

DIRECTORS & THEIR REMUNERATION

IMPLICATIONS UNDER THE COMPANIES (AMENDMENT) ACT, 2017

SECTION 2(49) – INTERESTED DIRECTOR

Interested Director means a director who is in any way, whether by himself or through any of his relatives or firm, body corporate or other association of individuals in which he or any of his relatives is a partner, director or a member, interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into by or on behalf of a company.

The definition of interested director has been omitted.

SECTION 2(51) – KEY MANAGERIAL PERSONNEL

Key Managerial Personnel, in relation to a company, means—

- (i) the Chief Executive Officer or the managing director or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the Chief Financial Officer;
- (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
- (vi) such other officer as may be prescribed;

Point (v) has been newly inserted. Therefore, the officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board, shall also be covered under the definition of key managerial personnel. This clause has been inserted to fix the accountability of the person who is in charge of various departments.

SECTION 135 – CORPORATE SOCIAL RESPONSIBILITY

In case the company is not required to appoint an independent director under section 149(4) of the Companies Act, 2013, it shall have in its Corporate Social Responsibility Committee two or more directors.

SECTION 149(3) – RESIDENT DIRECTOR

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

For a newly incorporated company the requirement of resident director shall apply proportionately at the end of the financial year in which the company is incorporated.

The compliance of resident director is to be considered for the financial year instead of calendar year.

SECTION 149(6)(c) – DECLARATION BY INDEPENDENT DIRECTOR

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 has or had no pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten percent 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.

In order to harmonize the provisions of the Companies Act, 2013 and Listing Regulations, 2015, the above stated declaration has been amended. Under Companies Act, 2013 even minor pecuniary relationships are covered even though such transactions may not compromise the independence of the directors, whereas under regulation 16 of the Listing Regulations, 2015 prohibits only 'material' pecuniary relationships for disqualifying appointment of persons as Independent Directors.

SECTION 149(6)(d) – DECLARATION BY INDEPENDENT DIRECTOR

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, 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 percent 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 percent 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);

Earlier a director can be appointed as an Independent Director only if none of his relatives has or had a pecuniary relationship or transaction of a prescribed* value 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. The scope of the restriction on “pecuniary relationship or transaction” entered into by a relative has been made more specific by clearly categorizing the types of transactions.

SECTION 149(6)(e)(i) – DECLARATION BY INDEPENDENT DIRECTOR

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, neither himself nor any of his relatives 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.

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.

The scope of the restriction has been modified. A director’s independence is likely to be impacted where his / her relative has held a significant position, such as a director or key managerial personnel, and not at lower levels during the preceding years. However, it would be possible to influence an Independent Director in case his relative is also working in the situations referred to in the section irrespective of the position he holds.

SECTION 152(3) – APPOINTMENT OF DIRECTORS

No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number under section 154 or any other number as may be prescribed* under section 153. [Section 153 - application for allotment of director identification number]

SECTION 152(4) – APPOINTMENT OF DIRECTORS

Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number "or such other number as may be prescribed* under section 153 and a declaration that he is not disqualified to become a director under this Act. [Section 153 - application for allotment of director identification number]

SECTION 153 – APPLICATION FOR ALLOTMENT OF DIRECTOR IDENTIFICATION NUMBER

Every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number to the Central Government in such form and manner and along with such fees as may be prescribed.

The Central Government may prescribe any identification number which shall be treated as Director Identification Number for the purposes of this Act and in case any individual holds or acquires such identification number, the requirement of this section shall not apply or apply in such manner as may be prescribed*.

SECTION 157(1) – COMPANY TO INFORM DIRECTOR IDENTIFICATION NUMBER TO REGISTRAR

Every company shall, within fifteen days of the receipt of intimation under section 156, furnish the Director Identification Number of all its directors to the Registrar or any other officer or authority as may be specified by the Central Government with such fees as may be prescribed or with such additional fees as may be prescribed and every such intimation shall be furnished in such form and manner as may be prescribed.

The reference of section 403 has been removed. In case of non-filing of the Form within time prescribed in the section along with the additional fee as may be prescribed then penal provisions of this sub-section would attract.

SECTION 157(2) – COMPANY TO INFORM DIRECTOR IDENTIFICATION NUMBER TO REGISTRAR

If a company fails to furnish Director Identification Number under sub-section (1), the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

The reference of section 403 has been removed. In case of non-filing of the Form within time prescribed in the section along with the additional fee as may be prescribed then penal provisions of this sub-section would attract.

SECTION 160 – RIGHT OF PERSONS OTHER THAN RETIRING DIRECTORS TO STAND FOR DIRECTORSHIP

The requirements of deposit of amount shall not apply in case of appointment of an independent director or a director is recommended by the Nomination and Remuneration Committee, if any, or a director is recommended by the Board of Directors of the Company, in the case of a company not required to constitute Nomination and Remuneration Committee.

This provision has been newly inserted.

SECTION 161(2) – APPOINTMENT OF ADDITIONAL DIRECTOR, ALTERNATE DIRECTOR AND NOMINEE DIRECTOR

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

In order to avoid the conflicts interest and ambiguity in the calculation of quorum, it is prohibited to appoint an existing director as an alternate director and the same individual acting as a director and alternate director for some other director of the same company.

SECTION 161(4) – APPOINTMENT OF ADDITIONAL DIRECTOR, ALTERNATE DIRECTOR AND NOMINEE DIRECTOR

If the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.

The section is applicable for all companies. The casual vacancy can be filled by the Board in case of private companies as well. Earlier, the said provision was applicable to public companies only. In order to fill the casual vacancy, approval of members is also required to be obtained in the immediate next general meeting.

SECTION 164(2) – DISQUALIFICATIONS FOR APPOINTMENT OF DIRECTOR

A person appointed as a director of a company which is in default of section 164(2)(a) and 164(2)(b) of the Act, he shall not incur the disqualification for a period of six months from the date of his appointment.

The intention behind the above stated amendment is that the disqualification under Section 164(2) should be only applicable to a person who was a director at the time of the noncompliance, and in case of a continuing non-compliance, there should be a period of six months' time allowed for a new Director to make the company compliant.

SECTION 164(3) – DISQUALIFICATIONS FOR APPOINTMENT OF DIRECTOR

The disqualifications referred to in section 164(1)(d), 164(1)(e) and 164(1)(g) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification.

In order to maintain consistency under section 164 and 167(1)(f) [vacation of office of director], in case of requirement of vacation of office of a Director, the vacation should not take effect until the appeals are disposed off, while in case of disqualification, it is not required to provide for period of pendency of appeal.

SECTION 165(1) – NUMBER OF DIRECTORSHIPS

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

Dormant companies are inactive and have insignificant transactions and persons would be disincentivized from accepting the position of a director in such companies. Thus, the directorship in dormant company for reckoning the limit shall be excluded.

SECTION 167(1)(a) – VACATION OF OFFICE OF DIRECTOR

The office of a director shall become vacant in case he incurs any of the disqualifications specified in section 164.

This is to be noted that in case a director incurs disqualification under section 164(2) of the Act, the office of the director shall become vacant in all the companies, other than the company which is in default.

Thus, the vacancy of an office should be triggered only where a disqualification is incurred in a personal capacity and therefore, the scope of Section 167(1)(a) should be limited to only disqualifications under Section 164.

SECTION 167(1)(f) – VACATION OF OFFICE OF DIRECTOR

The office shall not be vacated by the director where the orders refer to the following:

a) he becomes disqualified by an order of a court or the Tribunal

b) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months:

- (i) for thirty days from the date of conviction or order of disqualification;
- (ii) where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or
- (iii) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of.

In order to maintain consistency under section 164 and 167(1)(f) [vacation of office of director], in case of requirement of vacation of office of a Director, the vacation should not take effect until the appeals are disposed off, while in case of disqualification, it is not required to provide for period of pendency of appeal.

SECTION 168(1) – RESIGNATION OF DIRECTOR

A director may forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days of resignation in such manner as may be prescribed.

Earlier the said provision was mandatory. In order to overcome the issue that many of the directors do not have digital signature and the directors who are willing to resign from the Board but do not have a DSC are forced to take a DSC for the limited purpose of filing Form DIR 11, which may not be useful for them thereafter, if they are not on the Board of any other company(ies). Therefore, now, intimation of resignation by the directors is optional.

SECTION 185 – LOAN TO DIRECTORS

The companies are permitted to give loans to entities in which directors are interested after passing special resolution and disclosing all facts & particulars in the explanatory statement to the notice, providing a relief to companies for providing loans to companies with common directors for genuine transactions.

The prohibition is proposed to be made applicable for assistance to director or his partner or relative or a firm in which such director or relative is a partner or director of holding company of the company.

If the borrower is a Company then loan should be utilized for its principal business activity.

The exempted categories are loan to MD/ WTD as a part of service condition or scheme and loans by companies in their ordinary course of business by charging interest as per tenure and loan, guarantee or security by holding company to its WOS and guarantee or security by holding company to its subsidiary company with a condition to use it for its principal activity.

SECTION 196(3)(a) – APPOINTMENT OF MANAGING DIRECTOR, WHOLE-TIME DIRECTOR OR MANAGER

No company shall appoint or continue the employment of any person as managing director, whole-time director or manager who is below the age of twenty-one years or has attained the age of seventy years:

Further, appointment of a person who has attained the age of seventy years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

In case no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

SECTION 196(4) – APPOINTMENT OF MANAGING DIRECTOR, WHOLE-TIME DIRECTOR OR MANAGER

A managing director, whole-time director or manager shall be appointed and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting which shall be subject to approval by a resolution at the next general meeting of the company and by the Central Government in case such appointment is at variance to the conditions specified in Part I of that Schedule, which shall be subject to the provisions of section 197 and Schedule V of the Act.

Part I of Schedule V has been specifically referred.

SECTION 197 – OVERALL MAXIMUM MANAGERIAL REMUNERATION AND MANAGERIAL REMUNERATION IN CASE OF ABSENCE OR INADEQUACY OF PROFITS

The requirement of approval of the Central Government for Managerial Remuneration, above the prescribed limits are replaced by approval through special resolution by shareholders in general meeting.

No CG approval for public companies for payment of remuneration to managing director even exceeding 11% of net profits. For loss or inadequate profit making companies the requirement of Central Government approval under section 197(3) has been removed. However, Schedule V, Part II of the Companies Act, 2013 is required to be complied.

Approval of the central government would be needed only for variance to the conditions specified in part I of Schedule V for the appointment of MD/ WTD;

For payment of remuneration exceeding limits or for waiver of recovery of excess remuneration, prior approval of banks, financial institutions, non-convertible debenture holders or secured creditors is proposed.

Director should repay the excess remuneration to the Company within a maximum period to 2 years.

Duty casted on auditors- Report payment of remuneration in conformity with the provisions of the Act and disclose any excess remuneration.

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