APPOINTMENT AND QUALIFICATIONS OF DIRECTOR

BOD-SEC-2(10)

In relation to a company means the collective body of directors of the company

DIRECTOR- SEC 2(34)- means a director appointed to the board of the company (Exhaustive def)

COMPANY TO HAVE BOD-SEC 149

- Consisting of Individuals and minimum 3,2,1 for public, private and OPC respectively and maximum of 15 directors (more than 15 by passing SR, Maximum not applicable to Sec 8 and govt company but such companies not default u/s 92, 137 *filing of annual return and fs*)

- By articles can provide higher number as minimum strength.

- Atleast one director shall be stays in India not less than 182 days in FY (Newly one N/A)

- Only individuals to be director and directors cant assign the office (Must obtain DIN)

<u>WOMEN DIRECTOR</u>

- The public company will be required to mandatorily appoint at least one woman director if it fulfils any of the following criteria:

1. It is a listed company whose securities are listed on any stock exchange.
2. It is a company having paid-up capital of Rupees one hundred crore or more or a turnover of Rupees three hundred crores or more.

Vacancy shall be filled up by the board at the earliest but not later than immediately next board meeting or 3 months from the date of such vacancy whichever is later.

<u>INDEPENENT DIRECTORS (Exemption to Sec 8 and Govt Company)</u>

- Every listed public company must have atleast 1/3rd of total directors as ID and
  - Unlisted public company shall have atleast 2 ID if public Companies with paid-up share capital of Rs. 10 crores or more, Public Companies with turnover of Rs. 100 crore or more., Public Companies with aggregate outstanding loans, debentures, and deposits, exceeding Rs. 50 crore (Except Dormant, WOS, JV)

- Vacancy in Independent shall be filled in by the Board not later than next Board meeting or 3 months whichever is later

- The amount in last year financial statement shall be taken into consideration and the company must appoint higher number of directors if a higher number of ID is required by audit committee

- An ID, NED not being promoter or KMP shall be held liable , only in respect of such act or omission or commission by the company which had occurred with the knowledge/with his consent or connivance/has not acted diligently

- MD, WTD, Nominee director cannot be an ID, Schedule IV contains the code for ID

Qualifications-Sec 149(6)

An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director, –

- ✓ *who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;*
- ✓ *who is or was not a promoter of the company or its holding, subsidiary or associate company;*
- ✓ *who is not related to promoters or directors in the company, its holding, subsidiary or associate company;*
- ✓ *who has or had no pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent. 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 two immediately preceding financial years or during the current financial year;]*
- ✓ *none of whose relatives –*

(i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year:

Provided that 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 may be prescribed during the two 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 during the two 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 two per cent. 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);]

- ✓ *who, neither himself nor any of his relatives –*

(i) 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 three financial years immediately preceding the financial year in which he is proposed to be appointed;

Provided that in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding three financial years.]

- ✓ *is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of –*

(A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

(B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm;

- ✓ *holds together with his relatives two per cent. or more of the total voting power of the company; or*
- ✓ *is a Chief Executive or director, by whatever name called, of any nonprofit organisation that receives twenty-five per cent. or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or*

- ✓ *who possesses such other qualifications as may be prescribed.*

- ✓ *Every independent director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an independent director, give a declaration that he meets the criteria of independence as provided in sub-section*

- ✓ *a non-executive director not being promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.*

- ✓ *respect of retirement of directors by rotation shall not be applicable to appointment of independent directors.]*

OTHER POINTS

- Schedule IV of the Act contains a code for Independent Directors
- The Nomination & Remuneration Committee shall lay down the evaluation criteria for the performance of Independent Directors
- Obligation of Independent director to make a declaration

TERM

- He shall hold office for a term up to 5 consecutive years. On the expiry of his Ist term, he is eligible for the re-appointment. Re-appointment can be done by passing a special resolution by the company. Disclosure of such appointment is to be made in the Board's report term of the independent director is up to five consecutive years. (Remember one term is up to 5years)

- No independent director shall hold office for more than 2 consecutive terms. After the completion of 2 consecutive terms, he will only be not eligible for the appointment after a gap of 3 years and during 3 years he shall not be appointed in the company nor be associated with the company in any capacity.

- He may receive remuneration by way of fee for attending the meetings of Board or of committee or for other purpose as may be decided by the Board, Reimbursement of expenses for participation in the Board and other meetings and Profit related commission as may be approved by the members but shall not be entitled to stock option

LIABILITY OF INDEPENDENT DIRECTOR:

Independent director is Non-executive director who is not promoter nor shall key managerial personnel only be liable in the following circumstances –

- Of acts of omission or commission which had occurred with his knowledge(Board's agenda, board notes and minutes will play a vital role in determining participation by director and consequently his knowledge can be attributed). Of acts of commission or omission committed with his consent or connivance or of acts which show that he had not acted diligently.

MANNER OF SELECTION OF ID AND MAINTENANCE OF DATA-SEC 150

- Independent directors may be selected from database which contains their details, qualifications and expertise (Ex: Prime directors, Independent directors depository, Indian Board database)

- It is the responsibility of exercising due diligence before such appointment and selection

- The appointment shall be approved by the company in GM (Notice include explanatory notes with justification) and CG may prescribe the manner and selection of ID

APPOINTMENT OF DIRECTOR ELECTED BY SMALL SHAREHOLDERS-SEC 151

- ❖ A listed company may have one director elected by small shareholders (means shareholder holding shares of nominal value not exceeding 20000 or other sum prescribed)
- ❖ May be holder of equity- Preference share holder

SMALL SHARE HOLDER DIRECTOR

- ✓ A listed company , may upon a notice of at least 1000 small shareholders or 1/10th of total number of 'such' shareholder (.i.e.1/10th of total no. of small shareholders), whichever is lower, have a director elected by the small shareholders.

- ✓ small shareholders intending to propose a person as a candidate for the post of small shareholder shall leave a notice of their intention with the company at least 14 days before the meeting

- ✓ If the director elected by small directors fulfils the criteria of independent director laid down under section 149(6) and gives the declaration of his independence in accordance with section 149(7) then such director shall be considered as independent director

- ✓ Such director shall not be liable to retire by rotation, Tenure of such director shall not exceed 3 consecutive years ; and On the expiry of the tenure, such director shall not be eligible for re-appointment.

- ✓ Vacation of office of small shareholders' director. It states that a person appointed as small shareholders' director shall vacate the office if-

- ✓ He incurs any disqualification specified under section 164, The office of director becomes vacant in pursuance of section 167, The director ceases to meet the criteria of independence as provided under section 149(6).

- ✓ A person shall not be entitled to hold SSD in more than 2 companies at same time (second company business not to be conflict with the business of first company)

- ✓ No association with the company for next 3 years after cessation from directorship

- ✓ SSD included in total number of directors and appointed by postal ballot

APPOINTMENT OF DIRECTOR-SEC 152

- If no provisions made in articles, the subscribers of memorandum shall be deemed to be the first directors of the company (In OPC the member shall be deemed)

- Every director shall be appointed by the company in GM
    - ✓ DIN is mandatory, director shall given their consent he is not disqualified(DIR 2)

- ✓ Appointment shall be filed with registrar within 30 days
- ✓ In ID appointment explanatory statement annexed to notice and statement of board
- ✓ Exemption to sec 8 company
- ✓ Independent director and Nominee directors shall not be included in total number of directors
- ✓ Additional directors are non rotational director(appointed by board)

ROTATION OF DIRECTORS (Exemption to govt co)-Applicable only to public and subsidiary of public

- Unless articles so provide otherwise 2/3 of directors in public company liable to retire by rotation and 1/3 of 2/3rd shall retire at each AGM and they can be reappointed too (unless articles so provide otherwise)
- The retiring directors shall be those who have been longest in office since in their last appointment
- Not applicable to Nominee director, appointed by tribunal, Special, Small shareholders director, appointed by proportional representation, Independent directors

RETIRING DIRECTOR

- If vacant not filled, the meeting adjourned to next week same day and place and in adjourned if not filed it shall be deemed to have reappointed unless such resolution has lost, express unwillingness to act, not qualified, if appointment requires SR/OR, voted not individually(if national holiday then succeeding)
- Not applicable to private company, unlisted government company

APPLICATION FOR DIN- SEC 153

- Every individual who intends to be appointed as a director must file a form (DIR-3) with CG

ALLOTMENT OF DIN-SEC 154

- CG Shall allot DIN within 1 month to the applicant (power delegated to RD)
- If any mistake in application it can be rectify within 15 days
- CG shall reject, treat as invalid or inform the applicant the defect

PROHIBITION TO OBTAIN MORE THAN ONE DIN –SEC 155

OBLIGATION OF DIRECTOR TO INFORM DIN TO THE COMPANY- SEC 156

- Existing directors shall intimate DIN within 1 month of receipt in all companies in which he is a director

OBLIGATION OF COMPANY TO INFORM DIN TO ROC-SEC 157

- Company shall intimate DIN within 15 days of receipt of intimation to ROC(before 30/06/07)

OBLIGATION TO INDICATE DIN – SEC 158

- Any persons furnishes any return, information or particulars required to be furnished under the act and such persons shall mention DIN in such return, information or particulars (Non applicability to Govt company if entire share paid up capital held by CG/SG)

PUNISHMENT FOR CONTRAVENTION-SEC 159

- Makes any default in complying provisions of sec 152,155,156 such individual or directors of company shall be liable to a penalty which extend to 50000 and if continuing further penalty extend to 500 per day if default continues (Ordinance amendment 02/11/2018)

RIGHT OF PERSONS OTHER THAN RETIRING FOR DIRECTORSHIP-SEC 160

- In case of appointment other than retiring director, the member propose him as a director has not less than 14 days before meeting, left at registered office of the company

- Deposit amount of one lakhs and it shall be refunded if get more than 25% of vote (Not applicable ID or director recommended by NRC or by BOD)- Exemption to private , Sec 8, Govt, Nidhi
- The company shall inform its members about the candidature of the person proposed as a director atleast 7 days before GM (Non applicability of sec 101,102)
- Non compliance would render the appointment invalid

APPOINTMENT OF ADDITIONAL, ALTERNATE AND NOMINEE DIRECTOR- SEC 161

- By articles, the directors has the power to appoint additional directors and they shall hold office up to the date of next AGM or the last date on which the AGM or the last date on which the AGM should have been held, whichever is earlier
- BOD, if authorised by articles/resolution appoint alternate director (not being any person holding any alternate directorship in same company) to act as alternate during his absence for a period not less than 3 months from India

- If acting as a alternate for ID such person must also have such ID qualification

- Automatic reappointment provisions shall apply to original and not alternate (alternate directorship shall not included in number of directorship)

- Additional director may be appointed by passing a resolution at a board meeting or by passing resolution by circulation (he is not retiring director as per 152 and 160 treated as regular)

- BOD may appoint any person as director nominated by institution or agreement between CG/SG by virtue of its share holding in govt Co

- If director appointed in GM vacates before term, the resulting vacancy be filled by BOD meeting and later approved by members in next GM

- If casual vacancy filled by BOD again vacated such vacancy can be filled by board under this section and can only appoint additional director(death, resignation, disqualification, removal other than retirement and expiry of tenure)

APPOINTMENT OF DIRECTORS VOTED INDIVIDULLY-SEC 162

- Single resolution for appointment / reappointment of 2 or more directors is permitted, if before passing the single resolution a resolution is passed that the appointment / reappointment of 2 or more directors shall be made by a single resolution and no vote is cast against such resolution

- Consequences of appointment / reappointment of 2 or more directors by a single resolution in contravention of Sec. 162 : Such appointments shall be void and Provisions contained in Sec. 152(7) w.r.t. automatic reappointment shall not apply (N/A to Private, Fully owned govt company, WOS of such govt Co but not be default u/s 92, 137)

PROPOTIONAL REPRESENTATION –SEC 163

- Articles of company may provide appointment of not less than 2/3rd of the directors of a company according to principal of proportional representation, whether by single transferable vote or system of cumulative voting or otherwise and such appointments may be made once in every 3 years (Exemption to govt companies)

- Table F does not contain any provisions for appointment of directors under proportional representation and this section overrides entire companies Act 2013

QUALIFICATIONS AND DISQUALIFICATIONS OF DIRECTORS-SEC 164

- Unsound mind: Declared by a court, Unsound mind: Declared by a court, Applied to be adjudicated as an insolvent +Application is pending,
- Committed an offence (whether involving moral turpitude or otherwise)+ Convicted by a Court+ Imprisonment (6 months or more) then Disqualified for *5 years* (from the expiry of sentence)
- Committed an offence (whether involving moral turpitude or otherwise) + Committed an offence (whether involving moral turpitude or otherwise)+ Imprisonment (*7 years* or more) then Imprisonment (*7 years* or more)
- Order of Court or Tribunal + disqualifying him for appointment as a director + Order is in force
- Last day for payment of call on shares + 6 months if call not paid
- Offence u/s 188 + convicted and disqualified for 5 years
- If not allotted DIN

<u>*Disqualified due to company default-164(2)*</u>

- Company fails to file -financial statements; or annual returns for any continuous 3 years or Company fails to -*repay* the deposits/ pay interest thereon; or *redeem* debentures / pay interest thereon; or *pay* dividend and such failure continues for *1 year* or more then every person who is / has been a director of such company shall be *disqualified* for appointment as a director for *5 years 9 (Not apply to government company)*
- Private Company can specify additional grounds of disqualifications as per articles

- *Postponement of grounds (d),(e) and (g) of Sec.164(1) :* Ground u/s 164(1)(d),(e),(g) is attracted + 30 days+ Until appeal is disposed of (if appeal is filled within *30 days*)+ 7 days+ Until further appeal is disposed of (if further appeal is filed within *7 days*)

NUMBER OF DIRECTORSHIP-SEC 165

- '*Specified number of companies*' *(Maximum directorships)*
  - ✓ Directorships in *Public Co. (s)* + *Private Co. (s)* (including alternate directorships)- Max 20
  - ✓ Directorships in *Public Co. (s))* (including alternate directorships)- Max 10
  - ✓ A private company which is subsidiary of a public company shall be treated as public company
  - ✓ private company which is a *holding company of a public company treated as public company*
  - ✓ *Sec 8 company, Dormant company- Not applicable*

- Members by passing SR may specify lesser number of companies in which director of the company may act as a director

- If number of directorship held immediately before commencement of this act more than specified number of companies then within 1 year choose the companies wishes to continue and resign as director in other companies and intimate the choice to all such companies and ROC

Resignation u/s 165(3) - Effective immediately on dispatch *Not to act* as director in more than the 'specified number of companies' after dispatching his resignation; or after the expiry of *1 year* from the commencement of this Act, whichever is earlier

DUTIES OF DIRECTORS-SEC 166

- Act in accordance with articles in good faith so as to promote the objects of the company for the benefit of its members in best interest of employees, share holders, community and protection of environment

- To exercise his duty with due and reasonable care skill and diligence to exercise independent judgement

- Not involved in a situation where his interest may conflict with interest of the company and not to assign his office and hot to achieve undue gain

VACATION OF OFFICE BY DIRECTORS-SEC 167

- The office of the director shall become vacant
  - Incurs any *disqualification u/s 164, Absent*(with / without seeking leave of absence) all BMs held during *12 months,* Contravention of Sec.184, (*Participates in BM* in a contract or arrangement in which he is interested), Contravention of Sec.184 (*Fails to disclose* interest in contract or arrangement in which he is interested), Disqualified by an *order of Court or Tribunal,* Committed an *offence* (whether involving moral turpitude or + *Convicted* by a Court + Imprisonment (*6 months* or more) even appeal is filed, Removed, Appointed as a director by virtue of his holding any office in the holding, subsidiary or associate company ceases to hold such office in that company

- In vacation of offices of all the directors under any disqualifications the Promoter; or CG (in the absence of promoter) shall appoint required number of directors who shall hold office till the directors are appointed by company in GM

- If a director who becomes disqualified u/s 164(2) is also director in any other company, then his office of director in all such other companies shall becomes vacant, but his office of director in the defaulting company shall not become vaccant

- A private company by articles provide any other ground for vacation of office of director

RESIGNATION BY DIRECTORS –SEC 168

- Director can resign by give notice in writing to the company and the date of resignation should be the date of receipt by the company or date specified in notice

- The directors shall remain liable for offences committed during his tenure

- Board may take note of resignation in board meeting and the company shall intimation of resignation within 30 days to registrar(DIR-12) and directors personally in form DIR-11 within 30 days of resignation

- Company shall include the facts of resignation in board reports and the foreign director may authorise practicing CA/CS/CMA/any other resident director of the company to file DIR-11

- If all directors resign from office or vacates from office, the promoter or in his absence CG shall appoint required number of directors who shall hold office till the directors are appointed by members in GM

REMOVAL OF DIRECTORS-SEC 169

- By ordinary resolution (not being appointed by tribunal, Nominee) before expiry after giving reasonable opportunity of being heard, but in case of ID reappointed for second term shall be removed only by passing SR – Not applicable incase of appointment by proportional representation

- Special notice is required (Refer Sec 115) , the director concerned make representation in writing to the company and requests its notification to members of the company

- Notice to members state fact of representation and send a copy along with it (if not send director may require the representation shall be read out in meeting)

- Not required to be send with the approval with the application of company or any member of if it include defamatory matters or needless publicity

- Vacancy be filled by the board and the tenure shall be till the predecessor would have held office if he had not been removed

- Removed director cannot be reappointed as director by BOD

REGISTER OF DIRECTORS AND KMP-SEC 170

- Every director and KMP register shall contain personal details and prescribed detailed of securities in the company/associate/holding/subsidiary company

- Register shall maintained in registered office of the company and any changes of directors must intimate to registrar within 30 days (N/A if entire SC held by government)

MEMBERS RIGHT TO INSPECT THE REGISTER OF DIRECTORS AND KMP AND THEIR SHARE HOLDING- SEC 171

- Members has the right to inspect during business hours at every AGM or by any person attending the AGM and has right to extract the copies free of cost within 30 days of request

- If any member request inspection/copies to company and its refused/ copy is not furnished by company then registrar may order immediate inspection/supply copies t the company

PUNISHMENT FOR CONTRAVENTION-SEC 172

- Contravention of any provision (Sec 149 to 172) by any company then fine on company and every officer in default min 50000 and max 5 lakhs