

Chapter 1 - Appointment and Qualification of Board of Directors

Let's revise section numbers first

Never count the number of pages when the chapter is as important as director!

<u>Sec No.</u>	<u>Name of the Section</u>
149	Company to have Board of Directors
150	Manner of Selection of Independent Directors and Maintenance of Databank of Independent Directors
151	Appointment of Director Elected by Small Shareholders
152	Appointment of Directors
153	Application for Allotment of Director Identification Number
154	Allotment of Director Identification Number
155	Prohibition to Obtain More than One Director Identification Number
156	Director to Intimate Director Identification Number
157	Company to Inform Director Identification Number to Registrar
158	Obligation to Indicate Director Identification Number
159	Penalty for Default of Certain Provisions.
160	Right of Persons Other than Retiring Directors to Stand for Directorship
161	Appointment of Additional Director, Alternate Director and Nominee Director
162	Appointment of Directors to be Voted Individually
163	Option to Adopt Principle of Proportional Representation for Appointment of Directors
164	Disqualifications for Appointment of Director
165	Number of Directorships
166	Duties of Directors
167	Vacation of Office of Director
168	Resignation of Director
169	Removal of Directors
170	Register of Directors and key Managerial Personnel and their Shareholding
171	Members' Right to Inspect
172	Punishment



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Definition of Board or "Board of Directors" [Section 2(10)] means the **collective body** of the directors of the company

Why do we need Board of Directors (BOD)?

1. Co. is an artificial person having separate legal existence but no body or mind of its own.
2. Huge numbers of shareholders (especially in case of listed companies)
3. Requirement of Section 149

Directors are both **agent** as well as **trustee** of the company.

1. Agent - They bind the co. as their principal as soon as they enter into various transactions on its behalf
2. Trustee - They are required to take care of properties, moneys, trade secrets, etc. of co.

Executive Director (ED) and Non-Executive Director (NED)

Section 149: Company to have BOD

1. Consisting of **individuals**

Minimum - Public (3), Private (2) and OPC (1)

Max - 15 directors (To appoint more than 15 directors, pass **SR**) [N.A. to Govt co and Section 8 companies provided compliance with Sec 92 (AR) and 137(F.S.)]

AoA may provide for a lower limit of maximum directors.

Companies as may be prescribed shall have at least one woman director.

Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014

1. Provision of Woman Directors applies to following companies:
 - Listed company
 - Other public company
 - PUSC > = Rs. 100 crores
 - Turnover (T/O) > = Rs. 300 crores

PUSC and T/O as per last date of latest audited F.S.
2. Intermittent vacancy - 3m or immediately next BOD meeting - WI **Later**
3. Newly incorporated co. - Comply within 6 months

Example - Women Director - Death on 17th March 2022. Next BOD meeting - 25th June 2022.
Co. is required to fill vacancy by 25th June or 16th June 2022 **WI Later** i.e., 25th June.

2. Transition provision

3. Resident Director - At least one (stay in India for > = 182 days during FY)
Take proportionate to 182 days in case of newly incorporated co.
Covid Relief for FY 19-20 and 20-21

4. Independent Director (I.D.) (N.A. to Private companies)
(Refer Question Bank)

Listed Public Company - At least 1/3rd of total no. of directors to be independent
[Fractions = 1]



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Unlisted Public Company - As may be prescribed - At least 2 I.D.

Rule 4 of Companies (Appointment and Qualification of Directors) Rules, 2014

Following unlisted public co. to have at least 2 I.D.:

1. PUSC \geq 10 crores
2. T/O \geq 100 crores
3. O/S Loan, Debentures and Deposits (in aggregate) $>$ 50 crores (If equal to Rs. 50 crores, then N.A.)

PUSC, T/O and O/S as per last date of latest audited F.S.

Following co. shall not be covered in above rule:

1. JV
2. Wholly owned subsidiary (WOS)
3. Dormant co. u/s 455

If higher no. of I.D. required due to composition of A.C. (Sec 177), such higher no. of I.D. applicable under this section. [Ex. In an unlisted public co. having PUSC of Rs. 100 crores, if A.C. has 7 directors, 4 of them have to be I.D. (sec 177). So, as per Sec 149, the minimum no. of I.D. shall be 4 (and not 2)]

Intermittent vacancy - 3m or immediately next BOD meeting - WI Later

Not required to appoint I.D. if ceases to fulfil conditions (PUSC, T/O, O/S) for 3 consecutive years

Listed company (Sec 2(52)) means a company which has **any of its securities** listed in Recognized Stock Exchange (RSE).

The following classes of companies shall not be considered as listed companies, namely:

1. **Public** companies (equity not listed) having listed their following securities issues on Private placement basis as per SEBI regulations:
 - Non-convertible **debt** securities, or
 - Non-convertible redeemable **preference** shares
 - Both categories of (i) and (ii) above.
2. **Private** companies which have listed their non-convertible **debt** securities on private placement basis on a RSE as per SEBI Regulations;

5. Transition provision

6. Who can become an ID? (IMP DOGS FVVK)

Director **other than a MD, WTD or a nominee director** fulfilling all the following criteria:

- a. **Integrity** and has relevant expertise and experience in opinion of Board (or Ministry of CG/SG administratively in charge of the co.)
- b. i. Not is/was **promotor** of CASH
ii. Not related to promotor or director of CASH (restricts promotor of CASH but not director of CASH)

Funny! - As per above provision, a dir.(except for KMP) of ASH can be independent of parent company, but a person related to director of ASH is not independent.



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- c. Has no pecuniary (**monetary**) relationship with CASH or their P/D during last 2 FY + CY (*N.A. to Govt. co provided 92 and 137*)

[Other than:

1. Remuneration as such director,
2. Transaction $\leq 10\%$ of his total income or
3. Transaction in ALP in the Ordinary Course of Business (OCOB)]

- d. None of whose relatives:

- Holds any **security** or interest in CASH during last 2 FY + CY
(Exception: May hold in company of face value ≤ 50 lakhs or PUSC $\leq 2\%$ of CASH)
- Indebted to CASH or P/D > 50 lakhs - 2 FY + CY
- Given **guarantee** or provided security for **indebtedness** of any third person to CASH or P/D > 50 lakhs - 2 FY + CY
- Any **other** pecuniary relationship with CASH $\geq 2\%$ of his Gross T/O OR Total income (P/D not covered) [in aggregate]

- e. Neither himself nor relative:

- Is **KMP** or employee of CASH - Last 3 FY (Exception: Relative can be employee)
- Employee/Proprietor/Partner in
 - **Firm** of auditors or CS in practice or Cost auditors of CASH
 - Legal/Consulting **firm** having transaction with CASH of $\geq 10\%$ of Gross T/O
- Holds (with relative) $\geq 2\%$ of **Voting power** of Co. (**Not CASH**)
- Is the CEO/Director of **NPO** that
 - Receives $\geq 25\%$ of its receipt from CASH or P/D or
 - Holds VP $\geq 2\%$ of company

- f. Possesses such other qualification as may be prescribed (Rule 5 - I.D. shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management etc.)

Can Mr. A appointed as I.D. in a company be appointed as I.D. in subsidiary company? - Yes, no such restriction u/s 149(6)

Associate company:

7. I.D. to declare that he meets criteria of independence:

- i. first BOD meeting in which he participates as director and
- ii. first BOD meeting of every FY and
- iii. any change in circumstance which may affect his status as ID

8. I.D. to abide by prov. of Schedule IV

9. I.D. shall not be entitled to Stock Option. I.D. may receive remuneration by way of:

- a) Fees u/s sec 197 (5),
- b) Reimbursement of expenses for participation in meetings
- c) Profit related commissions - as may be approved by Members

In case of **no profits** or **inadequate profits**, I.D. may receive **remuneration**, excluding fees u/s 197(5), in accordance with the provisions of **Schedule V**



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10. Term of I.D. - **Upto** 5 consecutive years (a term of <5 years is possible)

Reappointment - Eligible on passing **SR** + Disclosure of same in BOD Report

11. No ID to hold office for more than 2 consecutive terms

Cooling period - 3 years (shall not be associated with co in any capacity, directly or indirectly)

12. ID and NED (not being KMP/promoter of co.) shall be held liable only in respect of those acts of omission or commission by a co. which had:

- occurred with his knowledge
- attributable to board process
- occurred with his consent or where he has not acted diligently

13. Sec 152 (6) and (7) N.A. to I.D.

Section 150: Manner of Selection of ID and Maintenance of Databank of ID

CG may notify - Body, Institution or association having expertise in creation and maintenance of such databank (CG has notified - Indian Institute of Corporate Affairs at Manesar)

ID may be selected from such databank containing details (Name, address, Educational and professional qualification, legal proceedings against him) of person **ELIGIBLE** and **WILLING** to act as ID.

Responsibility to exercise due diligence - Lies with such co.

Appointment of ID - To be approved in GM (ES annexed to notice of GM to include justification)

Companies (Creation and maintenance of databank of ID) Rules, 2019

- The data bank shall be an **online** and **placed** on the **website** of the Institute
- Databank to include:
 - DIN, If applicable
 - Basic Details - PAN, Full name, Father's Name, DOB, Gender, Occupation, Address, Phone No., Email ID, Qualification, and Experience
 - Pending criminal proceedings as per Sec 164 (1)(d)
 - List of LLPs in which he is a DP (name, nature, duration wise dates)
 - List of companies in which he is a director (name, nature, nature of directorship, duration wise dates)
- Info. of databank shall be available only to those companies required to appoint ID
- Institute with prior approval of CG shall determine a reasonable fee to be charged for info.

Rule 6 of Companies (Appointment and Qualification of Directors) Rules, 2014

- Make online application to Institute for inclusion of name in databank if:
 - Existing ID (needs to renew till he continues to be ID in any co.)
 - Aspiring ID - He intends to get appointed as an ID (before such appointment)
- Individual not having DIN can also apply
- Specify in application the period - 1 year, 5 years or Lifetime



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- Renewal application within 30 days of expiry else name removed (N.A if life time fees paid)
- Declaration by ID - Along with declaration u/s 149 (7)
- Online Proficiency Self Assessment Test (SAT) -
 - within **2 years** of inclusion of name else removed.
 - no limit on no. of attempts
 - test N.A for person who have served for **> = 3 years (If more than 1 co., count once)** as:
 - a) who is director or KMP in
 - listed public co,
 - Unlis. Public co. - PUSC >= Rs. 10 cr.
 - Body corp listed in RSE
 - Body corp incorporated o/s India - PUSC >= \$2Mn
 - Statutory corporations (Ex. LIC)
 - b) Pay scale of director or above in MCA, MoF, Ministry of Commerce and Industry, etc. and having experience in handling matters related to corporate/sec/eco. law.
 - c) Pay scale of Chief General Manager or above in SEBI, RBI, IRDA, PFRDA and having experience in handling matters related to corporate/sec/eco. Law

Section 151: Appointment of Director Elected by Small Shareholders (SSH)

- Listed company **MAY** have 1 director elected by SSH (NV **not more than** Rs. 20,000)
- Reason for appointment - Suo motu or Notice by SSH (not less than **lower** of 1,000 SSH or 1/10th SSH)
- Time limit of notice - to be given at least **14 days** before meeting
- **Content** of notice - Name, address, no. of shares held (if any) and folio number (if any) of - person whose name is proposed and all the SHs proposing such appt. (Note: SSD need not be a small SH or a SH himself)
- **Statement** by proposed SSD stating - DIN, not disqualified u/s 164, his consent to act as director
- SSD considered as **ID** - if eligible under 149 (6) and gives declaration u/s 149 (7).
- Not liable to retire by rotation
- **Tenure** - 3 consecutive years. **Not eligible for reappointment**. Cooling off period - 3 years
- SSD shall **vacate** office if - Disqualification u/s 164, vacation as per 167 or ceases to meet sec 149 (6)
- Not hold the position of SSD in **> 2** companies at the same time. 2nd co. not in **competing** or **conflicting** business.

Note: Co. is not bound to have SSD even if notice of intent is received from SSH. Having an SSD is purely a discretion of the company.

Section 152: Appointment of Directors

1. First director -

- Appointed as per provisions of AoA. Otherwise, subscribers to MoA (individuals) - Deemed
- Tenure - Till directors duly appointed as per provision of this Act
- OPC - Individual member deemed

2. **Every director** shall be appointed by the company in the **GM** (unless otherwise specified)

3. No person to be appointed as dir unless allotted DIN. (**Minor? - No cause minimum age to obtain DIN = 18**)



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4. Dir. to furnish **DIN** and **Declaration** that he is not disqualified before appt. - Applicable for every director (incl. sec 161)

5. Furnish **consent** to act as a director - On or before his appt. - **DIR-2** (Director to co.)

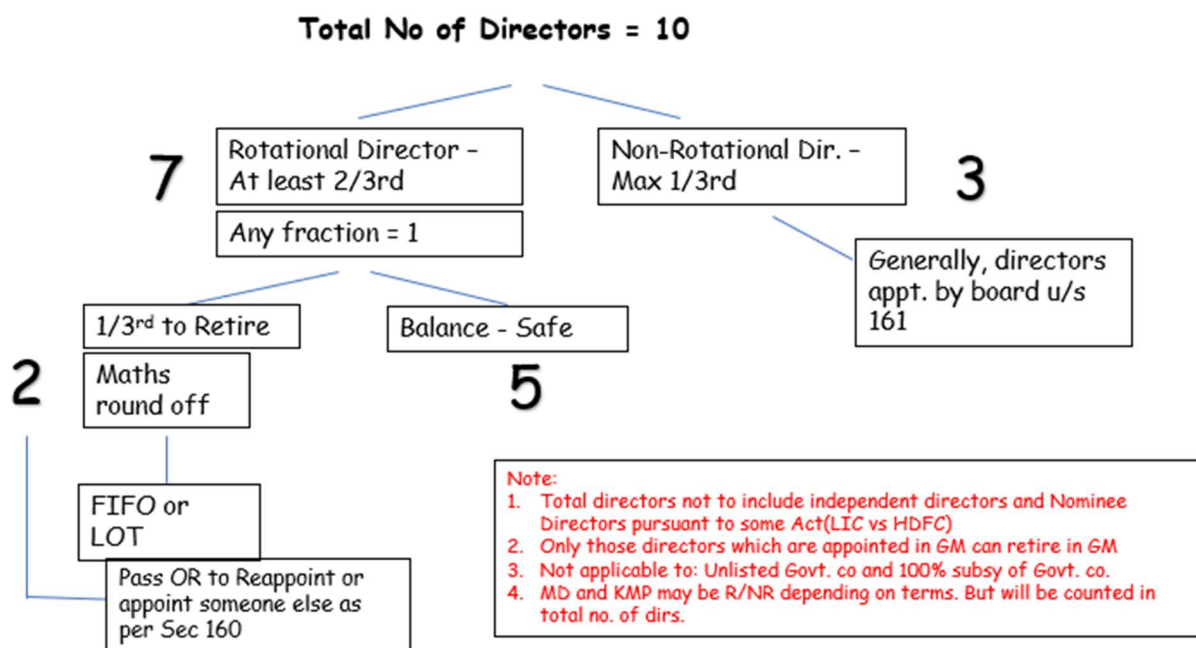
Co. to file such consent with RoC within 30 days of such appt. in Form **DIR 12** + Fees.

Proviso (N.A to S-8 Co.) - For appt. of ID, ES to include a statement of BOD that he fulfils condition specified in the act

6. Retirement by Rotation (RBR):

In case of a **public** company, unless AOA specifically provides for RBR of all directors every AGM, at every AGM:

- **At least $2/3^{\text{rd}}$ of total number of directors** - Period of office liable to determination by RBR and appt. by co. in GM
- $1/3^{\text{rd}}$ of the above $2/3^{\text{rd}}$ shall retire by rotation [If fraction is not multiple of 3, no. nearest to $1/3^{\text{rd}}$ (i.e., mathematical round off)]
- Who retires? - Those who have been longest in the office **since their last appointment**.
- If became directors on same day - Longest in office to be determined by lot
- Co. **may** fill up the vacancy in office of retiring director by appointing the retiring director or some other person.



Note:

- a) Total directors not to include I.D and nominee director appointed by a financial institution set up under Act or parliament.
- b) Nominee directors appointed pursuant to LIC Act shall not be included in total no. of directors (this is mentioned in LIC Act and LIC Act overrides Companies Act, 2013).
- c) Nominee director appointed by an institution *not being a financial institution set up under Act or Parliament* shall be included in total no. of directors



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- d) Alternate directors shall not be included in total number of directors [Refer QB]
- e) **Only those directors who are appointed in GM can retire in GM**
- f) Additional directors are directors appointed by Board and hence non rotational. However, they shall be included while calculating total no. of directors.
- g) Directors appointed by board u/s 161(4) shall be considered non-rotational as they are appointed by Board (irrespective of whether or not subsequently approved in in GM). However, to be included in total no. of directors.
- h) MD and KMP may be R/NR depending on terms. But will be counted in total no. of dirs.

7. Adjournment of meeting:

On retirement of a director as per Sec 152 (6), the company has to either:

- Reappoint the retiring director
- Appoint a new director
- Expressly resolve to not fill the vacancy

If vacancy is not filled in the AGM and the meeting has not resolved to not fill - Meeting adjourned (Next week, same time and place) (If national holiday -Next succeeding day which is not a holiday)

If in adjourned meeting also - vacancy not filled + not resolved - Retiring directors deemed reappointed (automatic reappointment)

Exception - No deemed / automatic reappointment if [LWR 164 162]:

- Resolution put and **Lost**
- Expressed his unwillingness in writing
- Disqualified u/s **164**
- **OR** / SR required as per this Act
- Sec **162** is applicable to the case(One director - One resolu)

If a co. could not hold AGM up to the last due date - Directors liable to retire to vacate office on the last due date

Sec 152 (6) and (7) N.A. to: Unlisted Govt co., 100% Govt. co. and WOS thereof.

Sec 153: Application for DIN

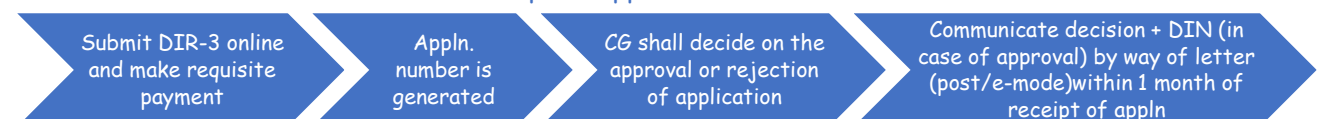
- Individual intending to be appointed as director shall make an application for DIN or other identification number as may be prescribed
- Application to the CG (Manner and fees - as may be prescribed) - Electronically - **DIR 3**
- LLP Act requires DPIN (DIN can be used as DPIN)

Rule 9 of Companies (Appointment and Qualification of Directors) Rules, 2014:

- **DIR 3** to be filed by person willing to be appointed as director (Photograph, Identity proof, residence proof, mandatory DSC and certified by full time CS, MD, Directors, CEO or CFO)
- **INC-32 (SPICe)** to be filed by company being incorporate to get DIN for proposed first director (max 3 directors at once)

Sec 154: Allotment of DIN (Make chart in class for both 153 and 154)

- CG shall allot DIN **within 1 month** of receipt of application



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- If CG finds any defect/incompleteness in application - Intimate the applicant by placing on **website** and by email. Applicant to rectify and resubmit within **15 days** of such placing on the website/email.
- On receipt of above rectification order:
Case 1: Defect rectified partially, or info given is still defective - CG may **reject** the application and ask applicant to file fresh application with correct and complete info + inform applicant (post/e-mode or any other mode)
Case 2: Defects are not at all removed within given time - treat and label such application as **invalid** in the e- record + inform applicant (post/e-mode or any other mode)
Case 3: Defects are rectified to the satisfaction of CG - Allot DIN and communicate to applicant

Sec 155: Prohibition to obtain more than 1 DIN

Sec 156: Intimation of DIN by director to co:

Every existing director to intimate (Form **DIR 3B**) DIN to the co.(s) wherein he is a director **within 1 month** of receipt

Question - Can a subscriber to memorandum be deemed as first director even if he doesn't have a DIN?

Sec 157: Intimation of DIN by co. to ROC:

Within 15 days of receipt of intimation u/s 156 (Form **DIR-3C**)

If defaulted, then co. and each OID - Fine 25k + Rs. 100/day up to max Rs. 1 lakh

Sec 158: Obligation to indicate DIN - In all returns, info or particulars by director or company.

Sec 159 - Contravention of Sec 152,155,156 - ~~Jail up to 6m OR~~ Fine up to Rs. 50,000 + Up to Rs. 500 per day

Other points:

- DIN may be cancelled, surrendered or deactivated by CG/RD if:
 - DIN is duplicated,
 - Obtained in a wrongful or fraudulent manner,
 - death,
 - unsound mind,
 - adjudicated insolvent,
 - application to surrender (**DIR-5**) made by DIN holder along with declaration that said DIN has never been used for filing any document.
- Intimation of changes in particulars stated in DIR 3 - Within 30 days via **DIR-6**
- No time limit for CG to approve changes. However, once approved, CG to intimate the applicant and concerned ROC
- Director also to intimate above changes in DIN to co. **within 15 days** of such change.
- Directors e-KYC (Free before due date) - Person holding DIN as on 31st march to submit e-form DIR 3 KYC on or before 30th September of immediately next FY.
 Provided that - If DIR 3 KYC submitted for PY, individual may submit DIR 3 KYC WEB through web service instead of DIR 3 KYC

Provided further that - Any updates in details can be made only via e - form DIR 3 KYC [i.e., WEB KYC can be filed only when there is no change in details]



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Sec 160: Right of person other than retiring director to stand for directorship

A person shall be eligible for appointment as director if:

- He or some member intending to propose him as director
- Sends a **notice** in writing at least 14 days before meeting at the registered office of co.
- Along with **deposit** of Rs. 1 lakh or such other sum prescribed

Deposit:

- Refunded if - Proposed candidate gets elected or >25% votes of total valid votes cast (either show of hand or poll)
- Deposit not required in case of:
 - Appointment of an ID
 - Director recommended by NRC
 - Director recommended by BOD, in case co. is not required to constitute NRC.

Company to inform candidature to members:

- At least 7 days before GM
- Inform by way of - Serving individual notices (email or in writing) AND place notice on website
- Alternatively - Advertise at least before 7 days in newspaper. Language - Vernacular + English

Legal wordings:

It shall not be necessary for the company to serve individual notices upon the members as aforesaid, if the company advertises such candidature or intention, not less than seven days before the meeting at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and circulating in that district, and at least once in English language in an English newspaper circulating in that district

Modifications:

- **Nidhi** companies - Deposit of Rs. 10,000 instead of Rs. 1 lakh
- In case of **S-8** companies, BOD has to decide whether deposit made by person failing to secure 25% votes is to be forfeited or refunded (discretion of BOD)
[i.e., BOD of S-8 companies can refund the money even if proposed candidate got <=25% votes]

Exemptions:

The provision of this section shall not apply to:

- **Private** company
- **Sec 8** companies whose AOA provides for election by ballot
- 100% **Govt.** co. and WOS thereof.

Sec 161: Appointment of Additional Director, Alternate Director and Nominee Director

1. Additional Director:

- **Articles** may confer the power to **BOD** for appointment of additional directors **at its discretion**
- This director can be any person other than who **fails to get appointed** as director in GM
- **Tenure** - Next AGM or Last due date of AGM whichever is earlier
- Appointed by passing a resolution in **BM** or **Resolution by Circulation**.

Conceptual clarity check!

1. Can the members pass OR/SR authorizing BOD to appoint additional director?
No. The power can only be conferred by AoA.



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2. What will be tenure of additional director if AGM is extended by ROC beyond due date? AD to vacate his office on the last date on which AGM should have been held.
3. Can an AD be MD/WTD? - Yes.
4. Is additional director a retiring director? - No
5. After the end of AD's tenure, if you intend to appoint him as a normal director, is compliance of Sec 160 needed? - Yes.

2. Alternate Director:

- Appointed by BOD only if authorized by - Articles or Resolution passed in GM
- To act in place of Original Director (OD) - absence of OD for period of 3 months or more.
- A person cannot be appointed as AD if:
 - He is holding any AD for any other director in the co. or
 - Holding directorship in the same co.
- Alternate for ID has to be independent as per 149(6)
- Tenure: Original term of OD or OD returns to India - whichever is earlier
- Automatic reappointment - Only OD. Not AD

Note: AD is not a proxy to OD under any stretch of imagination. AD is a director in his own capacity and shall be considered as director for the provision of this Act unless otherwise specified. Just that - Alternate director holds the office of original director.

Conceptual clarity check!

1. Can the Alt. D be appointed by OD? - No
2. Can BOD appoint Alt. D on behalf of regular director going out for less than 3 months? - No.
3. Can Alt. D be appointed for MD/WTD also? - YES

3. Nominee Director:

- Subject to the AOA,
- the BOD may appoint
- any person as a director nominated by any institution
- in pursuance of - (1) law or (2) agreement or (3) CG/SG by virtue of shareholding in a Govt. co.

4. Casual Vacancy:

- If office of a director **appointed by the co. in GM** is vacated before expiry of term in normal course, it results in casual vacancy (CV)
- Such CV shall be filed (subject to AOA) by the **BOD** at the **board meeting** (no RBC)
- Needs to be **subsequently approved by members** in immediately next GM
- Tenure - Up to date up to which the dir. in whose place he is appt. would have held office if it had not been vacated.

Conceptual clarity check:

1. Can vacancy in the office of director appointed u/s 161 (4) be again filled as per Sec 161(4)? No, cause CV in office of director appointed by co. in GM can only be filled u/s 161(4)
2. If a director declined to assume the office after appointment u/s 160, will it be casual vacancy? - No
3. Is director appointed under this Section a retiring director u/s 152(6)? - No (not appointed in GM, can't be removed in GM)



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Summary table for Section 161:

Criteria	(1) Additional	(2) Alternate	(3) Nominee	(4) Casual Vacancy
Appointed by	Board	Board	Board	Board
Ratification by SH?	Not required	Not required	Not required	Yes. In immediately next GM
Power conferred by	AoA	AoA / OR at GM	AoA	Law
Tenure	Next AGM/last date for AGM	Earlier of - Tenure of OD or OD returns to India	As per law/agreement	Tenure of director whose office vacated.
Resolution passed at	BoD meeting/RBC	BoD meeting/RBC	BoD meeting/RBC	Only Board meeting
Who cannot be appt?	Person who failed to be appt. as director in GM	a. Person acting as alt. director for any other director in the co. b. Person holding directorship in same co.	No such provision	No such provision
Additional points	-	AD of I.D to comply with sec 149(6) AD cannot be automatically reappointed	--	--

Sec 162 - Appointment of Directors to be Voted Individually

- At a GM, a motion for appt. of two or more persons as directors by a **single resolution** shall not be moved unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it.
- A resolution moved in contravention of sub-section (1) shall be void, whether or not any objection was taken when it was moved

Understanding this section:

- At GM, every director must be appointed by passing a **separate resolution**
- Single resolution for two or more appointment permitted only if a resolution that the such appointment will be made by a single resolution is first passed without a single vote casted against it.

Conceptual clarity check!

In a BOD meeting, can two or more additional director be appointed by a single resolution of BOD?
Yes, this provision is applicable only to appointments made in GM and not BOD meeting.

Sec 163 - Option to Adopt Principle of Proportional Representation for Appointment of Directors

- Notwithstanding anything contained in this Act,
- AOA may provide for
- Appointment of not less than 2/3rd of total dirs. of co.
- by way of proportional representation (whether by a single transferable vote or by a system of cumulative voting or otherwise)
- such appointments may be made once in 3 years
- CV to be filled as per Sec 161(4)

Sec 164 - Disqualifications for Appointment of Director



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1. A person shall not be eligible for appointment as a director of a company, if [IIM CALL OFF OR 188,152,165]:
 - a. declared to be of unsound mind by competent court
 - b. undischarged insolvent
 - c. application to be adjudicated as insolvent is pending
 - d. convicted by court of an offence (involving moral turpitude or otherwise) + Sentenced to imprisonment for ≥ 6 months and 5 years has not lapsed from expiry of the sentence (what if appeal is filed?)
If imprisonment for ≥ 7 years, then not eligible for appointment. (forever disqualified)
 - e. order of disqualification passed by court/tribunal + order is in force
 - f. not paid any calls in respect of any shares of the co. held by him (whether alone/jointly) + 6 months have lapsed from last day fixed for payment
 - g. convicted of offences dealing with RPT u/s 188 at any time during last preceding 5 years
 - h. Not complied with Sec 152(3) [DIN]
 - i. Not complied with Sec 165(1) [Max. no of directorship]

Provided that, disqualification under clause (d), (e) and (g) shall continue even if appeal is filed.

2. A person who is/has been director of a company shall NOT be eligible to be re-appointed as director of that co. or appointed in any other co. for a period of 5 years, if the co. in which he is a director, has:
 - a. Not filed FS or Annual Returns for continuous period 3 FY.
 - b. Failed to repay deposits + Interest (or) redeem debentures on due date + intt. (or) pay declared dividend AND such failure continues for 1 year or more

Provided that where a person is appointed as a director of a company which is in default under this sub-section, he shall not incur the disqualification for a period of 6m from the date of his appointment.

3. AOA of private co. may provide additional grounds for disqualification. (Public co. can't provide additional grounds)

Additional points:

- What if default is made good by the co. later on? - Doesn't matter. 5 years cooling period.
- What when new directors are appointed to these companies which have already made the default? Does the new director also get disqualified? No, as per proviso to sub-section (2), the newly appointed director shall not be disqualified for 6 months
- Default in repayment of loan from any PFI will not attract disqualification as Sec 164(2) only covered debentures, deposits and dividend.
- Directors to inform company whether or not disqualified u/s 164(2) - Form DIR 8
- Whenever co. defaults u/s 164 (2), it shall within 30 days of the date of default intimate registrar in DIR 9 details of directors during relevant FY.

Sec 165 - Number of Directorship:

1. No person shall hold office of director (incl. alt. director) in more than 20 companies at the same time.

Provided that, max no. of public co. in which a person can be director shall not exceed 10.

For reckoning limit of 10 public cos., those Pvt. co. that are holding/subsy of public co. shall be included.
For reckoning limit of 20 cos., directorship in dormant company shall NOT be included.

Example:

Whether directorship in these co. to be included?	Limit of 10	Limit of 20
A Private Ltd (not subsy/holding of any public co.)	No	Yes
B Ltd.	Yes	Yes



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C Pvt. Ltd. (Dormant)	No	No
D Ltd. (Dormant)	Yes	No

Point being - Dormant company is to be excluded while reckoning limit of 20 but dormant public company will not be excluded while reckoning limit of 10

2. The members of co. may by a **SR**, specify a lesser no. of cos. in which a dir. of the co. may act as a dir.
[they cannot specify higher no.]
3. Transition provision
4. Transition provision
5. Transition provision
6. If a person accepts appt. as a dir. in violation of this section, penalty - Rs. 2,000/day up to Rs. 2 lakhs!

Sec 166 - Duties of Directors:

1. Act in accordance with AoA
2. Act in good faith to promote objects of the co. for the benefit of all the stakeholders
3. Exercise duties with due and reasonable care
4. Not involve in situations which may possibly conflict with the interest of the co.
5. Not attempt to achieve undue gain or advantage - If found guilty, liable to pay such amt. to co.
6. Not assign his office - If assigned, void.

Contravention of duties - Fine Rs. 1 lakh to Rs. 5 lakhs.

Sec 167 - Vacation of office of Directors:

1. The office of dir. shall be vacated in following cases:
 - a) incurs disqualification u/s **164**
Provided that, if disqualification u/s 164(2), vacate office in all companies other than the defaulting company.
 - b) absents from **BOD meetings** held during 12 months with or w/o leave of absence
 - c) acts in contravention of **Sec 184** relating to entering into contracts/arrangement in which he is directly interested
 - d) fails to disclose interest in contravention of **sec 184**
 - e) **disqualified** by an order of court or tribunal
 - f) **convicted** by court of an offence (involving moral turpitude or otherwise) + Sentenced to imprisonment for **>=6 months**
 - g) **removed** under any provision of this Act
 - h) he, having been appointed a dir. by **virtue of** his holding any office or other **employment** in the ASH company, ceases to hold such office or other employment in that company.

Provided that, office shall not be vacated in case of orders referred in (e) and (f) above:

- for 30 days from the date of order
- if appeal/petition is preferred against the order within the aforesaid 30 days. until expiry of 7 days from date on which appeal/petition is disposed off.
- if further appeal/petition preferred within 7 days. until such further appeal/petition is disposed of.

2. In case if director continues to function even when office is vacated, fine - Rs. 1 lakh to Rs. 5 lakhs.



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3. Where all the directors vacate their office, the promotor/CG shall appoint required no. of directors who shall hold office till directors appt. by co. in GM
4. AOA of private co. may provide for additional grounds of vacation.

Additional points:

- No opportunity of being heard (OOBH) in case of vacation u/s 167
- Automatic vacation happens u/s 167 i.e., no board resolution required
- Board cannot waive any grounds of vacation [Relevant question asked in Jan '21 - New exam]

Quickly refer - Penalty of Sec 207 [Office vacated, and person disqualified in case a person is convicted of offence u/s 207]

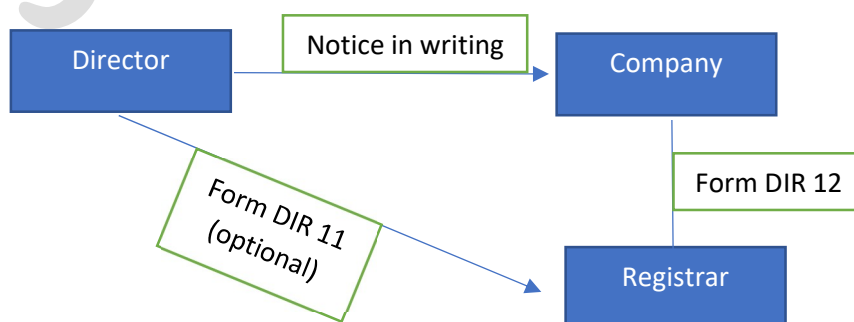
Sec 168 - Resignation of Director:

- A director may resign - by giving notice in writing to co.
- Director may also forward copy of resignation along with detailed reason therefor to the ROC within 30 days from the date of resignation in Form **DIR-11**.

In case of a **foreign director**, if co. has already filed DIR 12, the foreign director may authorize CA/CS or cost accountant or any other resident director to sign Form DIR 11 on his behalf.

- On receipt of such resignation notice:
 - Board to take note of the same.
 - Co. to intimate ROC in Form **DIR 12** within 30 days
 - Co. to post the info. on the website
 - Co. to place the fact of such resignation in BOD report in immediately following GM
- Resignation to be effective from - date on which notice is received by co. or date specified in notice (if any) whichever is LATER.
- Director to remain liable for offences which occurred during his tenure despite the resignation
- If all directors resigned, promotor/CG to appoint directors till dirs. duly appointed in GM

Note: The resignation will take effect without any need for its acceptance by the BOD or the company in GM. Even if the board doesn't accept or the company fails to intimate RoC in Form DIR 12, the resignation shall still be effective.



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Sec 169 - Removal of Director:

- A company may remove a director before the expiry of his tenure, by passing OR and after giving him reasonable OOBH.
- ID re-appointed for second term u/s 149 (10) can be removed only by passing SR + OOBH
- A **special notice** of a resolution, to remove the director or appoint someone in the place of a director so removed, shall be required.

[As per Sec - 115, special notice is to be given at least 14 days before meeting by members holding lower of 1% of VP or PUSC of Rs. 5 lakhs]
- On receipt of the special notice, the co. shall forthwith send a copy to the director concerned.
- The director shall be entitled to be:
 - heard on the resolution at the meeting
 - make representations in writing to the company
 - request the co. to notify the representation to the members
- The company shall, if time permits,
 - in the notice given to members, state the fact the representation has been made
 - send a copy of the representation to every member
 - if copy of representation couldn't be sent, director may require the representation to be read out at the meeting (without prejudice to his right to oral representation)
- If on an application either by co. or person aggrieved, the Tribunal is satisfied that right to make representation is abused to secure needless publicity for a defamatory matter, the tribunal may order:
 - Not to send the WR to members
 - Not to read out the WR
 - Cost incurred of making such application to tribunal be paid by director concerned.
- Vacancy created on removal of the director to be filled at the meeting provided special notice of intended appointment is given.

If not so filled, it can be filled as per Sec 161(4) (provided the director so removed in not reappointed by BOD)

Director so appointment shall hold office till the date predecessor would have held if he had not been removed.

- Removal under this section shall not deprive a person of CFLO, if eligible, in accordance with his terms of appointment.
- Directors that cannot be removed u/s 169:
 - Sec 242 - Appointed by tribunal
 - Sec 163 - Appointed by way of proportional representation
 - Sec 161 (3) - Nominee Director (by a special Act and such special act restrains such removal)

Note: Grounds for removal/reason for proposing a resolution to remove the director is not mandatory to be stated in the special notice [LIC vs Escorts Ltd]



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Sec 170 - Register of directors and KMP and their shareholding:

- Register to contain details of securities held by each of directors and KMP in CASH and Co-subsiary
- Register to be kept at registered office
- Co. to file with registrar a return containing such particulars within 30 days of appointment of every director or KMP and any change taking place.

Sec 171: Members' right to inspect the register maintained u/s 170

- Open for inspection during Business hours and kept open at AGM
- Right to take extract/copies - If application made by member, co. to provide within 30 days - Free of cost

Sec 172: Punishment

If default under provision for which no specific penalty is provided, the co. and every OID shall be liable to fine Rs. 50,000 and in case of continuing failure - Rs 500 /day subject to maximum of Rs. 3 lakhs (for co.) and Rs. 1 lakh (for OID)



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Chapter 2 - Meeting of Board and its power

Never count the number of pages when the chapter is as important as director!

Let's revise section numbers first

Sec No.	Name of the Section
173	Meetings of Board
174	Quorum for Meetings of Board
175	Passing of Resolution by Circulation
176	Defects in Appointment of Directors not to Invalidate Actions Taken
177	Audit Committee
178	Nomination and Remuneration Committee and Stakeholders Relationship Committee
179	Powers of Board
180	Restrictions on Powers of Board
181	Company to Contribute to Bona Fide and Charitable Funds, etc.
182	Prohibitions and Restrictions Regarding Political Contributions
183	Power of Board and Other Persons to Make Contributions to National Defence Fund,
184	Disclosure of Interest by Director
185	Loan to Directors, etc.
186	Loan and Investment by Company
187	Investments of Company to be Held in its Own Name
188	Related Party Transactions
189	Register of Contracts or Arrangements in Which Directors are Interested
190	Contract of Employment with Managing or Whole-Time Directors
191	Payment to Director for Loss of Office, etc., in Connection with Transfer of Und
192	Restriction on Non-cash Transactions Involving Directors
193	Contract by One Person Company
194	Omitted
195	Omitted



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Meeting of the board - It is pertinent for the board of directors to frequently meet to discuss on various matters relating to management and administration of affairs of the co. in the interest of the shareholder, the company and public at large with a goal of wealth maximization for stakeholders.

Decisions in board meetings are taken by votes and a resolution is said to be passed when majority of the directors "present and voting" vote in favor of such resolution.

Power of Board - In general, the directors are empowered to exercise all the power of the company except for those matter which by law is required to be exercised by the shareholders in the GM.

Sec 173 - Meeting of Board

Section 173(1) and 173(5):

<u>Type of company</u>	<u>Provision relating to board meeting</u>
General Rule for all companies	<ul style="list-style-type: none"> First BOD meeting - within 30 days of date of incorp. Subsequent BOD meeting - Min. 4 meeting in each calendar year (as per SS-1); max gap between 2 meeting = 120 days [Sec 173(1)]
Section 8 (subject to Sec 92 & 137)	At least 1 meeting in every 6 calendar months [CG notification u/s 173(1)]
<ul style="list-style-type: none"> OPC (>1 dir.) Small co. Dormant co. Pvt co. (startup and 92 + 137) 	At least 1 meeting in each half of calendar year and gap is NOT LESS THAN 90 days [Sec 173(5)]
OPC (=1 director)	No board meeting required. Provision of Sec 173(5) and Sec 174 - N.A.

Concept clarity check:

Is it mandatory for a director to attend all the Board meetings?

No. However, as per section 167, a director shall have to vacate his office if he absents himself with or without obtaining leave of absence from the board, from all the BOD meetings held within a period of 12 months.

COVID Relaxation - Gap may be extended to 180 days instead of 120 days (only applicable till 30/09/20)

Section 173(2): Participation in BOD meeting:

A director may attend BOD meeting:

1. in **person**; or
2. through **video conferencing (VC)**, or
3. through other **audio-visual (AV)** means, as may be prescribed

An audio-visual means should be capable of-

1. Recording and recognizing the **participation** of the directors; and
2. Recording and storing the **proceedings** of such meetings along with date and time.

~~Matters not to be dealt with in any meeting held through VC or other AV mode:~~



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1. ~~approval of annual FS;~~
2. ~~approval of the Board's report;~~
3. ~~approval of the prospectus;~~
4. ~~audit committee meetings (ACM) for consideration of financial statement including CFS, if any, to be approved by the board, and~~
5. ~~approval of the matter relating to amalgamation, merger, demerger, acquisition, and takeover. [omitted w.e.f. 15th June, 2021]~~

~~Provided that where there is quorum through physical presence of directors, in such case, any other director may participate through VC or other AV means in such meeting on any matter including the 5 matter specified above.~~

Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 - Meeting of BOD through VC or other AV means:

1. Co. to make necessary arrangements to avoid failure of VC or AV connection.
(There are no exceptions to this. Every company, whether private or public, shall make such arrangements)
2. CP and the CS, if any, shall take due and reasonable care to [IFRS DHS]-
 - a) safeguard the integrity of meeting by ensuring sufficient security and identification procedures;
 - b) ensure availability of proper VC or other AV equipment or facilities for providing transmission of the communications for effective participation of directors and other authorized participants;
 - c) record proceedings and prepare the minutes of the meeting;
 - d) store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records at least before the time of completion of audit of that particular year.
 - e) ensure that no person other than the concerned director is attending or have access to the proceedings of the meeting through VC mode or other AV means; [differently abled person may request for a companion]
 - f) ensure that participants attending the meeting through AV means are able to hear and see the other participants clearly during the course of the meeting.
3. Notice of meeting to be sent as per Sec 173(3)
4. Roll call - To be taken at commencement of meeting by the CP (not CS). Every director attending via VC or AV to state -
 - a) Name
 - b) Place - Location from where he is participating
 - c) Thing - Agenda and relevant material of meeting received
 - d) State that no one other than him is attending/has access to this meeting.
5. Quorum - After roll call, CP/CS to state names of person other than directors attending such meeting and confirm that required quorum is present



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Note - Quorum is to be **present throughout the meeting** and not just the start. For quorum, director participating through VC/AV shall be included. ~~However, he shall not be included if he is excluded for any item of business.~~

6. Venue of meeting - As mentioned in notice of the meeting
7. Signature of statutory registers - **Deemed** signed by director participating through VC/AV **if consent** provided and it is so recorded in minutes.
8. For the record, participants to **identify** himself before speaking
9. If a motion is **objected** and there is a need to put it to vote, **CP** (not **CS**) shall **call the roll** and note the vote of each director.
10. No person shall access the place where any director is attending the BOD meeting
11. At the end of each agenda item, **CP** (not **CS**) to announce **summary of decision** made along with name of dissenting directors.
12. Minutes of the meeting:
 - The minutes shall disclose particulars of directors who attended the meeting via VC/AV means
 - Draft minutes shall be preserved till their confirmation
 - Draft minutes shall be **circulated** among all directors **within 15 days** of meeting either in writing or in e-mode as may be decided by the Board.
 - On receipt of above draft, every director who attended the meeting, whether personally or through VC/AV means, shall **within 7 days** of receipt, confirm or give his comments in writing, about the **accuracy** of the draft minutes failing which his approval shall be **presumed**
 - Minutes shall be entered in the **minute book signed by the CP** (not **CS**).

Section 173(3): Notice of BOD meeting

- Notice to be given in **writing** at least 7 days before the meeting
- To **ALL** directors at his address **registered** with the co (India/Abroad)
- Send by - (a) hand delivery or (b) post or (c) electronic means.
- BOD meeting may be called on a **shorter notice** (i.e., <7 days) provided:
 - Such meeting is to transact **urgent** business
 - At least 1 **ID**, **if any**, shall be present in the meeting.
 If no ID is present in such meeting, decision taken in such meeting shall be - (a) **circulated** to **ALL** directors, and (b) **ratified** by at least 1 I.D.
- **Notice** to include following points related to **VC/AV** means:



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- A statement informing directors regarding **option** to participate via VC/AV means
- Director intending to participate via VC/AV means to **communicate his intention** to the CP/CS and give **prior intimation** to co. to enable the co. to make suitable arrangements.
- Dir. intending to participate via VC/AV means may **intimate** about such participation at the beginning of each **calendar year**. Such declaration shall be **valid for 1 year**. This declaration shall not debar him from attending in person if he intimates sufficiently in advance.

Section 173(4): Penalty for failing to send notices:

Officer whose duty is to give notices and fails - **Penalty of Rs. 25,000**

Additional points:

1. **Who sends the notice** of BOD meeting? - CS or any person auth. by BOD
2. Can notice for BOD meeting be sent via **email**? - Yes, of course. Sec 173(3) allows you to send notices via electronic modes (email)
3. Is it necessary to mention the **agenda** of the BOD meeting in notice? - Unless mandated by AoA, it is not mandatory. However, as a good secretarial practice, one should include agenda as well.
4. What if notice is not sent to few directors? [*Parmeshwari Prasad Gupta v Union of India (1974)*]
If concerned person fails to send notice to one or more, then the meeting **MAY** be considered void and all resolution passed may be declared invalid.
5. **Notice for adjourned meeting** - Adj. meeting is merely a continuation of original meeting and therefore fresh notice is not needed for adj. meeting unless: (a) AoA provides for fresh notice or (b) meeting is adjourned sine die (for indefinite period)
6. Notice is to be sent to directors even if they have **waived off their rights** to receive notices.
7. In case of **alternate** director, is notice to be sent to original director or alt. dir. or both? Yes. The AD is not a proxy or representative of OD. He is a director in his own rights. Therefore, **notice to be served to both AD and OD**.
8. Similarly, notices need to be sent to **interested director** as well.
9. Is it required to have BOD meetings each **quarter**? - No such requirement.
10. Can a bod meeting be held **o/s India** - Yes. No such restriction.

Section 174: Quorum [N.A. to OPC having only 1 director]

1. Quorum of BOD meeting shall be **higher** of - (a) 1/3rd of total strength of directors or (b) 2 directors

In case of **Sec -8** companies which is in compliance with Sec 92 and 137, quorum shall be **lesser** of: (a) 8 members or (b) 25% its strength

Note:

- Any fractions shall be rounded off as 1
- **Articles** of company may provide for a **higher** number of quorum
- **Directors** participating through VC/AV shall be counted for purpose of Quorum (~~except in case where the item of business is one of those 5 which is restricted to be discussed via VC/AV means~~)
- Quorum to be present throughout the meeting.
- Total strength of directors not to include those whose office are vacated.



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2. If the number of continuing directors is reduced below the quorum fixed by the ACT for BOD meeting, the continuing director(s) may act only for the purpose of (and for no other purpose):
- Increase the no. of directors to that fixed for quorum, or
 - Summoning a GM of the co.

[Example: A Ltd has 5 directors. 4 of them were travelling to the office in a car for the BOD meeting. They met an accident and all of them died. In such a case, the remaining 1 director has the power to act as a BOD himself and either appoint just 1 director to meet quorum and then function normally or to call for a GM so that shareholders can appoint director]

3. Where interested director $> 2/3$ rd of total strength of directors, quorum shall be higher of:
- No. of non-interested director present at such meeting
 - 2 directors
- Interested director - As per Sec 184(2)

Exception - In case of a private company(92+137), the interested director may participate in such meeting and shall also be counted in quorum subject to disclosure of interest u/s 184

4. If meeting could not be held for want of quorum - Automatic adjournment to next week, same day, time and place. [If national holiday - Next succeeding day which is not national holiday]

Additional point:

- Can the BOD meeting be initially scheduled on a national holiday? - Yes. The provision of national holiday applies only to automatically adjourned meeting. The original meeting can be held on a national holiday. Infact, meetings voluntarily adjourned by BoD may be held on a national holiday.
- Sunday is not a national holiday. We wish it was. But it isn't.
- Would alternate director be considered for purpose of quorum? - Yes, AD shall be includes cause it holds the office of original director.
- In a VC board meeting, assume a scenario where original director (OD) and alternate director both are present, in such case, the presence of OD shall be counted for the purpose of quorum and voting. However, AD shall continue to hold office. ~~However, while dealing with the 5 items which is restricted to be conducted via VC, the presence and vote of AD shall be counted.~~

Section 175: Passing of Resolution by Circulation (RBC):

- RBC shall be deemed to have passed if:
 - Circulated in draft together with necessary papers to all directors/members of the committee
 - at their address registered with co. IN INDIA
 - by hand delivery, post or by courier or prescribed e-mode (Email / Fax)
 - approved by majority of directors who are entitled to vote on the resolution.



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Provided that - If $\geq 1/3$ rd of total director (not entitled director) require that this resolution must be decided at a meeting (and not by RBC), CP shall put up such resolution in the meeting.

2. RBC shall be noted at a subsequent meeting as a part of the minutes.

Certain sections in the Act specify that a resolution can be passed only at a meeting (i.e., RBC not allowed). For example:

- 161(4) - Filling of Casual Vacancy of a director
- 179(3) - Power of Board to make calls on shares, issue securities of the company, borrow money, invest funds of the company, making loans etc.
- 182 - Making any political contribution
- 186 - Making loan, giving guaranty, providing security or making investment
- 188 - Approval of RPT

Section 176: Defects in appointment of director not to invalidate actions taken:

Acts of director shall **not be deemed invalid** merely on the grounds that it was **subsequently noticed** that:

- i. his appointment was invalid by reason of any "defect" or "disqualification" or
- ii. had **terminated** by virtue of any provision contained in this Act or in the Articles of the company

Provided that nothing in this section shall be deemed to give validity to any act done by the director if the company had noticed that such appointment has become invalid or to have terminated.

Section 177: Audit Committee [Read with Rule 6/6A of Co. (Meeting of Board and its power) Rule, 2014]

1. Following companies are required to constitute audit committee (AC):

- Listed Public Companies
- Unlisted public co having:
 - PUSC ≥ 10 crores
 - T/O ≥ 100 crores
 - O/S loan, debentures, and deposits (in aggregate) > 50 crores

Note:

1. Exemptions - JV/WOS/Dormant co
2. If ceases to fulfil conditions for 3 consecutive years - Provision not applicable
3. Limits to be checked as existing on last date of latest audited financial statement.

2. Composition:

- **Min. 3 directors**
- **Majority I.D.** (N.A. to Sec 8 prov. 92+137)
- **Majority including CP** - Ability to read and understand FS.

3. Transition provision

4. AC to act as per "term of reference" specified by BOD which shall, inter-alia, include [**A3 SAFE RPT**]:



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- a) Auditor - Recommend for appt., remuneration & terms of appt. [In case of Govt co (92=137), AC to only recommend rem. & not terms of appt.]
- b) Auditor - Review and monitor **independence** and performance & effectiveness of **audit process**.
- c) Auditor's Report - Examination of **financial statement** and auditor's report thereon
- d) **RPT** - Approval and subsequent modification thereof [provided AC may provide omnibus approval]

Provided that, for transactions **other than RPTs**, if AC doesn't approve it, it shall recommend it to BoD.

Provided also that, in case if any **transaction** (not just RPT) < **Rs. 1 crore** is entered into by director/officer of co. **w/o approval of AC**, it may be **ratified by AC within 3 months**. If not ratified within 3m, it shall be **voidable** at option of AC.

Moreover, if such transaction **with RP** to any director or authorized by any director, concerned director to **indemnify** co.

Provided also that this provision shall not apply to transaction (other than 188) between **Holding and WOS**.

- e) **Scrutiny** of inter corporate loans and investments
- f) Valuation of the co's **Asset/undertaking**
- g) **Evaluation** of IFC and risk management system
- h) **Funds**- Monitoring end use of fund raised through public offers or related matter.

Omnibus approval (OA) for RPTs:

- All RPTs shall require **approval** of AC.
- AC may provide OA for RPTs subject to following conditions:
 - AC shall, **after approval of BoD**, **specify the criteria** for making omnibus approval including:
 - **Max. value** of transaction (in aggregate)
 - **Max value per transaction**
 - Extent and manner of **disclosure** to be made to AC for omnibus approval
 - **Review** at such interval as AC may deem fit of the RPTs made under this approval
 - Transactions which **cannot** be subject to omnibus approval
 - AC shall consider following factors while specifying the above criteria:
 - **Repetitiveness** of transactions
 - **Justification** of need for omnibus approval
 - AC shall satisfy itself on the need of OA for transaction of repetitive nature and that such OA is in interest of the company
 - OA shall indicate the following:
 - **Name** of RPs



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- **Nature** and duration of transaction
- **Max amount** of transaction
- Indicative based **price** or current contracted price
- **Other** relevant info.

Provided that, where the need for OA cannot be foreseen and aforesaid detail is not available, omnibus approval may be made for transactions **not > Rs. 1 crore per transaction**.

- **Validity** of OA - Not > 1 FY. Require fresh approval each expiry of such FY
- No OA shall be made in respect of **selling or disposing of undertaking** of the co.

5. Rights of AC:

AC may:

- Call for **comments** of auditor about control (ICS), scope of audit, observations,
- **Review** FS before submission to board
- **Discuss** related issue with internal and stat auditors & management of co.

6. AC may **investigate** matter referred to it by BOD and may obtain **professional assistance** for the same.

7. **Auditors** and **KMPs** shall have **right to be heard** in **ACMs** when it considers auditor's report but shall not have right to vote.

8. BoD report shall **disclose**:

- a. **composition** of AC and
- b. where BoD had not accepted any **recommendation** of AC, the same shall be disclosed along with reason therefor.

9. Vigil Mechanism -

Who is required to set up?

- a. Listed co.
- b. Co. having **deposits** from public
- c. Co. having **borrowed** from bank and PFIs > **Rs. 50 crores**

Purpose - for directors and employees to **report genuine concerns**.

Oversight of mechanism - **AC**. In case if AC is not required, BoD to **nominate director for oversight**.

Vigil mechanism to provide for **adequate safeguards** against **victimization** of person who use of such mechanism and make provision for direct access to CP of AC in certain cases.

In case of **repeated frivolous complaints** being filed by director/employee, the AC or nominated director may take **suitable action** including reprimand.

Details of Vigil Mechanism to be disclosed in - (a) **Website** and (b) **Board Report**



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10. As per Sec 178(8), contravention of provision of Sec 177 shall attract penalty of Rs. 1 lakh for OID and Rs. 5 lakh for the co. [**Amended**]

Section 178 - Nomination & Remuneration Committee (NRC) and Stakeholder Relationship Committee (SRC):
[N.A. Sec -8 provided 92 +137]

NRC:

1. Who is required to constitute NRC? - **Same as AC** and Section 149(4)
2. Composition -
 - 3 or more **NEDs**
 - **At least $\frac{1}{2}$ I.D** (not majority)
 - **CP** of co. (executive or NED) can be appointed as member of NRC but cannot chair NRC
3. Function of NRC:
 - Identify person for **appointment** as director/senior management or for removal
Senior management - Management people **one level below** executive directors incl. dept heads
 - Evaluate **performance** of BoD, individual director and its committees
 - Formulate **criteria** for **determining performance**, independence, etc. of directors
 - Recommend board a **policy** relating to **remuneration** of directors, KMPs, other employees.
 - **Place** the policy in its **website** and disclose **salient features** in board report.

In case of **Govt co.** (92+173), NRC shall apply to only directors and **not senior management/employees**

Concept clarity check:

Can **Executive Directors** be part of **NRC**? - Not at all. Only NEDs can be part of NRC. Except for the CP of the co.

SRC

1. Who is required to constitute SRC?
Co. having **> 1,000** shareholders, debenture holders, deposit - holders, or any other security holder at any time during a FY (**Bole toh, 1,000 se jyada investors**)
2. Composition:
Chairperson - **NED**
Other members - As may be decided by Board
3. Purpose - Consider and resolve **grievances** of security holders of co.

Common points:

1. **CP**/Person authorized by CP of NRC and SRC to **attend GM**.
2. **Penalty** for contravention of Sec 177/178 - Co. - Rs. 5 lakhs and OID - Rs. 1 lakh.
Inability to resolve/consider grievances by SRC in **good faith** shall not be considered contravention.



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Section 179 - Power of Board

1. BoD is entitled to exercise all such powers, and do all such acts/things as the co. is authorised to exercise/do. Subject to the provision of this Act, AoA, MoA and other regulations.

The BoD shall not exercise such power which as per Act/MoA/AoA is to be exercised by the co. in the GM.

2. No regulation made by co. in GM shall invalidate any prior act of BoD which would have been valid if the regulation had not been made (i.e., changes in regulation cannot be implemented retrospectively)
3. Following power of the board to be exercised on at BoD meeting (and not by RBC):

Cash inflow	Cash outflow	FS	Badi Baatein	Others (Rule 8)
<ul style="list-style-type: none"> • Calls on SH for unpaid money • Issue securities incl. debt in India/outside • Borrow monies [Clause (d)] 	<ul style="list-style-type: none"> • Buyback u/s 68 (upto 10% of PUSC + FR) • Invest funds of co. (e) • Grant loans / give guarantee or sec. (f) 	<ul style="list-style-type: none"> • Approve F.S and BoD report 	<ul style="list-style-type: none"> • Diversify business • Approve amalgamation, merger, reconst. • Take over of co. or acquire controlling stake. 	<ul style="list-style-type: none"> • to make political contribution • to appoint or remove KMP • appoint or remove internal & secretarial auditors.

*Sec 8 co. (92+137) can exercise power to borrow money, invest fund and grant loans via RBC.

Provided that, BoD may, by a resolution passed at a meeting (not RBC), delegate the powers specified in clauses (d) to (f) above to:

- (a) any committee of directors,
- (b) the MD,
- (c) the manager or any other principal officer (PO) of the co., or
- (d) the PO of the branch office, if any

Provided further that, in case of banking co., following shall not be considered as borrowing monies or granting loans:

- a. Accepting of deposit from public in OCOB
- b. Placing of deposit by a banking co. with another banking co.
- c. Borrowing by one banking co. from another (incl. RBI, SBI, etc.)

4. SH may, be passing resolution at GM, impose restriction on powers of board (prospectively)

Points worth noting:

1. Sec 179(3)(d) - Borrow monies shall mean arrangement made with bankers for OD/CC or otherwise and not actual day to day operation of such OD/CC accounts



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2. Power of clause (d), (e) and (f) cannot be delegated to **manager of branch office** (only PO of branch covered)
3. Generally, the SH are not allowed to interfere in the way the BoD operates. But in the following 3 cases, **SH are empowered to exercise power of BoD**:
 - BoD has been acting **malafide**
 - All directors are **interested** in a particular transaction
 - **Deadlock** in management
4. Certain other power of BoD that needs to be exercised only in a meeting (not RBC):
 - 188 - Approval of RPTs
 - 186 - Giving loans/making investments
 - 203 - Appointing a person as MD holding office of MD/manager in other co.

Section 180 - Restriction on power of Board [N.A. to Private Co.]

1. Board can exercise the following power only with the consent of co. by way of **SR**: **[SALE]**
 - a. **Sell**, lease or otherwise dispose of whole or substantially the whole of **undertaking** of the co.
Note:
 - Undertaking - In which investment of co. >20% of its **net worth** or generates >= 20% of total **income** of co. (both during previous FY)
 - Substantially means >20% of such undertaking
 - **SR not required** if such sale/lease is in **OCOB**
 - **Right of buyer/lessee** not affected if purchased in **good faith** and exercised due care/diligence
 - b. **Invest** the **compensation** received from any merger/**Amalgamation**
 SR not required if such money is being invested into **Trust securities** as per Indian Trust Act.
 - c. **Borrow** money if money to be borrowed + Already borrowed > PUSC + FR + SP (Loan)
Note:
 - **SR to specify amount** up to which BoD can borrow. Else SR void. (i.e., unlimited power cannot be granted)
 - If BoD borrow in excess of limits specified, **SH may ratify**.
 - Borrowing in contravention of this section shall not be valid unless lender proves that it was made in **good faith** and w/o knowledge that limit is exceeded.
 - PUSC to include **both - Equity** as well as **preference**
 - SR N.A in case of **temporary loans** (payable on demand/within 6m) obtained from co. **bankers** in **OCOB**.
 - Temporary loan does not include loan raised to **finance capex**
 - Banking co. accepting public deposit shall not be considered borrowing for this provision
 - d. Remit, or give time for repayment of any **debt** due from **director** (**Extension**)

Concept clarity check:

Can **AoA** provide the **board** with power to do any of the above 4 activities **without SR**? - No. No such exception is given u/s 180.



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Section 181 - Company to contribute to bonafide and charitable funds, etc.:

- Applicable to both public and private company
- Can contribute any sum to charitable fund.
- **Prior permission** of company in GM (by passing OR) - For contribution in a FY of sum > 5% of Average Net Profit of 3 immediately preceding FY.

Concept clarity check:

- It is not needed for the co. to have **profit in the current year** to make such contribution. What needs to be considered is the net profit for last 3 FY.
- An amount spent in relation to business of co. or **welfare of employee** not to be considered as charitable contribution

Section 182 - Prohibitions and Restrictions Regarding Political Contributions (PC):

- Co. is allowed to contribute **any amount**, directly/indirectly towards PC (no limits)
Resolution authorizing PC has to be approved in the BoD meeting (**RBC not allowed**)
- Co. **prohibited** from PC - (a) **Govt.** co and (b) Co. in **existence <3 FY**
- **Deemed** political contribution:
 - a. donation/**payment** to a **person** carrying on activity likely to affect **public support** of a PP
 - b. **Advertisement** in any **publication** (souvenir, brochure, pamphlet) of PP
- **Disclosure** in P/L - Total amount contributed under this section
- **Electoral trust company** - Need **not disclose** as per Sec 183. It will suffice if they disclose the total amt.
- **Mode** - A/C Payee cheque or bank draft or through ECS
- **Penalty** for contravention of this section - Co (Up to **5x** the contribution) and OID (**Jail up to 6m**, fine up to 5x the contribution)

For this section - Political party means party registered u/s 29A of Representation of the People Act, 1951.

Section 183 - Power of BoD & Other Persons to Make Contributions to National Defence Fund (NDF), etc.:

- Notwithstanding anything contained in any provision of this Act, MoA, AoA or any other instrument of the co,
- BoD or person exercising power of BoD or of the co. in GM may
- Contribute such amount to NDF or other fund approved by CG for national defence

Disclosure - In P/L - **Total amt** contributed to these funds.

Summary of Sec 181, 182 and 183:

SN	Concept	Section 181	Section 182	Section 183
1	Over-riding Provision	None	Entire Companies Act	Entire Companies Act, Memorandum and Articles of the company
2	Who all are authorized to approve such payment	Board of directors (when amount within limit) Beyond limit - Shareholder to approve by OR	Only Board of directors	i. BOD, ii. Person exercising power of board, iii. person exercising power of company in GM



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3	Limit within which Board can approve	5% of average net profit of past 3 Financial years	Unlimited	Unlimited
4	Exception	Contribution in excess of 5% of average net profit shall be made only with prior approval of the shareholders (OR)	i. Government Company ii. Less than 3 Financial Year since incorporation	None
5	Mode of payment	Not specified	Account payee cheque, account payee bank draft and ECS or other prescribed instruments	Not specified
6	Disclosure	None	In P&L - Total amount paid during FY	In P&L - Total amount paid during FY
7	Penalty	None	Company - 5 times the amount contributed. OID - jail 6 months plus 5 times the amount contributed	None
8	Resolution by circulation	Allowed	Not allowed	Allowed

Section 184 - Disclosure of interest by director

(Read with Rule 9 of Companies (Meeting of Board and its Power) Rule, 2014)

1. General disclosure - Every director shall disclose his concern or interest (including shareholding interest) in co./BC/AOI or firms by way of written notice in Form MBP-1

When to disclose? - First BoD meeting:

- In which he participates
- Each FY
- Where there is a **change** in the disclosures already made.

It shall be duty of director to ensure that such notice of interest is **disclosed** at the meeting of BoD

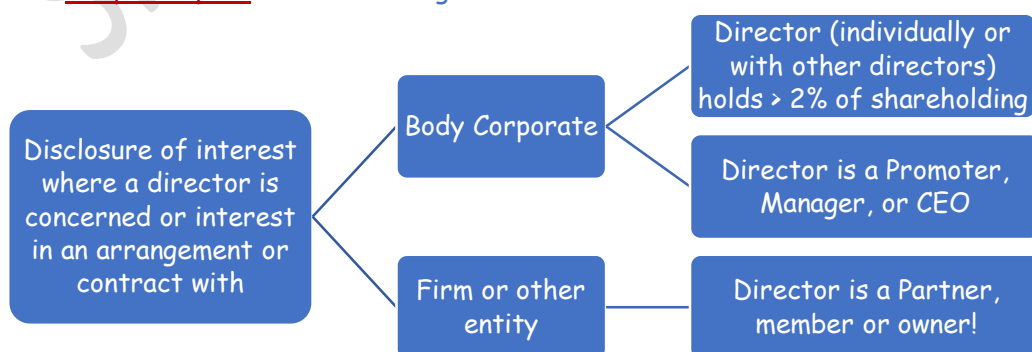
Notice of interest - To be kept at **registered office** of the co. in **custody** of CS/person auth. by BoD for **8 years** from end of FY to which it relates.

2. Specific disclosure -

Every director who is directly/indirectly concerned or interested in any contract/arrangement (C&A) with:

- a) a body corporate (BC) in which such director + other directors **holds >2%** shareholding of such BC or is a **promoter, manager, CEO** of such BC
- b) a firm/other entity in which he is partner/owner/member.

shall disclose the nature of his concern/interest in the BoD meeting in which such C&A is being discussed and shall not participate in such meeting.



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If a director is not concerned or interest in a C&A at the time of entering into it but **later becomes interested**, then **disclose** at the first BoD meeting held **immediately after** he becomes concerned/intt.

3. C&A entered into in contravention of Sub section (2) shall be **voidable** at the option of the co.

4. If director contravenes provision of this section, **penalty of Rs. 1 lakh**

Exception:

1. Sec 184(2) shall apply to **Sec-8 cos.** (92+137) only if C&A is with **Related Party** for an amount > Rs. 1 lakh
2. Sec 184(2) shall apply to **private company** (92+137) with exception that the interested director **may participate** in meeting after disclosure.

Concept clarity check:

Will interested director be counted for quorum? - No.

Section 185 - Loan to directors, etc.

1. Prohibition:

- No company shall (directly/indirectly)
- Advance **loan** (incl. book debt) to, give **guarantee** or provide **security** in respect of loan by (LGS):
 - Director of co./holding (such directors)
 - Partner/relative of such directors
 - Firm in which **such** dir/relative is partner

2. Restriction:

Co. may provide LGS in respect of **person in which director of co./holding is interested** provided that:

- **SR** is passed at **GM**
- ES to notice of **GM** to include particulars of such loan and purpose for which such loan is proposed to be utilized.
- Loans are utilized by borrowing co. for **principal business activity (PBA)**

Person in which director of co. is interested bole toh?

Pvt co. in which such director is director/member

Body Corp (BC) in which dir./two or more such dir. holds $\geq 25\%$ VP

BC - BoD, MD or mgr. is accustomed to act as per direction of BoD/dir. of lending co.

3. Non applicability of this section:

- a. Loan given to **MD/WTD**
 - As a part of condition of service extended to all Eees
 - Pursuant to scheme approved by SR
- b. Co. giving LGS in **OCOB** provided rate of **interest** not less than rate prevailing on Govt. security of tenor closer to that of loan (1 yr, 3 yrs, 5 yrs) (banks/NBFCs)
- c. LGS given by holding co. to **WOS**
- d. ~~Loan~~ LGS given in respect of loan given by Bank/PFI to its **subsidiary** company (not WOS)

Provided, Loan in point (c) and (d) above is utilized by subsidiary/WOS for **PBA**.

4. Contravention Penalty:



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	Company	Officer in Default	Person to whom LGS is given
Fine	Rs. 5 lakhs - 25 lakhs	Rs. 5 lakhs to Rs. 25 lakhs	Rs. 5 lakhs to Rs. 25 lakhs
Imprisonment	N.A	Up to term of 6 months	Up to a term of 6 months

Exemptions - Provision of Sec 185 N.A. to:

- **Govt co.** (92+137) provided **approval** of concerned Ministry of CG/SG obtained.
- **Private co.** (92+137) subject to following condition:
 - No other BC has invested in its **share cap**.
 - **Borrowings** from bank/PFI is < Lower of - (2xPUSC) or Rs. 50 crores
 - No default in repayment of such **borrowing** is subsisting
- **Nidhi co.** - Provided loan is given to dir/relative in **capacity** as members + **disclosed** in annual accounts

Concept notes:

1. Section 185 cannot be applied **retrospectively**. i.e., when a loan is made by co. to a person not covered in this section, but later, such person becomes a person specified in this section, retrospective application is not required.
2. **Advances** made to directors **for expenses** in OCOB is **not covered**.
3. There is no prohibition on co. from giving G/S w.r.t loan **given** by any person specified in above section to any other non-specified person.
4. Whether **security deposit** for **residential accommodation** taken on lease by company for the director amount to loan? - No.
5. Whether contravention of section 185 leads to **vacation** of office of director u/s 167? - No.
6. **Can a company give loan to the directors of its subsidiary?** - Yes. Only directors of holding co. is prohibited.
7. Can a company give loan to the firm in which the director's partner is a partner but the director himself is not a partner?
Yes. This section only covers those firm in which the relative of dir. or dir. himself is a partner. It does not cover partner of director.
8. Would sec 185 be applicable if **loan** is given by **co. to its subsidiary co?** - **Yes**. Sec 185 would still apply as Sec 185(3) only excludes guarantee and security on behalf of subdy and not loan given to subdy.
9. Would **part payment of a sale of flat** made by company to its director (at arm's length) and balance payment to be done in EMIs amount to loan as per Section 185? - **No**. Loan is the advance of money upon an understanding that it shall be returned back

Section 186 - Loan and investment by company

1. Max 2 layers of investment co (IC):

Unless otherwise prescribed, a co. shall make investment through **not more than 2 layers** of IC

IC means a co. whose principal business is acquisition of securities/debentures/other securities (SDO).

A co. shall be deemed to be IC if:

- **Assets** in form of investment in SDO > = 50% of total assets, or
- **Income** from such investments > = 50% of Gross total income

Provided that, this provision shall not affect:

- a co. **acquiring** a co. incorp. o/s India having beyond 2 layers of IC as per law of such country
- subdy. Co. from having **investment** subdy. for meeting requirement of law.



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2. Limit on amount of loan/investment that can be made:

No company shall, directly/indirectly:

- Loans - Give L or give G/S in connection with loan of **any person*/BC**
- Investment - Acquire by way of subscription or purchase, securities of **any BC**



* "Person" does not include individual who is in employment of the co.

3. Where LGS/investment already made + LGS/investment proposed to be made exceed above limit, **SR** is to be passed **prior** to making such LGS/investment

SR not required if - LGS is made to **WOS/JV** or investment is made in **WOS/JV** (However, these LGS/I shall be included for calculating the aggregate of LGS/I already made to determine limits)

4. Co. shall disclose - (a) **Full particulars** of LGS/I and (b) **purpose** of utilization.

5. No LGS/I (irrespective of the limit) shall be made unless:

- Resolution sanctioning it is passed at BoD meeting with consent of all the directors present at the meeting (**unanimous resolution**)
- Prior approval of **PFI** concerned where any term loan is subsisting

Provided that, prior approval of PFI shall not be required if LGS/I existing + proposed **is within limit** of this section **and** there is **no default** in repayment of loan installment.

Test your concepts:

- Can such board resolution be passed by way of **RBC**? - No. It is mandatory to be passed at BoD meeting.
- Can such discussion be taken up via **VC**? - Yes. All items can now be taken up via VC.
- Is it necessary for the **notice** of the meeting to **state** about this business? - No. **Giving agenda is not mandated** by Law
- Is **approval** of PFI required in case if **loan agreement** with PFI doesn't mention any such approval? - Yes. This is requirement of law.

6. Co. registered u/s 12 of SEBI Act shall NOT take inter corporate loans/deposits exceeding prescribed limits and furnish details in FS

7. No loan shall be given under this section at rate of **interest** < prevailing yield of Govt. sec closest to tenor of such loan (1/3/5/10 years)

Provided that, this subsection N.A. in case of **S-8 co.**, where **>=26%** of PUSC is held by **CG/SG/both** and loan is provided for **funding industrial R&D** projects in furtherance of objects as per MoA.

Note - No violation of this sub-section if **effective yield on tax free bonds** is greater than the prevailing yield of such Govt. security

8. No co. which is in default of repayment of deposit or interest thereon shall give an LGS/Investment **till such default subsists**



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9. Co. making LGS/I shall maintain **register** as may be prescribed
10. Above mentioned register shall be kept at **registered office** of co. and open for inspection. It shall be made avl to members on payment of prescribed fees.

Rule 12 of Companies (MBP) Rules, 2014:

- Particulars of LGS/I to be maintained in **Form MBP - 2**
- Entry to be made in register **chronologically** within **7 days** of making LGS/I.
- Entries to be **authenticated** by CS/person auth. by BoD
- Kept at regt. Office in **custody** of CS/person auth. by BoD
- **Preserve permanently**
- Furnish to member on payment of **fees** as per AoA not > Rs. 10 per page.

11. Sec N.A. to:

a. LGS/I made in **OCOB** by:

- Banking co.
- Insurance co.
- Housing finance co.
- Co. engaged in business of **financing industrial enterprises** and providing **infrastructural facilities**

b. Investment:

- Made by an **IC**
- Made in pursuance of shared allotted u/s 62(1)(a)
- Made by **NBFC** whose principal business is acquisition of sec.

12. **Penalty** for contravention:

	Company	Officer in Default
Fine	Rs. 25,000 to Rs. 5 lakhs	Rs. 25,000 to Rs. 1 lakh
Imprisonment	Not applicable	May extend to a term of 2 years

Exemption:

- Govt. co engaged in **defense** production
- **Unlisted Govt co.** (92+137) provided approval of concerned Ministry of CG/SG obtained.

Section 187 - Investment of company to be held in its own name:

1. All inv. made/held in property, securities and other assets shall be made/held in its own name.

Provided that, co. may hold inv. in subssy in name of any nominees to ensure that no. of members in subssy co. meets the stat. limit

2. Exceptions to 187(1):

Nothing above shall be deemed to prevent the co. from:

- depositing shares/sec. with bankers of co. for **collection of div/interest**
- depositing/transferring or holding shares/sec. in the name of bankers (SBI/Scheduled bank) for **transfer** thereof
If trf. not made within 6m, get it back in the name of co.
- depositing/transferring any share/sec. with/to any person as a **security** for repayment of loan/performance of obligation



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d. holding investment in name of **depository** where co. is the beneficial owner.

3. Co. to maintain register for investment made by co. not held in own name. Such register shall be open for inspection **without any charge**.

Rule 14 of Companies (MBP) Rules, 2014:

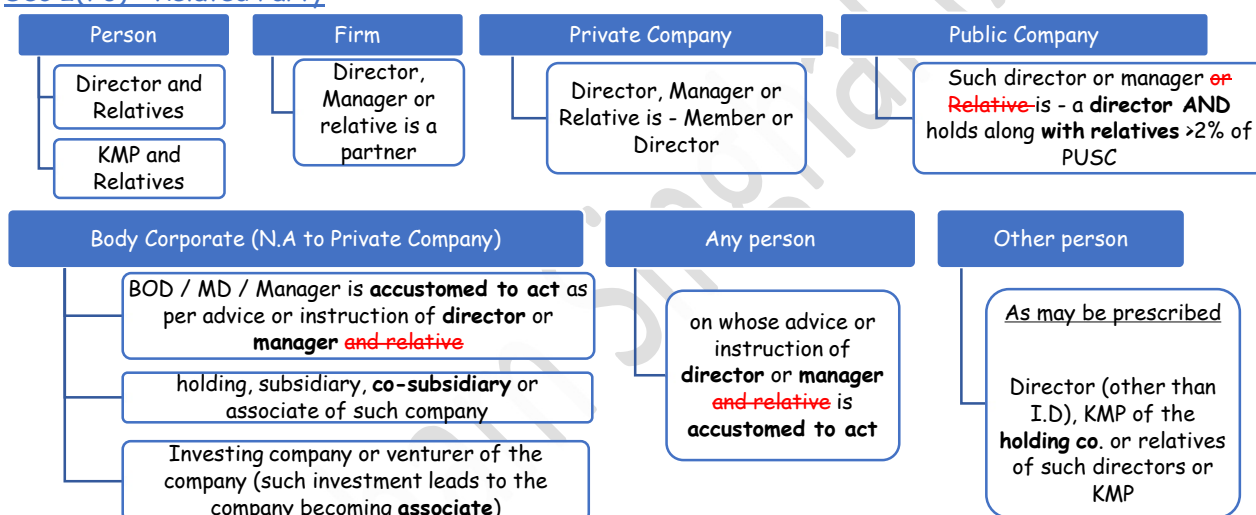
- Form **MBP - 3**
- Entry of investment not held in own name to be made in register **chronologically** along with the reason for not holding in its own name and relation/contract under which investment is held in name of other person.
- Entries to be **authenticated** by CS/person auth. by BoD
- Kept at regt. Office in **custody** of CS/person auth. by BoD
- Preserve **permanently**

4. Penalty for contravention

Co - Rs. 5 lakh ; OID - Rs. 50,000

Section 188: Related Party Transaction:

Sec 2(76) - Related Party



Sec 2(77) - Relative:

Anyone who is related to another and covers the following:

- they are members of a HUF (Hindu Undivided Family);
- they are husband and wife; or
- one person is related to the other in the prescribed manner as under:
 - Father (including step-father);
 - Mother (including step-mother);
 - Son (including step-son);
 - Son's wife;
 - Daughter (including ~~step daughter~~);
 - Daughter's husband;
 - Brother (including the step-brother);
 - Sister (including the step-sister).

- Following C&A with Related parties shall be considered as RPT and provision of this section shall apply:



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- a. Sale/purchase/supply of **goods** or material
- b. Selling/disposing/buying **property** of any kind
- c. Leasing **property** of any kind
- d. Availing or rendering of **services**
- e. Appointment of **agent** for purchase/sale of goods materials, services or property;
- f. such related party's appointment to any **office or place of profit** in the co., subdy or associate; and
- g. **underwriting** the subscription of any securities or derivatives thereof of the co.;

Office/place of profit means -

- a. where such office is held by **director** and receives remuneration in excess of entitled remuneration
 - b. where such office is held by **person** (individual/firm/Pvt. co/BC) **other than director** and receives anything from co. as remuneration
- RPT can be done only **after**:
 - Obtaining **consent of BoD** by way of resolution at BoD meeting and
 - Approved of **shareholder** where the amount of RPT exceeds prescribed limits
 - subject to other prescribed conditions.

Rule 15 of Companies (Meeting of Board and its power) Rule, 2014:

1. The agenda of the meeting shall disclose the following matters:
 - a. **Name** of RP and nature of relation
 - b. Nature/duration of the **C&A**
 - c. Material **terms** of C&A including value
 - d. **Advance** paid/received for the C&A
 - e. **Manner** of determining pricing and other commercial term
 - f. Whether or not all relevant factors have been considered
 - g. **Other** relevant info.
2. **Interested director** not to be present during such discussion
3. Prior approval of co. (**Ordinary Resoln**) shall be required where the RPT exceeds below specified limit:

Where the transactions during the FY relating to:	Limit
Sale/purchase/supply of goods/materials, directly or via agent	> = 10% of T/O
Selling/disposing/buying property of any kind, directly or via agent	> = 10% of NW
Leasing of property of any kind	> = 10% of T/O
Availing/rendering of any services, directly or via agent	> = 10% of T/O
C&A relating to appointment to any office or place of profit in the company, its subsidiary company or associate company	Rem. p.m. > 2.5 lakh
C&A relating to underwriting the subscription of any securities or derivatives of the company	> 1% of NW

*The T/O and net worth shall be as per audited FS of the preceding FY.

- Approval of shareholders for RPT shall **NOT** be required in following cases:
 - Transaction between **holding and WOS** whose account is **consolidated** with such holding co. and placed in **GM**
 - **Govt co.** in respect of C&A with other Govt co. or **CG/SG**



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- **Unlisted Govt co.** (92+137) provided approval of concerned Ministry of CG/SG obtained.
 - **ES** annexed to notice calling for GM shall include following details:
 - Name of RP
 - Name of Director/KMP who is related
 - Nature of relationship
 - Nature, material terms and value of C&A
 - Other relevant info
 - A **member** of co. who is a related party w.r.t. C&A shall not vote on such resolution.
- Exception** to the above restriction: That is, every member can vote even if he is related party:
- **Pvt. co** (92+137)
 - **Govt co.** in respect of C&A with other Govt co. or CG/SG
 - **Unlisted Govt co.** (92+137) provided approval of concerned Ministry of CG/SG obtained.
- Where a C/A which is a RPT is entered into by a director/employee w/o approval of BoD or SH as the case may be:
 - It can be **ratified** by the BoD/SH within 3 months of entering into such C&A
 - If not ratified, it shall be **voidable** at the option of BoD/SH
 - If such C/A is with a related party to a director, the director concerned to **indemnify** co.
 - It shall be open for the co. to **proceed against** the director/employee who entered in such C/A for recovery of loss if any.
 - **Disclosure:** All RPTs to be disclosed in board report along with justification for entering into such C/A
 - **Non applicability** - This section is N.A. to those RPTs entered in OCOB at ALP
- The expression "arm's length transaction" means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.
- **Punishment for contravention:**
 Director/employee of co. who authorized such C/A shall be liable to a fine of:
 In case of listed co. - Rs. 25 lakhs
 In case of other co. - Rs. 5 lakhs

Section 189: Register of Contracts or Arrangements in which directors are interested

1. Register containing particulars of all C/A u/s 184(2) and 188 to be maintained in the prescribed manner. Such registers shall be placed in the next meeting of Board and signed by all directors present.
2. Every director / KMP shall within 30 days of appointment/relinquishment of office, disclose his interest u/s 184(1) which needs to be included in the register

Rule 16 of Companies (MBP) Rule, 2014:

- Register to be maintained in Form **MBP - 4**
- Include particulars of C/A entered into with BC, Firms, etc as mentioned u/s 184(1), 184(2) or with related party u/s 188
- Entry to be made in register **chronologically** whenever there is a cause to make entry.
- Entries to be **authenticated** by CS/person auth. by BoD



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- Kept at regt. Office in custody of CS/person auth. by BoD
- Preserve permanently
- Furnish to member within 7 days of req. on payment of fees as per AoA not > Rs. 10 per page

3. Register to be kept at RO of the co. and open for inspection during business hours. Extracts may be provided to members in manner prescribed

4. Register to be produced at every AGM.

5. Nothing in this section shall apply to following C/A:

- a. Sale/purchase/supply of goods/materials/services if amount < Rs. 5 lakhs in aggregate in a year
- b. Banking co. for collection of bills in OCOB

6. Penalty - Director - Rs. 25,000

Note: For S-8 companies, this section shall apply in case the transaction u/s 188 exceeds Rs. 1 lakh.

Section 190: Contract of Employment with Managing or Whole-Time Directors

N.A. to Private co.

1. Co. to keep at registered office:
 - a. Where a contract of service with MD/WTD is in writing - Copy thereof
 - b. If no contract in writing, written memorandum (WM) setting out its terms
2. Copies of contract/WM - open for inspection to member without any fees
3. Penalty for contravention - For each default - Co - Rs. 25,000 and OID - Rs. 5,000

Section 191: Payment to Director for Loss of Office, etc., in Connection with Transfer of Undertaking, Property or Shares

General Rule - No CFLO can be paid unless it is approved by Shareholders by OR in GM.

1. Events in which compensation for loss of office (CFLO) becomes payable:
 - transfer of whole/part of undertaking/prop. of co.
 - transfer to any person all or any shares of co. resulting from:
 - offer made by general body of SH
 - offer made by a BC with a view to co. becoming subsidiary of such BC
 - offer made by individual with a view to obtain control or exercise > = 1/3rd of VP at GM
 - any other offer which is conditional on acceptance
2. Who pays such compensation?
Such payment for CFLO/Consideration for retirement from office shall be paid by:
 - Such company
 - Transferee of such undertaking/prop.
 - Transferee of such shares
 - From any other person not being such co.
3. Disclosure and approval of compensation:



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Payment under this section can be made only after it is disclosed to members and **approved by resolution at GM**. (If such GM is adjourned for want of quorum, no deemed approval)

Disclosure:

- a. **name** of the director;
- b. **amount** proposed to be paid;
- c. **event** due to which compensation becomes payable;
- d. **date** of Board meeting recommending such payment;
- e. **basis** for the amount determined;
- f. reason or **justification** for the payment;
- g. **manner** of payment - whether payable in cash or otherwise and how;
- h. **sources** of payment; and
- i. Any **other** relevant particulars as the Board may think fit.

4. Prohibition on payment of compensation:

In case of MD/WTD/Managers, the amount of compensation shall **not exceed the limit** prescribed under **section 202** of Companies Act.

No CFLO to MD/WTD/manager of co. (except 'notice pay' and 'statutory payments'), in the following cases where the co. has defaulted in payment/repayment of:

- a) **public deposits** or payment of interest thereon;
- b) **debentures** or payment of interest thereon;
- c) any **liability**, secured or unsecured, payable to any bank, PFI, etc.
- d) any **dues** towards income tax, service tax or any other tax or duty, payable to CG/SG, statutory authority or local authority unless company has disputed such liability.
- e) o/s statutory dues to the **employees** or workmen of the company which have not been paid by the company unless company has disputed such liability and
- f) dividend on **preference shares** or not redeemed preference shares on due date.

5. Payment made in contravention of this section - Director deemed to have received it in **trust** for the co.

6. Penalty on directors for contravention - **Rs. 1 lakh**.

Section 192: Restriction on Non-cash Transactions involving Directors:

1. No co. shall enter into an **arrangement** by which:

- a. director of CASH or person associated with him acquires assets from co. for consideration other than cash
 - b. Co. acquires asset from such person for consideration other than cash,
- Unless **prior approval** by way of resolution at GM.

Moreover, if the dir./connected person is a **director of holding co.**, then **resolution** is to be passed at **GM of holding co. as well**.

7. **Notice** of GM of co./holding co. for above resolution to include **particulars** of arrangement along with value of such assets involved duly calculated by a registered valuer.

8. If such arrangement is entered into in contravention of this section, it shall be **voidable** by the company (shareholders), **unless**:



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- a. **restitution** of any money/other consideration which is the subject matter of the arrangement is **no longer possible** and the company has been **indemnified** by any other person for any loss or damage caused to it; or
- b. any **rights** are **acquired bona fide** for value and **without notice of the contravention** of the provisions of this section by any other person.

Section 193: Contract by One Person Company

1. Where a contract is entered into between a OPC (limited by shares/guarantee) with its sole member who is also director, such contract has to be in **writing**.

If not in writing, the term of contract has to be recorded in a **memorandum** or in the **minutes** of the first BoD meeting after entering into such contract, unless such contract is in OCOB

2. In case where such terms are recorded in the minutes of BoD meeting, co. shall **inform** RoC about such contract **within 15 days** of approval by BoD.



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Chapter 3 – Appointment and Remuneration of Managerial Person

Never count the number of pages when the chapter is as important as director!

Let's revise section numbers first

Sec No.	Name of the Section
196	Appointment of Managing Director, Whole-time Director or Manager
197	Overall Maximum Managerial Remuneration and Managerial Remuneration in Case of Absence or Inadequacy of Profits
198	Calculation of Profits
199	Recovery of Remuneration in Certain Cases
200	Central Government or Company to Fix Limit with Regard to Remuneration
201	Forms of, and Procedure in Relation to, Certain Applications
202	Compensation for Loss of Office of Managing or Whole-time Director or Manager
203	Appointment of Key Managerial Personnel
204	Secretarial Audit for Bigger Companies
205	Functions of Company Secretary

Certain Key Definitions:

1. Chief Executive Officer (CEO) - Officer of co. designated as such by co. [Sec 2(18)]
2. Chief Financial Officer (CFO) - Person appointed as CFO by co. [Sec 2(19)]
3. Company Secretary or Secretary (CS) - CS as per CS Act, 1980 and appointed by co. to perform functions of CS [Sec 2(24)]
4. Key Managerial Personnel (KMP) [Sec 2(51)] in relation to a co. means -
 - a. CEO/MD/Manager
 - b. CS
 - c. WTD
 - d. CFO
 - e. Officers, not more than 1 level below the dir., in whole time employment, designated as KMP by BoD
 - f. Other officers as may be prescribed

Author's Note - Only MD and WTD are considered as KMP. No other director is KMP.

5. Manager [Sec 2(53)] - Individual, who subject to superintendence, control and direction of BoD, has the mgt. of whole or substantially the whole of the affairs of co. and includes a director or other person occupying position of manager.
6. Managing Director (MD) [Sec 2(54)] - Director who is entrusted with substantial ~~the whole~~ power of mgt. of affairs of the co. by virtue of:



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- a. **AoA**, or
- b. **Agreement** with co., or
- c. **Resolution** passed at **GM**, or
- d. **Resolution** passed at **BM**

Explanation - Power to do administrative acts of a routine nature shall not be deemed to be included in substantial power of management. For example:

- a. Power to affix common **seal** to any doc.,
- b. draw/endorse any **cheque** or NI of co.,
- c. sign a **share certificate** or
- d. direct registration of **transfer** of shares.

7. Whole-Time Director (WTD) [Sec 2(94)] - Director in whole time employment of co.

8. Remuneration [Sec 2(78)] - Money/Equivalent given or passed to any person for service and **includes** **perquisites** as per Income Tax Act, 1961

Concept clarity check -

- Can a non-director be appointed as MD? - **No**
- Can an additional director be appointed as MD/WTD? - **Yes**
- Can a MD/WTD be rotational director? - **Yes**
- Can a person continue to be MD after his tenure as a director is over? - **No**
- Kaun bada? - MD or BoD? - **BoD**.

196 - Appointment of MD/WTD or Manager

1. **No co.** shall employ or appoint a **MD** and a **Manager** at the **same time**.
2. **No co.** shall appoint/reappoint MD/WTD or Manager for a **term** > 5 years at a time
Provided that, **reappointment** shall **not** be made **earlier than 1 year** before expiry of term
3. **No co.** shall **appoint/continue** with a MD/WTD who is:

Age	Insolvent	Creditors	Convicted
<ul style="list-style-type: none"> • Below age of 21, or • Attained age of 70 	<ul style="list-style-type: none"> • Undischarged insolvent • Adjudged as insolvent 	<ul style="list-style-type: none"> • at any time suspended payment to crs. , or • makes or at any time made composition with them 	<ul style="list-style-type: none"> • convicted by a court, and • sentenced for a period > 6 months

To appoint person of age > 70 years:



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- Either pass **SR** and **ES** annexed to notice to include justification.
- If no **SR** but votes cast in favour > against (i.e., **OR**) and **CG**, on application, is **satisfied** that such appt. is **beneficial** to co., appt. can be made.

Additional Eligibility Conditions for MD/WTD/Manager as per Part I of Schedule V:

- a) Not sentenced to **imprisonment** for any period or to **fine** > Rs. 1,000 for conviction of any offence under 19 Acts.
(Excise, Companies Act, SEBI, SCRA, Income Tax, Custom, FEMA, PMLA, IBC, GST, etc.)

- b) Not been detained for any period under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (**COFESA**)

If approval of **CG** is sought once to appoint a person disqualified under (a) or (b), no further approval will be required to appoint such person unless convicted/detained again

- c) Completed **age** of 21 and not attained 70
Provided that, if **SR** passed to appoint person who has attained 70, then no **CG** approval required)

- d) **Resident** of India (RoI) [N.A. to companies in **SEZ**]
RoI includes person staying in India for a continuous period of > 12m immediately preceding date of such appt. **and** who has come to stay in India:
(i) for taking up **employment** in India; or
(ii) for carrying on a **business** or **vocation** in India.

4. Subject to Sec 197 and Schedule V, the terms and conditions of appointment and remuneration payable to MD/WTD/Manager shall be:

- approved by **BoD** at a **meeting**
- approved by **SH** at the next **GM** (E.g., Eicher Motors refused reappointment of their MD)
- approved by **CG** only if such terms is in variance to conditions as per Part I of Sch V
Approval of **CG** to be sought in Form **MR-2** within **90 days** of appointment.

Notice for such BM/GM to **include** such **T&C**, remuneration payable and other relevant info.

A return in Form **MR-1** to be filed with RoC within **60 days** of such appointment

5. Where appt. of MD/WTD/Manager is not approved by **SH** in **GM**, **acts** done by him before approval deemed **valid** (i.e., it will be valid)

Non Applicability	196(1)	196 (2) Term	196(3)	196(4) Approval	196(5) Acts valid
Private co. (92+137)	Applicable	Applicable	Applicable	N/A	N/A
Govt co. (92+137)	Applicable	N/A	Applicable	N/A	N/A



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Concept Clarity Check:

1. Can a co. have MD and WTD at the same time? - **Yes**
2. Can a co. have two MDs at the same time? - **YES!** MDs can have substantial powers but need not be whole power and hence multiple MDs can be appointed.
3. Can a co. have two managers at the same time? - **No.** (This answer is correct, don't worry!)
4. Can a person be appointed as MD for life? - **No**
5. Can a person of age less than 21 be appointed as director(Not MD)? - **No, cause can't apply for DIN**
6. Can a person who is an undischarged insolvent be appointed as Manager with the approval of CG? - **No, approval of CG works only in case of variance with Sch V Part I. CG cannot approve variance from S-196**
7. Can a person disqualified u/s 164 be appointed as MD? - **No, MD should be qualified u/s 164**
8. Can a person of age less than 21 be appointed by SR? - **No, it is applicable only for age > 70**
9. Can a person of age less than 21 be appointed by OR plus CG approval? - **Again, No!**
10. A Ltd. has Mr. A appointed as MD in the co. After 6m, A Ltd wants to appoint Mr. B as Manager to head the finance department. Is it valid u/s 196(1) of the Act? - **Yes. Cause, head of one dept cannot be considered as Manager as per Sec 2 and therefore 196(1) not attracted**

Sec 197 - Overall Maximum Managerial Remuneration and Managerial Remuneration in Case of Absence or Inadequacy of Profits *[N.A. to Private co and Govt. co]*

This section talks about remuneration to all directors including MD/WTD and Manager (managerial person) and Independent Directors also.

1. **Total managerial remuneration** payable by a **public co.** to all directors shall be **< = 11%** of Net Profit (as per Sec 198 without deducting director's remuneration from Gross Profit)

For payment exceeding 11%, **approval of SH (OR) in GM** required and subject to **Schedule V**

Except with prior approval in GM by SR,

- a. Rem. to any one MD/WTD/Manager shall not be **> 5% of NP** or if there is more than one such director, rem. shall not be **> 10% of NP** (in aggregate)
- b. Rem. to directors other than MD/WTD shall not exceed:
 - i. **1% of NP** if there is a MD/WTD/Manager
 - ii. **3% of NP** in other case

In case of a Nidhi co, rem. to director (other than MD/WTD/Mgr) for performing special services to the Nidhi as per AoA may be paid by way of **monthly** payment subject to approval in GM and Sec 197.

No approval in GM required where:

- a. Nidhi does not have MD/WTD/Manager
- b. Rem. to all directors **< 10% of NP** or Rs. 15 lakhs, WEL and such rem. is approved by SR.

Where the co. has **defaulted in payment of dues** to any:



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- i. Bank/PFI
- ii. Non-convertible debenture holder (DH)
- iii. Secured creditor (SC),

Approval of concerned Bank/PFI/DH/SC shall be needed prior to approval of SH in GM

Summary of summary:

Remuneration Payable to:	Limit:	Above Limit?
All the directors and Manager	11% of Net Profit	OR and subject to Sch V and PFI approval
One MD/WTD/Manager	5% of Net Profit	SR and PFI approval
More than 1 MD/WTD/Mgr.	10% of Net Profit	
<u>Dir. other than MD/WTD:</u>		
1. In case there is a MD/WTD/Manager	1% of Net Profit	
2. In case there is no MD/WTD/Manager	3% of Net Profit	

2. Above % shall be exclusive of fees u/s 197(5)
3. Subject to Sch V, if in any FY, the co. has no profit or inadequate profits, the co. shall not pay its directors (incl. MD/WTD/manager/NED/ID) any remuneration except fees u/s 197(5) except in accordance with Sch V
4. Rem. payable to director shall be determined, in accordance with prov. of this section, by:
 - a. Articles
 - b. Resolution passed at GM.
 - c. If AoA so requires, SR passed at GM.

Author's Note - The Board has no power to fix remuneration.

Rem. so determined shall be inclusive of rem. payable to director in any other capacity. However, rem. provided in other capacity shall not be so included if:

- a. Services rendered are of professional nature
 - b. In opinion of NRC, or where no NRC, in opinion of BoD, director possesses requisite qualification for practice of the profession.
5. **Sitting fees:** A director may receive rem. by way of fees for attending meetings of BoD or committees thereof.

This fees shall be such sum as decided by BoD not exceeding Rs. 1 lakh per meeting of BoD/Comm.

Provided that for ID and WD, sitting fees shall not be less than that of other directors.

Author's Note -

- (i) Sitting fees is payable even if director attends via VC/AV means.
- (ii) Sitting fees payable to ID can be more than WD or vice-versa.



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(iii) Where a Board meeting is adjourned for want of quorum or any other reason, the directors who were present to attend such Board meeting shall be entitled to receive the sitting fees.

An adjourned meeting is a continuation of the original meeting. Therefore, where a Board meeting is held and is adjourned to a later date, the sitting fees cannot be paid twice, since it is counted as one Board meeting only.

6. **Manner** of payment of Rem. – Monthly or at a specified % of NP or partly one way and partly another.

7. Omitted

8. NP for this section = NP as per Sec 178

9. What if director draws/receives **rem. in excess of limit** or without necessary approvals?

- He shall **refund** such excess sums to co. within 2 years or lesser period as allowed by co.
- Until such sum is refunded, hold it in **trust** for the co.

10. Can co. **waive off** the sum refundable under above subsection? – Cannot waive off unless:

- Approved by co. by **SR** within 2 years from the date it becomes refundable
- **Approval of banks/PFI/DH/SC** where co. has defaulted in payment of dues has been obtained prior to approval of co.

Author's Note – Recall Sec 180. Remittance or extension of any debt due from directors requires SR. And hence, such waiver would mandatorily require a SR.

Bell vs Lever Bros:

Facts of the case – Mr. Bell was MD in one of the companies of Lever Bros Ltd. Mr. Bell traded some personal profit during his tenure. Without knowledge of this, Lever Bros terminated his contract for some other reason and paid him huge sum as compensation for loss of office.

Later on when Lever Bros came to know about this fraud, they argued that this concealment and misconduct was a breach of his duty that was detailed in his employment contract and hence the compensation paid should be refunded.

Held that – a director was not legally bound to disclose any breach of his fiduciary obligations so as to give the company an opportunity to dismiss him and hence compensation cannot be refunded.

11. **Sch V overrides MoA, AoA or agreement or any resolution passed at GM or BM.**

In case of no profit or inadequate profit, the amount of rem. shall be as per provision of Sch V.

Any provision contained in MoA, AoA or agreement or any resolution passed at GM or BM, which purports to increase the amount of rem., shall have no effect unless it is in accordance with Sch V.

12. **Disclosure for listed co. in Board Report**



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- a. **Ratio** of rem. of each director to the median rem. of employees of the co. for the FY;
- b. the **% increase** in rem. of each director, CFO, CEO, CS or manager, if any, in the FY;
- c. the **% increase** in the median rem. of employees in the FY;
- d. the no. of **permanent employees** on the rolls of co.;
- e. Avg. **percentiles increase in salaries** of employees (Eee) other than managerial personnel in last FY and its **comparison** with percentile increase in the managerial rem. and **justification** of difference.
- f. **Affirmation** that the remuneration is as per the **remuneration policy** of the company.

The Board Report shall include a statement showing name of top 10 **Eee** in term of rem. drawn and name of **Eees** who:

- a. If employed throughout the FY, rem. \geq Rs. 1.02 crores
- b. If employed for part of FY, rem. per month \geq Rs. 8.50 lakhs
- c. Receives rem. \geq Rem. drawn by MD/WTD/Manager and holds (himself + spouse + dependent children) \geq 2% of Equity shares of co.

For the above statement, include following details of employee:

- a. **Rem.** received,
- b. **nature** of employment,
- c. **qualification** and experience,
- d. date of **commencement** of employment,
- e. **age**,
- f. **last employment** held by such employee before joining the company,
- g. the % of **equity shares** held by the employee in the company and
- h. whether any such employee is a **relative** of any director or manager of the company and if so, name of such director or manager.

13. Insurance premium not to be included in calculating rem. :

- Where any **insurance** is taken by a co.
- on behalf of its managerial person, CEO, CFO or CS,
- for **indemnifying** any of them
- against any liability w.r.t., any negligence, default, misfeasance, breach of duty/trust
- for which they **may** be guilty in relation to the company,
- the **premium** paid on insurance shall **not be** treated as part of the rem. payable to any such personnel.

Provided that if such person is proved to be **guilty**, the **premium** paid on such insurance shall be **treated** as part of the remuneration.

14. If any director is receiving any commission from co, he shall not be disqualified from receiving rem./comm from Holding/subsy co. subject to **disclosure** in Board Report

15. **Contravention** of this section - Person - Rs. 1 lakh and Co. - Rs. 5 lakhs.



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16. **Auditor's report** u/s 143 to make a statement whether rem. paid to directors is in accordance with this section and whether excess rem. is paid to any directors. [CARO]

17. Transition provision

Schedule V - Part II - Remuneration [Amended w.e.f. 18th March 2021 to include other directors i.e., NED and Independent Directors]

This schedule is divided into 5 sections.

Sec I: Rem. payable by co. having profit

Sec II: Rem. payable by co. having no profit or inadequate profit

Sec III: Rem. payable by co. having no profit or inadequate profit in special circumstances

Sec IV: Perqs not includes in Managerial Rem.

Sec V - Rem. payable to KMPs in 2 cos.

Section I: Co. having profit in a FY may pay remuneration to Managerial persons (MPs) or other directors within limits specified u/s 197

Section II: Where in any FY, the co. has no profit or inadequate profit, it may pay rem. to MP or other directors not exceeding the limits under (A) and (B) given below subject to approvals as mentioned below:

Limit under (A):

	Limit of yearly remuneration payable shall not exceed (in any FY)	
Where the Effective Capital (EC) is:	In case of Managerial Person (MP)	In case of other directors
Negative or < Rs. 5 crores	60 lakhs	12 lakhs
5 cr. & above but < Rs. 100 crores	84 lakhs	17 lakhs
100 cr. & above but < Rs. 250 cr.	120 lakhs	24 lakhs
250 cr. & above	120 lakhs + [0.01% * (EC - 250 cr.)]	24 lakhs + [0.01% * (EC - 250 cr.)]

If period < 1 year, prorate managerial remuneration

Remuneration in excess of above limit may be paid if **Special Resolution** is passed by Shareholders

Calculation of Effective Capital: To be done on the last date of

Add

1. PUSC (excl. share application money/advances against share)

2. Credit of share premium account

3. R&S (excl. revaluation reserve)

4. Long term loans and deposits repayable after 1 year (excl. short term arrangement such as bank OD, guarantees, etc.)

Deduct

1. accum. losses & preliminary exp. not w/off.

2. sum of any investments (except investment by Investment co.)



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Limit under (B):

In case a MP/Dir. is acting in professional capacity, rem. as per Limit (A) may be paid if such MP/Dir. has:

1. No **interest** in capital* of CSH, and
2. Not interest, directly or indirectly or **related** to director or promotor of CSH during last 2 years before or on or after the date of appointment
3. Possess graduate level **qualification** with expertise and specialized knowledge in field which co. operates.

* Employee holding shares of company upto 0.5% of PUSC under any scheme such as ESOP shall be deemed to be a person not interested in capital of co.

In case of no profit or inadequate profit, the rem. can be paid as per limits specified under (A) and (B) only if such payment:

- i. Approved by **BoD + NRC** (if applicable)
- ii. No default in repayment of dues to **Banks/PFI/DH/SC**. **If defaulted** - Obtain approval prior to approval of SH
- iii. **OR/SR as** the case may be for payment as per (A) and **SR** in case of (B) at the **GM** for a period not > 3 years
- iv. **Notice** calling for **GM** contains statement containing relevant info such as:
General information of the company - Nature of industry, financial performance, etc.
 Information about the **appointee** - Background, past remuneration and proposed remuneration, etc.
Other information - Reason for loss or inadequate profits, steps for improvement, etc.
Disclosures that shall be made in the board's report.

Section III: In following circumstances, a co. may pay rem. in excess of amt specified in Sec II:

- i. Where such rem. in excess of Sec I or II is paid by any "**other company**" and such other co. is:
 - a. either a **foreign co.**, or
 - b. has taken **approval of SH** for making such payments
and treats such payment as Managerial Remuneration (MR) under Sec 197 and the total MR paid by such company including this payment is within limit u/s 197.
- ii. The following company may pay **any amount of rem.** to its MP/other directors for following period:
 - a. **Newly** incorp co. for 7 years
 - b. **Sick** company for whom scheme of revival ordered by BIFR for 5 years from date of sanction of scheme
 - c. Co. for which Resolution Plan is approved by NCLT under **IBC** for 5 years from date of approval.
 - d. Where rem. exceeds limit u/s II but rem. fixed by **BIFR** or **NCLT**

Provided that rem. under this section may be given subject to meeting the following condition in **addition** to conditions specified under Sec II:

- a. ~~MP/other director~~ is **not** receiving rem. from any other co.



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- b. Auditor/CS of Company/ CS in whole time practice certifies that all secured creditors and term lenders have stated in writing that they have no objection, and such certificate is filed along with the return u/s 196(4)
- c. Auditor/CS of Company/ CS in whole time practice certifies that there is no default on payment to any creditors or deposit holders

Section IV: Perquisites not included in Managerial Rem.

- a. Contribution to PF, Super AF, AF (to extent not taxable under Income tax)
- b. Gratuity Payable (not > $\frac{1}{2}$ a month salary for each completed year)
- c. Leave encashment

In addition to above, the following perquisites to an expatriate MP shall not be included in rem:

- a. Children Edu. Allowance (upto max Rs. 12,000 per month per child for 2 children)
- b. Holiday Passage
- c. Leave travel concession

Section V: Subject to the provisions of Sec I to IV, a MP shall draw rem. from one or both companies, provided that:

Total remuneration drawn from the cos. < Higher maximum limit admissible from any one of the cos. of which he is a MP.

Note: Section V is applicable also in case of sufficient profit i.e., Section I.

Concept clarity check!

1. Are the provisions of Sec 197 and Sch V applicable to CEO, CFO and CS? - No, the provisions are not applicable to KMPs such as CEO, CFO and CS.
2. Does Guarantee commission paid by co. to NED for guaranteeing a term loan taken by co. amount to remuneration u/s 197? No, it is a service not in capacity of director. This will not be included in rem.

Part III - Schedule V

1. Appt. and rem. under Part I and II shall be subject to approval of SH in GM
2. The auditor /CS of co. / CS in WTP shall certify that the requirement of this Schedule have been complied with and such co. to file such certificate with ROC along with filings u/s 196(4)

Part IV - Schedule V

CG may exempt cos. from requirement of this Schedule

Section 198: Calculation of Net Profits (NP)

- a. Following adjustments need to be made to arrive at NP
- b. Credits shall be given for bounties or subsidies received from Govt. or public authorities unless otherwise directed by Govt (i.e., include in NP)
- c. Credits shall not be given for following:



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- **Premium** on shares/debentures of co. (unless it is an IC)
- Profit on sales of **forfeited** shares
- Profit of **capital** nature - Such as profit on sales of undertaking
- Profit on sale of **immovable prop.** or fixed asset of capital nature unless in OCOB
Provided that if sale value > WDV, include profits upto original cost - WDV in net profit
- Change in **carrying value** of Asset or Liab. for measuring at Fair Value
- Amt. representing **unrealized gain, notional gain, or revaluation** of assets

Post above adjustments, following adjustments shall be made:

Following shall **not** be deducted

income-tax and **super-tax** payable under the Income-tax Act, 1961 (other than those allowed specifically) [PBT lena, PAT nahin]

any **compensation**, damages or payments made **voluntarily (not bound legally)**

loss of a capital nature including loss on sale of undertaking (except upto WDV - sales proceed)

any change in **carrying amount** of an **asset** or of a **liability** on account of fair valuation.

Following shall be deducted

all the usual **working charges**

directors remuneration

bonus or commission paid or payable

any **tax** notified by the CG as being taxes on **abnormal profits**

any **tax on business profits** imposed for special reasons

interest on **debentures** issued by the company

interest on **mortgages** executed by the company

interest on **loans** and advances **secured** by a **charge** on assets

interest on **unsecured loans** and advances

payments inclusive of contributions made u/s 181

expenses on repairs (not of a capital nature)

depreciation to the extent specified in section 123

the excess of expenditure over income in any previous year

any **compensation/damages** to be paid in virtue of any legal liability including breach of contract

any sum paid by way of **insurance**

debts considered **bad and written off**

Section 199: Recovery of Remuneration in Certain Cases

- Where a co. is required to **re-state** its FS
- due to **fraud** or **non-compliance** with the prov. of this Act,
- Co. shall **recover** from past/present MD/MTD/Manager or CEO,
- who during such period for which FS is re-stated received remuneration,
- in excess of what would have been payable to him as per restated FS.

Note: Directors other than Managerial person not covered here.

Section 200: Company to fix limit with regard to remuneration

- A co. may, while according to its approval u/s 196 or 197 (no profit or inadequate profit),



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- Fix the remuneration at such amount or % of profit of co. as it may deem fit
- And while fixing such rem. shall have regard to:
 - a. **Financial position** of co.
 - b. Rem. drawn by individuals in **other capacity**
 - c. Rem. drawn from **other cos.**
 - d. Professional **qualification** and experience.
 - e. **Other matter** as may be prescribed (relationship between remuneration and performance, remuneration policy and securities held by the director)

Section 201: Forms of, and Procedure in Relation to, Certain Applications

1. Application made to CG u/s 196 shall be in **Form MR-2** and shall be made within **90 days** of such appointment
2. Before making any such application to CG:
 - Issue a **general notice** to members indicating the nature of application proposed to be made.
 - **Publish** notice in **newspaper** - one in principal language and one in English.
 - Copies of the notice shall be attached to the application.

Section 202: Compensation for Loss of Office of Managing or Whole-time Director or Manager

1. Co. can make payment to MP, **but not to any other director** as:
 - Compensation for Loss of Office (**CFLO**)
 - Consideration for Retirement from Office (**CFRO**)
 - In connection with such loss or retirement
2. No payment under this section in following case [**R₂VGWI**]:
 - a. Director **Resigns** as a result of **reconstruction** or amalgamation and is **appointed** as MP/other officer in reconstructed/amalgamated co.
 - b. Director **Resign** from office otherwise than on reconstruction/amalgamation
 - c. Office **Vacated** u/s 167
 - d. Where co. is wound up, provided that **WUP** was due to negligence/default of director
 - e. Director is **Guilty** of fraud or breach of trust or gross negligence or mismanagement in conduct of affairs of the co/subsy/holding
 - f. Where the director has **Instigated**, or has taken part in bringing about, the termination of his office.
3. Payment not to exceed what he would have earned if he had been in the officer for remainder period or 3 years whichever is shorter.

Calculation of payment: Average remuneration of last 3 years or shorter period if he held office for less than 3 years.

So, payment = Average remuneration * Period (balance period of office or 3 years whichever is shorter)

Provided that, no payment if WUP commence before or within 12 months after he ceases to hold office and assets is not sufficient to repay the share capital



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4. Nothing in this section prohibits directors from receiving remuneration under this Act.

Section 203: Appointment of Key Managerial Personnel

1. Following companies shall have "whole time KMP":

- Listed co.
- Public co. having PUSC \geq Rs. 10 crores

Whole time KMP bole toh?

- MD/Manager/CEO or in their absence WTD,
- CS, and
- CFO

Moreover, every private co. having PUSC \geq Rs. 10 crores shall have a whole time CS.

Provided that, individual shall not be appointed as **Chairperson** of the company as well as **MD/CEO** of the company at the same time **unless**:

- AoA provides otherwise, or
- Co. does not carry multiple business (i.e., if company has single business, the CP can be MD/CEO too)

Provided further that, **above proviso (i.e., Chairman and MD/CEO cannot be same person)** shall be **N.A** to public companies:

- Having PUSC \geq Rs. 100 crores, and Annual turnover \geq Rs. 1,000 crores
- Co. is engaged in multiple business and
- Has appointed one or more CEO for each such business.

PUSC and T/O as per latest audited FS.

2. Whole time KMP to be appointed by **resolution** of **Board** containing T&C of such appt.

3. A whole time KMP shall **not hold office in more than once co. at the same time except in subsidiary co.**

Nothing in this section shall disentitle a ~~whole time~~ KMP from becoming a director in any co. with the permission of Board.

Can a person be MD in two companies at the same time?

If a person is MD/manager in one other company, it is permissible for a company to appoint him as its MD.

The following conditions needs to be satisfied:

- Such person should be MD/Manager of **one**, and of **not more than one**, other company.
- Approved by a resolution passed at BM with the **consent** of **all the directors present**.
- Specific notice** of such meeting, and of the **resolution** to be moved thereat has been given to all the directors then in **India** (i.e., agenda required)

Author's Note:



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1. Approval of all the directors present in the meeting is required. It means, if director's abstain from voting, this resolution cannot be passed. E.g. If a company has 8 directors and 6 directors are attending the meeting, all the 6 should vote in favour of this resolution or this resolution will fail.
2. Prior to this section, Sec 188 had mandated for the agenda of the meeting to be sent to BoD.

4. **Vacancy** in office of whole time KMP, to be filled by BoD within **6m** of vacancy

5. **Penalty** - Co. - Rs. 5 lakhs, Director/KMP in default - Rs. 50K + Rs. 1,000 per day, Max. Rs. 5 lakhs

In case of a Government co, this section shall not apply to MD/Manager/CEO or in their absence WTD
For e.g., vacancy in the office of MD/etc. need not be filled within 6m.

Section 204: Secretarial Audit for Bigger Companies

1. Following companies to annex **Secretarial Audit Report** (by CS in practice) to the BoD Report u/s 134(3):
 - Listed co.
 - Public co. having **PUSC** >= Rs. 50 crores
 - Public co. having **T/O** >= Rs. 250 crores
 - Every co. having o/s **loan** or borrowings from bank/PFI >= Rs. 100 crores

Secretarial Audit Report - **Form MR-3**

2. Duty of co. to give **assistance** and facility to CS in P for auditing such records
3. BoD Report to **explain** in full any **observation** or **qualification** made in secretarial audit report
4. Contravention - Co/OID/CS - Penalty - Rs. 2 lakhs

Section 205: Function of CS

1. Function of CS includes following: [**C₂ AGM RAO**]
 - Report to BoD about **Compliance** with Act/Rules/Other law
 - Ensure co. **Complies** with applicable **SS**
 - Discharge prescribed duties
 - Provide **Guidance** to director of co. w.r.t. duties and power
 - Facilitate convening of **Meeting**, attend BoD/committee or **GM** and maintain minutes thereof
 - Obtain **Approvals** of BoD/SH/Govt as per this Act
 - **Represent** before various regulator and other auth. under this Act
 - Assist BoD in conduct of **Affairs**
 - **Other** duties as may be assigned time to time.
2. Provision of Sec 204 and 205 not to affect duties and functions of BoD, CP, MD or WTD.



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