



The Companies Act 2013

Enlightening Nation

E-newsletter

September, 2017

About the E-newsletter

Dear Users,

To keep you updated about the latest notifications, circulars & orders issued during the month, thecompaniesact2013.com present herewith its monthly e-newsletter. This is the issue of the January month comprising contemporary articles & monthly amendments.

The notion is to render all the updates in a compiled format and serve a better pavement for easy accessibility.

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Remedies for removal of Disqualification of the Directors

Our E-newsletter for last month talked about “**CRACKDOWN ON SHELL COMPANIES AND NON OPERATIONAL COMPANIES BY REGULATORY BODIES**”, in line of the same Ministry of Corporate Affairs has made public the names of directors whom it disqualified.

Now the major question comes to the mind is “What is disqualification of the Directors and how can it be removed?” So, for this month our E-newsletter is dedicated towards the remedies for removal of disqualification. But before going on how we can remove the disqualification, first we need to understand the basic provision mentioned under Companies Act, 2013. To have better and clear view, here we will discuss it in parts.

As per Section 164 of Companies Act, 2013:

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

(a) he is of unsound mind and stands so declared by a competent court;

(b) he is an un-discharged insolvent;

(c) he has applied to be adjudicated as an insolvent and his application is pending;

(d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence: Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;

(e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

(f) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;

(g) he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or

(h) he has not complied with sub-section (3) of section 152.

The disqualification mentioned in clauses (d), (e) and (g) of sub section 1, can be appealed by the Director in the immediate superior court of which passed the order of conviction of the director.

While disqualifications listed in sub-section (1) of section 164 are general in nature, disqualification pointed out under sub – section (2) of section 164 is punitive in nature. These punitive disqualifications need special attention of subordinate legislation to place standard operating procedure.

And for that reference sub section (2) reads-

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

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

As clearly explained, these two situations attract disqualification of Directors and they stand incapable in the eyes of law to be re-appointed as a director in any other Company for five years.

Further, the law states in Rule 14(3) of Companies (Appointment of Directors) Rules, 2014:

*...(3) Whenever a Company fails to file the financial statements or annual returns, or fails to repay any deposits, interest, dividend, or fails to redeem its debenture, as specified in sub section (2) of section 164, the company shall immediately file Form **DIR-9**, to the Registrar furnishing there in the names and addresses of all the directors of the company during the relevant financial year.*

The time period specified in law to file DIR-9 is within 30 days of the failure that would attract the disqualification under sub section (2) of section 164, failing to which officers of the company specified in clause (60) of section 2 of the Act shall be the officers in default.

ACTION TAKEN BY GOVERNMENT

The corporate affairs ministry has disqualified another 200,000 directors for holding posts in defaulting companies that have not filed their financial returns for the last three years or more, taking the total number to over 300,000, and has also issued a list of disqualified directors, while cancelling the registration of another 10,000 companies.

While the current law does not provide for any appeal, the government is thinking of exercising “the review power to take any such plea into consideration,”

PP Chaudhary, minister of state for corporate affairs, stated “By operation of law, these directors are disqualified but we have to see under what provision of law we can examine this. If we need to frame a rule we will do it.”

The move is apart of actions to break the network of ‘shell companies’ and further the fight against black money/money laundering, it said.

Directors cut

A number of directors of shell companies were identified or disqualified in a government exercise. The top 5 region-wise:

Region	Directors in struck-off companies	Region	Disqualified directors
Chennai	24,048	Delhi	74,920
Ahmedabad	12,692	Mumbai	66,851
Ernakulam	12,000	Hyderabad	41,156
Cuttack	4,760	Ernakulam	14,000
Shillong	670	Cuttack	13,383

Click here to check the list issued by Ministry of Corporate Affairs naming the disqualified directors: <http://www.mca.gov.in/MinistryV2/disqualifieddirectorslist.html>

REMEDY AVAILABLE

Provisions which are tainting provisions, crucial for determining the tenure of a director in a Company, shall be drafted with due concern and care but this time the law makers have drafted the provisions so loosely that companies are struggling with the interpretation and remedies. The only remedy available with the directors of such Companies has been spoken as understated:

Rule 14 sub rule (5) reads-

....(5) Any application for removal of disqualification of the directors shall be made in Form DIR-10

This is where the law mentions the removal of the disqualification of the directors via Form DIR-10 but leaves all the pages unturned in regard of further procedure.

This form seeks information of “ground of disqualification” and “detail of application”, where any director can apply for the removal of the disqualification.

Form DIR-10 prescribed under law is a physical form and not an E-Form, and as the law does not establish any other ground regarding the authority to which it shall address, the debatable points are “how we can file this form and to which authority it shall be addressed”.

Clearing all the ambiguity in context of many general forms, Ministry of corporate Affairs on 25th April, 2014 issued a general circular regarding the “Availability of E-Forms/non E-Forms under the Companies Act, 2013”, which also stated that DIR-10 shall be filed as an attachment to E-Form CG-1. As E-Form CG-1 is a general Form and addressed to Central Government for its approval, so in this account we can opine that DIR-10 when attached with CG-1 shall be addressed to Central Government.

Click here for the

circular: http://www.mca.gov.in/Ministry/pdf/General_Circular_9_2014.pdf

But the hurdles in this context are not still done with, CG-1 being an e-Form, needs to be digitally signed by one of the directors of the Company but in case of attraction of disqualification under 164(2) all the Directors of the Company stand disqualified, hence the form can not be signed by any of the disqualified directors.

What can be the measures?

Pursuant to provision of **section 167(3)**: *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.*

As due to disqualification of the entire board, and vacation of office under section 167, company would be left with no directors on board. The promoters of the Company can appoint any other person as Director of the Company that person shall hold the office till the next General Meeting of the Company. But the same can not be informed to the ROC as per the requirement of the Companies Act, 2013 via e-Form since, all the directors are disqualified so company can't use their DSC.

In such a situation company can file the physical copy of application along with details of the person appointed by promoter to act as director of the Company. The ROC officials shall verify the application and if they are satisfied they will update the name of such person in their record as Director of the Company. After such a process the company can file any E-Form on MCA with the DSC of non disqualified director.

Further with such process the company will make its default good and directors would be able to file DIR-10 for removal of their disqualification.

The format of DIR-10 is available hereunder:

FORM 'DIR-10'

FORM OF APPLICATION FOR REMOVAL OF DISQUALIFICATION OF DIRECTORS

[Pursuant to Section 164(2) read with rule 14(5) of Companies (Appointment and Qualification of Directors) Rules, 2014]

Registration No. of Company _____

Nominal Capital Rs. _____

Paid-up Capital Rs. _____

Name of Company _____

Address of its Registered Office _____

Grounds under which director(s) are disqualified _____

Date of disqualification _____

Details of the application _____

Signature

Designation*

Dated this _____ day of _____

*State whether Director, Managing Director, Manager or Secretary

RULES

G.S.R. 1176 (E) Companies (Acceptance of Deposit) Second Amendments Rules, 2017

Click

here: http://www.mca.gov.in/Ministry/pdf/CompaniesAcceptanceofDepositSecondAmendmentRule_22092017.pdf

G.S.R. 1172 (E) Companies (Restriction on number of layers) Rules, 2017

Click

here: http://www.mca.gov.in/Ministry/pdf/CompaniesAcceptanceofDepositSecondAmendmentRule_22092017.pdf

CIRCULARS

General Circular 11/2017

Click here:

http://www.mca.gov.in/Ministry/pdf/GeneralCircular11_27.09.2017.pdf

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In Association with:

**Arms & Associates LLP
Practicing Company Secretaries
24 ka 1 Jyoti Nagar, Jaipur
Ph.No. 0141-2740924, 5119323**

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