



# APPOINTMENT AND QUALIFICATIONS OF DIRECTORS



## LEARNING OUTCOMES

**By the end of this chapter, students will be able to:**

- Know the provisions related to appointment of Board of Directors, number of directors, women director
- Understand the concept of Independent Director, their appointment, qualifications, tenure etc.
- Analyze retirement by rotation, application of Director Identification Number and its allotment.
- Know the provisions related to additional director, alternate director, nominee director and casual vacancy
- Explain Disqualifications of appointment of director, duties of director, vacation of office of director, resignation of director, removal of director



## 1. INTRODUCTION

According to section 2(10) of the Companies Act, 2013, "**Board of Directors**" or "**Board**", in relation to a company, means the collective body of the directors of the company.

According to section 2(34) "director" means a director appointed to the Board of a company.



## 2. COMPANY TO HAVE BOARD OF DIRECTORS [SECTION 149]

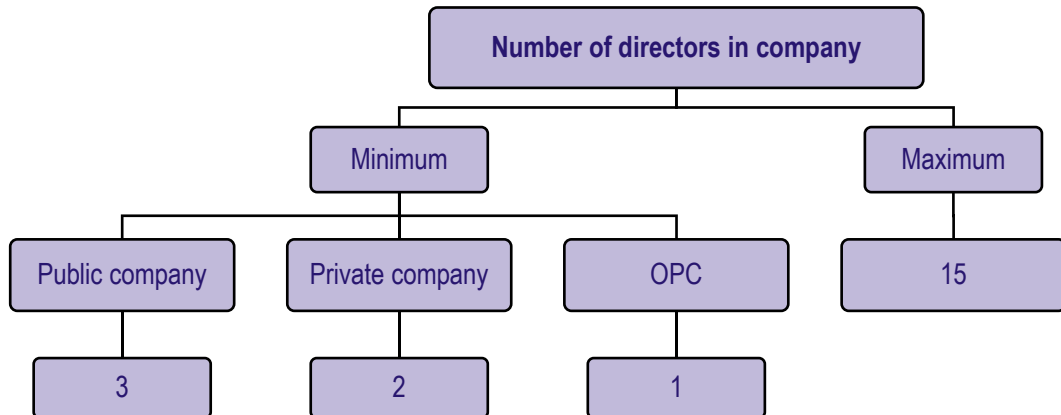
This section provides for the provisions for companies to have a duly constituted Board of Directors. According to this section:

**Number of Directors:** According to section 149(1) of the Companies Act, 2013, every company shall have a Board of Directors consisting of individuals as directors and shall have-

- (a) **minimum number** of directors:
- (A) in the case of Public company-3,
  - (B) in the case of Private Company-2, and
  - (C) in case of One person company (OPC)-1

- (b) **maximum number of directors:** 15

If the company wants to appoint more than 15 directors, it can do so after passing a special resolution.



**Exemptions**

As per the Notification G.S.R. 463(E) dated 5<sup>th</sup> June, 2015, the limit of maximum of 15 directors and their increase in limit by special resolution shall not apply to Government company.

Further, as per the Notification dated 13<sup>th</sup> June, 2017, the limit of maximum of 15 directors and their increase in limit by special resolution shall not apply to Section 8 companies

- (c) **Women director:** At least one woman director shall be on the Board of such class or classes of companies as may be prescribed. [Second proviso to section 149(1)]<sup>1</sup>



Rule 3 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* provides that the following class of companies shall appoint at least one woman director-

(1)	every listed company;
(2)	every other public company having -
	(A) paid-up share capital of one hundred crore rupees or more; or
	(B) turnover of three hundred crore rupees or more.

A company, which has been incorporated under the Act and is covered under provisions of second proviso to sub-section (1) of section 149 shall comply with such provisions within a period of six months from the date of its incorporation.

Further, any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

**Example:** In XYZ Ltd., an intermittent vacancy of the women director arises on 15<sup>th</sup> June, 2017. Thus, the vacancy shall be filled-up by the Board at the earliest but not later than the date of the next Board meeting or three months from the date of such vacancy whichever is later.

⇒ If after the vacancy, the immediate Board meeting was held on 14<sup>th</sup> August, 2017, then

<sup>1</sup> In case of Specified IFSC Public Company - Second proviso to Sub-section (1) of section 149 shall not apply- Notification Dated 4th January 2017.

"International Financial Services Centre (IFSC)" means an International Financial Service Centre which has been approved by the Central Government under sub-section (1) of Section 18 [Section 2(q) of the Special Economic Zones, 2005]

the vacancy shall be filled-up by 14<sup>th</sup> August, 2017 or by 14<sup>th</sup> September 2017 (3 months from the date of such vacancy) whichever is later. In this case, it shall be filled up by 14<sup>th</sup> September 2017.

⇒ If after the vacancy, the immediate Board meeting was held on 14<sup>th</sup> October, 2017 then the vacancy shall be filled-up by 14<sup>th</sup> October, 2017 or by 14<sup>th</sup> September 2017 whichever is later. In this case it shall be filled up by 14<sup>th</sup> October 2017.

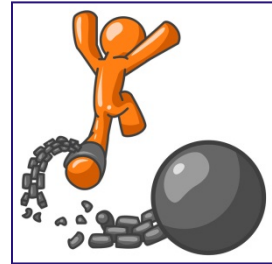
*Explanation.*- For the purposes of this rule (woman director on board), it is clarified that the paid up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.

(d) **Resident Director:** Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year. [Section 149(3)]<sup>2</sup>

(e) **Independent Director (ID):** Every listed public company shall have at least one-third of the total number of directors as independent directors. [Section 149(4)]<sup>3</sup>

The Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

Any fraction contained in such one-third numbers shall be rounded off as one



According to the Rule 4 of the *Companies (Appointment and Qualification of Directors) Rules, 2014*, the following class or classes of companies shall have at least 2 directors as independent directors:

(1)	the Public Companies having paid up share capital of 10 crore rupees or more; or
(2)	the Public Companies having turnover of 100 crore rupees or more; or
(3)	the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

<sup>2</sup> In case of Specified IFSC Public Company & IFSC Private Company - Sub-section (3) of section 149, the following proviso shall be inserted, namely:-

“Provided that this sub-section shall apply to a Specified IFSC public company in respect of financial years other than the first financial year from the date of its incorporation.”. - Notification Dated 4th January 2017.

<sup>3</sup> In case of Specified IFSC Public Company - Sub-sections (4) to (11), clause (i) of subsection (12) and sub-section (13) of section 149 shall not apply. - Notification Dated 4th January 2017.

However, in case a company covered as under the above rule is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.

As per section 177(2) of the Companies Act, 2013, the Audit Committee shall consist of a minimum of three directors with independent directors forming a majority.

**Example:** XYZ Ltd. is having 6 directors in its Audit Committee, then 4 directors out of 6 must be Independent Directors (4 is forming majority). Therefore, although in terms of the *Companies (Appointment & Qualification) Rules 2014* the company is required to have at least 2 Independent directors, in this case the limit of 2 will increase to 4 as the company is required to appoint a higher number of independent directors due to composition of its audit committee.

Further, any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

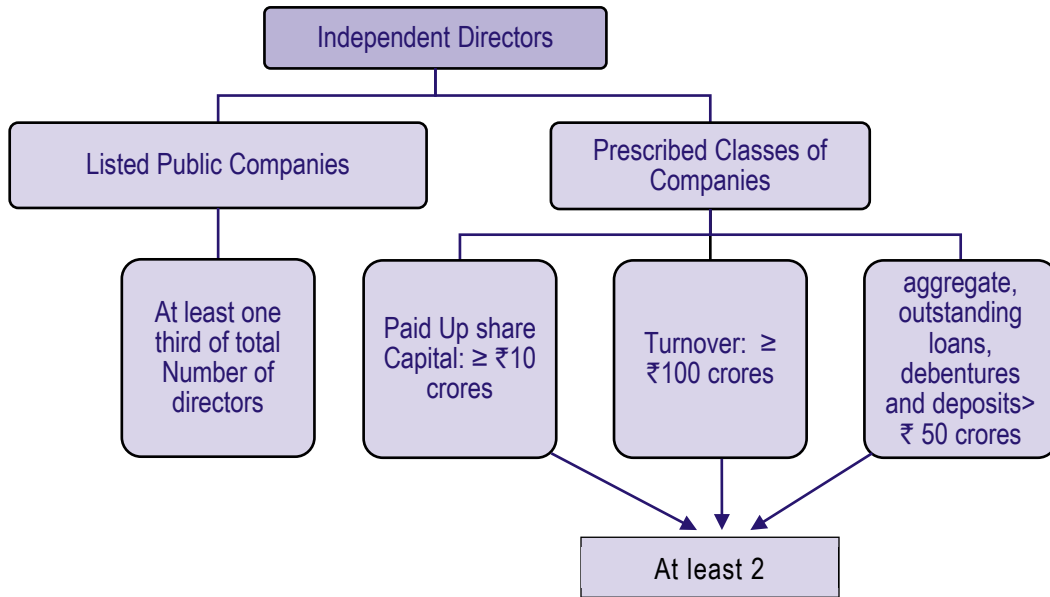
**Example:** In XYZ Ltd., the vacancy of the independent director arises on 15<sup>th</sup> June, 2017. Thus, the vacancy shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

- ⇒ If the immediate next Board meeting after the vacancy was held on 14<sup>th</sup> August, 2017, then the vacancy shall be filled-up by 14<sup>th</sup> August, 2017 or by 14<sup>th</sup> September 2017 whichever is later. In this case it shall be filled up by 14<sup>th</sup> September 2017.
- ⇒ If the immediate next Board meeting after the vacancy was held on 14<sup>th</sup> October, 2017, then the vacancy shall be filled-up by 14<sup>th</sup> October, 2017 or by 14<sup>th</sup> September 2017 whichever is later. In this case it shall be filled up by 14<sup>th</sup> October 2017.

However, where a company ceases to fulfill any of three conditions laid down above for three consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions.

For the purpose of the above assessment, the paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

A company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law.



If due to composition of audit committee, such higher number of ID shall be applicable

Non Applicability: If company ceases to fulfil any of the 3 conditions for 3 consecutive years

(f) **Who can become the Independent Director [Section 149(6)]:** In relation to a company, an independent director means a director other than a managing director or a whole-time director or a nominee director<sup>4</sup>, and who fulfills the following criteria:

- (1) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

#### Exemptions

*As per G.S.R. 463 (E) dated 5th June, 2015, in case of a Government company, the word "Board" shall be substituted by the words "Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the State Government".*

- (2) (A) who is or was not a promoter of the company or its holding, subsidiary or associate company;

<sup>4</sup> As per Explanation to section 149(7), "**Nominee director**" means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

- (B) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;
- (3) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

#### Exemptions

*As per Notification 463 (E) dated 5th June, 2015, the above point no. (3) [section 149(6)(c)] shall not apply in case of a Government company.*

- (4) none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to 2% or more of its gross turnover or total income or 50 lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;
- (5) who, neither himself nor any of his relatives—
- (A) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed;
- (B) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of—
- (i) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or
- (ii) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm;
- (C) holds together with his relatives 2% or more of the total voting power of the company; or
- (D) is a Chief Executive or director, by whatever name called, of any non-profit organisation that receives twenty-five per cent or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company; or
- (6) who possesses such other qualifications as may be prescribed. According to the *Companies (Appointment and Qualification of Directors) Rules, 2014*, independent director shall possess appropriate skills, experience and knowledge in one or more

fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business.

- (g) **Declaration by Independent Director [Section 149(7)]:** Every independent director shall
- (1) at the first meeting of the Board in which he participates as a director; and
  - (2) thereafter at the first meeting of the Board in every financial year; or
  - (3) whenever there is any change in the circumstances which may affect his status as an independent director, give a declaration that he meets the criteria of independence as provided in sub-section (6).
- (h) **Code for independent directors [Section 149(8)]:** The company and independent directors shall abide by the provisions specified in Schedule IV to the Companies Act, 2013.
- (i) **Remuneration of Independent Directors [Section 149(9)]:** Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option and may receive remuneration by way of
- (1) fee provided under section 197(5),
  - (2) reimbursement of expenses for participation in the Board and other meetings and
  - (3) profit related commission as may be approved by the members.

Entitled to:	Not Entitled to:
Fee provided under section 197(5)	Any stock option
Reimbursement of <b>expenses</b> for participation in: <ol style="list-style-type: none"> <li>(i) Board Meetings</li> <li>(ii) Other Meetings</li> </ol>	
<b>Profit</b> related commission as may be approved by the members	

- (j) **Tenure [Section 149(10) & (11)]:**
- (i) Subject to the provisions of section 152 (Appointment of directors), an independent director shall hold office for a term up to five consecutive years on the Board of a company. He shall be eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.
  - (ii) No independent director shall hold office for more than two consecutive terms. However, such independent director shall be eligible for appointment after the expiration of three years of ceasing to be an independent director:



Provided that during the said period of three years, such independent director shall not, be appointed in or be associated with the company in any other capacity, either directly or indirectly.

- (iii) For the purposes of sub-sections (10) and (11), any tenure of an independent director on the date of commencement of this Act shall not be counted as a term under those sub-sections.

**(k) Liability [Section 149(12)]:** As per section 149(12) of the Companies Act, 2013, Notwithstanding anything contained in this Act,—

- (i) an independent director;
- (ii) a non-executive director not being promoter or key managerial personnel,

shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

Parties Liable	Liable Acts
<ul style="list-style-type: none"> <li>(i) an independent director</li> <li>(ii) a non-executive director not being promoter or key managerial personnel</li> </ul>	<ul style="list-style-type: none"> <li>• acts of omission or commission by a company which had occurred with his knowledge,</li> <li>• attributable through Board processes</li> <li>• with his consent or connivance, or where he had not acted diligently</li> </ul>

**(l) Retirement by rotation [Section 149(13)]:** The provisions of retirement of directors by rotation covered under sub-sections (6) and (7) of section 152 shall not be applicable to appointment of independent directors.

(Note: The provisions of retirement of directors by rotation covered under sub-sections (6) and (7) of section 152 will be discussed later on in this chapter)

*Here*, in section 149 “Nominee director” means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

The MCA vide General Circular No. 14/2014 dated 9<sup>th</sup> June, 2014 has given some clarifications over manner relating to appointment and qualifications of directors and Independent Directors which are as under:

**(i) Section 149(6)(c) : "pecuniary interest in certain transactions":**

- (a) This provision inter alia requires that an 'ID' should have no 'pecuniary relationship' with the company concerned or its holding/ subsidiary / associate

company and certain other categories specified therein during the current and last two preceding financial years. Clarifications have been sought whether a transaction entered into by an 'ID' with the company concerned at par with any member of the general public and at the same price as is payable/paid by such member of public would attract the bar of 'pecuniary relationship' under section 149(6)(c). The matter has been examined and it is hereby clarified that in view of the provisions of section 188 which take away transactions in the ordinary course of business at arm's length price from the purview of related party transactions, an 'ID' will not be said to have 'pecuniary relationship' under section 149(6)(c) in such cases.

- (b) Stakeholders have also sought clarification whether receipt of remuneration, (in accordance with the provisions of the Act) by an 'ID' from a company would be considered as having pecuniary interest while considering his appointment in the holding company, subsidiary company or associate company of such company. The matter has been examined in consultation with SEBI and it is clarified that 'pecuniary relationship' provided in section 149(6)(c) of the Act does not include receipt of remuneration, from one or more companies, by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission approved by the members, in accordance with the provisions of the Act.
- (ii) **Section 149(10) / (11)- Appointment of 'IDs' for less than 5 years:-** Clarification has been sought as to whether it would be possible to appoint an individual as an ID for a period less than five years. It is clarified that section 149(10) of the Act provides for a term of "upto five consecutive years" for an 'ID'. As such while appointment of an 'ID' for a term of less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as a one term under section 149(10) of the Act. Further, under section 149(11) of the Act, no person can hold office of 'ID' for more than 'two consecutive terms'. Such a person shall have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years. In such a case the person completing 'consecutive terms of less than ten years' shall be eligible for appointment only after the expiry of the requisite cooling-off period of three years.
- (iii) **Appointment of 'IDs' through letter of appointment:-** With reference to Para IV(4) of Schedule IV of the Act (Code for IDs) which requires appointment of 'IDs' to be formalized through a letter of appointment, clarification has been sought if such requirement would also be applicable for appointment of existing 'IDs'? The matter has been examined. In view of the specific provisions of Schedule IV, appointment of 'IDs' under the new Act would need to be formalized through a letter of appointment.

**Exemptions**

*The MCA vide Notification No.466(E) dated 5th June, 2015, has exempted section 8 companies from following the provisions of sub-section (4), (5), (6), (7), (8), (9), (10), (11), clause (i) of sub- section (12) [related to independent director] and sub- section (13) of section 149 of the Companies Act, 2013.*



### **3. MANNER OF SELECTION OF INDEPENDENT DIRECTORS AND MAINTENANCE OF DATA BANK OF INDEPENDENT DIRECTORS [SECTION 150]**

This section provides for the manner of selection of independent directors and maintenance of databank of independent directors.

- (i) According to section 150(1) of the Companies Act, 2013, an independent director may be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, subject to the provisions contained in section 149(5).

Such data bank shall be maintained by any body, institute or association, as may be notified by the Central Government as having the expertise in creation and maintenance of such data bank and put on their website for the use by companies appointing such directors.

Further, the responsibility of exercising due diligence before selecting a person as an independent director from the data bank referred to above, shall lie with the company making such appointment [Proviso to section 150(1)].

- (ii) The appointment of independent director shall be approved by the company in general meeting as provided in sub-section (2) of section 152 and the explanatory statement annexed to the notice of the general meeting called to consider the said appointment shall indicate the justification for choosing the appointee for appointment as independent director [Section 150(2)].
- (iii) The data bank referred to in sub-section (1), shall create and maintain data of persons willing to act as independent director in accordance with such rules as may be prescribed [Section 150(3)]
- (iv) The Central Government may prescribe the manner and procedure of selection of independent directors who fulfill the qualifications and requirements specified under section 149 [Section 150(4)]

### Creation and maintenance of databank of persons offering to become independent directors:

- (i) Any body, institute or association (referred as “the agency”), which has been authorised in this behalf by the Central Government shall create and maintain a data bank of persons willing and eligible to be appointed as independent director and such data bank shall be placed on the website of the Ministry of Corporate Affairs or on any other website as may be approved or notified by the Central Government.
- (ii) The data bank shall contain the particulars in respect of each person included in the data bank to be eligible and willing to be appointed as independent director like DIN, the name and surname in full, details of LLPs in which he is or was a designated partner, the list of companies in which he is or was director, etc.
- (iii) For further details regarding the procedure of creation and maintenance of databank of persons offering to become independent directors, please refer *Companies (Appointment and Qualification of Directors) Rules, 2014* and *Companies (Appointment and Qualification of Directors) Amendment Rules, 2014*.

#### Exemptions

*The MCA vide Notification No. 466(E) dated 5<sup>th</sup> June, 2015, has clarified that section 150 of the Companies Act, 2013, shall not apply to a section 8 company.*



## 4. APPOINTMENT OF DIRECTORS ELECTED BY SMALL SHAREHOLDERS [SECTION 151]

According to section 151 of the Companies Act, 2013:

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

Here, “Small Shareholders” means a shareholder holding shares of nominal value of not more than ₹ 20,000 or such other sum as may be prescribed.

The *Companies (Appointment and Qualification of directors) Rules, 2014* provides for the procedure for appointment of Small shareholders’ director according to which:

- (i) A listed company, may upon notice of not less than
  - (a) one thousand small shareholders; or
  - (b) one-tenth of the total number of such shareholders,
 whichever is lower, have a small shareholders’ director elected by the small shareholders.

However, a listed company may opt to have a director representing small shareholders *suomotu* and in such a case the provisions of sub-rule (ii), given below, shall not apply for appointment of such director.

- (ii) 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 signature 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.

However, 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.

- (iii) 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.
- (iv) 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.
- (v) 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.
- (vi) A person shall not be appointed as small shareholders' director of a company, if he is not eligible for appointment in terms of section 164 which specifies the disqualifications for appointment of a director.
- (vii) 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.

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

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

(ix) 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.



## 5. APPOINTMENT OF DIRECTORS [SECTION 152]

According to section 152 of the Companies Act, 2013:

### (i) Appointment of directors:

(a) Where no provision is made in the articles of a company for 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. [Section 152(1)]

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. [Section 152(1)]



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

(c) No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number (DIN) under section 154. [Section 152(3)]

(d) Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number (DIN) and a declaration that he is not disqualified to become a director under this Act. [Section 152(4)]

(e) 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 30 days<sup>5</sup> of his appointment in Form *DIR-12* along with the fee as prescribed [Section 152 (5)].

Rule 8 of the *Companies (Appointment and Qualification of Directors) Rules, 2014*

<sup>5</sup> In case of Specified IFSC Public Company- In Sub-section (5) of section 152, For the words "thirty days" read as "sixty days".- Notification Dated 4th January 2017.

provides that every person who has been appointed to hold the office of a director shall on or before the appointment furnish to the company consent in writing to act as director in Form *DIR-2*.

The proviso to Section 152 (5) states that in 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 fulfills the conditions specified in this Act for such an appointment.

#### Exemptions

*The Ministry of Corporate Affairs has clarified via Notification dated 5th June, 2015, that proviso to section 152(5) shall not apply in case of section 8 company.*

*The Ministry of Corporate Affairs has clarified via Notification dated 5th June, 2015, that in case of Government company, section 152(5) shall not apply where appointment of such director is done by the Central Government or State Government, as the case may be.*

#### (ii) Retirement by rotation [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—
  - (A) be persons whose period of office is liable to determination by retirement of directors by rotation; and
  - (B) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.
- (b) The remaining directors 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.
- (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 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.

**Example 1:** Company is having six directors.

Directors liable to retire by rotation:  $6 \times \frac{2}{3}$  i.e. 4

No. of directors to retire at AGM:  $4 \times \frac{1}{3}$  i.e. 1.33 or nearest to  $\frac{1}{3}$ <sup>rd</sup> is 1.

**Example 2:** Company is having 7 directors.

Directors liable to retire by rotation  $7 \times \frac{2}{3}$  i.e. 4.7

No. of directors to retire at AGM:  $4.7 \times \frac{1}{3}$  i.e. 1.56 or nearest to  $\frac{1}{3}$ <sup>rd</sup> is 2.

- (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.
- (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.

For the purposes of the above provisions “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.

**(iii) Vacancy in case of retiring director [Section 152(7)]<sup>6</sup>**

- (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—
  - (A) 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;
  - (B) 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;
  - (C) he is not qualified or is disqualified for appointment;
  - (D) a resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act; or
  - (E) section 162 is applicable to the case.

For the purposes of section 152, the “retiring director” means a director retiring by rotation.

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<sup>6</sup> In case of Specified IFSC Public Company -Sub-sections (6) and (7) of section 152 shall not apply Notification Dated 4th January 2017.



### Exemptions

**Non applicability of section 152(6) and 152(7):** The Ministry of Corporate Affairs has clarified via Notification 13<sup>th</sup> June, 2017, that section 152(6) and (7) of the Companies Act, 2013, shall not apply to:

- (a) Government company, which is not a listed company, in which not less than fifty-one per cent. of paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;
- (b) a subsidiary of a Government company, referred to in (a) above." - Notification Dated 13th June, 2017.



## 6. APPLICATION FOR ALLOTMENT OF DIRECTOR IDENTIFICATION NUMBER [SECTION 153]

“**Director Identification Number**” (DIN) means an identification number allotted by the Central Government to any individual, intending to be appointed as director or to any existing director of a company, for the purpose of his identification as a director of a company;

Provided that the Director Identification Number (DIN) obtained by the individuals prior to the notification of these rules shall be the DIN for the purpose of the Companies Act, 2013:

Provided further that "Director Identification Number" (DIN) includes the Designated Partnership Identification Number (DPIN) issued under section 7 of the Limited Liability Partnership Act, 2008 the rules made thereunder; [Rule 2(1)(e) of the *Companies (Specification of definitions details) Rules, 2014*]

Section 153 of the Companies Act, 2013 deals with the filing of application for allotment of DIN. According to it, every individual intending to be appointed as director of a company shall make an application for allotment of DIN to the Central Government in such form and manner and along with such fees as may be prescribed.

Rule 9 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* provides for the points for making application for allotment of DIN according to which:

- (1) Every individual, who is to be appointed as director of a company shall make an application electronically in Form DIR-3, to the Central Government for the allotment of a DIN along with such fees as prescribed.
- (2) The Central Government shall provide an electronic system to facilitate submission of application for the allotment of DIN through the portal on the website of the Ministry of Corporate Affairs.

- (3) (a) The applicant shall download Form DIR-3 from the portal, fill in the required particulars sought therein, verify and sign the form and after attaching copies of the following documents, scan and file the entire set of documents electronically-
- (i) photograph;
  - (ii) proof of identity;
  - (iii) proof of residence; and
  - (iv) specimen signature duly verified.
- (b) Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital Signature Certificate and shall be verified digitally by -
- (i) a chartered accountant in practice or a company secretary in practice or a cost accountant in practice; or
  - (ii) a company secretary in full time employment of the company or by the managing director or director of the company in which the applicant is to be appointed as director.

*The MCA vide Notification No. S.O. 1354(E) dated 21<sup>st</sup> May, 2014 delegates the powers and functions of the Central Government in respect of allotment of Director Identification Number under section 153 of the Companies Act, 2013 to the Regional Director, Joint Director, Deputy Director or Assistant Director posted in the office of Regional Director at Noida.*

- (4) In case the name of a person does not have a last name, then his or her father's or grandfather's surname shall be mentioned in the last name along with the declaration in Form No. DIR-3A.

## 7. ALLOTMENT OF DIRECTOR IDENTIFICATION NUMBER [SECTION 154]

According to section 154 of the Companies Act, 2013, the Central Government shall, within one month from the receipt of the application under section 153, allot a Director Identification Number (DIN) to the applicant in such manner as may be prescribed.

Rule 10 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* provides the procedure for allotment of DIN according to which:

- (i) On the submission of the Form DIR-3 on the portal and payment of the requisite amount of fees through online mode, an application number shall be generated by the system automatically.
- (ii) After generation of application number, the Central Government shall process the applications received for allotment of DIN and decide on the approval or rejection thereof

and communicate the same to the applicant along with the DIN allotted in case of approval by way of a letter by post or electronically or in any other mode, within a period of one month from the receipt of such application.

- (iii) If the Central Government, on examination, finds such application to be defective or incomplete in any respect, it shall give intimation of such defect or incompleteness, by placing it on the website and by email to the applicant who has filed such application, directing the applicant to rectify such defects or incompleteness by resubmitting the application within a period of 15 days of such placing on the website and email.

Provided that the Central Government shall –

- (a) reject the application and direct the applicant to file fresh application with complete and correct information, where the defect has been rectified partially or the information given is still found to be defective;
  - (b) treat and label such application as invalid in the electronic record in case the defects are not removed within the given time; and
  - (c) inform the applicant either by way of letter by post or electronically or in any other mode.
- (iv) In case of rejection or invalidation of application, the fee so paid with the application shall neither be refunded nor adjusted with any other application.
- (v) All DIN allotted to individual(s) by the Central Government before the commencement of these rules shall be deemed to have been allotted to them under these rules.
- (vi) The DIN so allotted under these rules is valid for the life-time of the applicant and shall not be allotted to any other person.

*The MCA vide Notification No. S.O. 1354(E) dated 21<sup>st</sup> May, 2014 delegates the powers and functions of the Central Government in respect of allotment of Director Identification Number under section 154 of the Companies Act, 2013 to the Regional Director, Joint Director, Deputy Director or Assistant Director posted in the office of Regional Director at Noida.*



## **8. PROHIBITION TO OBTAIN MORE THAN ONE DIN [SECTION 155]**

According to this section, no individual, who has already been allotted a DIN under section 154, shall apply for, obtain or possess another DIN.



## 9. DIRECTOR TO INTIMATE DIN [SECTION 156]

Section 156 of the Companies Act, 2013, provides for a Director to intimate the DIN allotted to him. According to this section, every existing director shall, within one month of the receipt of DIN from the Central Government, intimate his DIN to the company or all companies wherein he is a director.



## 10. COMPANY TO INFORM DIN TO REGISTRAR [SECTION 157]

According to section 157 of the Companies Act, 2013:

- (i) Every company shall, within 15 days of the receipt of intimation under section 156, furnish the DIN of all its directors to the Registrar or any other officer or authority as may be specified by the Central Government with such fees as may be prescribed or with such additional fees as may be prescribed within the time specified under section 403. Every such intimation shall be furnished in such form and manner as may be prescribed. [Section 157(1)]
- (ii) If a company fails to furnish the DIN under sub-section (1) above, before the expiry of the period specified under section 403 with additional fee, the company shall be punishable with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1,00,000 and every officer of the company who is in default shall be punishable with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1,00,000. [Section 157(2)]

According to Rule 10A of the *Companies (Appointment and Qualification of Directors) Amendment Rules, 2014*:

- (1) Every director, functioning as a director in one or more companies on or before the 30th June, 2007 and who has not yet intimated his DIN to such company or companies 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 as per Form DIR-3B.
- (2) The intimation by the company of Director Identification Number of its directors under section 157 of the Act shall be furnished in Form DIR-3C within 15 days of receipt of intimation under section 156.”



## 11. OBLIGATION TO INDICATE DIN [SECTION 158]

According to section 158 of the Companies Act, 2013, every person or company, while furnishing any return, information or particulars as are required to be furnished under this Act, shall mention the Director Identification Number in such return, information or particulars in case such return, information or particulars relate to the director or contain any reference of any director.

## 12. PUNISHMENT FOR CONTRAVENTION [SECTION 159]

Section 159 of the Companies Act, 2013 provides for Punishment for contravention of any of the provisions of section 152, 155 and 156 of the Act.

According to the section, if any individual or director of a company, contravenes any of the provisions of section 152, 155 and 156, such individual or director of the company shall be punishable with imprisonment for a term which may extend to 6 months or with fine which may extend to ` 50,000 and where the contravention is a continuing one, with a further fine which may extend to ` 500 for every day after the first during which the contravention continues.

## 13. CANCELLATION OR SURRENDER OR DEACTIVATION OF DIN

Rule 11 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* as amended by the *Companies (Appointment and Qualification of Directors) Amendment Rules, 2014*, lays down the procedure for cancellation or surrender or deactivation of DIN as under:

The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received alongwith fee as specified in *Companies (Registration Offices and Fees) Rules, 2014*, from any person, cancel or deactivate the DIN in case -

- (a) the DIN is found to be duplicated in respect of the same person provided the data related to both the DINs shall be merged with the validly retained number;
- (b) the DIN was obtained in a wrongful manner or by fraudulent means;

Provided that before cancellation or deactivation of DIN pursuant to the above clause (b), an opportunity of being heard shall be given to the concerned individual.

For this purpose

- (i) the term “*wrongful manner*” means if the DIN is obtained on the strength of documents which are not legally valid or incomplete documents are furnished or on suppression of material information or on the basis of wrong certification or by making misleading or false information or by misrepresentation.
  - (ii) the term “*fraudulent means*” means if the DIN is obtained with an intent to deceive any other person or any authority including the Central Government.
- (c) of the death of the concerned individual;
  - (d) the concerned individual has been declared as a person of unsound mind by a competent Court;

- (e) if the concerned individual has been adjudicated an insolvent.
- (f) on an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN.

Provided that before deactivation of any DIN in such case, the Central Government shall verify e-records.



## 14. INTIMATION OF CHANGES IN PARTICULARS SPECIFIED IN DIN APPLICATION

Rule 12 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* as amended by the *Companies (Appointment and Qualification of Directors) Amendment Rules, 2014*, provides for the procedure for Intimation of changes in particulars specified in the DIN application according to which:

- (1) Every individual who has been allotted a DIN under these rules shall, in the event of any change in his particulars as stated in Form DIR-3, intimate such change(s) to the Central Government within a period of thirty days of such change(s) in Form DIR-6 in the following manner, namely;-
  - (i) The applicant shall download Form DIR-6 from the portal, fill in the relevant changes, verify the Form and attach duly scanned copy of the proof of the changed particulars and submit electronically.;
  - (ii) the form shall be digitally signed by a chartered accountant in practice or a company secretary in practice or a cost accountant in practice;
  - (iii) the applicant shall submit the Form DIR-6;
- (2) The Central Government, upon being satisfied, after verification of such changed particulars from the enclosed proofs, shall incorporate the said changes and inform the applicant by way of a letter by post or electronically or in any other mode confirming the effect of such change in the electronic database maintained by the Ministry.
- (3) The DIN cell of the Ministry shall also intimate the change(s) in the particulars of the director submitted to it in Form DIR-6 to the concerned Registrar(s) under whose jurisdiction the registered office of the company(s) in which such individual is a director is situated.
- (4) The concerned individual shall also intimate the change(s) in his particulars to the company or companies in which he is a director within 15 days of such change.



## 15. RIGHT OF PERSONS OTHER THAN RETIRING DIRECTORS TO STAND FOR DIRECTORSHIP [SECTION 160]<sup>7</sup>

According to section 160 of the Companies Act, 2013:

- (i) a person who is not a retiring director in terms of section 152 shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he, or some member intending to propose him as a director, has, not less than 14 days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director or, as the case may be, the intention of such member to propose him as a candidate for that office.
- (ii) Such notice must come along with the deposit of ₹ 1,00,000 or such higher amount as may be prescribed. Such deposit shall be refunded to such person or, as the case may be, to the member, if the person proposed get selected as a director or gets more than 25% of the total valid votes cast either on show of hands or on poll on such resolution.

*As per Notification G.S.R. 465(E) dated 5th June, 2015, in case of a Nidhi Company, in section 160(1) of the Companies Act, 2013, the words "one lakh rupees" shall be substituted with "ten thousand rupees".*

*The MCA vide General Circular No. 38/2014, dated 14th October, 2014, has issued a clarification with respect to Refund of deposit under section 160. In case of companies registered under section 8 of the Companies Act, 2013, the Board of directors of such company is to decide as to whether the deposit [₹ 1,00,000 received by them under section 160(1)] made by or on behalf of the person failing to secure more than 25% of the valid votes is to be forfeited or refunded.*

- (iii) The company shall inform its members of the candidature of a person for the office of director (as discussed above) in such manner as may be prescribed.

### Exemptions

**Non applicability of section 160:** *The MCA has clarified via Notifications No. 463(E), 464(E) and 466(E) dated 5<sup>th</sup> June, 2015, that section 160 of the Companies Act, 2013, shall not apply to:*

- (1) *A Government company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;*

<sup>7</sup> In case of Specified IFSC Public Company - Section 160 shall apply as per the articles framed by the company. - Notification Dated 4th January 2017.

- (2) *A subsidiary of a Government company, referred to in (a) above, in which the entire paid up share capital is held by the Government company.*
- (3) *A Private company*
- (4) *Section 8 Companies whose articles provide for election of directors by ballot.*

**Notice of candidature of a person for directorship:** Rule 13 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* lays down the following points for giving notice of candidature of a person for directorship as under:

- (i) The company shall, at least 7 days before the general meeting, inform its members of the candidature of a person for the office of a director or the intention of a member to propose such person as a candidate for that office-
  - (1) by serving individual notices, on the members through electronic mode to such members who have provided their email addresses to the company for communication purposes, and in writing to all other members; and
  - (2) by placing notice of such candidature or intention on the website of the company, if any.
- (ii) However, it shall not be necessary for the company to serve individual notices upon the members as aforesaid, if the company advertises such candidature or intention, not less than 7 days before the meeting at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and circulating in that district, and at least once in English language in an English newspaper circulating in that district.



## 16. APPOINTMENT OF ADDITIONAL DIRECTOR, ALTERNATE DIRECTOR AND NOMINEE DIRECTOR [SECTION 161]

**(A) Additional Director [Section 161(1)]:** Section 161(1) of the Companies Act, 2013 provides for appointment of additional director. According to this section:

- (i) The articles of a company may confer on its Board of Directors the power to appoint any person as an additional director at any time.
- (ii) A person, who fails to get appointed as a director in a general meeting, cannot be appointed as an additional director.
- (iii) Additional director 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.



**(B) Alternate Director [Section 161(2)]:** Section 161(2) of the Companies Act, 2013 provides for appointment of Alternate director. According to this section:

- (i) The Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person to act as an alternate director in place of another director (original director) during his absence for a period of not less than 3 months from India.
- (ii) A person who is holding any alternate directorship for any other director in the company cannot be considered for appointment as above.
- (iii) No person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act.
- (iv) An alternate director shall not hold office for a period longer than that permissible to the original director in whose place he has been appointed and shall vacate the office if and when the original director returns to India.
- (v) If the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

**Example:** Mr. Q, a Director of PQR Limited proceeding on a long foreign tour, appointed Mr. Y as an alternate director to act for him during his absence. The articles of the company provide for appointment of alternate directors. Mr. Q claims that he has a right to appoint alternate director. Advice

**Answer:** Under section 161(2) of the Companies Act, 2013 the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

From the above provision it is clear that the authority to appoint alternate director has been vested in the board of directors only and that too subject to empowerment by the Articles.

Therefore, Q is not authorized to appoint an alternate director and the appointment of Mr. Y is not valid.

(C) **Nominee Director [Section 161(3)]<sup>8</sup>**: Section 161(3) of the Companies Act, 2013 provides for appointment of Nominee director. According to this section:

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.

(D) **Casual Vacancy [Section 161(4)]**: Section 161(4) of the Companies Act, 2013 provides for appointment of director in casual vacancy. According to this section:

- (i) 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.
- (ii) 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.

## 17. APPOINTMENT OF DIRECTORS TO BE VOTED INDIVIDUALLY [SECTION 162]

According to section 162 of the Companies Act, 2013:

- (i) Two or more directors of a company cannot be elected as directors by a single resolution.
- (ii) Thus, each director shall be appointed by a separate resolution unless the meeting first agreed that the appointment shall be made by a single resolution and no vote has been cast against such agreement.
- (iii) A resolution moved in contravention of this provision shall be void, whether or not objection thereto was raised at the time it was so moved.
- (iv) 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.

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<sup>8</sup> In case of Specified **IFSC Public Company & IFSC Private Company** - In sub-section (3) of Section 161, the following proviso shall be inserted, namely:-

“Provided that in case of a Specified IFSC public company & IFSC Private Company, the Board may appoint, any person nominated by any institution or company or body corporate as a director 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.”- Notification Dated 4th January 2017.

### Exemptions

**Non applicability of section 162:** The MCA has clarified via Notifications No. 463(E) and 464(E) dated 5th June, 2015, that section 162 of the Companies Act, 2013, shall not apply to:

- (1) A Government company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;
- (2) A subsidiary of a Government company, referred to in (a) above, in which the entire paid up share capital is held by the Government company.
- (3) A Private company



## 18. OPTION TO ADOPT PRINCIPLE OF PROPORTIONAL REPRESENTATION FOR APPOINTMENT OF DIRECTORS [SECTION 163]

According to section 163 of the Companies Act, 2013:

- (i) Notwithstanding anything contained in the Companies Act, 2013, 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.
- (ii) Such appointments may be made once in every 3 years whether by the single transferable vote or by a system of cumulative voting or otherwise.

Single transferable vote means, a candidate gets elected if he gets the required number of votes fixed as quota. These systems of voting ensure that the Board will have fair representation of the minority interest.

- (iii) Casual vacancies of such directors shall be filled as provided in sub-section (4) of section 161.

### Exemptions

**Non applicability of section 162:** The MCA has clarified via Notifications No. 463(E) dated 5<sup>th</sup> June, 2015, that section 163 of the Companies Act, 2013, shall not apply to:

- (1) A Government company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;
- (2) A subsidiary of a Government company, referred to in (a) above, in which the entire paid up share capital is held by the Government company.



## 19. DISQUALIFICATIONS FOR APPOINTMENT OF DIRECTOR [SECTION 164]

According to section 164 of the Companies Act, 2013:

(i) A person shall not be eligible for appointment as a director of a company in any of the following cases:

- (a) he is of unsound mind and stands so declared by a competent court;
- (b) he is an undischarged 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 6 months and a period of 5 years has not elapsed from the date of expiry of the sentence.

However, if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of 7 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 6 months have elapsed from the last day fixed for the payment of the call;
  - (g) he has been convicted of the offence of dealing with related party transactions under section 188 at any time during the last preceding 5 years; or
  - (h) he has not complied with sub-section (3) of section 152 which requires a director to have a Director Identification Number under section 154.
- (ii) 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 3 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 1 year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for period of 5 years from the date on which the said company fails to do so.  
[Section 164(2)]

### Exemptions

*The MCA has clarified via Notifications dated 5<sup>th</sup> June, 2015, that Section 164(2) is not applicable to Government company.*

- (iii) A private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2) of section 164 as stated above [i.e. point (i) and (ii) above].

However, the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) [given in point (i) above] shall not take effect—

- (a) for 30 days from the date of conviction or order of disqualification;
- (b) where an appeal or petition is preferred within 30 days as aforesaid against the conviction resulting in sentence or order, until expiry of 7 days from the date on which such appeal or petition is disposed off; or
- (c) where any further appeal or petition is preferred against order or sentence within 7 days, until such further appeal or petition is disposed off.



## 20. NUMBER OF DIRECTORSHIP [SECTION 165]

Section 165 of the Companies Act, 2013 provides for the maximum permissible number of directorships that a person can hold. According to this section:

- (i) No person, after the commencement of this Act, shall hold office as director, including any alternate directorship, in more than 20 companies at the same time. [Section 165(1)]

Provided that out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10. [Proviso to section 165(1)]

Private companies that is either holding or subsidiary company of a public company shall be included in reckoning the limit of public companies in which a person can be appointed as a director.

### Exemptions

*The MCA vide Notification No. 466(E) dated 5<sup>th</sup> June, 2015, has clarified that section 165(1) of the Companies Act, 2013, [ie. Point (i)] shall not apply to section 8 companies.*

- (ii) The members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors. [Section 165(2)]
- (iii) Transition period for complying with sub-section (1) is one year and within this period, if any director is holding office as director in companies more than the specified limits, he shall -

- (a) choose not more than the specified limit of companies, in which he wishes to continue to hold the office of director;
  - (b) resign his office as director in the other remaining companies; and
  - (c) intimate the choice made by him under clause (a), to each of the companies in which he was holding the office of director before such commencement and to the Registrar having jurisdiction in respect of each such company. [Section 163(3)]
- (iv) Any resignation made in pursuance of clause (b) of sub-section (3) shall become effective immediately on the dispatch thereof to the company concerned. [Section 163(4)]
- (v) After dispatching the resignation of his office as director or non-executive director or after the completion of the transition period of one year, whichever is earlier, no such person shall act as director in more than specified number of companies.
- (vi) If a person accepts an appointment as a director in contravention of sub-section (1) i.e. holding directorship in more than 20 companies or more than 10 public companies, he shall be punishable with fine which shall not be less than ₹ 5,000 but which may extend to ₹ 25,000 for every day after the first during which the contravention continues.



## 21. DUTIES OF DIRECTORS [SECTION 166]

Duties of directors has been defined in the company Law for the first time under section 166 of the Companies Act, 2013. The following duties have been prescribed for a director under the said section:

- (i) He shall act in accordance with the articles of the company, subject to the provisions of this Act.
- (ii) He shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- (iii) He shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- (iv) He shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
- (v) He shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
- (vi) He shall not assign his office and if any assignment so made, it shall be void.

- (vii) If a director of the company contravenes the provisions of this section, such director shall be punishable with fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 5,00,000.



## 22. VACATION OF OFFICE OF DIRECTOR [SECTION 167]

According to section 167 of the Companies Act, 2013:

- (i) The office of a director shall become vacant in case [Section 167(1)]-
- (a) he incurs any of the disqualifications specified in section 164;
  - (b) he absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board;
  - (c) he acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;
  - (d) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184;
  - (e) he becomes disqualified by an order of a court or the Tribunal;
  - (f) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months.  
It is further provided that the office shall be vacated by the director even if he has filed an appeal against the order of such court;
  - (g) he is removed in pursuance of the provisions of this Act;
  - (h) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.
- (ii) If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in sub-section (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 5,00,000, or with both. [Section 167(2)]
- (iii) Where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting. [Section 167(3)]
- (iv) A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified in sub-section (1). [Section 167(4)]



## 23. RESIGNATION OF DIRECTOR [SECTION 168]

Provisions regarding resignation of directors has been provided for the first time under the Companies Act, 2013. According to this section:

- (i) a director may resign from his office by giving a notice in writing to the company.
- (ii) The Board shall on receipt of such notice take note of the same.
- (iii) The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in *Form DIR-12* and post the information on its website, if any.
- (iv) The company shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company.
- (v) Such director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation in *Form DIR-11* along with the prescribed fee.

Provided that in case a company has already filed *Form DIR-12* with the Registrar (as provided above), a foreign director of such company resigning from his office may authorise in writing a practising chartered accountant or cost accountant in practice or company secretary in practice or any other resident director of the company to sign *Form DIR-11* and file the same on his behalf intimating the reasons for the resignation. [*Companies (Appointment and Qualification of Directors) Amendment Rules, 2015*].

The MCA vide General Circular No. 3/15 dated 3<sup>rd</sup> March, 2015 has clarified that in the event of deactivation of Digital signature certificate (DSC) following en masse resignation of all the directors of a company before appointment of new directors in their places. The difficulty arises because of automatic deactivation of DSC on filing of *DIR-11* (Notice of resignation of a director to the Registrar) by the resigned/resigning Director(s), and none of the new Director's details having been filed. As a result, *Form DIR-12* (Particulars of appointment of directors and the key managerial personnel and the changes among them) cannot be filed by a company due to lack of an authorized signatory Director.

In order to enable the filing of such e-forms and till an alternative mechanism is put in place in MCA 21 system, it is clarified that the Registrar of Companies within their respective jurisdictions are authorized, on request from the stakeholders, and after due examination, to allow any one of the resigned director who was an authorized signatory Director for the purpose of filing *DIR-12* only along with additional fees, as applicable and subject to compliance of other provisions of Companies Act, 2013.

- (vi) 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.



- (vii) It is further provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.
- (viii) Where all the directors of a company resign from their offices, or vacate their offices under section 167, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.



## 24. REMOVAL OF DIRECTORS [SECTION 169]

Section 169 of the Companies Act, 2013 provides the provisions for removal of directors. According to this section:

- (i) A company may, by ordinary resolution, remove a director other than a director appointed by the Tribunal under section 242 of the Act, before the expiry of the period of his office after giving him a reasonable opportunity of being heard. [Section 169(1)]
- (ii) It is further provided that the directors appointed on the principle of proportional representation under section 163 cannot be removed by an ordinary resolution as aforesaid. [Proviso to section 169(1)]
- (iii) A special notice shall be required of any resolution, to remove a director under section 169 or to appoint somebody in place of a director so removed, at the meeting at which he is removed. [Section 169 (2)]
- (iv) On receipt of the notice of a resolution to remove a director under section 169, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting. [Section 169(3)]
- (v) Where notice has been given of a resolution to remove a director under this section and the director concerned makes with respect thereto representation in writing to the company and requests its notification to members of the company, the company shall, if the time permits it to do so,-
  - (a) in any notice of the resolution given to members of the company, state the fact of the representation having been made; and
  - (b) send a copy of the representation to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company), and if a copy of the representation is not sent as aforesaid due to insufficient time or for the company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting:

Provided that copy of the representation need not be sent out and the representation need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Tribunal is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter; and the Tribunal may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it.

- (vi) The vacancy resulting from the aforesaid removal if he had been appointed by the company in general meeting or by the Board, may be filled in by the appointment of another director at the same meeting at which the director is removed, provided special notice of the proposed appointment has been given under section 169(2). [Section 169(5)]
- (vii) A director so appointed shall hold office for the remaining period for which the director who has been removed would have held office if he had not been removed. [Section 169(6)]
- (viii) If the vacancy is not filled in the same meeting as above, then it may be filled as a casual vacancy in accordance with the provisions of this Act provided that the director who was so removed from office shall not be reappointed as a director. [Section 169(7)]
- (ix) Nothing in this section shall be taken to deprive a person removed under this section of his rights to compensation or damages payable to him in respect of the premature termination of the directorship, or terms of his appointment as director or of any appointment terminating with that as a director. [Section 169(8)(a)]
- (x) Nothing in this section shall be derogating from any power to remove a director under any other provisions of this Act. [Section 169(8)(b)]



## **25. REGISTER OF DIRECTORS AND KEY MANAGERIAL PERSONNEL AND THEIR SHAREHOLDING [SECTION 170]**

Section 170 of the Companies Act, 2013 provides as under:

- (i) Every company shall keep at its registered office a register containing such particulars of its directors and key managerial personnel as may be prescribed and which shall include details of securities held by each of them in the company or its holding, subsidiary, subsidiary of its holding companies or associate companies. [Section 170(1)]
- (ii) Section 170(2) provides that a return containing such particulars and documents as may be prescribed, of the directors and the key managerial personnel shall be filed with the Registrar

- (a) within 30 days<sup>9</sup> from the appointment of every director and key managerial personnel, as the case may be, and
- (b) within 30 days of any change taking place.

#### Exemptions

*Section 170 of the Companies Act, 2013 shall not apply to a Government company in which the entire share capital is held by the Central Government, or by any State Government or Governments or by the Central Government or by one or more State Government by MCA vide Notification No. 463(E) dated 5th June, 2015.*



## 26. MEMBERS RIGHT TO INSPECT [SECTION 171]

According to section 171 of the Companies Act, 2013:

- (i) The register of directors and Key Managerial personnel kept under section 170(1) shall be open for inspection during business hours and the members shall have the right to take extracts therefrom and copies thereof, on request and will be provided within 30 days free of cost. [Section 171(1)(a)]
- (ii) Such register shall also be kept open for inspection at every annual general meeting of the company and shall be made accessible to any person attending the meeting. [Section 171(1)(b)]
- (iii) If any inspection during business hours is refused, or if any copy required as above is not sent within thirty days from the date of receipt of such request, the Registrar shall on an application made to him order immediate inspection and supply of copies required there under. [Section 171(2)]

#### Exemptions

*Section 171 shall not apply to a Government company in which the entire share capital is held by the Central Government, or by any State Government or Governments or by the Central Government or by one or more State Government by MCA vide Notification No. 463(E) dated 5th June, 2015.*

<sup>9</sup> In case of **Specified IFSC Public Company**- In Sub-section (2) of section 170 for the words “thirty days” at both places read as “sixty days”. - Notification Dated 4th January 2017.

In case of **Specified IFSC Private Company**- In Sub-section (2) of section 170 For the words “thirty days” at both places read as “sixty days”. - Notification Dated 4th January 2017.



## 27. PUNISHMENT [SECTION 172]

Section 172 of the Companies Act, 2013 provides as under:

If a company contravenes any of the provisions of the sections i.e. from 149 to 171 (both inclusive) and for which no specific punishment is provided therein, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 5,00,000.

**TEST YOUR KNOWLEDGE****Question 1**

*The Articles of Association of Rajasthan Toys Private Limited provide that the maximum number of Directors in the company shall be 10. Presently, the company is having 8 directors. The Board of directors of the said company desire to increase the number of directors to 16. Advise whether under the provisions of the Companies Act, 2013 the Board of Directors can do so.*

**Answer**

Under section 149(1) of the Companies Act, 2013 every company shall have a Board of Directors consisting of individuals as directors and shall have a minimum number of 3 directors in the case of a public company, 2 directors in the case of a private company, and one director in the case of a One Person Company. The maximum number of directors shall be 15.

The proviso to section 149(1) states that a company may appoint more than 15 directors after passing a special resolution.

From the provisions of section 149 (1) as above, though the minimum number of directors may vary depending on whether the company is a public company, private or a one person company, the maximum number of directors is the same for all types at 15 directors.

In the given case since the number of directors is proposed to be increased to 16, the company will be required to comply with the following provisions:

- (i) Alter its Articles of Association under section 14 of the Act, so as to increase the number of directors in the Articles from 10 to 16;
- (ii) Approval shall also be taken to be authorised to increase the maximum number of directors to 16 by means of a special resolution of members passed at a duly convened general meeting of the company.

**Question 2**

*ADJ Limited has 10 directors on its board. Two of the directors have retired by rotation at an Annual General Meeting. The place of retiring directors is not so filled up and the meeting has also not expressly resolved 'not to fill the vacancy'. Since the AGM could not complete its business, it is adjourned to a later date. At this adjourned meeting also the place of retiring directors could not be filled up, and the meeting has also not expressly resolved 'not to fill the vacancy'.*

*Referring to the provisions of the Companies Act, 2013, decide:*

- (i) *Whether in such a situation the retiring directors shall be deemed to have been re-appointed at the adjourned meeting?*

- (ii) *What will be your answer in case at the adjourned meeting, the resolutions for re-appointment of these directors were lost?*
- (iii) *Whether such directors can continue in case the directors do not call the Annual General Meeting?*

### **Answer**

#### **Retiring director – When to be deemed director?**

In accordance with the provision of the Companies Act, 2013, as contained in section 152(7)(a) which provides that if at the annual general meeting at which a director retires and the vacancy is not so filled up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned to 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.

Section 152(7)(b) further provides that if at the adjourned meeting also, the place of the retiring 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 at the adjourned meeting or at the previous meeting a resolution for the re-appointment of such directors was put and lost or he has given a notice in writing addressed to the company and the Board of Directors expressing his desire not to be re-elected or he is disqualified.

Therefore, in the given circumstances answer to the questions as asked shall be:

- (i) In the first case, applying the above provisions, the retiring directors shall be deemed to have been re-appointed.
- (ii) In the second case, where the resolutions for the reappointment of the retiring directors were lost, the retiring directors shall not be deemed to have been re-appointed.
- (iii) Section 152(6)(c) states that 1/3<sup>rd</sup> of the rotational directors shall retire at every AGM. They retire at the AGM and at its conclusion. Hence, they will retire as soon as the AGM is held. Further, as per section 96 (dealing with annual General Meeting) of the Companies Act, 2013, every company other than a One Person Company shall in each year hold an Annual General Meeting. Hence, it is necessary for the company to hold the AGM, whereby these directors will be liable to retire by rotation.

### **Question 3**

*Prince Ltd. desires to appoint an additional director on its Board of directors. The Articles of the company confer upon the Board to exercise the power to appoint such a director. As such M is appointed as an additional director. In the light of the provisions of the Companies Act, 2013, examine:*

- (i) *Whether M can continue as director if the annual general meeting of the company is not held within the stipulated period and is adjourned to a later date?*

- (ii) Can the power of appointing additional director be exercised by the Annual General Meeting?
- (iii) As the Company Secretary of the company what checks would you make after M is appointed as an additional director?

### Answer

Section 161(1) of the Companies Act, 2013 provides that the articles of association 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 at the general meeting, as an additional director at any time and such director will hold office upto the date of the next annual general meeting or the last date on which such annual general meeting should have been held, whichever is earlier.

- (i) M cannot continue as director till the adjourned annual general meeting, since he can hold the office of directorship only 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. Such an additional director shall vacate his office latest on the date on which the annual general meeting could have been held under Section 96 of the Companies Act, 2013. He cannot continue in the office on the ground that the meeting was not held or could not be called within the time prescribed.
- (ii) The power to appoint additional directors vests with the Board of Directors and not with the members of the company. The only condition is that the Board must be conferred such power by the articles of the company.
- (iii) As a Company Secretary, I would put the following checks in place in respect of M's appointment as an additional director:
  - a. He must have got the Directors Identification Number (DIN);
  - b. He must furnish the DIN and a declaration that he is not disqualified to become a director under the Companies Act, 2013;
  - c. He must have given his consent to act as director and such consent has been filed with the Registrar within 30 days of his appointment;
  - d. His appointment is made by the Board of Directors;
  - e. His name is entered in the statutory records as required under the Companies Act, 2013.

### Question 4

The Board of directors of XYZ Ltd. filled up a casual vacancy caused by the death of Mr. P by appointing Mr. C as a director on 3<sup>rd</sup> April, 2016. Unfortunately Mr. C expired on 15<sup>th</sup> May, 2016 after working about 40 days as a director. The Board now wishes to fill up the casual vacancy by

*appointing Mrs. C in the forthcoming meeting of the Board. Advise the Board in this regard as per the provisions under the Companies Act, 2013.*

### **Answer**

Section 161(4) of the Companies Act, 2013 provides that 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.

In view of the above provisions, in the given case, the appointment of Mr. C in place of the deceased director Mr. P was in order. In normal course, Mr. C could have held his office as director up to the date to which Mr. P would have held the same.

However, Mr. C expired on 15<sup>th</sup> May, 2016 and again a vacancy has arisen in the office of director owing to death of Mr. C who was appointed by the board to fill up the casual vacancy resulting from P's demise. Vacancy arising on the Board due to vacation of office by the director appointed to fill a casual vacancy in the first place, does not create another casual vacancy as section 161 (4) clearly mentions that such vacancy is created by the vacation of office by any director appointed by the company in general meeting. Hence, the Board cannot fill in the vacancy arising from the death of Mr. C.

The Board may however appoint Mrs. C as an additional director under section 161 (1) of the Companies Act, 2013 provided the articles of association authorises the board to do so, in which case Mrs. C will hold the 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.

### **Question 5**

*Mr. John is a director of MNC Ltd., which had accepted deposits from public. The Financial position of MNC Ltd. turned very bad and it failed to repay the deposits which fell due for payment on 10<sup>th</sup> April, 2016 and such repayment has not been made till 5<sup>th</sup> May, 2017. Another company JKL Ltd. wants to appoint the said Mr. John as its director at its annual general meeting to be held on 6<sup>th</sup> May, 2017. You are required to state with reference to the provisions of the Companies Act, 2013 whether Mr. John can be appointed as a director of JKL Ltd.*

### **Answer**

Section 164 (2) (b) of the Companies Act, 2013 states that where a person is or has been a director of a company which has failed to repay its deposit on due date and such failure continues for one year or more, then such person shall not be eligible to be appointed as a director of any



other company for a period of five years from the date on which such company, in which he is a director, failed to repay its deposit.

In the instant case, MNC Ltd., has failed to repay its deposit on due dates and the default continues for more than one year. Hence, Mr. John will not be eligible to be appointed as a director of JKL Ltd.

### Question 6

*XYZ Limited is an unlisted public company having a paid-up capital of twenty crore rupees as on 31st March, 2017 and a turnover of one hundred fifty crore rupees during the year ended 31st March, 2017. The total number of directors is thirteen.*

*Referring to the provisions of the Companies Act, 2013 answer the following:*

- (i) *State the minimum number of independent directors that the company should appoint.*
- (ii) *How many independent directors are to be appointed in case XYZ Limited is a listed company?*

### Answer

- (i) According to Rule 4 of the *Companies (Appointment and Qualification of Directors) Rules, 2014*, the following class or classes of companies shall have at least 2 directors as independent directors:

- (1) the Public Companies having paid up share capital of 10 crore rupees or more; or
- (2) the Public Companies having turnover of 100 crore rupees or more; or
- (3) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

In the present case, XYZ Limited is an unlisted public company having a paid-up capital of ₹ 20 crores as on 31st March, 2017 and a turnover of ₹ 150 crores during the year ended 31st March, 2017. Thus, as per the *Companies (Appointment and Qualification of Directors) Rules, 2014*, XYZ Limited shall have at least 2 directors as independent directors.

- (ii) According to section 149(4) of the Companies Act, 2013, every listed public company shall have at least one-third of the total number of directors as independent directors.

In the present case, XYZ Limited is a listed company and the total number of directors is 13. Hence, in this case, XYZ Limited shall have atleast 5 directors ( $1/3$  of 13 is 4.33 rounded as 5) as independent directors.

The explanation to section 149(4) specifies that any fraction contained in such one-third numbers shall be rounded off as one.

As the explanation to rule 4 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* specifies that for the purpose of the assessment of the paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, their existence on the last date of latest audited financial statements shall be taken into account.

In the present case, it is mentioned that paid up capital of XYZ Limited is ₹ 20 crore on 31st March, 2017 and turnover is ₹ 150 crore during the year ended 31st March, 2017. So, it is assumed that 31st March, 2017 is the last date of latest audited financial statements.

