

M.COM. – FIRST YEAR

(II SEMESTER)

Paper: Corporate Laws and Governance

UNIT -III : The Company Act, 2013

Topic: Appointment of Directors-Process, Qualifications & Disqualifications

Lecture: 10

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Who can be appointed as a Director

Appointment of a Director is not only a crucial administrative requirement, but is also a procedural requirement that has to be fulfilled by every company. Under the Companies Act, only an individual can be appointed as a Director; a corporate, association, firm or other body with artificial legal personality cannot be appointed as a Director.

Appointment of Directors

Generally, in a public company or a private company subsidiary of a public company, two-thirds of the total numbers of Directors are appointed by the shareholders and the remaining one-third is appointed in accordance with the manner prescribed in Articles failing which, the remaining one-third of the Directors must be appointed by the shareholders. The Articles of a public company or a private company subsidiary of a public company may provide for the retirement of all the Directors at every AGM.

In a private company, which is not a subsidiary of a public company, the Articles can prescribe the manner of appointment of any or all the Directors. In case the Articles are silent, the Directors must be appointed by the shareholders.

The Companies Act also permits the Articles to provide for the appointment of two-thirds of the Directors according to the principle of proportional representation, if so adopted by the company in question.

Nominee Directors can be appointed by a third party or by the Central Government in case of oppression or mismanagement.

Appointment of Managing Directors

A Managing Director must be an individual and can be appointed for a maximum term of five (5) years at a time.

A person who is already a Managing Director / Manager of a public company or a private company subsidiary of a public company can become the Managing Director / Manager of only one other company (whether private or public) with the prior unanimous approval of the Board of such company. However, no such restrictions are applicable to a Manager or a Managing Director of "pure" private companies.

In case of a public company or a private company that is a subsidiary of a public company, if the appointment is not in accordance with Parts I and II of Schedule XIII of the Companies Act, such appointment must be approved by the Central Government.

Remuneration

In the case of a public company or a private company which is a subsidiary of a public company, the remuneration payable is subject to the provisions of the Companies Act, and may be determined either by the Articles or, if the Articles so provide, by a special resolution of the company in general meeting.

Qualifications for Directors

The Companies Act does not prescribe any qualifications for Directors of any company. An Indian company may, therefore, in its Articles, stipulate qualifications for Directors.

The Companies Act does, however, limit the specified share qualification of Directors which can be prescribed by a public company or a private company that is a subsidiary of a public company, to be five thousand rupees (Rs. 5,000/-).

Conditions for appointment of managing / Whole-time Directors; Disqualifications

The Companies Act, under Schedule XIII, also prescribes certain other conditions that are to be fulfilled for the appointment of a Managing or a Whole-time Director or Manager in case of a public company and a private company that is a subsidiary of a public company. Accordingly, no person shall be eligible for appointment as a Manager, a Managing Director or a Whole-time Director if he or she fails to satisfy the following conditions:

1. He or she should not have been sentenced to imprisonment for any period, or a fine imposed under any of the following statutes, namely:

- i. The Indian Stamp Act, 1899;
- ii. The Central Excise Act, 1944;
- iii. The Industries (Development and Regulation) Act, 1951;
- iv. The Prevention of Food Adulteration Act, 1954;
- v. The Essential Commodities Act, 1955;
- vi. The Companies Act, 1956;
- vii. The Securities Contracts (Regulation) Act, 1956;
- viii. The Wealth Tax Act, 1957;
- ix. The Income Tax Act, 1961;
- x. The Customs Act 1962;
- xi. The Monopolies and Restrictive Trade Practices Act, 1969 – now the Competition Act, 2002;
- xii. The Foreign Exchange Regulation Act, 1973 – now the Foreign Exchange Management Act, 1999;
- xiii. The Sick Industrial Companies (Special Provisions Act) 1985;
- xiv. The Securities Exchange Board of India Act, 1992; and / or
- xv. The Foreign Trade (Development and Regulation) Act, 1973.

2. He or she should not have been detained or convicted for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

3. He or she should have completed twenty-five (25) years of age, but be less than the age of seventy (70) years. However, this age limit is not applicable if the appointment is

approved by a special resolution passed by the company in general meeting or the approval of the Central Government is obtained.

4. He or she should be a managerial person in one or more companies and draws remuneration from one or more companies subject to the ceiling specified in Section III of Part II of Schedule XIII.

5. He or she should be a resident of India. 'Resident' includes a person who has been staying in India for a continuous period of not less than twelve (12) months immediately preceding the date of his or her appointment as a managerial person and who has come to stay in India for taking up employment in India or for carrying on business or vocation in India. However, this condition is not applicable for companies in the Special Economic Zone, as notified by Department of Commerce from time to time.

Restrictions on number of Directorships

The Companies Act prevents a Director from being a Director, at the same time, in more than fifteen (15) companies. For the purposes of establishing this maximum number of companies in which a person can be a Director, the following companies are excluded:

1. A "pure" private company;
2. An association not carrying on its business for profit, or one that prohibits the payment of any dividends; and
3. A company in which he or she is only appointed as an Alternate Director.

Failure of the Director to comply with these regulations will result in a fine of fifty thousand rupees (Rs. 50,000/-) for every company that he or she is a Director of, after the first fifteen (15) so determined.

Director Identification Numbers

All Directors of Indian companies are required to obtain Director Identification Numbers ("DINs"). Primarily, DINs are required to authenticate any electronic filings made by the company.

Additional disqualifications in case of a public company

In addition to the requirements mentioned above, the Companies Act further provides that a person shall not be eligible to be appointed as a Director of any other public company for a period of five (5) years from the date on which the public company, in which he or she is a Director, has failed to file annual accounts and annual returns or has failed to repay its deposits or interest thereon or redeem its debentures on the due date or pay dividends declared.

Additional disqualification in case of a "pure" private company

A private company that is not a subsidiary of a public company can, by its Articles, provide that a person shall be disqualified for appointment as a Director on any grounds in addition to those specified in the Companies Act.

Additional disqualifications for Managing and Whole-time Directos

An individual cannot be appointed as a Managing or a Whole-time Director of a company if he or she:

1. is an undischarged insolvent, or has at any time been adjudged an insolvent;
2. suspends, or has at any time suspended, payment to his or her creditors, or makes, or has at any time made, a composition with them; or
3. is, or has at any time been, convicted by a court of an offence involving moral turpitude.

These requirements are not only more stringent than the requirements for an ordinary Director, but are also of an absolute and mandatory nature.

Retirement of Directors

In any public company or a private company that is a subsidiary of a public company, one-third of the Directors must retire at every AGM. However, every retiring Director is eligible for re-appointment. If the vacancy is not filled and the meeting has not expressly resolved to fill such vacancy, he or she shall be deemed to have been re-appointed until the next election meeting, unless he or she is not otherwise disqualified or is unwilling to so act as a Director or no resolution for such appointment has been put to the meeting and lost.

Removal of Directors

A Director can be removed by an ordinary resolution of the general meeting after a special notice has been given, before the expiry of his term of office. However, this is not applicable to Directors appointed by proportional representation or the Directors appointed by the Central Government.

Vacation of Office

The office of a Director of a public company, or of a private company which is a subsidiary of a public company, becomes vacant if he or she:

1. Becomes subject to any of the three (3) disqualifications mentioned above (with regard to disqualifications for a Managing or a Whole-time Director) during his or her term of office;
2. Fails to obtain within any time period as may be specified in the Articles (two months in case of a public company), or at any time thereafter ceases to hold, the necessary share qualification if any as prescribed by the Articles;
3. Absents himself or herself from three (3) consecutive meetings of the Board, or from all meetings of the Board for a continuous period of three (3) months, whichever is longer, without obtaining leave of absence from the Board;
4. Whether by himself or herself, or by any person on his or her account or any firm in which he or she is a partner or company in which he or she is a Director, accepts a loan or guarantee or security for a loan from the company in contravention of the requirements governing loans etc to Directors;

5. Acts in contravention of the requirements regarding disclosure of interests;
6. Is removed from office under the Companies Act; or
7. Having been appointed as Director by virtue of his or her holding an office or other employment in the company (for instance, that of Managing Director), he or she fails to hold such office or other employment.

Also, in such public companies and private companies that are subsidiaries of public companies, if a Director or his or her relative holds an office of profit without the consent of the company, and with such Director's knowledge, such Director shall be deemed to have vacated his or her office.

In addition to these reasons for the Director's office becoming vacant, a "pure" private company may prescribe other such reasons in its Articles.

If a person continues to act as a Director, despite knowing that his or her office has become vacant, he shall be punishable with a fine up to five thousand rupees (Rs. 5,000/-) for every day that he or she continues to function and act as such.

Resignation

The Companies Act is silent with respect to resignation of Directors. However, in a majority of cases, the Articles provide for Directors to resign. Even in cases where the Articles are silent, there is no absolute bar on Director's resigning, which becomes effective upon submission of such resignation letter and the filing of the necessary form for such resignation with the Registrar of Companies (whether or not the Board formally accepts the same, unless the Articles provide otherwise). The filing of such resignation related form with Registrar of Companies is an obligation to be discharged by the company in question.

The only exception to the above rule is in the case of Managing, Whole-time and Executive Directors who are employees of the company, and where the terms of their respective service contracts will ordinarily refer to resignations, notice periods and / or compensation in lieu thereof.

Compensation of Loss of Office

Only a Managing Director, a Director holding the office of a Manager and Whole time Directors can receive compensation for loss of office or consideration for retirement, subject to the conditions specified by the Companies Act.