CORPORATE AND ECONOMIC LAWS

Final Course - Paper-4

NEW SYLLABUS - NOV 2020 EXAMS & ONWARDS

New Scheme of Education and Training

CHAPTER 1

APPOINTMENT & QUALIFICATIONS OF DIRECTORS

Introduction:

Different meaning of "Board or Board of Director"

Section	Description
Section 2(10)	Means the collective body of the directors of the company.
Section 2(34)	Means a director appointed to the Board of a company

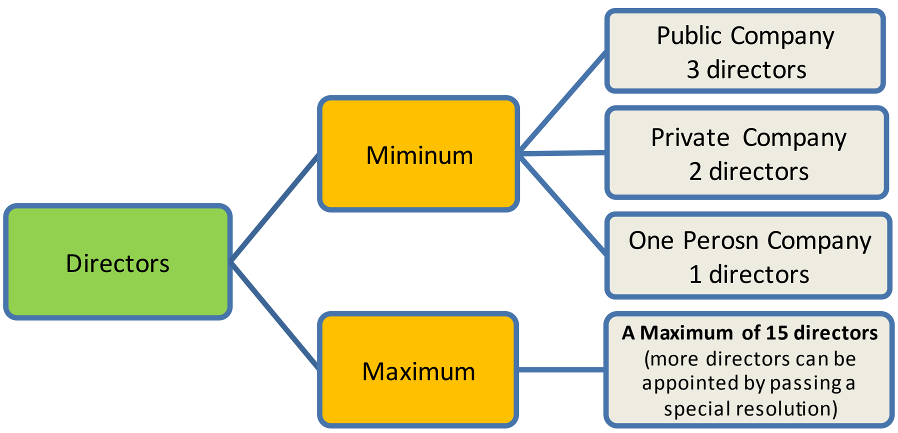
The directors are the individuals who are appointed to manage the business affairs of a company. A company is an artificial person created by law having separate legal existence but without any physical body or mind of its own.

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.
- **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.
- Definition of 'officer' U/s 2(59) of Act 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.

2. Company to have board of director:

Section 149 of the companies Act 2013, every company shall have a board of director consisting of individuals as director and shall have Minimum and Maximum number of directors:



(1) WOMEN DIRECTOR

At least 1 woman director shall be on board. The companies Rule 2014 states that following class of companies shall **appoint at least one women director:**

(a) Every listed company.

(b) Every other public limited company:

-- Paid up share capital of 100 crore or more

OR

-- Turnover of 300 crore or more

(c) If there is any intermittent (irregular) vacancy of a woman director, it shall be filled up by the board but not later than immediate next board meeting or 3 months from the date of such vacancy whichever is later. **This can be explained with the following example:**

Vacancy of the woman director due to death **17-March-2019.**

Date of board meeting **25-June-2019**

Going by the law, if board meeting was to be held on 25-June-2019, then the vacancy shall be filled up by 25-June-2019 or 17-June-2019 whichever is later. In this case, it shall be filled up by 25-June-2019.

(2) RESIDENT DIRECTOR

Every company shall have at-least 1 resident director who has stayed in India for total of not less than 182 days in financial year.

New incorporated company:

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.

(3) INDEPENDENT DIRECTOR

- Prescribed large public companies are required to appoint independent directors on their Board with a view to boost the level of corporate governance.
- The provisions relating to independent directors are discussed later in this Chapter.

(4) 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.
- He needs to disclose his interest at the appropriate forum and at appropriate time.

(5) EXECUTIVE & NON-EXECUTIVE DIRECTOR

Executive director -->

- 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

Non-Executive director -->

- Participate through Board meetings in discussions relating to framing of policies for the efficient management of the company.
- Independent directors are a type of non-executive directors. They are not as active as executive directors. They are to be held liable only if they knowingly consented to the wrongful acts.

3. Appointment of Directors:

Section 152

- **Appointment of first director:**

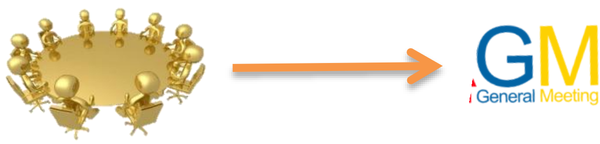
Where no provision is made in the articles of a company — **Subscribers to the memorandum** who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed.

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.

Point to remember →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

- **Appointment of subsequent Directors:** **Section- 152(2)**

Save as otherwise expressly provided in this Act, every director shall be appointed by the company in general meeting.



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

- **Other requirement of appointment:**

Allotment of Director Identification Number (DIN):

- A person shall be appointed as director of the company when he has been allotted DIN or any other number.

Providing of DIN and furnishing of Declaration by the proposed Director:

- A person to be appointed as director in general meeting or otherwise;
- Shall furnish DIN or any other number as prescribed.
- He shall also furnish a declaration that he is not disqualified to become a director

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 director.
- The consent shall be furnished to the company on or before his appointment as director in Form DIR-2.

Explanatory Statement in case of appointment of Independent Director

- When independent director is appointed in GM,
- An explanatory statement annexed to the notice for the general meeting, shall include statement that in opinion of the Board, he fulfils the conditions for such appointment

Exemption to above provisions:

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. (अगर सरकार करता है तो सब ठीक है, otherwise all other have to do).

(2) Similar exemption from Section 152(5) is also applicable to a section 8 company.

In both the above cases, the exemption is applicable only if 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.

- **Retirement of director by rotation: Section – 152(6)**

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

(i) Unless the articles provides for retirement (मतलब if article of association says वो होगा, if not then) at every annual general meeting, not less than 2/3 of total number of directors(Public company) shall:

(A) Be person whose office tenure is liable to be determined by retirement of director by rotation.

(B) Save as otherwise expressly provided in act be appointed by the company in general meeting.

(ii) 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.

(iii) At the first AGM of a public company held next **after the date of general meeting,** at which first (1^{st}) directors are appointed; and **at every general meeting**

$1/3^{rd}$ of the directors for the time being (Liable to retire by rotation)

OR

If their number is neither 3 nor multiple of 3, then number nearest to one-third shall retire

A company is having 7 directors,
(a) Directors liable to retire by rotation are: 7*2/3 i.e. 4.7 or 5 (not less than two-third)
(b) Directors to retire at AGM: 5* 1/3 i.e. 1.67 or nearest to $1/3^{rd}$ is 2.
A company is having six directors,
(a) Directors liable to retire by rotation are: 6*2/3 i.e. 4
(b) Directors to retire at AGM: 4* 1/3 i.e. 1.33 or nearest to $1/3^{rd}$ is 1.

(iv) 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.

(v) Following directors are not covered under the ambit of retire by rotation

- **Independent Directors.**
- **Nominee Director** - **Any person appointed as a nominee director being nominated by any institution/central/state government in pursuance of the provisions of any law cannot be considered as a director liable to retire by rotation.**

(vi) In above example, as per law 2 directors must retire. But who???...Law says →

- **Directors who have been longest in the office since their last appointment are the directors who need to be retired first**
- **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.**

Retirement and then vacancy to be filled up.

(Retirement और फिर vacancy को भरने के लिए)

(vii) Directors are retired now, so there is vacancy, the company may fill up the vacancy by appointing the **retiring director** or **some other person thereto**:

- 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, provisions of Section 160(3) are to be complied with.

(viii) We are discussing about the retirement and re-appointment/appointment of directors at AGM.

What will happen in case AGM is not held on due date:

"The directors will retire by rotation even though AGM could not be held. The retirement process will not be postponed. The directors who are liable to retire must vacate the office of director on that very date when the AGM is ought to have been held".

(ix) 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 provisions in articles of the company.

- **Deemed re-appointment of retiring directors under certain circumstances {Sec-152(7)}**

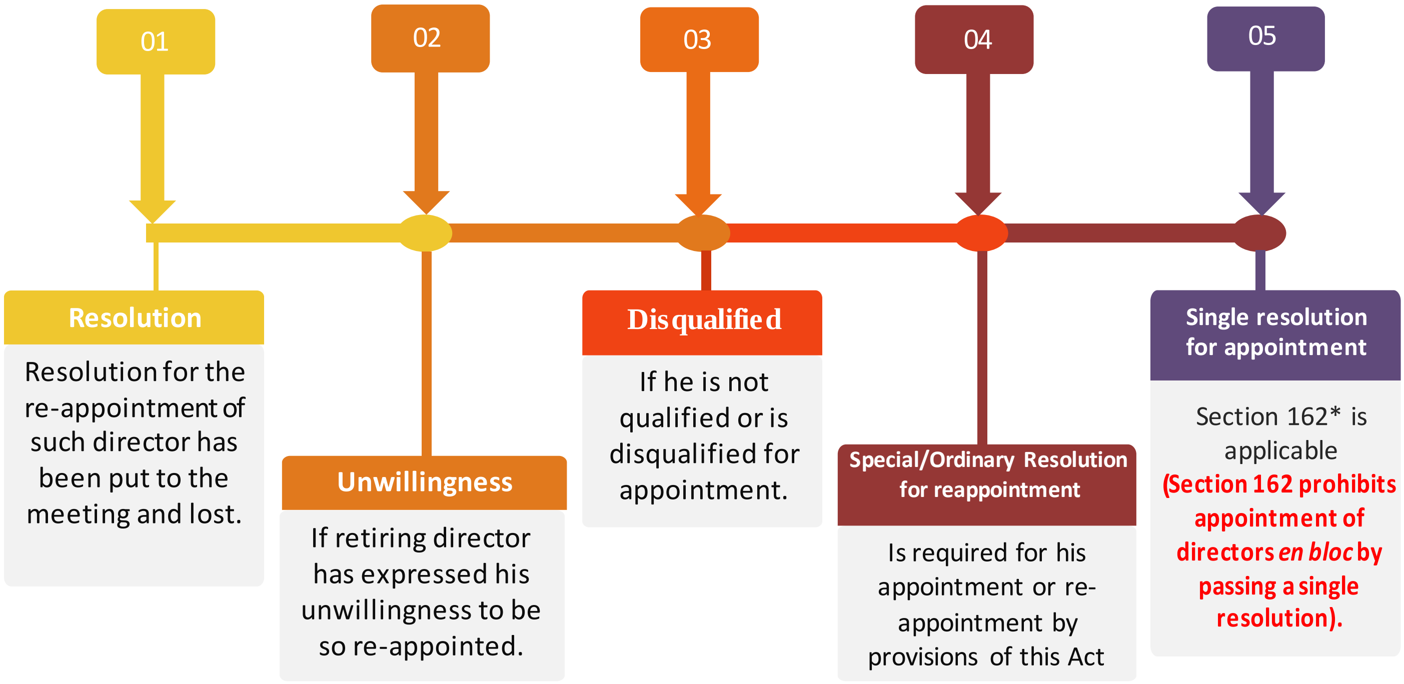
Adjournment of general meeting:

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.

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.

However there are certain exceptions to the above re-appointment provisions. List of the reasons are enumerated below:



*** 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.

4. Director Identification Number:

Section 153 to 159

- **Appointment of first director:**

"DIN" means director identification number. This is allotted by central government to any individual for the purpose of his identification as a director of the company. Section 153 deals with the filing application for allotment of DIN. As such, a person intended to be appointed as director shall make application to the central government in such form and with prescribed fee.

Section	Narrative	Description
152(3)	Requirement of DIN	No person shall be appointed as director unless he Has been allotted DIN under section 154.
153	Filling of application For allotment of DIN	Every individual intending to be appointed as director of company shall make an application for allotment of DIN to central government in prescribed manner.

Now will discuss process of filling of application for allotment of DIN before appointment in a company:-

1. Every individual shall make an application electronically in form DIR-3 to the central government with fee as prescribed.
2. The central government shall provide electronic system to facilitate submission of electronic application for the DIN allotment.

3. **Follows:**

(a) The applicant shall download the form DIR-3 from the portal, fill up the required particulars, verify and sign the form and after attaching the following set of documents:

-- Photograph.

-- Proof of identity.

-- Proof of residence.

-- Specimen signature duly verified.

(b) Form DIR-3 will be signed and submitted electronically by the applicant using his own digital signature certificate and shall be verified by:

-- A CA or CS or Cost accountant in practice.

-- A CS in full time employment of the company or

-- MD or director or CEO or CFO of the company in which applicant is to be appointed as director.

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: Section 154

"Central government within 1 month from the receipt of application, allot a DIN to the applicant". Under rule 10 of companies rules 2014 provides following procedure for rejection/allotment of DIN:-

1. On the submission of form DIN-3 by the applicant inline, a provisional DIN is allotted which shall not be utilised till the DIN is confirmed by the central government.

2. After providing the provisional DIN, **central government will process the application and either reject or approve it**. The same will be communicated to applicant. In case of approval, communication is done by way of letter by post/electronically, **within 1 month from receipt of application**.

3. In case, central government find such application to be defective, it shall intimate of such defect by placing it on website and by email to the applicant**, directing the applicant to rectify the defects within 15 days of such placing on the website and email.**

4. The central government shall:
   - Reject application and direct the applicant to file new application with complete details, where information in revised application is still found to be defective.
   - Treat and label application as invalid in the electronic records.
   - Inform the applicant by way of letter by post or electronically.
   - In case of rejection/invalidation of application, provisional DIN so allotted will lapse

All DIN allotted by the central government before the commencement of these rules shall be deemed to have been allotted under this rule. (अगर DIN is alloted before these rules become applicable, समझा जाता है that DIN is alloted within these new rules).The DIN so allotted to the applicant is for life time and cannot be allotted to other person.

• Prohibition on obtaining more than 1 DIN Section 155

According to Section 155, no individual, who has already been allotted a DIN under section 154, shall apply for, obtain or possess another DIN.

• Director to intimate DIN — Section 156

Every director who has been allotted DIN shall intimate the DIN to the company or all companies in which he is director. The intimation should be done within 1 month of receipt of DIN from the central government.

• Company to inform DIN to registrar — Section 157(1)

Every company shall within 15 days of receipt of intimation U/s 156, furnish DIN of all directors to the registrar/other officer with the prescribed fee. Under Rule 10A of companies rule 2014;

(1) Every director (functioning as director in one or more company on or before 30th June 2007) has not intimated his DIN to such company or companies;

(2) Shall **within 1 month of** receipt of DIN from central government, intimate his director identification number to the company wherein he his director as per **FORM DIR-3B**.

• Punishment for failure of furnish SIN to registrar: — Section 157(2)

This provision speaks of the penalty to be levied on company or defaulting officer in case of its failure to furnish DIN details to registrar of the company.

- Company shall be punishable with fine : INR 25,000 & INR 100 every day in case of continuing default.
- Officer of the company who is in default : INR 25,000 & INR 100 every day in case of continuing default.

(In both scenarios, the maximum amount is INR 1, 00,000)

• Obligatory to indicate DIN: — Section 158

Every person or company while furnishing any return, information or particulars shall mention the director Identification Number in such return or information.

• Punishment for contravention of Sec152,155 & 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 up-to INR 50, 000 where default is continuing, with a further penalty up-to INR 500 each day after first during which the default continues.

• Cancellation or surrender or de-activation & re-activation of DIN: — Rule 11

Following procedure to be followed up for cancellation/deactivation/surrender of DIN:

(1) Central government upon being satisfied on verification of particulars or documentary proof attached with the application received from any person, may cancel or deactivate if:-

(a) DIN is found to be duplicate

(b) DIN was obtained by fraudulent means or wrongful manner.

However, before cancellation of DIN, an opportunity of being heard shall be given to the concerned individuals. Here, “wrong manner” depicts that

- DIN was obtained on the basis of documents which are not legally valid 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.
- Term “fraudulent” means if the DIN is obtained with an intent to deceive any other person or any authority including the Central Government

(c) Death of individual.

(d) If the concerned individual has been adjudicated (निर्णय करना) an insolvent.

(e) Concerned individual has been declared as a person of unsound mind by a competent Court.

(f) On an application made in Form DIR-5 by DIN holder to surrender his/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.

- **Intimation of changes in particulars specified in DIN application: Rule 12**

(1) In the event of any changes in his particulars as stated in DIR3, intimate such changes to central government within a period of thirty days of such change(s) in Form DIR-6 in the following manner:

(i) The applicant shall download Form DIR-6 from portal, fill in 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) Central government upon being satisfied:

- After verification of such changed particulars from the enclosed proofs;
- All 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.

(3) The DIN cell of ministry shall also intimate:

- Change(s) in the particulars of 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) 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.**

5. Right of persons other than retiring Directors to stand for directorship :

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

(i) Requirement of written Notice:

(1) A **person who is not a retiring director** shall be eligible for appointment as a director at any general meeting, if he has left at the registered office of the company a notice in writing under his hand signifying his candidature as **a director at least 14 days before the meeting**.

(2) Some other member of the company who intends to propose such other person as a director can also leave 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:

Written notice to be accompanied with INR 1,00,000 or higher amount as prescribed. Below are exceptions to the aforesaid condition:

(1) In case of appointment of independent director.

(2) In case of appointment of independent director recommended by **nomination & remuneration committee.**

(3) In case of appointment of independent director by board of directors of the company, in case company is not required to constitute **nomination & remuneration committee.**

(iii) Action by the company:

The company shall inform its members regarding the candidature of a person for the office of director atleast At least 7 days before the general meeting, by-

(1) 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) Placing notice of such candidature on its website, if any.

(iv) Refund of deposit:

If a 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, then deposit amount shall be refunded.

- For section 160, retiring director means director "retiring by rotation".
- In case of appointment of additional director or alternate director or nominee director appointed to fill a **causal vacancy,** then procedure laid in Sec-160 is to be followed.
- 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.

- **Exemptions to section 160 (Non applicability of section 160):**

Section 160 is not applicable to→

(1) Notifications No. 463 (E) as amended by Notifications No. 582 (E):-

(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) Notifications No. 464 (E) as amended by Notifications No. 583 (E), private companies are exempted from provisions of section 160.

(3) Notifications No. 466 (E) as amended by Notifications No. 584 (E), section 8 companies are exempted whose article provides election of directors by ballot.

--- VERY IMPORTANT POINT ---

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 by small shareholders: Section 151

As per provision, a listed company may **have only 1 director** elected by small shareholders. This helps the small shareholders to have a representative among board members so that their voices are heard.

But यहsmall shareholders कौन है, कहाँ से आते हैं यह लोग

The term "small shareholders" means a shareholder holding shares of nominal value of not more than INR 20,000 or such other sum as may be prescribed. Rule 7 of Companies rules 2014 lays down the various provisions in respect of shareholders and appointment of director:

(i) Strength of small shareholders required for appointment of their director:

A listed company may, upon notice of not less than:

- one thousand small shareholders; or **(1,000)**
- one- tenth of the total number of such shareholders **(1/10th)**

Whichever is lower

Have a small shareholders' director elected by the small shareholders. However, a listed company may opt to have a director representing small shareholders suo motu 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 post of small shareholder director:

- shall leave a notice of their intention with the company atleast 14 days before meeting;
- Under their signature specifying name, address, share holds and folio number of proposed person.
- If person from outside company, then folio number and details of shares held, **not required.**

(iii) Statement to be annexed:

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 shareholder's director as independent director:

- Such director shall act as **independent director.**
- He should meet the eligibility criteria pertaining to independent director and should give 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 retire by rotation.

(b) Tenure of such directorship shall not **exceed a period of 3 consecutive years.**

(c) On expiry of term, such directors are not eligible for re-appointment.

(vi) Vacation of Office:

A person appointed as small shareholder's director shall vacate office if-

(a) If director incurs any disqualification – U/s 164.

(b) If office becomes vacant as per section 167.

(c) If director ceases to meet criteria of independence as per section 149(6).

(vii) Maximum number of directorship:

- A small shareholder director shall not more than 2 companies at the same time.
- 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.

(viii) Cooling period:

- A small shareholder director shall not **for period of 3 years from date on which he ceases to hold office;**
- Be appointed in or be associated with such company in any other capacity, either directly or indirectly.

** (Directorship से हटाए जाने के बाद, next 3 years तकsuch person cannot be appointed as director)

7. Appointment of additional director, alternate director, director to fill casual vacancy and nominee director Section 161

Section	Narrative	Description
161(1)	Additional Director **Who will elect →** **Disqualification →** **Tenure →**	**Provisions in respect of appointment:** (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 elected as director in general meeting cannot be appointed as additional director. (iii) Additional director **shall hold till next AGM or last date on which AGM should have been held (Whichever is earlier).**

Important points to be considered:-

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

Section	Narrative	Description
161(2)	**Alternate Director** **Who will elect →**	Provisions in respect of appointment: (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 to act as an alternate director for a director during his absence for a period of not less than three months from India. (ii) Person who is eligible to be appointed as alternate director shall be qualified to be appointed as alternate director. (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.
	Tenure→	Term of alternate director 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.
	Who will elect →	It is the Board which shall make the appointment because the authority for such appointment vests in the Board.

Important points to be considered:-

- 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.
- A person who is already an alternate director in the company cannot hold another alternate directorship.
- For considering maximum number of directorships of a person under Section 165, the alternate directorship shall also be counted.
- 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.

Section	Narrative	Description
161(3)	**Nominee Director**	**Provisions in respect of appointment:** (i) 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; (ii) Or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

Important points to be considered:-

- 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 nominates its representative for safeguarding its interests till the loaned amount is completely repaid.
- The Board of Directors (subject to the articles) is empowered to appoint a nominee director and the shareholders cannot interfere with such appointment.

Section	Narrative	Description
161(4)	**Casual Vacancy**	**Provisions in respect of appointment:** **(i)** If office of director which is appointed by company in general meeting is vacated before expiry term, the resulting vacancy; **(ii)** To 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]

<u>Important points to be considered:-</u>

- **What all are covered under casual vacancy?**

  ☑ Death ☑ Attraction of disqualification ☑ tendering of resignation or removal

- **What all are the cases not covered under casual vacancy?**

  ☑ Decline to assume office after appointment

When there was no assumption of office by the director, how can he vacate. Thus, there arises no casual vacancy.

- 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.

- **What will happen in case of "woman director" and "independent director" vacancy?**

Intermittent Vacancy

Board shall fill such casual vacancy at the earliest but not:
(a) later than immediate next Board meeting; OR
(b) 3 months from the date of creation of such vacancy
Whichever is later

Board shall fill such casual vacancy at the earliest but not:
(a) later than immediate next Board meeting; OR
(b) 3 months from the date of creation of such vacancy
whichever is later.

- 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.

8. Appointment of directors to be voted individual — Section 162

Section 162 requires every individual person to be voted individually for appointment as director.

<u>Reason for such provisions →</u>

Electing more than 1 director through single resolution will deprive shareholders from their rights of electing a specific person. Shareholders have either to accept or reject the appointments if done collectively. He cannot make choices among the available.

Exemption from the provision→

(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.

(c) Private company.

(Exemption is applicable only if such private/ government 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 principal of representation for appointment of directors — Section 163

As general rule, directors are appointed by simple majority. In case shareholders holding 51% of shareholding enjoys more power (for appointing directors) as compared to rest of 49% of shareholders. This will create an unpleasant situation in company and hence **provision of section 163 comes into play.** Below are the provisions:

(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 Companies Act, 2013.

(ii) The articles of a company need to contain provisions for the appointment of directors by proportional representation. AOA must contain procedure to enable minority shareholder to appoint director through proportionate representation.

(iii) The articles need to provide for the appointment of not less than two-thirds (i.e. minimum 2/3rd or more) of the total number of the directors in accordance with the principle of proportional representation.

(iv) Following methods of voting:

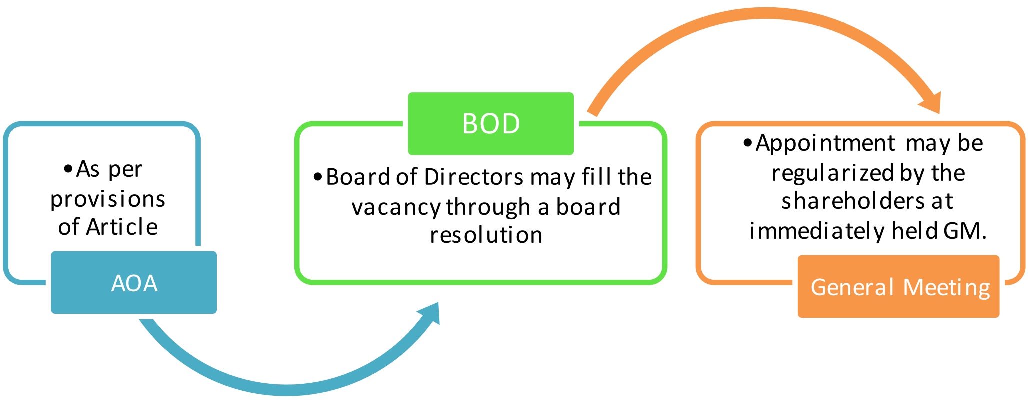
(a) A candidate gets elected if he secures the requisite votes fixed as quota.

(b) Voting according to a system of 'cumulative voting'

(c) Any other transparent and effective method of voting if it ensures that the Board shall have fair representation of the minority interest, in case aforesaid methods are not adopted.

(v) Such appointments may be made once in every 3 years.

(vi) In case of casual vacancy, following to be considered while appointing→



Exemption from the provision→

(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.

(Exemption is applicable only if such private/ government company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

10. Disqualification of Directors — 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. Various disqualifications are:

(i) Section 164(1) states that a person shall not be appointed as a director if-

दिवालिया (Insolvent)	अपराधी (Culprit)
1. Undischarged insolvent. 2. Applied to be adjudicated as an inslovent and his application is pending in court.	1. Convicted by court, and imprisonment for not less than 6 months & period of 5 years has not lapsed. 2. Disqualified by the order of court or tribunal to be appointed as director. 3. Convicted of an offence of dealing with related party transactions under section 188.

(ii) Section 164(2) 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-

1. He has not complied with sec-152(3) which requires director to **obtain DIN.**
2. No person who is or has been director of company which:
   (a) Has not filed financial statement for continuous period of 3 years.
   (b) Has failed to repay deposits or interest thereon or debentures or interest, or has not declared dividend for 1 year or more.

** Director concerned shall not be eligible to be reappointed as director of such defaulting company or in other company for **period of 5 years from date on which such company committed default.**

** 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 6 months from the date of his appointment.**

(iii) Section 164(3) empowers **private companies to** provide for additional qualifications through its article of association.

11. Maximum number of Directorship — Section 165

Section No.	Narrative	Descriptive
165(1)	Maximum permissible number of directorship **** Directorship in section 8 companies will not be counted for determining the permissible limit.**	▪ No person (after this act commencement) shall hold office as director, including **alternate directorship**, in more than 20 companies at the same time. ▪ Out of 20, a person can be appointed as director in public company up-to 10. (In such case, private company that is either holding/subsidiary of public company shall be included in limit of public company).
165(2)	Lesser number of directorships than maximum	Member of company, **by way of special resolution,** specify lesser number of directorship than maximum.;

165(3)	Prescription of transition period of 1 year	Immediately before commencement of companies act 2013 **(i.e. 01.04.2014)**, if any person holding office as director in more than specified limits, he was required within 1 year**(i.e. 31.03.2015)** to: (a) Choose not more than the specified limit of companies, in which he wish to continue to hold office of director. (b) resign his office as director in remaining companies (c) Intimate the choice made by him to each of the companies in which he was director and to the jurisdictional Registrar.
165(4)	Resignation	Any resignation so made was to become effective immediately on the dispatch thereof to the company concerned.
165(5)	Dispatching resignation	No such person would act as director in more than the specified number of companies, **"After dispatching the resignation of his office as director/non-executive director or after the completion of the transition period of one year" whichever is EARLIER**
165(6)	Punishment for contravention	In case a person holds directorship more than the specified limit (subject to exemptions), shall be liable to a penalty **of ₹ 5,000 for every day after first during such contravention continues.**

12. Independent Directors **Section 149**

(a) Number of Independent Directors:

Following companies are required to appoint independent directors→

Listed Companies	149(4)	Every listed public company shall have at least one-third of the total number of directors as independent directors.
Other Public Companies	 	Central government is empowered to prescribe certain minimum number of independent directors for a class or classes of public cos. Companies rule 2014 states that the following class or classes of companies shall have at **least two directors** as independent directors: All such public companies which have paid up share capital of **10 crore rupees or more; or** All such public companies which have **turnover of 100 crore rupees or more.**  All such public companies which have, in the aggregate, outstanding loans, debentures and deposits, **exceeding 50 crore rupees.**

(b) Requirement of higher number:

Due to composition of its audit committee, if a public company covered under above rule, is required to appoint a higher number of independent directors, such higher number shall be applicable to it. **Audit Committee shall consist of a minimum of 3 directors with independent directors forming a majority.**

(c) Intermittent (irregular) vacancy of an independent director:

Such vacancy to be filled up **by board of directors at the earliest but not later than**

"Immediate next Board meeting

OR

3 months from the date of such vacancy, whichever is later."

(d) Duration of conditions after non-fulfilment of which no appointment required:

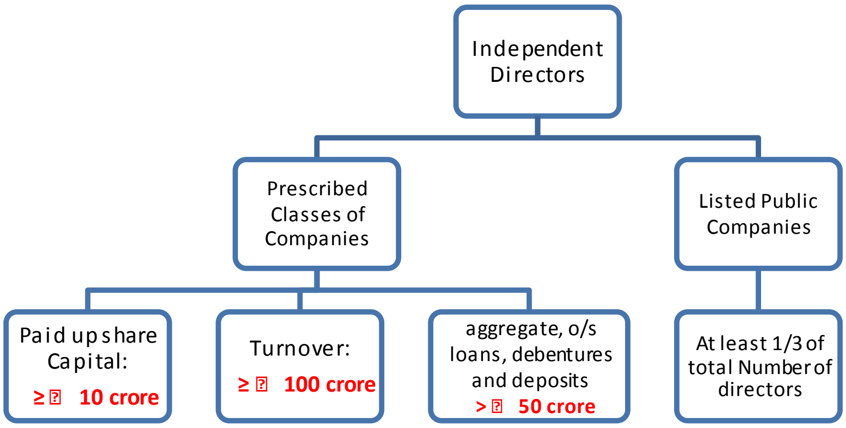
- A company which was obligated to appoint independent directors, shall not be required to make such appointment if;
- It ceases to fulfill any of the 3 conditions relating to paid-up share capital /turnover /outstanding loans, etc. for **three consecutive years.**
- It shall again be required to appoint independent directors if it starts meeting any of such conditions.

** **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.**

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

Joint ventures, wholly owned subsidiaries and dormant companies are not covered under Rule 4 (1)

If company ceases to fulfil any of the 3 conditions for 3 consecutive years.- No appointment of independent directors.



(e) Other provisions regarding independent director:

Section	Narrative
149(6)	Who can be an independent director

1. Who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;
   (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 company **(Its holding, subsidiary or associate co.)**

2. 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.

3. <u>None of the relatives-</u>
   (i) Is holding any security of or interest in the company **(Its holding, subsidiary or associate co.)**
   Exception → **Relative may hold security or interest in the company of face value not exceeding ₹ 50 lacs rupees or 2% of the paid-up capital of the company, or any higher sum as 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 co.)** for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year.
   (iv) Has any other pecuniary transaction or relationship with company **(Its holding, subsidiary or associate co.)** amounting to 2% or more of its gross turnover or total income singly or in combination with the transactions mentioned in point (i), (ii) & (iii).

4. Who neither himself nor any of his relative-

(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.

(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-
   (i) Firm of auditors/ CS in practice/ cost auditors of company (its holding, subsidiary or associate);
   (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.

(d) Is Chief executive of any non- profit organisation that receives **25%** per cent or more of its receipts from the company or **that holds 2% or more of the total voting power of the company**.

(e) Who possesses such other qualifications as are prescribed under Rule 5 of the Companies (Appointment and Qualification of Directors) Rules, 2014.

Section	Narrative
149(7)	**Declaration by independent director**

Every independent director shall give a declaration that he has meets all the criteria provided u/s 149(6) 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 circumstances** which may affect his status as an independent director.

Section	Narrative
149(8)	**Code for independent director**

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.

Section	Narrative
149(9)	**Remuneration of independent director**

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:

Entitled to:	Not Entitled to:
Fee provided under section 197(5)	Any stock option
Reimbursement of expenses for participation in: (i) Board Meetings (ii) Other Meetings	
Profit related commission as may be approved by the members	

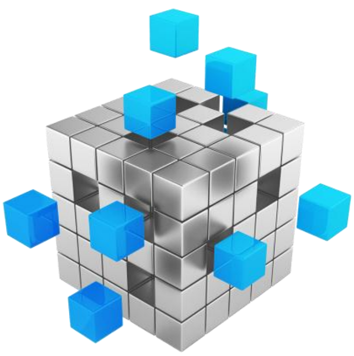
Section	Narrative
149(10) &(11)	Tenure of independent director
Term	Subject to the provisions of section 152 (Appointment of Directors), an independent director shall hold office for a term up to **5** consecutive years on the Board of a company.
Eligibility for Re-appointment	Eligible for re-appointment- 1. Passing of a special resolution by the company & 2. Disclosure of such appointment in the Board's report.
Removal	149(10) — Shall be removed by the company only by passing a special resolution
Limit on holding of office	An independent director shall not hold office for more than 2 consecutive terms.
Cooling period for appointment	**Below are the provisions:** 1. He/she shall be eligible for appointment after the expiration of three years of ceasing to be an independent director 2. During the said period of three years he shall not be appointed in or be associated with the company in any other capacity, either directly or indirectly.

Section	Narrative
149(12)	Liability
Parties Liable	**Liable Acts**
(i) An independent director (ii) A non-executive director not being promoter or key managerial personnel	• 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

Section	Narrative
149(13)	Retire By rotation
• Independent Directors are not liable to retire by rotation	

13. Manner of selection of independent director & maintenance of data bank of independent director: Section 150

Companies Rules, 2014, contain provisions regarding the manner of selection of independent directors and maintenance of databank of independent directors. These provisions are stated below:

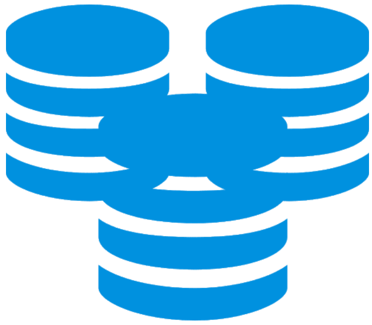


According to Rule 6 (1),

- Any body, institute or association (referred as "the agency"), which has been authorized in this behalf by the Central Government'
- shall create and maintain a data bank of persons willing and eligible to be appointed as independent director;
- Such data bank shall be placed on the website of the Ministry of Corporate Affairs or on any other website as may be approved or notified by the Central Government.

Details to be included in data bank:

- DIN (Director Identification Number); - Name & Surname
- Father's Name - Date of Birth - Gender
- Nationality - Occupation - Phone Number
- Email ID - Legal proceedings against person.
- Educational and professional qualifications - Experience
- List of companies in which he is or was director along with name and nature of industry.

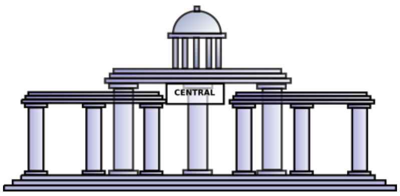


Due diligence to be exercised by the company:

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.**

Approval of appointment in general meeting: (क्यों)

1. The appointment of independent director shall be approved by the company in general meeting.
2. 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.



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.

14. Duties of director: Section 149

Section 166 specifies the following duties which are required to be accomplished by a director:

1. He shall act in accordance with articles of company, subject to the provisions of the Companies Act, 2013.
2. He shall act in good faith in order to promote objects of company for benefit of its members as a whole.
3. He shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
4. He shall not involve in a situation in which he may have a direct or indirect interest that conflicts with the interest of the company.
5. He shall not achieve any undue gain or advantage either to himself or to his relatives, partners, or associates. If found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
6. He shall not assign his office to anyone and if any assignment is so made, it shall be void.

   **** Since shareholders have elected a particular person for the post of director, so in case another person act as a director, then shareholders may not have faith in that another person. a person who does not command the faith of the shareholders cannot be given the responsibility to manage the company.**

Punishment for not accomplishing statutory duties→

1. **If any director of the company contravenes the provisions of Section 166,**
2. **Such director shall be punishable with fine which shall not be less than INR 1,00,000 but which may extend to INR 5,00,000**

Other duties of director:

1 File Document
Directors to file various documents required to be filed with the Registrar within the specified time limits

2 Convene General Meetings
Annual General Meeting (AGM) and extraordinary general meetings (EGMs)27 need to be convened by the directors

3 Attend Board Meetings
A director should attend the board meetings. In case of cabsence*, he shall be deemed to have vacate his office.

Board Meeting frequency
Atleast four board meetings every year and the gap between two board meetings must not exceed 120 days.

***Absence from Board meeting**
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 office

4 Attach Board Report
A report by BOD containing details of company's affair including director's responsibility statement with financial statement.

5 Approve Financial Statement
Balance sheet, statement of profit and loss, cash flow statement, etc. if any, are required to be approved by directors

6 To disclose Interest
He should not get himself benefitted from a transaction, the profit of which belongs to the company. It his duty to disclose such interest

In case of Interest
It his duty to disclose such interest at the very first Board meeting he attends after becoming interested in the transaction.

Change in Disclosure
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.

7 Apppoint First Auditor
It is the duty of directors to appoint first auditors of the company.

15. Vacation of office of director: Section 167

Section 167 specifies provisions detailing out as to when the office of a director shall become vacant. These provisions are given as under:

Section	Description
164	- He incurs any of the disqualifications specified in section. - U/s 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
184	- He acts in contravention of the provisions of section 184 - Relating to entering into contracts/arrangements in which he is directly or indirectly interested.
184	- He fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested.

Other points:

☑ He becomes disqualified by an order of a court or the Tribunal.

☑ 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.

☑ He is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced to imprisonment for 6 months or more.

Punishment **Section 167(2)**

- ☑ 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-

Imprisonment	:	Up-to 1 year
Fine	:	Min ⍰ 1 Lacs
		Max ⍰ 5 Lacs

Or Both.

All directors vacating the office **Sec-167(2)**

- ☑ Section 167 (3) specify the scenario where all the directors of a company vacate their offices under any of the disqualifications specified in Section 167 (1).
- ☑ Promoter shall appoint required number of directors who shall hold office till the directors are appointed by the company in the general meeting.
- ☑ In case of absence of promoter, Central Government shall appoint required no. of directors who shall hold office till directors are appointed by the company in general meeting.

16. Resignation of director: Section 168

Section 168 read with Rule 15 and Rule 16 of the Companies (Appointment and Qualification of Directors) Rules, 2014 deal with resignation of a director as under:

Resignation by Director

A director may resign from his office by giving a notice in writing to the company.

Action by Board

The Board shall on receipt of such notice take note of the same

Intimation to registrar by company

The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in Form DIR-12 and posts the information on its website, if any.

Disclosure in director report

Company shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company.

Resignation copy + Reason

Director may also forward a copy of his resignation along with reasons for the resignation to the Registrar within

- ☑ 30 days
- ☑ In DIR-11
- ☑ Prescribed Fees

17. Removal of director:

A director of a company may be removed before completion of his term as director. By below 2 methods, director can be removed from its post-

(1) Removal by the shareholders [Section 169].

(2) Removal by the Tribunal [Section 242]

Removal by the shareholders **[Section 169]**

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 as per provision:-

1. **Requirement of Ordinary Resolution:**

   Company can remove the director before expiry of its term, by **moving an ordinary resolution,** except the following-

   (a) Director appointed by tribunal u/s 242.

(b) **When as per section 163, 2/3rd or more of total number of director, are appointed according to principle of proportional representation.**

2. **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.

3. **Special Notice:**

   Special notice may be issued for removal of director. Special notice u/s 115 is required to be signed by-

   (a) **Members holding not less than 1% of total voting power.**

   (b) **Members holding shares on which at least ₹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

4. **Action by the company:**

   On receipt of special notice of a resolution to remove a director-

   ☑ **Company shall forthwith send a copy thereof to the director concerned, and**

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

5. **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.**

   (b) **Send representation to every member of the company to whom notice of the meeting is sent.**

   Exception-

   In case tribunal is of opinion that rights of representation are being abused to secure needless publicity for defamatory matter, then representation need not to be sent out and read out at meeting.

6. **Filling of Vacancy:**

   Vacancy resulting from removal of director (which were appointed in general meeting or by board of director), may be filled by appointment of another director at same meeting at which director is removed, provided special notice of the proposed appointment has been given.

   ** **In case vacancy is not filled as stated above, then it shall be filled treating it as "casual vacancy" provided that "director" to be removed is "not reappointed".**

7. **Period of holding of office by new director:**

   Period of "new director" – period remained of the removed director.

8. **Payment of compensation:**

   However, person who is removed from directorship shall not be deprived of his right to compensation or damages payable to him in respect of the premature termination of the directorship.

9. **No restriction imposed by Section 169:**

   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.

Removal by the Tribunal **[Section 242]**

According to section 242 of this Act, director may be removed by 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;**

Impact of removal of director by tribunal→

- ☑ **Shall not be entitled to claim any compensation for loss of his office.**
- ☑ **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 & key management personnel & 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. The provisions in this respect-

- ☑ **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.**
- ☑ **Rule 17 of the Companies (Appointment and Qualification of Directors) Rules, 2014 prescribes the following particulars to be included in the Register.**
  - Director Identification Number.
  - Present name/Former Name and surname in full.
  - Father's name, mother's name and spouse's name (if married) and surnames in full.
  - date of birth
  - Present and permanent residential address
  - Nationality
  - Occupation
  - date of the board resolution in which the appointment was made
  - date of appointment and reappointment in the company
  - Membership number of ICSI, in case of Company Secretary, if applicable.
  - Permanent Account Number.
- ☑ **Rule 18 + section 170(2) →** 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

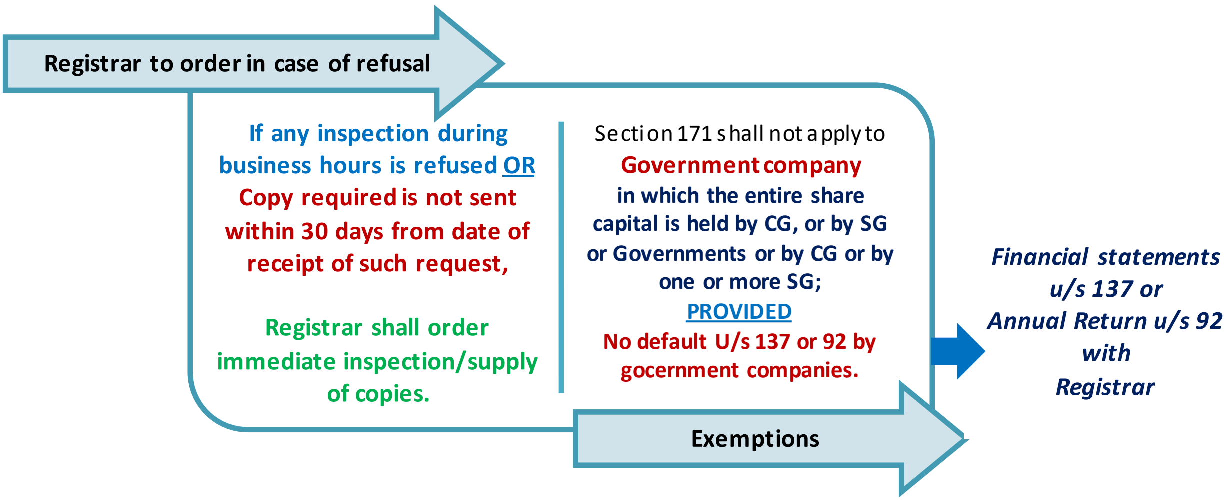
  (b) within 30 days of any change taking place

19. Member's right to inspect: Section 171

Members of the company have a right to inspect the register of directors and key managerial personnel under Section 171 of the Act. Consequently,

- **The register of directors and key managerial personnel shall be open for inspection during business hours.**
- **The members shall have the right to take extracts therefrom and copies thereof on request and**
- **Same will be provided to them within 30 days free of cost.** Section 171(1)(a)

- 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. Section 171(1)(b)



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;

☑ for which no specific punishment is provided therein;

Company and every officer of the company who is in default shall be punishable with Fine-

☑ Minimum ₹ 50,000

☑ Extendable to ₹ 5,00,000.