

Resignation of director: How soon to fill the composition of Audit and Nomination and Remuneration Committee

Dr S. Chandrasekaran



The Companies Act, 2013 (the Act) mandates that every listed public company and such other class or classes of companies as mentioned below shall constitute an Audit Committee (AC) and Nomination and Remuneration Committee (NRC). The provisions of SEBI (LODR) Regulations, 2015 (LODR) also mandate every listed company to constitute an AC & NRC. The provisions with respect to AC & NRC as per the Act and LODR are highlighted in the table below:

Provisions	Audit Committee	Nomination & Remuneration Committee
Applicability (as per the Act)	Sec 177 (AC)/ sec 178 (NRC) read with rules made thereunder <ul style="list-style-type: none"> • Every listed public company • Every public co. having: <ul style="list-style-type: none"> a) Paid up capital: Rs 10 crore or more b) Turnover: Rs 100 crore or more c) Aggregate outstanding loans, debentures or deposits: exceeding Rs 50 crore 	
Applicability (as per LODR)	Regulation 18 – Every listed company	Regulation 19 – Every listed company
Composition	As per the Act: <ul style="list-style-type: none"> • Min: 3 directors with independent directors 	As per the Act: <ul style="list-style-type: none"> • 3 or more non-executive directors

	<p>forming majority</p> <ul style="list-style-type: none"> Majority + Chairperson : ability to read financial statements <p>As per LODR:</p> <ul style="list-style-type: none"> Min: 3 directors 2/3rd: Independent directors All members shall have financial literacy; at least 1 member shall have accounting or related financial management expertise. In case of a listed entity having outstanding SR equity shares, the AC shall only comprise independent directors CS : Secretary of Committee 	<ul style="list-style-type: none"> Out of which not less than one half shall be independent directors. <p>As per LODR:</p> <ul style="list-style-type: none"> At least 3 directors. All directors shall be non-executive directors At least 50% shall be independent directors In case of a listed entity having outstanding equity SR equity shares, two-third of NRC shall comprise independent directors.
Meetings	<p>As per the Act : Silent</p> <p>As per LODR:</p> <ul style="list-style-type: none"> At least 4 in a year and max. gap of 120 days 	<p>As per the Act : Silent</p> <p>As per LODR:</p> <ul style="list-style-type: none"> At least 1 in a year
Quorum for meetings of the Committee	<p>As per the Act : Silent</p> <p>As per LODR:</p> <ul style="list-style-type: none"> 2 or 1/3rd whichever is higher But 2 independent directors shall be present 	<p>As per the Act : Silent</p> <p>As per LODR:</p> <ul style="list-style-type: none"> 2 or 1/3rd whichever is higher But 1 independent director shall be present
Chairperson	Independent director	Independent director (he

		<p>shall not be Chairperson of the company)</p> <p>The chairperson of the listed entity, whether executive or non-executive, may be appointed as a member of the Nomination and Remuneration Committee and shall not chair such Committee.</p>
Function/ Role inter alia includes	<p>As per the Act & LODR:</p> <ul style="list-style-type: none"> • Recommendation for appointment, remuneration and terms of appointment of auditors of the company • Review and monitor the auditor's independence and performance, and effectiveness of audit process. • Examination of the financial statement and the auditors' report. • Approval or any subsequent modification of transactions of the company with related parties. • Evaluation of internal financial controls and risk management systems 	<p>As per the Act & LODR:</p> <ul style="list-style-type: none"> • Identify persons who are qualified to become directors and who may be appointed in senior management. • Formulate the criteria for determining qualifications, positive attributes and independence of a director. • Recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees

Intermittent vacancy: Both the Act and LODR provide that, where there is an intermittent vacancy of independent director or woman director, such vacancy has to be filled in not later than the immediate Board meeting or

three months from the date of such vacancy whichever is later. NRC has to first identify a person and recommend that person to the Board for appointment and on appointment intermittent vacancy has been filled up.

There are chances that till such time the intermittent vacancy is filled up, committees such as audit committee, NRC and other committees may not be fully constituted. Both the Act and LODR mandate only the constitution of committees but silent on any gap in constitution till an intermittent vacancy has been filled up.

Short fall in NRC: Where there is a vacancy in NRC on account of any resignation/ removal/ death of a non-executive director or ID in the company, the existing members of the NRC will be sufficient to comply with the provisions of the law.

The NRC shall identify and recommend a non-executive director or ID to the Board for being appointed in its next Board meeting which should not be later than 3 months. The gap between the date of intermittent vacancy and date on which the Board filled up such intermittent vacancy, the NRC is not fully constituted, however that period shall not attract any penal provisions of the Act and LODR.

Short fall in AC: Where there is a vacancy in AC on account of any resignation/ removal/ death of a director or ID in the company, the NRC shall identify and recommend a director or ID to the Board for being appointed in its next Board meeting which should not be later than 3 months and on appointment and re-constitution of the AC thereof, the intermittent vacancy will be filled up.

Accordingly, the composition of the Audit Committee shall be filled up within a maximum period of 3 months keeping in mind that the gap between two Audit Committee meetings shall not be more than 120 days as per LODR. The gap between the date of intermittent vacancy and date on which the Board filled up such intermittent vacancy, the AC is not fully constituted, however that period shall not attract any penal provisions of the Act and LODR.

There may be chances that any intermittent vacancy of ID or non-executive director or any director may reduce the strength of AC or NRC and there is no availability of required director in the remaining strength of the Board. If the company fills the vacancy of ID or non-executive director or any director

within the maximum period of three months and the Committees are re-constituted, then the same will be treated as proper compliance.

The Act for the purposes of quorum permits that “the continuing directors may act only for the purpose of increasing the quorum.” Similarly, the remaining directors of NRC, irrespective of quorum may convene meeting and identify the required qualified director and recommend the person to the Board for appointment. The Board on appointment of such person as a director, simultaneously fill up the intermittent vacancy in NRC and AC and the gap between the date of intermittent vacancy and date on which the Board filled up such intermittent vacancy, though the NRC & AC is not fully constituted but that period does not attract any penal provisions of the Act and LODR. If there is no meeting of NRC till the time of completion of its constitution or NRC meeting convened only for the purpose of identifying the person to be appointed as a director which will also be subsequently become the member of NRC or Committee, then there should not be any penalty levied on the company consequent upon non-constitution of committee as per LODR or Act.

Conclusion

The Act and LODR prescribe constitution and composition of AC & NRC but are silent on time limit for filling any intermittent vacancy so that any short fall in the committees is filled up. For Audit Committee and Board meeting, there is a requirement of gap between two meetings of not more than 120 days but there is no such condition prescribed for NRC. The role of NRC is to identify persons for the position of director and to recommend the person to the Board for appointment.

Therefore, any shortfall in the constitution and composition of directors in AC & NRC and subsequently filled up, the gap between the intermittent vacancy and the date of filling such intermittent vacancy shall not attract any penal provisions on the company. Further, if there is any such kind of vacancy and there is no period or time gap given to fill the vacancy, the regulator should not levy any penalty and further, the Regulators should give time line to fill such vacancy.

*(Dr S. Chandrasekaran is Senior Partner, Chandrasekaran Associates, Delhi.
The author acknowledges inputs from his colleague, Akash Goyal, Asst
Manager Secretarial)*