant Company. Apart from the dormant Company, on 30.06.2019 a Private Company (in which Mr. R is holding directorship) has become a subsidiary of a Public Company.

In the light of the provisions of the Companies Act, 2013 examine and decide:

- (i) The validity of holding directorship of Mr.'R' with reference to number of directorship as on 31.05.2019 and as on 30.06.2019.
- (ii) Whether a Company has power to specify any lesser number of Companies in which a director of the Company may act as a director?

ANSWERS

Answer to Multiple Choice Questions

1.	b	2.	b	3.	b	4.	d	5.	d
6.	b								

Answer to Descriptive Questions

1. Under Section 149(1) of the Companies Act, 2013 every company shall have a Board of Directors consisting of individuals as directors and shall have a minimum number of 3 directors in the case of a public company, 2 directors in the case of a private company, and one director in the case of a One Person Company. The maximum number of directors shall be 15.

The First Proviso to Section 149(1) states that a company may appoint more than 15 directors after passing a special resolution.

From the provisions of section 149 (1) as above, though the minimum number of directors may vary depending on whether the company is a public, private or a one person company, the maximum number of directors is same for all types of companies *i.e.* 15 directors.

In the given case since the number of directors is proposed to be increased from 8 to 16, the company will be required to comply with the following provisions:

- (i) Alter its Articles of Association as per the provisions of Section 14 of the Act by passing a special resolution, so as to increase the number of directors in the Articles from 10 to 16;
- (ii) Also take approval for increasing the maximum number of directors from 8 to 16 by means of a special resolution passed by the members at a duly convened general meeting.

2. **Retiring director – When to be deemed director?**

In accordance with the provision of the Companies Act, 2013, as contained in section 152(7)(a) which provides that if at the annual general meeting at which a director retires and the vacancy is not so filled up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned to same day in the next week, at the same time

and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.

Section 152(7)(b) further provides that if at the adjourned meeting also, the place of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless at the adjourned meeting or at the previous meeting a resolution for the re-appointment of such director was put and lost or he has given a notice in writing addressed to the company or the Board of Directors expressing his desire not to be re-elected or he is disqualified.

Therefore, in the given circumstances answers to the asked questions shall be as under:

- (i) In the first case, applying the above provisions, the retiring directors shall be deemed to have been re-appointed.
 - (ii) In the second case, where the resolutions for the reappointment of the retiring directors were lost, the retiring directors shall not be deemed to have been re-appointed.
 - (iii) Section 152(6)(c) states that 1/3rd of the rotational directors shall retire at every AGM. Accordingly, the directors will retire as soon as the AGM is held on its due date. Further, as per Section 96 (dealing with Annual General Meeting), every company other than a One Person Company is required to hold an Annual General Meeting in each year. Hence, it is necessary for the company to hold the AGM, where the directors liable to retire by rotation shall retire. In case AGM is not held till the last date on which it should have been held, the term of retiring directors ends on this last date and it can not be extended till the new date when the AGM shall be held. As the calling of the AGM is the duty and responsibility of the directors, they by omitting to call the AGM on its due date cannot take advantage of their own fault and by that means cannot extend their own continuance in the office for any period of their choice and as long as the holding of the next AGM does not take place.
3. Section 161(1) of the Companies Act, 2013 provides that the articles of association of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director at the general meeting, as an additional director at any time and such director will hold office upto the date of the next annual general meeting or the last date on which such annual general meeting should have been held, whichever is earlier.
- (i) M cannot continue as director till the adjourned annual general meeting, since he can hold the office of directorship only up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier. Such an additional director shall vacate his office latest on the date on which the annual general meeting should have been held under Section 96 of the Companies

Act, 2013. He cannot continue in the office on the ground that the meeting was not held or it could not be called within the time prescribed.

- (ii) The power to appoint additional directors vests with the Board of Directors and not with the members of the company. The only condition is that the Board must be conferred such power by the articles of the company.
 - (iii) As a Company Secretary, I would put the following checks in place in respect of M's appointment as an additional director:
 - (a) He must have got the Directors Identification Number (DIN).
 - (b) He must furnish the DIN and a declaration that he is not disqualified to become a director under the Companies Act, 2013.
 - (c) He must give his written consent in Form DIR-2 on or before his appointment as director and such consent stands filed with the Registrar within 30 days of his appointment.
 - (d) His appointment is made by the Board of Directors.
 - (e) His name is entered in the statutory records as required under the Companies Act, 2013.
4. Section 161(4) of the Companies Act, 2013 provides that if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.

Further, any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

In view of the above provisions, in the given case, the appointment of Mr. C in place of the deceased director Mr. P was in order. In normal course, Mr. C could have held his office as director up to the date to which Mr. P would have held the same.

However, Mr. C expired on 15th May, 2018 and again a vacancy has arisen in the office of director owing to death of Mr. C who was appointed by the board and approved by members to fill up the casual vacancy resulting from P's demise. Vacancy arising on the Board due to vacation of office by the director appointed to fill a casual vacancy in the first place, does not create another casual vacancy as section 161 (4) clearly mentions that such vacancy is created by the vacation of office by any director appointed by the company in general meeting. Hence, the Board cannot fill the vacancy arising from the death of Mr. C who was appointed to fill a casual vacancy.

The Board may however appoint Mrs. C as an additional director under section 161 (1) of the Companies Act, 2013 provided the articles of association authorise the Board to do so, in

which case Mrs. C will hold the office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

5. Section 164 (2) (b) of the Companies Act, 2013 states that where a person is or has been a director of a company which has failed to repay its deposit on due date and such failure continues for one year or more, then such person shall not be eligible to be appointed as a director of any other company for a period of five years from the date on which such company, in which he is a director, failed to repay its deposits.

In the instant case, MNC Ltd., has failed to repay its deposit on due dates and the default continues for more than one year. Hence, Mr. John will not be eligible to be appointed as a director of JKL Ltd.

6. (i) According to Rule 4(1) of the Companies (Appointment and Qualifications of Directors) Rules, 2014, the following class or classes of companies shall have at least 2 directors as independent directors:
- (1) the Public Companies having paid up share capital of 10 crore rupees or more; or
 - (2) the Public Companies having turnover of 100 crore rupees or more; or
 - (3) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

In the present case, XYZ Limited is an unlisted public company having a paid-up capital of ₹ 20 crore as on 31st March, 2019 and a turnover of ₹ 150 crore during the year ended 31st March, 2019. Accordingly, as per stated Rules it must have at least 2 directors as independent directors.

- (ii) According to Section 149(4) of the Companies Act, 2013, every listed public company shall have at least one-third of the total number of directors as independent directors. The Explanation to Section 149(4) specifies that any fraction contained in such one-third numbers shall be rounded off as one.

In the present case, XYZ Limited is a listed company and the total number of directors is 13. Hence, in this case, XYZ Limited must have atleast 5 directors ($1/3$ of 13 is 4.33 rounded as 5) as independent directors.

Explanation to Rule 4 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 clarifies that for the purpose of this Rule the paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

In the present case, it is mentioned that paid up capital of XYZ Limited is ₹20 crore as on 31st March, 2019 and turnover is ₹150 crore during the year ended 31st March, 2019. It is, therefore, assumed that 31st March, 2019 is the last date of latest audited financial statements.

7. According to section 161(4) of the Companies Act, 2013, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.

Provided that any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

In the given question, the casual vacancy caused due to death of Mr. Anmol (who was appointed by the company in AGM held on 30.9.2016, for a period of 3 years) is filled by the Board of Directors by appointing Mr. Prateek for a period of three years. However, the appointment of Mr. Prateek for a period of three years is in contravention of above stated provisions as he can hold office only up to the date up to which Mr. Anmol would have held office if it had not been vacated.

Further, as per the provisions of the Act, the appointment of Mr. Prateek ought to be approved by members in the immediate next general meeting. However, the appointment of Mr. Prateek was not even proposed or approved in the AGM held on 29.9.2018. Hence, the appointment of Mr. Prateek is in contravention of the provisions of the Companies Act, 2013. Therefore, the opinion of CFO is correct.

8. According to section 164(2) of the Companies Act, 2013, no person who is or has been a director of a company which has not filed financial statements or annual returns for any continuous period of three financial years; or has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause(b), he shall not incur the disqualification for a period of six months from the date of his appointment.

Also, according to section 167(1)(a), the office of a director shall become vacant in case he incurs any of the disqualifications specified in section 164;

Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.

Thus, in the light of the said provisions of the Act and the facts of the question:

- (i) Yes, Mr. Dhruv is disqualified under the Companies Act, 2013, as LT Limited did not file financial statements for a period of three years. Also, the LT Limited has defaulted in the repayment of matured deposits taken from public since 1st April, 2017 (i.e. the default has continued for more than one year).

Mr. Dhruv can continue as a director in LT Limited as proviso to section 167(1)(a) provides that where the director incurs disqualification under section 164(2), the office of the director shall become vacant in all the companies, other than the company which is in default. Whereas he has to vacate the office of director in XT Limited.

Mr. Dhruv cannot be reappointed (in the AGM to be held in September 2019) as director in XT Limited.

- (ii) Mr. Dhruv cannot be appointed as an Additional Director (in the AGM to be held in June 2019) of MN Limited because as per section 164(2), he is not eligible to be appointed in other company for a period of five years from the date of such default.

9. (a) According to Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorized by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

According to section 165, no person shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. However, the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

Hence, in the instant case, a person can be appointed as an alternate director for only one director in the **same company** but maximum twenty different companies.

An alternate director will have only one vote as he can hold alternate directorship for one director only in the same company.

- (b) According to second proviso to section 161(2), an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

Third proviso says that if the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

Hence, in the instant case, the alternate director shall hold office till the time original director returns to India, even if the period is as long as 3-4 years.

- (c) As per section 161(2), the Board of Directors of a company may, if so authorized by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

From the above provision, it is clear that an alternate director can be appointed for any director. Hence, an alternate director can be appointed for Executive director/ Whole Time Directors / Managing Director however, not by them but by the Board of Directors.

10. (i) According to Section 165 of the Companies Act, 2013, no person shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. Whereas that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included.

For reckoning the limit of directorships of twenty companies, the directorship in a dormant company shall not be included.

In the instant case, holding of directorship of Mr. R as on 31.05.2019 is valid as he is holding directorship in 10 public companies and in 11 private companies out of which one company is dormant company. So, maximum directorship he is holding in 20 companies.

Holding of directorship of Mr. R as on 30.06.2019 is not valid, as on 30.06.2019 a private company (in which Mr. R is holding directorship) has become a subsidiary of a public company. Accordingly, it means that this private company shall be deemed to be included in the limit of public companies and thereby increasing the number of public companies in which he is holding directorship to 11 and making it valid.

- (ii) According to section 165(2), Subject to the provisions of sub-section (1), the members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors.

