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Appointment of Director in Casual Vacancy under CA 2013

Dear Professional Colleagues,

There are various methods and categories for appointment of Directors under Companies Act, 2013. In my previous articles I had discussed about the following 2 procedures for the appointment of Directors:

1. [Procedure for Appointment of Additional Director in CA 2013](#)
2. [Procedure for Appointment of Alternate Director under CA 2013](#)

Now through this write up we'll discuss the provisions and interpretations regarding appointment of Director to fill up the casual vacancy caused by the resignation of existing director due to death, disqualification or resignation. [Section 161(4)].

Legal Provisions related to appointment of Director to fill casual vacancy [Section 161(2)]

Legal Provisions related to Appointment of Director to fill casual vacancy caused by the resignation of existing director are given in Section 161(4) of the Companies Act, 2013, which is reproduced for your quick reference:

Section 161(4): Appointment of Director to fill casual vacancy

Section 161(4): In the case of a public company, 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:

***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.*

Main notable points regarding appointment of Director to fill up casual vacancy

Please find below few relevant points to understand the concept of Director appointed to fill casual vacancy:

1. In Companies Act 2013, provisions related to appointment of Director to fill up casual vacancy are regulated by Section 161(4) of the Companies Act, 2013.
2. Only Public companies or Private companies which are subsidiary of Public Companies can fill the casual vacancy created in the office of Director under Section 161(4) of the Companies Act, 2013. In case casual vacancy created in a Private Company, the has to be filled in the General Meeting only read with Section 152(2) of the Companies Act, 2013. In

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other words the board of directors of a Private Company has no authority to fill the casual vacancy in the office of Director.

3. A casual vacancy in the office of a Director may, in default of and subject to the provisions of the articles of the company, be filled by the Board of Directors at a meeting of the Board. To fill up a casual vacancy prior authorization from Articles is not required just like Alternate or Additional Director. In case Articles are silent regarding appointment of director to fill casual vacancy, board of directors have inherent power to fill the resulting casual vacancy under section 161(4).
4. Filling up of casual vacancy through resolution by Circulation (Section-175) is not allowed as casual vacancy is compulsorily to be filled at the meeting of the Board of Directors of a Public Company.
5. As per the interpretation of the language of Section 161(4), vacancy in the office of a Director, who was appointed by the Company in General meeting, can only be filled as a Casual Vacancy under section 161(4). In simple words if casual vacancy created in the office of a Director who was appointed in Board meeting, that vacancy cannot be filled under section 161(4). For example if an additional director appointed by Board vacated his office thereby creating casual vacancy, such casual vacancy cannot be filled under section 161(4) of the Companies Act 2013.
6. **Tenure of casual director:** The person so appointed will be eligible to act as a casual director till the remaining tenure of the director in whose place he was appointed by the company.

Secretarial Procedure for filling up of casual vacancy

Please find below the **procedure** for appointment of Director to fill the casual vacancy in Board Meeting as per Companies Act, 2013:

1. Check whether Articles of the Company contain any provisions to appoint Director to fill the casual vacancy read with Section 161(4) of the Companies Act, 2013. If yes, then follow the provisions given in Articles to fill the casual vacancy.
2. If Articles are silent about filling up of casual vacancy, then hold a board meeting to appoint a Director to fill the casual vacancy.
3. Collect DIN number of the proposed director u/s 153 read with from DIR-3 and DIR-4.
4. Collect following Documents/Consent/Declaration from the proposed director:

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- i. Consent in writing to act as Director in form **DIR-2** pursuant to Rule-8 of Companies (Appointment & Qualification of Directors) Rules, 2014.
- ii. Intimation in Form **DIR-8** pursuant to Rule-14 in terms of Companies (Appointment & Qualification of Directors) Rules, 2014, to the effect that he/she is not disqualified u/s 164(2) of Companies Act, 2013.
- iii. Disclosure of Interest in Form **MBP.1** pursuant to section 184(1) read with rule 9(1) of Companies (Meetings of Board and its Powers) Rules, 2014. Remember one thing **MBP.1** should not be dated earlier than date of his/her appointment as Director.

However, if there is nothing to disclose on the part of new Director, then form **MBP.1** may be collected later as and when his interest created in specified entities.

5. Hold a board meeting to pass Board Resolution for appointment of Director u/s 161(4) of Companies Act, 2013 to fill the vacancy caused by existing director.
6. File form **DIR.12** with ROC as return of appointment of Director within 30 days of passing board resolution for appointment.
7. Also check the management hierarchy of your company to check such Director comes under the category of “**one level below KMP**”. If yes then also file form **MGT.14** with board resolution for appointment

To know more about filing of **MGT.14** with concerned ROC regarding appointment or removal of “**one level below KMP**”, kindly refer my article available at the link below:

[List of Resolutions to be filed with ROC in form MGT.14](#)

8. Make necessary entries in the Register of Directors along with their Shareholding, if any, maintained u/s 170 of Companies Act, 2013.

Board resolution for taking note of Disclosure of Interest and filing of form MGT.14

Form **MBP.1** given by the Director appointed to fill the casual vacancy, towards disclosure of interest u/s 184, should be taken note of by the Board of Directors through a separate Board Resolution. This Board Resolution should be passed in the **next board meeting** to complete the formalities for appointment of casual vacancy Director.

As per section 179(3)(k) read with rule 8(5) of Companies (Meetings of Board and its Powers) Rules, 2014, taking note of the disclosure of director's interest and shareholding shall be done by the Board **only by means of resolutions** passed at meetings of the Board. Hence it is duty of the company to pass board resolution to take note of disclosure of interest by Director and file a

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copy of that board resolution in **MGT.14** within 30 days of passing board resolution as desired by section 117(3) of Companies Act, 2013.

Few Notable Points

Request all the professionals to please take note of below mentioned points w.r.t. secretarial practice and relevant provisions:

1. Intimation by such Director of such appointment to all other companies in which he/ she is already a Director (if any), would be required i.e., change in Disclosure of Interest u/s. 184 (1) in all other companies and subsequent compliance.
2. If proposed appointee is whole-time KMP in any other company, Board resolution of that company will be required as per first proviso to section 203(3).
3. Issue letter of appointment to the concerned Director.

SECRETARIAL PRACTICE / DRAFTING

Board Resolution for Appointment of Director to fill the casual vacancy

"RESOLVED THAT pursuant to Section 161(4) of the Companies Act, 2013 and other applicable provisions (including any modification or re-enactment thereof), if any, of the Companies Act, 2013, Mr. Sanyam Goel, be and is hereby appointed as a Director of the Company to fill up the casual vacancy caused due to Mr. Umesh Mehra vacating his office as a Director of the Company before the expiry of his term of office and that Mr. Sanyam Goel, is to hold office till the date the outgoing Director Mr. Umesh Mehra would have held office.

FURTHER RESOLVED THAT for the purpose of giving effect to this resolution, Mr. Manoj Agarwal, Director of the Company be and is hereby authorised, on behalf of the Company, to do all acts, deeds, matters and things as deem necessary, proper or desirable and to sign and execute all necessary documents, applications and returns for the purpose of giving effect to the aforesaid resolution along with filing of necessary E-form as return of appointment with the Registrar of Companies, NCT of Delhi and Haryana."

Disclaimer:

This write up is intended to start academic discussion on few significant interpretations under Companies Act, 2013. It is not intended to be a professional advice and should not be relied upon for real time professional facts. Readers are advised to refer relevant provision of law before applying or accepting any of the point mentioned above. Author accepts no responsibility whatsoever and will not be liable for any losses, claims or damages which may arise because of the contents of this write up.

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I am hopeful that this write up would be of some help w.r.t. your professional working and endeavours under Companies Act, 2013. Kindly share your opinion.

Thanks

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