

# DIRECTOR'S SUMMARY

By CA SANIDHYA SARAF



## SECTIONS

149 to 172

173 to 195

196 to 205

## CHAPTER NUMBER

XI, XII, XIII

## RULES

Companies(Appointment & Qualification of Director)Rules, 2014

**DIR**

Companies(Meeting of Board & its Powers)Rules,2014

**MBP**

Companies(Appointment & Remuneration of Managerial Personnel) Rules,2014

**MR**

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## CHAPTER XI-SECTIONS 149 TO 172

### SECTION-149

#### Number of directors:

**149(1)(a)-Minimum-** OPC-1, Pvt Co-2, Public co- 3

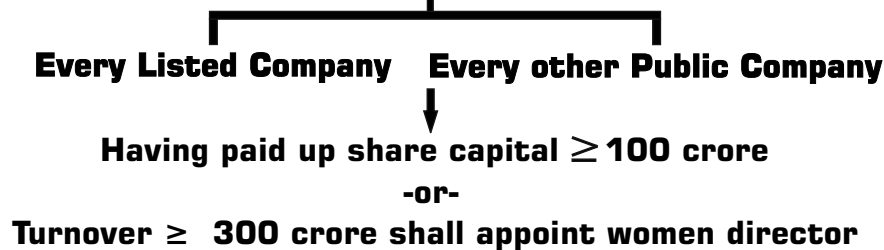
**149(1)(b)-Maximum-** 15. Provided that more than 15 directors can be appointed by passing SR.

#### MCA Clarification

- ☆ However, the provisions pertaining to Section 149(1)(b) is not applicable to Section 8 companies and government companies. They can appoint more than 15 directors without passing SR.
- ☆ **However, the exemption will not be available if company has defaulted in the filing of annual returns or financial statements to ROC.**

#### Women Directors:

#### Rule 3 states



**Note:** The paid up share capital or turnover as on the last date of latest audited financial statement shall be taken into account.

**Note:** The above classes of companies are required to appoint at least one women director.

#### Vacancy in office of Women Director:

Filled by BOD (Next Board meeting or 3 months whichever is later).

#### Resident Director:

At least 1 Resident Director (At least 182 days in **the financial year**). **ICAI has taken the view that the stay of 182 days is to be considered in the current financial year.** For a newly incorporated company, this requirement shall apply proportionately at end of FY in which company is incorporated.

#### Independent Director:

#### Composition

- ☆ Listed Public Company-one third of directors shall be independent.

- ☆ If company is required to appoint Audit Committee under Section 177- Majority of members of Audit Committee must be Independent.
- ☆ **Rule 4**-Other Public Company(POT  $\geq$  10cr/50cr/100cr).
  - ➔ Paid up share capital  $\geq$  10 cr.
  - ➔ **O/S Loans, Debentures and Deposits > 50 cr.**
  - ➔ Turnover  $\geq$  100 cr.

## No of Independent Directors

As per Sec 149(4), every listed co shall have at least 1/3<sup>rd</sup> of total no of directors as independent directors and other prescribed companies were required to have at least 2 independent directors. Now the exemption from having 2 independent directors have been granted to following class of unlisted companies that is Joint Venture, wholly owned subsidiary and Dormant Company.

## Vacancy in the office of Independent Director

Next Board Meeting or 3 months whichever is later.

## Tenure of Independent Director

- Initial appointment for a term of 5 years by members in GM.
- Can be appointed for 2nd consecutive 5 years (by passing SR).
- **No independent director shall hold office for more than two consecutive terms**, but such independent director shall be eligible for appointment after the expiration of 3 years of ceasing to become an independent director. An independent director shall not, during the said period of three years, be appointed in or be associated with the company in any other capacity, either directly or indirectly.
- **The independent directors who have been appointed for the second time can be removed only after passing SR after giving a reasonable opportunity of being heard.**

## Remuneration of Independent Directors

- ⊛ Entitled to reimbursement of expenses, sitting fees, other profit related commissions.
- ⊛ Not entitled to stock option.

### **New Proviso Inserted**

- ⊛ Provided that if a company has no profit or its profits are inadequate, an independent director may receive remuneration, exclusive of any fees payable under section 197 (5) (sitting fees), in according with the provisions of Schedule V.

## Counting Purpose

- ⊛ Counting for purpose of Section 149(1) i.e Total No of Directors.
- ⊛ Not counted in rotational directors { 152(6), 152(7) }

## Liability of Independent Directors

- ⊛ Only for those acts of omission which had occurred with his knowledge and consent.

## Section 149(6)-Requirements for being Independent Director

- ⊛ Should not be MD, WTD or nominee director.
- ⊛ Person of integrity, expertise and experience.
- ⊛ Not/was not a promoter of C/H/S/A nor related.
- ⊛ No pecuniary relationship currently **other than remuneration as such director or having transaction not exceeding 10 % of his total income or during the two immediately preceding financial years with C/H/S/A or promoters or directors.**
- ⊛ Relatives should not hold security exceeding **Rs 50 lakh face value or 2 percent** of PSC /be indebted/given a guarantee of **Rs 50 lakhs or more** in current year or 2 immediately preceding financial year in C/H/S/A. Also pecuniary transaction or relationship with C/H/S/A should not amount to 2 % or more of gross turnover or total income individually or in combination with above transactions.
  
- ⊛ **Neither himself , nor his relative or partner-** should be KMP or employee in C/H/S/A in current year or 3 immediately preceding FY/Nor employee/proprietor/partner of firm of auditors/CS/CWA firm or legal or consultancy firm that has had transaction with C/H/S/A amounting to **10 % or more of gross turnover** in current year or 3 immediately preceding FY.
- ⊛ Hold more than 2 % or more of total voting power with relatives, should not be a CEO or director of NPO that receives 25 % or more of its receipts from C/H/S/A or promoters or directors or hold 2 % or more voting power in such company.

### MCA notification

Provisions relating to women directors and independent directors are not applicable to Sec 8 Co's.



## Rule-6 Compliance required by a person eligible and willing to be appointed as an independent director:

### 1 EVERY INDIVIDUAL

(a) who has been appointed as an independent director in a company, on the date of commencement of the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, (1st december 2019), shall within a period of **thirteen months** from such commencement; or

(b) who intends to get appointed as an independent director in a company after such commencement, shall before such appointment, apply online to the institute for inclusion of his name in the data bank for a period of one year or five years or for his life-time, and from time to time take steps as specified in sub-rule (2), till he continues to hold the office of an independent director in any company:

Provided that any individual, including an individual not having DIN, may voluntarily apply to the institute for inclusion of his name in the data bank.

2 Every individual whose name has been so included in the data bank shall file an application for renewal for a further period of one year or five years or for life-time, within a period of thirty days from the date of expiry of the period upto which the name of the individual was applied from inclusion in the data bank, failing which, the name of such individual shall stand removed from the data bank of the institute:

**Provided that** no application for renewal shall be filed by an individual who has paid life-time fees for inclusion of his name in the data bank.

3 Every independent director shall submit a declaration of compliance of sub-rule (1) and sub-rule (2) to the Board, each time he submits the declaration required under **sub-section (7) of section 149 of the Act**.

4 Every individual whose name is so included in the data bank under sub-rule (1) shall pass an online proficiency self-assessment test conducted by the institute within a period of **two years** from the date of inclusion of his name in the data bank, failing which, his name shall stand removed from the databank of the institute:

**Provided that** an individual shall not be required to pass the online proficiency self-assessment test when he has served for a total period of not less than three years as on the date of inclusion of his name in the data bank,-

A as a director or key managerial personnel, as on the date of inclusion of his name in the databank, in one or more of the following, namely:-

a listed public company; or

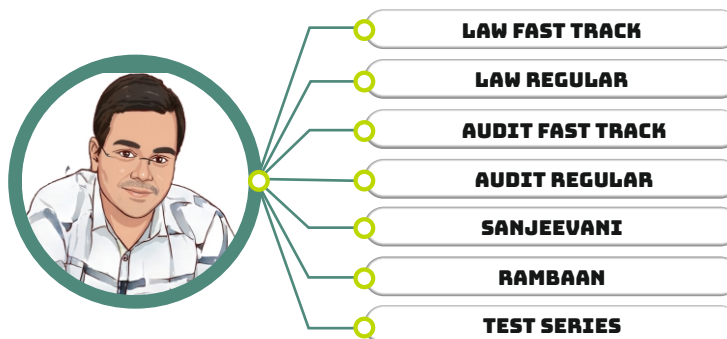
b unlisted public company having a paid-up share capital of rupees ten crore or more; or

- c body corporate listed on any recognized stock exchange or in a country which is a member State of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member State is a member of the International Organization of Securities Commissions; or
  - d bodies corporate incorporated outside India having a paid-up share capital of US\$ 2 million or more; or
  - c statutory corporations set up under an Act of Parliament or any State Legislature carrying on commercial activities; or
- B in the pay scale of Director or above in the Ministry of Corporate Affairs or the Ministry of Finance or Ministry of Commerce and Industry or the Ministry of Heavy Industries and Public Enterprises and having experience in handling the matters relating to corporate laws or securities laws or economic laws; or
- c in the pay scale of Chief General Manager or above in the Securities and Exchange Board or the Reserve Bank of India or the Insurance Regulatory and Development Authority of India or the Pension Fund Regulatory and Development Authority and having experience in handling the matters relating to corporate laws or securities laws or economic laws :

### Points to be Noted

- G For the purpose of calculation of period of **3 years**, if an individual was acting as a director or KMP in two or more companies or body corporate, it shall be counted only once.
- G "Institute" means the 'Indian Institute of Corporate Affairs at Manesar'.
- G Minimum **50 %** is required in aggregate to pass the online proficiency test.
- G There shall be no limit on number of attempts an individual may take for passing the online proficiency self-assessment test.

## CHOOSE THE BEST FOR YOU



## SECTION-150

CG may authorise Institute or Agency to Maintain Data Bank of Independent Directors.

## SECTION-151

### Read with Rule 7

### Appointment of director elected by small shareholder

- ⊛ A listed company may appoint director of small shareholders if notice is given by
  - a) Not less than 1000 shareholders or
  - b) one tenth of total no of small shareholders whichever is lower.
- ⊛ Listed companies may also appoint small share holder directors suo moto.
- ⊛ Notice must be given at least 14 days before meeting specifying the details and consent of the proposed director.
- ⊛ A person can become small shareholder director in maximum 2 companies.
- ⊛ Small share holder means a share holder who holds shares of nominal value of Rs.20000 or less.
- ⊛ Maximum tenure is 3 years and he cannot be reappointed.
- ⊛ Cannot be reappointed for 3 yrs in any other capacity directly or indirectly.
- ⊛ Can be an ID if he gives declaration and fulfils criteria. However he cannot be a MD or WTD. {ICAI view-Mandatory to fulfil the requirement of independence as per 149 (6) and give declaration of independence as per 149 (7)}.
- ⊛ A person disqualified under Section 164 cannot be a small shareholder director. If the disqualification is incurred later on, the small share holder director will have to vacate his office.

## SECTION-152

### Appointment of Directors

Appointment of first directors- Persons named in AOA/ Subscribers of MOA.

Appointment of subsequent directors- Pass OR in GM, Obtain consent and file to ROC.

**Every person proposed to be appointed as a director shall furnish his DIN or such other no as may be prescribed.**

**He shall not act as director unless he gives his consent to hold office as director in Form DIR-2 and such consent has been file to ROC within 30 days in Form DIR-12 along with fees prescribed.**

## Rotation of Directors {152(6),(7)}

- ✦ This requirement is applicable only in case of Public Company.
- ✦ Atleast  $2/3$  rd (No rounding off )of the total number of directors shall be rotational directors(higher is allowed).
- ✦ Independent Directors **and Nominee Directors** will not be counted in Total Directors for the purpose of taking two third.
- ✦ **There is a debate w.r.t Additional directors whether they will be counted in Total No of Directors for the purpose of taking two third. Since the law is not clear. Students can take a suitable assumption and mention assumption clearly in exams.**
- ✦ All directors appointed by BOD are non-rotational directors.
- ✦ New Companies Act does not specifically excludes MD and WTD from the requirement of rotation. However, in normal course they are non- rotational.
- ✦ Appointed in G. M. by passing OR. Remaining  $1/3$ rd directors shall be appointed by AOA. If AOA is silent, then by members in GM.
- ✦ Exact  $1/3$  rd of the total number of rotational directors shall retire by rotation at every AGM(Round off to nearest decimal).FIFO method to be followed .ie. directors who have been longest in office shall retire first. If 2 directors are appointed on the same day, then the same shall be determined by lot.  
However in case there is agreement between directors, retirement shall take place subject to such agreement.

### Example

- (i) Total number of directors=9,Minimum no of rotational director=6(say 7).Exact  $1/3$ rd of  $7=2.33=2$  shall retire.(rounded off to nearest decimal).
- (ii) Total number of directors=8,Minimum no of rotational director= $2/3$ rd of  $8=5.33$ .Logically company will have to maintain atleast 6 rotational directors(say all 8 retire). Exact  $1/3$ rd of  $8=2.67$  i.e. 3 shall retire.
- (iii)Total no of directors= 10(including 1 Independent Director).

**Hence, No of directors to be liable to retire by rotation= $9*2/3=6$ .**

## Automatic Adjournment and re appointment (Section 152(7))

- (a) If the vacancy of the retiring director is not so filled-up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day, in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.
- (b) If at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless—



- (i) at that meeting or at the previous meeting a resolution for the re-appointment of such director has been put to the meeting and lost;
- (ii) the retiring director has, by a notice in writing addressed to the company or its Board of directors, expressed his unwillingness to be so re-appointed;
- (iii) he is not qualified or is disqualified for appointment;
- (iv) a resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act; or
- (v) section 162 is applicable to the case.

## MCA Clarification

Provisions of Section 152(6) and 152(7) shall not apply to a unlisted Government Company and its subsidiary. However the exemption shall not be available if the company has defaulted in the filing of annual returns or financial statements.

### SECTION-162

- Separate resolution passed for the appointment of every individual director is valid.
- However, if > 1 director is to be appointed by a single resolution,
  - a) First pass a unanimous resolution in General Meeting
  - b) Only then such a resolution passed in General Meeting is valid.
- Where re-appointment becomes void under Section 162, the provision relating to automatic re-appointment is not applicable.

**Important note-MCA has clarified via Notifications No 464(E) dated 5th June, 2015 that provisions of Section 162 shall not be applicable to a private company.**



## SECTION-160

Notice to be appointed as director by any person at least **14 days before GM.**

Deposit-Rs. **100000**

Resolution – OR

Refund of Deposits-If he gets **25% of Vote**

**Exemption to the following directors from giving deposit- Independent director, Director whose name is recommended by NRC/BOD.**

**Relaxation- Nidhi Companies only deposit of Rs 10,000 will be required.**

**MCA Notification- Requirement not applicable to Pvt co, 100 percent Govt co's, Sec 8 co's.**

## SECTION-161

### Additional Director 161 (1)

#### POWER

Regulation 72 of Table A authorizes BOD to appoint additional directors.

#### TENURE

Up to the commencement of First AGM held after the appointment of additional director(MCA Clarification). Even if such AGM is not held, still the additional director shall retire on the last day on which AGM should have been held.

#### METHOD OF APPOINTMENT

In Board Meeting or Resolution by Circulation.

#### RESTRICTION

A person who fails to get appointed as a director in GM, shall not be appointed as an additional director. However, a person who fails to get appointed as additional director, can be appointed as a directors in GM.

#### LIMIT

Existing directors + Additional Director=Maximum no of directors permissible in AOA.

### Alternate Director 161 (2)

#### POWER

Authorisation in AOA/Resolution in GM.

## TENURE

Appointed by BOD for the time being during absence of original director in India for a continuous period of 3 months. Such director shall hold office until the return of original director in India or End of office of original director whichever is earlier.

## METHOD OF APPONTMENT

In Board Meeting or Resolution by Circulation.

## RESTRICTION

- a) An Individual can act as Alternate Director for 1 individual only.
- b) Concept of automatic re-appointment shall apply to the original , and not alternate director.
- c) Person can be appointed as an alternate director to an Independent Director only if he is qualified to be appointed as Independent as per 149(6).



## Important Points

1. A person who is already a director in the company cannot become an alternate director for any other director.
2. Alternate director to a women director should be a women.

## Director in casual vacancy 161 (4)

## POWER

No authorisation required in AOA i.e. no provision in Table A regarding appointment of casual directors.

## TENURE

Casual Vacancy means any vacancy(due to death or any other reason otherwise than in normal course) arising in the office of such a director who was originally appointed In Gm. Eg: Death of Alternate Director is not Casual Vacancy. His tenure is valid only for the unexpired period of original director.

## METHOD OF APPONTMENT

In Board Meeting. **Not by Resolution by Circulation.**

## RESTRICTION

**Appointment cannot be done by way of RBC.**



## Points to remember

1. Section 161(4) is now also applicable to a private company.
2. The vacancy arising in the office of the director shall be fulfilled by the Board which shall subsequently be approved by members in next GM.

## Nominee Director Section 161 (3)

- ★ He is a director nominated by any Bank or Financial Institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the CG or SG by virtue of its share holding in a Government Company.
- ★ However, AOA must authorise the BOD to appoint nominee directors.

## Provisions relating to Director Identification Number

### Section 153-159)

#### SECTION-153

Every individual, who is to be appointed as director----> make an application electronically in **Form DIR-3, to the CG** for the allotment of a DIN along with such fees as prescribed.

No person shall be director unless allotted a DIN **or such no as may be prescribed.**

Documents to be filed- Photograph, Proof of identity, Proof of residence, Copy of Board Resolution proposing appointment in existing co, specimen signatures.

Form DIR 3- shall be signed and submitted electronically by applicant using his digital signature certificate and shall be verified digitally by CS in full time employment of Co or MD or Director or CEO or CFO of the company in which applicant is intended to be appointed as a director.

#### SECTION-154

The CG shall, **within 1 month** from the receipt of the application U/S 153, Allot a DIN to the applicant in such manner as may be prescribed.

#### SECTION-155

No individual, who has already been allotted a Director Identification Number under section 154, shall apply for, obtain or possess another Director Identification Number.

## SECTION-156

Every existing director shall, within one month of the receipt of Director Identification Number from the Central Government, intimate his Director Identification Number to the company or all companies wherein he is a director.

## SECTION-157

Every company shall, within fifteen days of the receipt of intimation under section 156, furnish the Director Identification Number of all its directors to the Registrar.

If any company fails to furnish the Director Identification Number to the ROC within fifteen days of receipt of DIN under Section 157(1)

### A. Penalty for Company

**Minimum-Rs 25,000**

In case of continuing failure , Rs 100 per day

**Maximum-Rs 1,00,000**

### B. Penalty for officers in default(same as company )

**Minimum-Rs 25,000**

In case of continuing failure , Rs 100 per day

**Maximum-Rs 1,00,000**

## SECTION-158

Every person or company, while furnishing any return, information or particulars shall mention DIN.

## SECTION-159

If any individual or director of the company makes any default in complying with the provisions of

1. Section 152 or
2. Section 155- i.e. the Director wrongfully obtains more than 1 DIN or
3. Section 156-i.e. the existing Director fails to intimate his DIN to companies in which he is director, within one month of the receipt of DIN from the CG .

### **Penalty for such individual or director:-**

Penalty may extend to fifty thousand rupees and where the default is a continuing one, with a further penalty which may extend to five hundred rupees for each day after the first during which such default continues.

## Rule 12A of Companies (Appointment and Qualification of Directors) Rules, 2014

Every individual who holds DIN as on 31<sup>st</sup> March of the Financial Year is supposed to file e-form DIR-KYC on or before 30<sup>th</sup> September. { Earlier it was 30<sup>th</sup> June }

A new web-form DIR -3 KYC-WEB has been introduced. { i.e a pre-filed form which the director is just required to authenticate by entering OTP number received. He is not required to manually enter same information every year }

If an individual who has already submitted e-form DIR -3 KYC in relation to any previous financial year, submits web-form DIR-3 KYC-WEB through the web service in relation to any subsequent financial year it shall be deemed to be the compliance of the provisions of this rule for the said financial year

However, in case an individual desires to update his personal mobile number or the e-mail address, as the case may be, he shall update the same by submitting e-form DIR KYC only.

The fees for filing e-form DIR -3 KYC or web-form DIR-3 KYC-WEB through the webservice , as the case may be, shall be payable in Companies(Registration Offices and Fees) Rules, 2014.



### SECTION-163

## Appointment of Directors by Proportional Representation

1. A company may opt for proportion representation only authorized by AOA.
2. **At least 2/3rd** of the directors must appointed by proportional representation, whether by single transferable vote or by a system of cumulative voting or otherwise;
3. such appointment shall be made once in **every 3 years**.

## SECTION-164

### Disqualification of Directors

#### Section 164(1) (Newly added clause)

A person shall not be eligible for appointment as a director of a company, if —

- (a) he is of unsound mind and stands so declared by a competent court;
- (b) he is an undischarged insolvent;(declared insolvent but liabilities not settled. Once liability is settled it is discharged insolvent)
- (c) he has applied to be adjudicated as an insolvent and his application is pending;
- (d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence:

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;

- (e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;
- (f) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;
- (g) he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or
- (h) he has not complied with sub-section (3) of section 152. i.e. DIN not obtained.

**(I) he has not complied with the provisions of sub-section (1) of section 165. { i.e. if a Director hold more directorship's then what is permissible under Section 165(1) , he is disqualified.**



#### **Point to Remember**

Disqualification shall apply even after appeal is filed.

However, as per grounds of vacation specified in Section 167, not required to vacate the office before expiry of 30 days from date of conviction. If within 30 days, he further appeals, he wont have to vacate within 7 days of the disposal of such appeal and similar for further appeal.

#### **Section 164(2)**

No person who is or has been a director of a company which—

- (a)** has not filed financial statements or annual returns for any continuous period of three financial years; or
- (b)** has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Provided that where a person is appointed as a director of the company which is in default of clause (a) or clause (b) , he shall not incur the disqualifications for a period of 6 months from the date of his appointment.

**Q. Does failure to pay interest on loan attract 164(2) disqualification? No**

**Q. Is there any auditor's liability with regard to reporting the disqualification under Section 164(2)?Yes, under Section 143(3)(g)**

## MCA Notification dated 5/06/2015

- Section 164(2) is not applicable to Government Company.



Note

A private company may add additional ground of disqualifications.

Note

As per Section 167(1), the office of the director shall become vacate if he incurs any disqualification specified in Section 164.

Note

A minor cannot be a director since he is not eligible to obtain DIN and cannot file a valid consent to act as director.

### Points to remember

As per ICAI view, 164(2) disqualification is not applicable to nominee director although the Act does not give any such exemption.



### Point to Remember

As per grounds of vacation given in Section 167(1)(a), the director of the defaulting company under Section 164(2) is required to vacate office in all the companies in which he is the director except the defaulting company.

## SECTION-165

A person can be a director in maximum 20 companies(public or private including alternate directorships) in which there can be maximum 10 public companies.

**Section 8 companies and Dormant companies shall be excluded from the ceiling of 20 companies. {ICAI view in past MTP- Even Foreign companies shall be excluded}.**



### Point to remember

Members of a company may by SR, specify any lesser number of companies in which a director of the company may act as directors.

### Penalty for Contravention

If a person accepts an appointment as a director in contravention of sub-section(1), he shall be liable to penalty of **2,000** rupees for each day after the first during which such contravention continues, subject to a maximum of **2 Lakh rupees**.



## SECTION- 165 (2)

The members of a company may specify in AOA by SR, specify any lesser number of companies .

## SECTION-166

### Duties of Director

#### Some do's for Directors



Act in good faith.

Act in accordance with articles.

Exercise independent judgement.

Exercise power with due care, skill and due diligence.

#### Some don'ts for Directors



Direct or Indirect interest that conflicts his interest.

Achieve any undue gain or advantage.

Assignment of office.

## SECTION-167

### Vacation of office of Director

#### Section 167 (1)

**The office of a director shall become vacant in case he:-**

- Incurs any of the disqualifications specified in section 164; Provided that, not required to vacate in defaulting co.
- Absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board.
- Contravention of the provisions of Section 184.
- becomes disqualified by an order of a court or the Tribunal.
- is convicted by a court of any offence (minimum imprisonment 6 months).  
The office shall be vacate **only after expiry of 30 days from date of conviction if further appeal is not made.**
- is removed in pursuance of the provisions of this Act;

- appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company. Subsequently if he ceases to hold such office, he shall vacate the office of director.

## SECTION-168

### Resignation of Director

By giving a notice in writing to the company

- **The director may resign by giving notice in writing to company. Director may also forward copy of resignation to ROC within 30 days of resignation in DIR-11**

- company shall intimate the Registrar within 30 days in DIR-12. (Rule 15)

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

**The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.**

- Director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.
- **Even if company has not filed DIR-12 to ROC, the resignation shall be valid.**



### PTR

- ★ If all the directors of a company resign from their office or vacate their office, the promoter or in his absence the CG shall appoint the required number of directors to hold office till the directors are appointed by the Company in General Meeting.
- ★ In case a company has already filed DIR-12 with Registrar, a foreign director of such company resigning from office may authorize in writing a practising CA or CS or CWA of other resident director of company to sign Form DIR-11 and file the same on his behalf intimating the reasons of his resignation.

## SECTION-169

- ★ OR/SR (for removing ID appointed under Second term) is needed to remove a director.
- ★ A special notice u/s 115 shall be required of any resolution, to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed.
- ★ Director's cant be removed- Directors appointed u/s 242 or 163 or nominee director's

## Register of Directors & KMP & members right to inspect the same

## SECTION-170

### Right of directors and KMP and their shareholding

Every company shall keep at its registered office a register containing such particulars of its directors and key managerial personnel including the details of securities held by each of them in the company or its holding, subsidiary, subsidiary of company's holding company or associate companies.

Return containing such particulars shall be filed with the Registrar within thirty days from the appointment of every director and key managerial personnel, as the case may be, and within thirty days of any change taking place.

### **Illustrative list of some of particulars to be included as per Rule 17**

DIN, PAN, Name, Address, Date of Birth, office held, No of shares held, date of acquisition, mode of holding (physical or dematerialized).

### **Section 170 shall not be applicable to 100 % Government Company.**

## SECTION-171

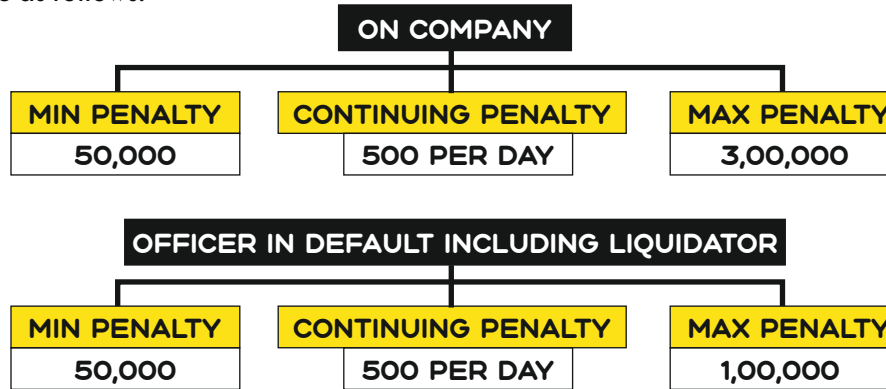
### Members right to inspect



## SECTION-172

### GENERAL PUNISHMENT

If a company contravenes any of the provisions from Section 149 to 171 and for which no specific punishment is provided therein, the company and every officer of the company who is in default shall be punishable as follows:



## ●●● CHAPTER XII-SECTIONS 173 TO 195 ●●●

### SECTION-173

#### MEETING OF BOARD:

#### SECTION- 173 (1)

- ★ First Board Meeting should be held within 30 days from the date of incorporation of company.
- ★ Minimum 4 Board Meeting every year
- ★ Maximum gap between 2 Board Meeting= 120 days.

#### MCA Clarification –

Section 173(1) shall apply to Non Profit Organisations(Section 8 Companies) only to the extent that the BOD of such Co's shall hold at least one meeting within every six calendar months.

#### SECTION- 173 (2)

- ★ Directors may participate either personally or by video conferencing by other audio visual means.

#### SECTION- 173 (3)

- ★ Notice shall be given in writing.
- ★ Notice period to call BM-7 days.
- ★ Mode of sending notice-by hand delivery or by post or by electronic means. (Notice of Board Meeting by Fax will be adequate notice(Ferruccio Sias V. Jai Manga Ram)
- ★ Shorter notice- may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.
- ★ In case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

#### Parmeshwari Prasad Gupta v UOI:

Omission to give Notice – Consequences

1. BM shall be void even if single director is not given notice;
2. If BM at (1) is void, resolutions passed thereat also void;
3. Accidental/Deliberate omission immaterial;
4. BM not void if:

- Absentee director do not complain of want of notice;
- The director to whom notice is not given, attends BM.

## Can a director waive the right to receive notice

Notice of Board Meeting is statutory obligation and not a contractual obligation, and therefore, cannot be waived off by any director.

### Section 173(4)

- ⚙ Every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of twenty-five thousand rupees.

### Section 173(5)

- ⚙ One Person Company, small company and dormant company and a pvt co which is a start up

👉 At least one meeting in each half of a calendar year.

👉 Minimum gap between 2 BM-90 days.

However, the pvt co is not entitled to exemption if it has made default in filing of F/S or Annual Returns to ROC.

- ⚙ 173(5) and Section 174 shall not apply to OPC's having only 1 director.

### Content of Notice

- ❖ No specific requirement in Section 173.
- ❖ Date, time and place must be given as a matter of good secretarial practise.

### Point to remember:-

A director who desires to attend the meeting through electronic mode can participate electronically if he submits his declaration to the company. This Declaration shall be valid for a period of one year. Now with prior intimation, This Director can also attend the meeting physically.

### **PLEASE NOTE**

1. Rule 4 has been omitted w.e.f 15 June, 2021. The meetings on matters referred above may be held through video conferencing or other audio visual means.

2. The facility of video conferencing is optional and not mandatory. This option may be exercised by the director only when this facility is provided by the company to its directors. The director can not insist the companies to provide the facility of participation and meetings through electronic mode (ICAI View).

**“However, NCLT has held in one of its judgements that provisions of section 173 (2) are mandatory and companies cannot be permitted to make any deviations there from”.**

**PTR-** It is discretion of the company to provide the facility of VC and not mandatorily.

---

## SECTION-174

### QUORUM OF BOARD MEETING:

#### Section 174(1)

Quorum- 1/3rd of Total Strength or 2 directors whichever is higher.  
 Round off the fraction to the highest number.  
 Total strength does not include directors whose offices are liable to be vacant.

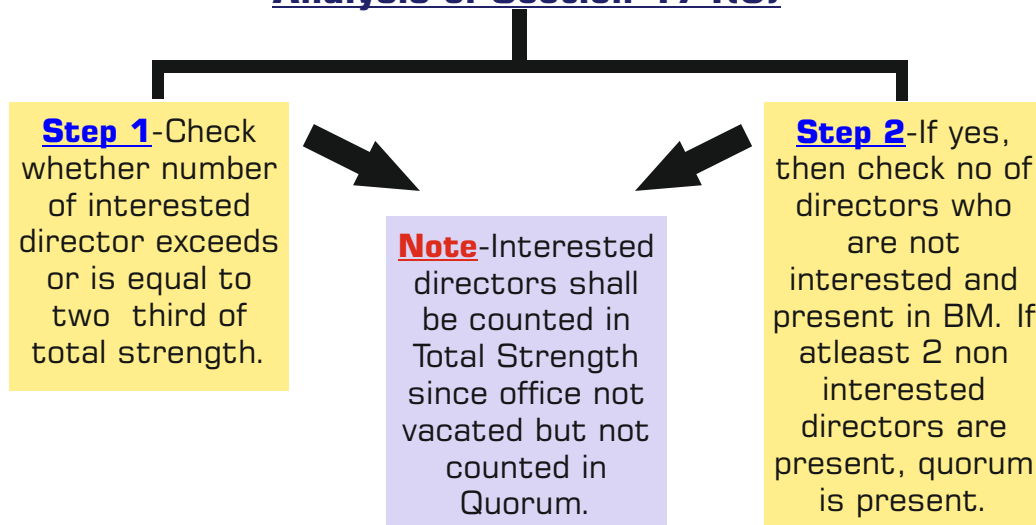
#### MCA Clarification-

Quorum for BM of Section 8 Companies-Eight Members or 25 % of its total strength whichever is less. Provided that quorum shall not be less than two members

#### Section 174(3)

Where at any time the number of interested directors exceeds or is equal to two thirds of the total strength of the Board of Directors, the number of directors who are not interested directors and present at the meeting, being not less than two, shall be the quorum during such time.

#### Analysis of Section 174(3)



#### Point to remember

Now, If an interested director discloses his interest to the board u/s 184, then for the purposes of quorum under 174(3), he would be counted in the quorum

# DREAM BIG WORK HARD

## SECTION-175

### RESOLUTION BY CIRCULATION:

#### Section 175(1)

Resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be, at their addresses registered with the company in India by hand delivery or by post or by courier(Notice of BM main courier nai tha), or through such electronic means(Electronic means includes email or fax as per Rule 5) as may be prescribed

#### AND

approved by a majority of the directors or members, who are entitled to vote on the resolution(If 11 directors were entitled to vote, 2 abstained from voting. 5 voted in favour , % of directors who approved=5/11 and not 5/9.) Minimum 1/3rd of total no of directors may require that resolution under circulation must be decided at meeting.

#### Section 175(2)

A resolution under sub-section (1) shall be noted at a subsequent meeting of the Board or the committee thereof, as the case may be, and made part of the minutes of such meeting.

---



## POWERS OF THE BOARD SECTION-176 TO 183

### SECTION-176

Acts done by a person as a director shall be deemed to be valid, even if it is subsequently noticed that his appointment was invalid by reason of any defect or disqualification or office was later on terminated because of any provisions of Act/Articles. However, any act done which came to notice of company shall be invalid.

#### PTR:

**Acts of MD after expiry of his term is not valid because the company cannot claim that the company was not aware of the expiry of tenure of 5 years. {Varkey Souriar Vs Keraleeya Banking Co.Ltd}**

### SECTION-179

#### **POWER OF BOARD OF DIRECTOR:**

The Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:—

- (a) to make calls on shareholders in respect of money unpaid on their shares;
- (b) to authorise buy-back of securities under section 68;
- (c) to issue securities, including debentures, whether in or outside India;
- (d) to borrow monies; (Clause d is not applicable when a banking company borrows from other Banking Co./Banks/RBI.)**
- (e) to invest the funds of the company;**
- (f) to grant loans or give guarantee or provide security in respect of loans;**

#### Note-

**Powers given in clause (d) to (f) can be delegated to** committee of directors, the managing director, the manager or any other principal officer of branch office.

#### MCA Clarification-

**Matters given in clause (d) to (f), may be decided by the board by circulation instead of at the meeting in case of Section 8 Co's.**

- (g) to approve financial statement and the Board's report;
- (h) to diversify the business of the company;
- (i) to approve amalgamation, merger or reconstruction;
- (j) to take over a company or acquire a controlling or substantial stake in another company.

## Rule 8

Now only there are three matters in Rule 8 for which passing resolution in BM is mandatory.



**To make political contribution.**



**To Appoint or Remove KMP**



**To Appoint Internal Auditor's and Secretarial Auditors.**

## SECTION-180

### **RESTRICTION ON POWERS OF BOARD:**

#### **Section 180(1)**

**Following powers exercisable by BOD only by passing SR**

**(a)** To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

**(b)** to invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation;

**(c)** If existing borrowings plus proposed borrowings > aggregate of paid up capital and free reserves and **securities premium** (apart from temporary loans obtained from the company's bankers in the ordinary course of business\_

**(d)** To remit, or give time for the repayment of, any debt due from a director.

#### **MCA Notification-**

**Section 180 now not applicable to private companies.**

#### **Section 180(2)**

Every special resolution passed shall specify the total amount up to which monies may be borrowed by the Board of Directors.

## SECTION-181 TO 183

### **POWERS TO CONTRIBUTE/DONATE:**

#### **Section 181**

#### **Company to Contribute to bonafide & charitable funds etc**

the BOD of a company may contribute to 'bona fide' charitable and other funds provided that prior permission of the company in GM is required if such contribution exceeds 5% of its average net profits for the 3 immediately preceding previous years.



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## Section 182 Powers of BOD to Contribute to Political Parties

- ⊙ Companies Prohibited-- Government company, a company which has been in existence for less than **3 F/Y.**
- ⊙ Other companies can contribute any amount as they may deem fit .
- ⊙ Resolution Required—**BR in BM.**
- ⊙ Contribution shall be made only by an account payee cheque or account payee bank draft or use of an electronic clearing system through a bank account.
- ⊙ Disclosure in P & L- amount contributed, name of the Political party.

## Section 183 Powers of BOD and other authorise persons to contribute to National Defence Fund etc

The Board is authorized to contribute such amount as it thinks fit to the National Defense Fund or any other fund approved by the Government for the purpose of national defense. The company is required to disclose in its profit and loss account the total amount or amounts contributed by it during the financial year.

### Committees of the Board(S :177 & 178) ( R : 6 & 7)

Following Companies to have Audit Committee, Nomination and Remuneration Committee:-(Every Listed Co plus POT(10/50/100):

- ⊙ Every Listed Public Company;
- ⊙ All Public Companies with a paid up capital of 10 crores or more;
- ⊙ All Public Companies with turnover of 100 crores or more;
- ⊙ All Public Companies having outstanding dues exceeding fifty crores.

**Note**

All this figures shall be taken as existing on the date of last audited financial statements).

## SECTION-177

### **AUDIT COMMITTEE:**

**01**

The Board of Directors of every listed **public** company and such other class or classes of companies, as may be prescribed, shall constitute an Audit Committee.

**02**

The Audit Committee shall consist of a minimum of three directors. Majority of them shall be Independent Director. Majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand, the financial statement.

#### MCA Clarification-

**Section 8 Co's are not required to form a majority of Independent Directors**

03

Transition period-1 year.

Every Audit Committee shall act in accordance with the terms of reference specified

in writing by the Board which shall, inter alia, include,—

(i) the recommendation for appointment, remuneration and terms of appointment

of auditors of the company;

04

(ii) review and monitor the auditor's independence and performance, and effectiveness of audit process;

(iii) examination of the financial statement and the auditors' report thereon;

(iv) approval or any subsequent modification of transactions of the company with related parties;

**The Audit Committee may give omnibus approval for RPT's proposed to be entered by the Company(i.e. one time AC approval for all RPT's transactions )**

**Even for other transactions, AC may give its recommendations.( Refer amendment notes and class for details)**

(v) scrutiny of inter-corporate loans and investments;

(vi) valuation of undertakings or assets of the company, wherever it is necessary;

(vii) evaluation of internal financial controls and risk management systems;

(viii) monitoring the end use of funds raised through public offers and related matters.

05

Every listed company or such class or classes of companies, as may be prescribed (**Rule 7**), shall establish a vigil mechanism for directors and employees to report genuine concerns.

a) All listed Companies.

b) Companies which accepted deposits from the public .

C) Companies which have borrowed money from banks and public financial institutions in excess of Rs. 50 Crores.

## SECTION-178



### **NOMINEE AND REMUNERATION COMMITTEE AND STAKEHOLDERS RELATIONSHIP COMMITTEE:**

#### **MCA Clarification-**

Section 178 shall not be applicable to Non Profit Organisations(Section 8 Companies).

**(a) Applicability-** same as Independent Director.

(b) Nomination and Remuneration Committee shall consists three or more non – executive executive directors directors with not less than one half of members members of the Committee shall be Independent Directors.

(c) The Board of a company which consist of more than 1000 shareholders, debenture holders, and deposit holders or any other security holder any time during the financial year shall constitute a stakeholder relationship committee with a chair person to be non-executive director and such other members as may be decided by the Board of directors.

(d) Non consideration of resolution of any grievance in good faith shall not constitute contravention of this Section.

(e) Functions of Nomination and Remuneration Committee

i) Identify quality personnel to become director.

ii) Performance Evaluation of Directors

iii) Formulate policy to ensure; that remuneration is reasonable and attractive, remuneration is balanced(i.e. fixed and performance based) and to define clear cut relation between performance and remuneration.

## Penalty for Contravention of Section 177 & 178

In case of any contravention of the provision of section 177 and 178 the penalty shall be imposed as follows:

**On company-5,00,000**

**On officer in default-1,00,000**

## Related Party Transactions(Section 184, 188 and 189)

### SECTION-184

#### **EVERY EDITOR**

- 1st BM after appointment.
- 1st BM of every FY.
- If interested to change then 1st BM after such change.

Shall **disclose his concern or interest (by way of form no MBP-1)** in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding. **every director** of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into".

- ▲ with a body corporate in which such director or such director in association with any other director, holds more than 2 % shareholding of that body corporate,
- ▲ or is a promoter, manager, Chief Executive Officer of that body corporate; or
- ▲ with a firm or other entity in which, such director is a

**Partner**



**Owner**



**Or Member**

Shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting.

## MCA Clarification-

In case of private companies, there is an exception given in Section 184(2). The interested director may participate in meeting after disclosure of his interest. In case of Section 8 Companies, Section 184(2) shall apply only if the transaction with reference to Section 188 on the basis of terms and conditions of the contract or arrangement, exceeds one lakh rupees.

## SECTION-188

### RELATED PARTY TRANSACTIONS

#### COVERAGE OF RELATED PARTY:

#### INDIVIDUALS

- Director or his relatives.
- Key managerial personal or his relative
- Any person on whose advice, directions or instructions a director or manager is accustomed to act.
- A director or key managerial personal of the holding company or his relative.



#### OTHER THEN INDIVIDUALS

- ⊙ A firm, in which a director, manager or his relative is a partner
- ⊙ A private company in which a director or manager is a member or director.
- ⊙ A public company in which a director or manager is a director or holds along with his relatives, more than 2% of its paid-up share capital.
- ⊙ Any body corporate whose board of directors, managing directors or manager is accustomed to act in accordance with the advice, direction or instruction of a director or manager. (However shall apply to the advice, directions or instructions given in a professional capacity.)
- ⊙ **Any body corporate which is-**
  - A holding, subsidiary or an associate company of such company.
  - A subsidiary of a holding company to which it is also a subsidiary; or
  - An investing company or the venturer of the company; { the investing company or the venturer of a company means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate }





## Approvals needed for RPT's

- ⊙ Board Resolution is always needed for all RPT's.
- ⊙ Audit Committee approval is needed(Section 177).
- ⊙ OR is needed if threshold limits are exceeded.{Companies Amendment Act, 2015}. Earlier SR was needed.
- ⊙ RPT's by company where value of transactions are in excess of limit specified as mentioned below will require prior approval of shareholders by ordinary resolution(First proviso of Section 188(1)).

1. Sale, purchase, supply of goods/materials;(If directly/indirectly through appointment of agent greater than or equal to 10% of turnover , resolution must be passed in GM.

2. Selling /disposing/buying of any property;(If directly/indirectly through appointment of agent greater than or equal to 10% of net worth , resolution must be passed in GM.

3. Leasing of any property; greater than or equal to 10% of turnover resolution must be passed in GM.

4. Availing/rendering any service;(If directly/indirectly through appointment of agent greater than or equal to 10% of turnover resolution must be passed in GM.

5. Appointment of related party to any office or place of profit in the Company /its subsidiary/its associate ;(If monthly remuneration > 2.50 lakhs), resolution must be passed in GM.
6. Undertaking subscription of securities/derivatives of the Company.(remuneration > 1 % of net worth), resolution must be passed in GM.

**No member of the company shall vote on such resolution , to approve any contract or arrangement which may be entered into by the company, if such member is a related party(Second proviso to Section 188(1).Here related party is construed with reference only to the contract or arrangement for which the said resolution is being passed.**

### Points to remember

- If 90 % or more members in number are relatives of promoters or are related parties, they shall be allowed to vote.
- Every contract or arrangement entered with a related party as mentioned above, shall be referred in Board report to the shareholders along with justification for entering into such contract or arrangement.

### First and Second Proviso of Section 188(1) is not applicable to

- ✦ Government Company entered into contract or arrangement with another Government Company or with Central Government or any State Government or any combination thereof.{ Amendment}
- ✦ Unlisted Government Company, if prior approval of Department or Ministry is taken.
- ✦ Effect of Amendment: Now contracts with Central Government or any State Government or any combination thereof can be entered without any approval from members.



### **PENALTY FOR CONTRAVENTION ON DIRECTOR/EMPLOYEE**

Any director or other employ of a company, who has entered into or authorised the contract or arrangement in violation of **section 188** shall be liable to a penalty of:-

Listed company-**25,00,000**  
Other company-**5,00,000**

### Register of contracts or arrangements in which directors are interested. (S:189)(R :16)

- ⊙ Company shall maintain a register in Form “MBP-4” for contracts entered into under Section 184(2) or 188.
- ⊙ Such register will be available for inspection for members at the registered office during the business hours.

## SECTION-185,186,187

### **LOAN AND INVESTMENTS:**

#### Loan to directors( Section 185)

Company cannot give loan/ give guarantee or security in connection with loan to its director, director of holding co or partner or relative of such director or any firm in which such director or relative is interested.

Company may advance loan/ give guarantee or provide security in connection with such loan to any person in whom director of the company is interested if SR is passed in GM and loans are utilised by borrowing company for principal business activity.



## **Any person in whom director of the co is interested means:-**

- ❖ Pvt co- in which director is a member or director.
- ❖ Body corporate- at which not less than 25 % voting power may be exercised or whose BOD/MD /Mgr is accustomed to act in accordance with directions of directors of lending co.

## **Non applicability-**

Loan given to MD or WTD pursuant to SR or common scheme to EE's , Loan advanced in ordinary course of business and interest rate is not less than RBI Rate, Wholly owned subsidiaries are fully exempted, Subsidiary's are partly exempted (ie only Guarantee/ Security can be provided).

## **Section 186-Loan and investment by company.** **(S: 186)(R : 11 to 13)**

Approval by special resolution is required where the inter-corporate loan/guarantee/security exceed 60% of its paid up capital, free reserves and securities premium account or 100% of its free reserves **whichever is more.**

**When term loan is subsisting in PFI, conditions for every Inter-corporate Loans/Guarantee/Security.**

- ❖ Obtain unanimous consent of all directors present in Board Meeting
- ❖ Prior approval of PFI .
- ❖ However, if I/L/G/S is within limits & company has not defaulted in repayment of loan/interest only unanimous consent is needed. PFI approval is not required.

## **Exceptions of Section 186**

**a)** Loan made/Guarantee given/Security given by Banking Co./Insurance Co/Housing finance Co in ordinary course of business.

**b)** Company engaged in business of financing **industrial enterprises** /infrastructure/NBFC's or any other Company whose principal business is acquisition of securities.

**c)** Allotment of Right Shares u/s 62.

**d)** Where a loan/guarantee/security has been provided by a Company to its WOS, JV or acquisition is made by a Holding Company of shares of WOS no special resolution is required even if it exceeds the limit under Section 186(2).

## **MCA Circular-10-3-2015**

If a company gives loan to its EE's (other than MD/WTD) in accordance with condition of service and as per remuneration policy of co, Section 186 is not applicable.

## **Points to remember**

- Delegation of power exercisable under Section 186 can be done to MD, Manager or Principal officers of the Company. However, Section 186 specifically provides that unanimous resolution of all directors are needed.

- As per Section 186(3), no loan shall be given under this section at a rate of interest lower than the prevailing yield of one year, three year, five year or ten year Government security closest to the tenor of the loan.
- In the earlier law, as per Sec 186, no company can invest through more than 2 layers of Subsidiaries. Now the exemption has been granted to Banking Company/ NBFC/ Insurance Co and Govt Co.

## **Investments of company to be held in its own name.** **(S:187)( R : 14)**

All investments made by a Company shall be held in its own name

**Following are the circumstances when a company may not have investment in its own name:-**

- ⊙ A company may deposit with a bank, being the bankers of the company, any shares or securities for the collection of any dividend or interest payable thereon; or
- ⊙ A company may deposit with, or transferring to, or holding in the name of, the State Bank of India or a scheduled bank, being the bankers of the company, shares or securities, in order to facilitate the transfer thereof, but required to again hold the shares or securities in its own name within a period of six months;
- ⊙ A company may deposit with, or transferring to, any person any shares or securities, by way of security for the repayment of any loan advanced to the company or the performance of any obligation undertaken by it;
- ⊙ A company may hold investments in the name of a depository when such investments are in the form of securities held by the company as a beneficial owner.



### **Penalty for contravention of section 187**

On company-**5,00,000**

Officer in default-**50,000**

## **SECTION-191**

No director shall be paid any compensation for loss of office or retirement of office etc in connection with transfer of undertaking, property or shares, unless the particulars of the same have been disclosed to the members of the company and the proposal has been approved by the company in General Meeting.



## SECTION-192



### ① **RESTRICTION ON NON-CASH TRANSACTIONS INVOLVING DIRECTORS:**

<b>Applicability</b>	All the companies Companies shall not enter into certain types of contracts with certain persons except with the <b>prior</b> approval of members in the general meeting.
<b>Types of contract</b>	<ul style="list-style-type: none"> <li>⊙ Company acquires or is to acquire assets for consideration other than cash</li> <li>⊙ Director of the company or holding company or subsidiary company or associate company or any person associated with them acquires or is to acquire assets from the company for consideration other than cash.</li> </ul>
<b>How contract is entered into?</b>	<p>Every such contract requires prior approval of the members by a resolution.</p> <p>The notice of general meeting shall include the particulars of the arrangement along with the value of the assets involved in such arrangement duly calculated by a registered valuer.</p>
<b>Approval in holding company also</b>	Where contract is entered into with the director of the holding company then approval of member shall be obtained in holding company also.
<b>Effect on conytravention</b>	Contract entered into in contravention of these provisions shall be voidable at the option of the company.



## SECTION-193



### ① **CONTRACT BY ONE PERSON COMPANY WITH THE SOLE MEMBER WHO IS ALSO DIRECTOR :**

<b>Form of contract</b>	<p>Any such contract shall be <b>in writing</b>.</p> <p>If it is <b>not in writing</b>, the terms of the contract shall be recorded in a memorandum or in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract.</p>
<b>Intimation to ROC</b>	Within 15 days since approval by the Board.
<b>Non-Applicability</b>	Contracts entered into by the company in the ordinary course of business.

**Section 194 and 195 are now omitted.**

## APPOINTMENT AND REMUNERATION OF KEY MANAGERIAL PERSONNEL

### SECTION-196-205

#### Some important definitions

#### Key Managerial Personnel

- ⦿ The Companies Act, 2013 has for the first time recognized the concept of Key Managerial Personnel.
- ⦿ As per section 2(51) “key managerial personnel”, in relation to a company, means—
- ⦿ the Chief Executive Officer or the managing director or the manager;
- ⦿ the company secretary;
- ⦿ the whole-time director;
- ⦿ the Chief Financial Officer; and
- ⦿ such other officer, not more than one level below the directors who are in whole time employment, designated as KMP by Board
- ⦿ such other officer as may be prescribed.

#### MD vs Manager

##### Manager

- ⇒ Defined u/s 2 (53).
- ⇒ May or may not be a director.
- ⇒ Individual who subject to superintendence, control and direction of BOD has management of whole or substantially whole of affairs of co.

##### Managing Director

- ⇒ Defined u/s 2 (54).
  - ⇒ Mandatory to be a director.
  - ⇒ Means a director who is entrusted with substantial powers of management.
- Administrative acts of routine nature like affixing common seal, signing share certificates or negotiable instrument are excluded from substantial powers.



## SECTION-196

### APPOINTMENT OF MANAGING DIRECTOR WHOLE TIME DIRECTOR OF MANAGER :

**1.**

No company shall appoint or employ at the same time a managing director and a manager.

**2.**

No company shall appoint or re-appoint any person as its MD/WTD/Manager for a term exceeding five years at a time. However they can be reappointed before the end of original term but only during last one year of the original term.

**3.**

No company shall appoint or continue the employment of any person as managing director, whole-time director or manager who —  
**(a)** is below the age of twenty-one years or has attained the age of seventy yrs.

However, even if age is 70 years or more the person can be appointed by passing SR and indicating justification in explanatory statement.

**Provided that SR is not needed if votes cast in favour of motion exceeds votes cast against the motion, application for such appointment is made to CG and according to CG such appointment is beneficial.**

**(b)** is an undischarged insolvent or has at any time been adjudged as an insolvent;

**(c)** has at any time suspended payment to his creditors or makes, or has at any time made, a composition with them; or

**(d)** has at any time been convicted by a court of an offence and sentenced for a period of more than six months

**4.**

**Appointment of MD, WTD, Manager**

- ⊙ approval by the Board of Directors
- ⊙ approval by a resolution at the next general meeting of the company
- ⊙ **by the Central Government in case such appointment is at variance to the conditions specified in Schedule V.**

**5.**

Even if appointment of a managing director, whole-time director or manager is not approved by the company at a general meeting, any act done by him before such refusal shall be valid.

### **MCA Notification dated 5th June 2015**

Section 196 (4) & (5) not applicable to private companies and 196(2), (4) and (5) not applicable to government companies.

## SECTION-197

### Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits :

#### (This Section is applicable only to a public company)

- ⊙ Maximum remuneration payable to all directors (including MD, WTD, Mgr) is 11% of Net Profits of the Company.
- ⊙ Any one MD/WTD/Mgr = 5% of Net Profits of Co.
- ⊙ > 1 MD/WTD/Mgr = 10% of Net Profits of Co.
- ⊙ Other directors = 1% of Net profits if there is a MD/WTD/Mgr in Co. and 3% if there is no MD/WTD/Mgr.

#### Important Points

- ✱ To jump the individual limits of 1%, 3%, 5% or 10% company needs to pass SR and approval of bank/FI/Non-convertible debenture holder/secured creditor if company has made a default in there payment.
- ✱ To jump limit of 11% - take approval of members, and approval of bank/FI/Non-convertible debenture holder/secured creditor if company has made a default in there payment and compliance with Sch V. { In absence of clarification whether its OR or SR, logical assumption here is SR since SR was needed to jump overall limits}.
- ✱ If excess remuneration is paid to directors, they are required to refund excess remuneration within 2 years or lesser period as may be specified in the company. Such amount cannot be waived off unless SR is passed and approval of bank/FI/Non-convertible debenture holder/secured creditor if company has made a default in there payment.
- ✱ Notwithstanding anything contained in sub-sections (1) and (2), but subject to the provisions of Schedule V, if, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, or any other non-executive director, including an independent director, including any managing or wholtime director or manager, by way of remuneration any sum exclusive of any fees payable to directors under sub-section (5) i.e. sitting fees, hereunder except in accordance with the provisions of Schedule V.

#### Remuneration to director includes

- ✱ remuneration paid to him in capacity of director & includes
- ✱ remuneration paid to him in any other capacity but does not include the remuneration paid to him in professional capacity provided that he holds the professional qualification in opinion of NRC/BOD, for such capacity.



Directors are entitled to sitting fees. According to Rule 4, the maximum sitting fees per meeting is Rs.1,00,000.

#### Remuneration of Independent Director

- ⊙ shall not be entitled to any stock option.
- ⊙ may receive remuneration by way sitting fees, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.

## SECTION-199

### RECOVERY OF REMUNERATION IN CERTAIN CASES :

If a company is required to re-state its financial statements due to fraud or non-compliance with any requirement under this Act and the rules made there under, the company shall recover from any past or present MD or WTD or manager or CEO (by whatever name called) who, during the period for which the financial statements are required to be re-stated, received the remuneration (including stock option) in excess of what was permissible as per restated F/S.

## SECTION-202

### Compensation for Loss of Office of Managing or Whole time Director or Manager :

(i) Section 202 provides that a company may make payment to a MD/WTD/Mgr but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

(ii) However, No payment shall be made in the following cases:—

- (a) where the director resigns from his office as a result of the reconstruction/amalgamation of the company and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company/of resulting company from the amalgamation;
- (b) where the director resigns from his office otherwise than on the reconstruction/ amalgamation of the company;
- (c) where the office of the director is vacated due to disqualification;
- (d) where the company is being wound up due to the negligence or default of the director;
- (e) where the director has been guilty of fraud or breach of trust or gross negligence or mismanagement of the conduct of the affairs of the company or any subsidiary company or holding company; and
- (f) where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

(iii) Maximum limit of compensation to MD/WTD/Mgr

Any payment made to a MD OR WTD or manager shall not exceed the remuneration which he would have earned if he had been in office for the remainder of his term or for 3 years, whichever is shorter

The amount shall be calculated on the basis of the average remuneration actually earned by him during a period of 3 years immediately preceding the date on which he ceased to hold office, or where he held the office for a lesser period than 3 years, during such period.

No such payment shall be made to the director in the event of the commencement of the winding up of the company, (ii)The company can recover the amount of Rs. 5 lakhs paid on the ground that Mr. Doubtful is not entitled to any compensation, because he is guiding of corrupt practise.

**Bell vs. Lever Bros** it was observed that directors are not bound to disclose any breach of his fiduciary obligations so as to give the company an opportunity to dismiss him.

## SECTION-203

### 📌 Appointment of key managerial personnel (Applicable only to public co) :

1.

a)As per Section 203 read with Rule 8 of Companies(Appointment & Remuneration of Managerial Personnel) Rules, 2014

Every listed company & { every unlisted public company having a paid up share capital (P out of Pot) of Rs. 10 crore or more shall appoint following whole time KMP

(i) managing director, or Chief Executive Officer or manager and in their absence,

a whole-time director;

(ii) company secretary; and

(iii) Chief Financial Officer :

**Every private company which has a paid -up-share capital of ten crore rupees or more shall have a whole -time company secretary.**

2.

Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration.

3.

a)A whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time. However, he can hold directorship in other companies with permission of Board.

b)A whole time KMP holding office in more than one company at same time has to choose one company within 6 months from the date of commencement of Act.

c)A person can be appointed as **MD** in 2nd Company if he is Mgr/MD of One Company (not more than one) if unanimous resolution is passed at Board Meeting of the Company & specific notice stating that unanimous resolution has been passed shall be send to all directors in India .(**A person can never be appointed as Manager of 2nd Co**)



- 4.** Vacancy if any in office of KMP shall be filled-up by the Board at a meeting of the Board within a period of six months from the date of such vacancy.

## SECTION-204

### SECRETARIAL AUDIT FOR BIGGER COMPANIES :

- 1.** As per Section 204 read with rule 9 , Every Listed Company and other public companies if paid up share capital is  $> 50$  or turnover  $> 250$  crore or **Every company having O/S loans and borrowings from banks or Public financial institution is  $> Rs 100$  cr shall annex with Board Report a Secretarial Audit Report.**
- 2.** Company to give all assistance and facilities to the CS in practise for audit purpose.
- 3.** BOD in Board report shall explain in full any qualification or observation or other remarks made by CS.

<i>SCHEDULE V</i>							
(See sections 196 and 197)							
Part I	Part II					Part III	Part IV
Pre-requisites - Imprisonment or fine - Detention - Age - Two Companies - Resident	Remuneration					Procedural requirements	Power of Central Govt. to grant exemptions
	Sec. I	Sec. II	Sec. III	Sec. IV	Sec. V	- Filing of return - Members approval	
	Company having adequate net profit	Net Profit is inadequate or loss	Excess Remuneration	Perquisites	Remuneration from two companies		

### PART-1

#### CONDITIONS TO BE FULFILLED FOR THE APPOINTMENT OF A MANAGING OR WHOLE-TIME DIRECTOR OR A MANAGER WITHOUT THE APPROVAL OF THE CENTRAL GOVERNMENT

### APPOINTMENTS:

- (a). No person shall be eligible for appointment as a managing or whole-time director or a manager (hereinafter referred to as managerial person) of a company unless he satisfies the following conditions, namely:—
- he had not been sentenced to imprisonment for any period, or to a fine exceeding one thousand rupees, for the conviction of an offence under this Act or any of the following acts. ( **Around 19** acts are mentioned in total)

- (b). he had not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974);
- (c). has completed the age of twenty-one years and has not attained the age of seventy years: Provided that where he has attained the age of seventy years; and where his appointment is approved by a special resolution passed by the company in general meeting, no further approval of the Central Government shall be necessary for such appointment;
- (d). where he is a managerial person in more than one company, he draws remuneration from one or more companies subject to the ceiling provided in section V of Part II **[OMITTED]**
- (e). he is resident of India.

**Explanation 1.**—For the purpose of this Schedule, resident in India includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India,—

- (i) for taking up employment in India; or  
 (ii) for carrying on a business or vacation in India.

## **PART-2**

### **SECTION I**

Remuneration payable by companies having profits :

Subject to the provisions of section 197, a company having profits in a financial year may pay remuneration to a managerial person or persons not exceeding the limits specified in such section.

### **SECTION II**

Remuneration payable by companies having no profit or inadequate profit without Central Government approval :

Where in any financial year during the currency of tenure of a managerial person **or other director** a company has no profits or its profits are inadequate, it may, , pay remuneration to the managerial person not exceeding the higher of the limits under (A) and (B) given below:—

### **(A)**

Where the effective capital is	Limit of yearly remuneration payable shall not exceed (Rupees)	Limit of yearly remuneration payable shall not exceed (Rupees) in case if other director
(i) Negative or less than 5 crores	60 Lakhs	12 Lakhs
(ii) 5 crores and above but less than 100 crores	84 Lakhs	17 Lakhs
(iii) 100 crores and above but less than 250 crores	120 Lakhs	24 Lakhs
(iv) 250 crores and above	120 lakhs plus 0.01% of the effective capital in excess of 250 crores,	24 Lakhs plus 0.01% of the effective capital in excess of Rs. 250 cr.

**Provided that the limits can be increased by passing SR.**

However, payment of remuneration must be approved by Board/ NRC and also approval must be taken from Banks/PFI's/ NCD's /secured creditors if company has made default in there repayment.

## (B)

In case of a managerial person who is functioning in a professional capacity, remuneration as per item (A) may be paid, if such managerial person is not having any interest in the capital of the company or its holding company or any of its subsidiaries directly or indirectly or through any other statutory structures and not having any direct or indirect interest or related to the directors or promoters of the company or its holding company or any of its subsidiaries at any time during the last two years before or on or after the date of appointment and possesses graduate level qualification with expertise and specialised knowledge in the field in which the company operates:

Provided that any employee of a company holding shares of the company not exceeding 0.5% of its paid up share capital under any scheme formulated for allotment of shares to such employees including Employees Stock Option Plan or by way of qualification shall be deemed to be a person not having any interest in the capital of the company.

### **How to compute effective capital?**

Effective capital means the aggregate of the paid up share capital (excluding share application money or advances against shares) plus share premium credit balance plus reserves and surplus(excluding revaluation reserves) plus long term loans and deposits repayable after one year minus accumulated losses and preliminary expenses(except in cases of investment by investment co whose principal business is the acquisition of securities



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