

Company Secretary (CS) – Time period to fill vacancy of CS

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Definition of Company Secretary

Section 2(24) of the Companies Act, 2013:

Company Secretary or secretary means a Company Secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 (56 of 1980) who is appointed by a company to perform the functions of a company secretary under this Act.



As per Clause (c) read with Clause (g) of sub-section (1) of section 2 of the Company Secretaries Act, 1980:

Company Secretary means a person who is a member of the Institute of Company Secretaries of India constituted under the Company Secretaries Act, 1980.

The section 203 of the Companies Act, 2013 (the Act) read with Rules made thereunder mandates that every listed company and such other class or classes of companies as mentioned below shall have a whole-time key managerial personnel. As per section 2(51) of the Act, a Company Secretary is included in the definition of key managerial personnel in relation to a company. The provisions of SEBI (LODR) Regulations, 2015 (LODR) also mandate every listed company to appoint a qualified Company Secretary as the compliance officer of the Company.

The provisions with respect to Company Secretary/ Compliance Officer as per the Act and LODR are highlighted in the table below:

Particulars	Companies Act, 2013	SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015	Comments
Definition of Key Managerial	As per section 2(51) of the Act “key managerial personnel”, in relation	As per Regulation 2(o) of the LODR, “key	The Act and LODR both have same provisions

Personnel (KMP)	<p>to a company, means—</p> <p>(i) the Chief Executive Officer or the managing director or the manager;</p> <p>(ii) the company secretary;</p> <p>(iii) the whole-time director;</p> <p>(iv) the Chief Financial Officer;</p> <p>(v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and</p> <p>(vi) such other officer as may be prescribed</p>	<p>managerial personnel” mean key managerial personnel as defined in sub-section (51) of section 2 of the Companies Act, 2013.</p>	<p>for persons included in the definition of KMP.</p>
Threshold limit for appointment of KMP	<p>As per section 203 of the Act, every Listed Company and every other public company having a paid-up share capital of ten crore rupees or more shall have whole-time key managerial personnel (which includes Company Secretary).</p> <p>However As per Rule 8A of Companies (Appointment and Remuneration of Managerial Personnel)</p>	<p>As per Regulation 6(1) of LODR, a listed entity shall appoint a qualified company secretary as the compliance officer.</p>	<p>As LODR is applicable on listed companies only, it mandates for appointment of qualified Company Secretary as the Compliance Officer of the company.</p> <p>While the Act provides for appointment of Company</p>

	Amendment Rules, 2020, every private company which has a paid up share capital of ten crore rupees or more shall have a whole-time company secretary (which includes Company Secretary).		Secretary in companies as prescribed under section 203 of the Act and rules made thereunder.
Appointment of KMP	<p>As per section 179(2) and 203(2) of the Act, every whole-time KMP shall be appointed by means of resolutions passed at meetings of the Board containing the terms and conditions of the appointment including the remuneration.</p> <p>As per section 203(3) of the Act, a whole-time KMP shall not hold office in more than one company except in its subsidiary company at the same time.</p>	There is no such provision mentioned in LODR.	<p>Act mandates a CS must be appointed in the meeting of the Board of Directors containing the terms and conditions of his appointment including remuneration.</p> <p>Also, a CS may not hold office in more than one company except in its subsidiary company at the same time as per the Act.</p> <p>In spite of LODR is silent on both the provisions, the same will be applicable as section 203 of the Act is</p>

			<p>applicable on the Listed Companies.</p> <p>Therefore, a CS must be appointed in the meeting of Board of Directors only. CS must not be appointed vide Resolution by Circulation.</p>
<p>Time limit to fill casual vacancy of KMP</p>	<p>As per section 203(4) of the Act, if the office of any whole-time KMP is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of six months from the date of such vacancy.</p>	<p>No time limit is prescribed for filling up vacancy of Company Secretary in LODR.</p>	<p>As per the Act, time period of six months is provided for filing up the vacancy of CS.</p> <p>LODR is silent on filing up of vacancy of CS. It creates confusion as what is the time period for filling up vacancy in case of Listed Company and from when it will attract penal provisions.</p> <p>Therefore, there is a contradiction on filing up of vacancy of CS as per the Act</p>

			and LODR.
Penal provisions	As per section 203(5) of the Act, if any company makes any default in complying with the provisions of this section, such company shall be liable to a penalty of five lakh rupees and every director and key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees and where the default is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such default continues but not exceeding five lakh rupees.	As per SEBI Circular No. SEBI/HO/CFD/CMD/CIR/P/2018/77 dated May 3, 2018, Non-compliance with requirement to appoint a qualified company secretary as the compliance officer as per Regulation 6(1) of LODR shall attract penalty of Rs 1000 per day.	<p>The Act provides penalty for non-compliance of section 203 on the Company, every director and KMP of the Company who is in default.</p> <p>LODR provides penalty in case of non-compliance of Regulation 6(1) of LODR.</p> <p>However, as per the SEBI Circular still it is not clear whether the penal provisions will be attracted soon after the vacancy of CS is created or after filing up the vacancy of CS within any time period.</p>

Time period for filling up vacancy of Company Secretary

As per the Act – It allows a period of six months for filling up the vacancy of CS from the date of vacancy as per section 203 of the Act. The same section is specifically applicable on the listed companies also.

As per the LODR – No time period prescribed for filling the casual vacancy of CS/ Compliance Officer.

For companies on which only the Act is applicable, they are provided with sufficient time period for filling up the vacancy of CS in their company.

However, the Act and LODR, both are applicable on the listed companies, it creates confusion as what the time period is for filling up of vacancy of CS/ Compliance Officer in listed entities, LODR being silent on the same.

There are many questions which come up for listed companies like what is the time period for filling up vacancy of CS, how the company will find a suitable candidate in a short period, whether it will be possible for NRC and Board to hold a meeting at such a short notice for appointment of CS, etc.

Conclusion

The Company Secretary holds the position of Compliance Officer and whole-time key managerial personnel in a listed company who is handed over with many mandatory and regulatory obligations as per the Act, LODR and other laws of land.

Where there is a vacancy of CS on account of any reasons like resignation/ removal/ death in a listed company, it is impractical for the company to find a suitable candidate in a short time period, call a meeting of NRC and Board of Directors of the company and fill up the casual vacancy.

Therefore, in the absence of any provisions in LODR for filling of vacancy of CS, the same must be complied with as per the provisions of section 203 of the Act. It must be noted that listed company is specifically required to comply with section 203 of the Act.

Listed company must be allowed to fill up the vacancy of CS within a period of six months from the date of vacancy which is also to enable the company to find a suitable candidate for the position of CS cum Compliance Officer and also call a NRC and Board of Directors for appointment of CS in a proper manner.

If the vacancy of CS is not filled up within a period of six months from the date of vacancy, then the penal provisions should be applicable on the listed company. SEBI has to come out with clarification in this regard.

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