

**VIVEKANANDA COLLEGE THAKURPUKUR**

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**NAAC ACCREDITED 'A' GRADE**



**Topic: Appointment of Director**

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## Appointment of Director

The minimum and maximum number of directors a company can appoint as per Companies Act, 2013. Under the 2013 Act, a private company is required to appoint at least two directors; while a public company must appoint at least three directors and a one person company is required to appoint at least 1 director. A company can appoint a maximum of 15 directors (a maximum of 12 directors were allowed under the Companies Act, 1956). It is possible for a company to increase the number of directors beyond 15 by passing a special resolution to this effect. Moreover, one of the directors of the company must be resident in India, that is, he must have stayed in India for a period of not less than 180 days in the previous calendar year.

Section 151 of the Companies Act, 2013 defines the term 'Appointment of director elected by small shareholders' as under: -

### 1.Appointment of director elected by small shareholders

A listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.

#### Explanation

For the purposes of this section small shareholders means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.

**Rule 7 of the Companies (Appointment and Qualification of Directors) Rules,2014, provides the information regarding the appointment of small shareholders director as a result of notice given by small shareholders.**

(1) A listed company, may upon notice of **not less than one thousand small shareholders or one-tenth of the total number of such shareholders, whichever is lower**, have a small shareholders' director elected by the small shareholders:

Provided that nothing in this sub-rule shall prevent a listed company to opt to have a director representing small shareholders suo motu and in such a case the provisions of sub-rule (2) shall not apply for appointment of such director.

(2) The small shareholders intending to propose a person as a candidate for the post of small shareholders' director shall leave a notice of their intention with the company **at least fourteen days** before the meeting under their signatures specifying the name, address, shares held and folio number of the person whose name is being proposed for the post of director and of the small shareholders who are proposing such person for the office of director:

Provided that if the person being proposed does not hold any shares in the company, the details of shares held and folio number need not be specified in the notice:

(3) The notice shall be accompanied by a statement signed by the person whose name is being proposed for the post of small shareholders' director stating -

(a) his Director Identification Number;

(b) that he is not disqualified to become a director under the Act; and

(c) his consent to act as a director of the company

(4) Such director shall be considered as an independent director subject to, his being eligible under sub-section (6) of section 149 and his giving a declaration of his independence in accordance with sub-section (7) of section 149 of the Act.

(5) The appointment of small shareholders director shall be subject to the provisions of section 152 except that-

(a) such director shall not be liable to retire by rotation;

(b) such director's tenure as small shareholders' director shall not exceed a period of three consecutive years; and

(c) on the expiry of the tenure, such director shall not be eligible for re-appointment.

(6) A person shall not be appointed as small shareholders' director of a company, if the person is not eligible for appointment in terms of section 164.

(7) A person appointed as small shareholders' director shall vacate the office if -

(a) the director incurs any of the disqualifications specified in section 164;

(b) the office of the director becomes vacant in pursuance of section 167;

(c) the director ceases to meet the criteria of independence as provided in sub-section (6) of section 149.

(8) No person shall hold the position of small shareholders' director in more than **two companies** at the same time:

Provided that the second company in which he has been appointed shall not be in a business which is competing or is in conflict with the business of the first company.

(9) A small shareholders' director shall not, for a period of **three years** from the date on which he ceases to hold office as a small shareholders' director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

## **2. Appointment of First Directors**

**As per Section 152(1)** of the Companies Act 2013, the provisions regarding the appointment of First director of the Company are explained below:

If there is no provision in the articles of a company about the appointment of the first director, the subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed and in case of a One-Person Company an individual being member shall be deemed to be its first director until the director or directors are duly appointed by the member in accordance with the provisions of this section but this should be kept in our mind that this section is applicable for all the Public as well as Private Company.

**The General Provision regarding to appointment of directors are as follows:**

**As per Section 152(2)**, Save as otherwise expressly provided in this Act, every director shall be appointed by the company in **general meeting**.

**As per Section 152(3)**, No person shall be appointed as a director of a company unless he has been allotted the **Director Identification Number under section 154**.

**As per Section 152(4)**, Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish

- i) his Director Identification Number and
- ii) a declaration that he is not disqualified to become a director under this Act.

**As per Section 152(5)**, A person appointed as a director shall not act as a director unless he gives his consent to hold the office as director and such consent has been filed with the Registrar **within thirty days of his appointment** in such manner as may be prescribed:

Provided that in the case of appointment of an independent director in the general meeting, an explanatory statement for such appointment, annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfils the conditions specified in this Act for such an appointment.

**The provisions regarding the appointment of Rotational, Non-rotational Directors as per section 152(6) –**

**As per Section 152(6)(a)**, unless the articles provide for the retirement of all directors at every annual general meeting, **not less than two-thirds of the total number of directors** of a public company shall -

- (i) be persons whose period of office is liable to determination by retirement of directors by rotation (called **rotational director**); and
- (ii) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

**As per Section 152(6)(b)**, the remaining directors (called **non-rotational director**) in the case of any such company shall, in default of, and subject to any regulations in the articles of the company, also be appointed by the company in general meeting.

**The provisions regarding the retirement of Directors by rotation are contained in section 152(6) –**

**Section 152(6)(c):** At the first annual general meeting of a public company held next after the date of the general meeting at which the first directors are appointed in accordance with clauses (a) and (b) and at every subsequent annual general meeting, **one-third of such of the directors for the time being as are liable to retire by rotation**, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.

**Section 152(6)(d):** The directors to retire by rotation at every annual general meeting shall be **those who have been longest in office since their last appointment**, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

**Section 152(6)(e):** At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

#### **Explanation**

For the purposes of this sub-section, total number of directors shall not include independent directors, whether appointed under this Act or any other law for the time being in force, on the Board of a company.

#### **Fulfillment of the vacancy position due to Retiring Director as per section 152(7)**

##### **Adjournment of Meeting due to the vacancy of the retiring director [Section 152(7)(a)]**

As per section 152(7)(a), 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.

##### **Re-appointment of Directors in vacant position [Section 152(7)(b)]**

As per section 152(7)(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.

**Explanation**

For the purposes of this section and section 160, the expression retiring director means a director retiring by rotation.

**3.Appointment of additional director**

The Board may appoint any person as an additional director due to some emergency purposes, but the number of the directors and additional directors jointly shall not exceed the maximum number of directors mentioned in the articles. [As per regulation 66 of Table F]

**The provisions relating to the Appointment of Additional Directors are contained in the Section 161(1) of the Companies Act, 2013 as under–**

The articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

**1.Regulation 66 of Table F authorizes the Board to appoint the additional directors. So, An additional director may be appointed by the Board of its discretion.**

**2.An additional director shall be appointed either by the passing a resolution at a Board meeting or may be appointed by passing a resolution by circulation.**

**4.Appointment of Alternate Director**

An Alternate Director is an individual to act as a substitute for an existing director for specified time limit. It is only possible if it is authorized by the article.

**The provisions relating to the Appointment of Alternate Directors are contained in the Section 161(1) of the Companies Act, 2013 as under –**

(i) The Board of Directors of a company must be authorised by its articles or by a resolution passed by the company in general meeting for appointment of alternate director.

- (ii) The person in whose place the Alternate Director is being appointed should be absent for a period of not less than 3 months from India.
- (iii) The person to be appointed as the Alternate Director shall be the person other than the person holding any alternate directorship for any other Director in the Company.
- (iv) If it is proposed to appoint an Alternate Director to an Independent Director, it must be ensured that the proposed appointee also satisfies the criteria for Independent Directors.
- (v) An alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.
- (vi) If the term of office of the original director is determined before he so returns to India, any provision for the automatic reappointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

### **5.Appointment of Directors by Nomination**

Nominee director means a director appointed by any financial institution, bank or other institution, in pursuance of the provision of the law, to look after their vested interest and acts as a watchdog of the institution.

**The provisions relating to the Appointment of Directors by Nomination are contained in the Section 161(3) of the Companies Act, 2013 as under –**

This new sub-section now provides for appointment of Nominee Directors. It states that subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government Company.

### **Appointment of Directors in causal vacancy**

The provisions relating to the Appointment of Directors by Nomination are contained in the Section 161(3) of the Companies Act, 2013 as under –

In the case of a public company, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board:

Provided that any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

Generally due to under mentioned reasons ,casual vacancy of director may arise-

- (a) Death of the Director,
- (b) Resignation by the Director,
- (c) Disqualification of the Director,
- (d) Insolvency of Director.

It is not mandatory to appoint the casual Director; however, it's totally depends on the board. This provision is applicable for public as well as private company .

### **Appointment of directors to be voted individually**

Section 162 of the Companies Act, 2013 defines the term 'Appointment of directors to be voted individually' as under, -

1. At a general meeting of a company, a motion for the appointment of two or more persons as directors of the company 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.
2. A resolution moved in contravention of sub-section (1) shall be void, whether or not any objection was taken when it was moved.
3. A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

### **Option to adopt principle of proportional representation for appointment of directors:**

Generally, we see that the appointment of directors in a company is done through simple majority voting system in the general meeting of shareholders. As a result, simple majority shareholders get opportunity to elect their choice-based directors and minority sections is unable in appointing even a single director. This may hamper the interests of minority shareholders in a company. To reduce this discrimination ,minority shareholders will get an opportunity of placing their representatives on the Board of Directors if the concerned company adopted the system of proportional representation by providing in its 'articles of association'. The provisions relating to proportional representation for appointment of directors in a company are now included in the section 163 of the Companies Act, 2013 which are likely:

Notwithstanding anything contained in this Act, the articles of a company may provide for the appointment of **not less than two-thirds** of the total number of the directors of a company in accordance with the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise and such appointments may be made **once in every three years** and casual vacancies of such directors shall be filled as provided in sub-section (4) of section 161.

There are two methods of appointment, such as, a) single transferable voting and b) cumulative voting are usually followed for appointment of directors under the system of proportional representation.

**(Sources: Paul&Ghosh)**

