



The Companies Act 2013

Enlightening Nation

E-newsletter

OCTOBER, 2020

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 October 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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ARTICLE

AUDITORS

Who is an Auditor?

Statutory auditor is an independent professional, appointed by a company to perform statutory audit and to ensure the reliability and accuracy of the financial statements prepared by the company.

What is the purpose for the appointment of the Auditor?

The purpose of the auditors in the company is to protect the interests of the shareholders. The auditor is obligated by law to examine the accounts maintained by the directors and inform the shareholders of the true financial position of the company. Auditor gives his independent opinion to the owners or shareholders of the company to protect and keep the company in a safe financial condition. The Auditor needs to make sure that the accounts and books accurately match with the activities that have been partaken by the company. He is responsible for scrutinizing the books of account of a Company with reference to documents, vouchers, and other relevant records and ensuring that the entries made therein give a clean and clear picture of the business.

List of section under Companies Act, 2013 in which auditors related provisions are referred.

Companies Act, 2013	Section Title
139	Appointment of Auditors
140	Removal, Resignation of auditor and giving of special notice
141	Eligibility, qualifications and disqualifications of auditors
142	Remuneration of auditors
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146	Auditor to attend AGM
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Section 139:

Particulars	Non Government Company	Government Company
1. Appointment of First post Auditors Incorporation	<p>1. Appointed by the Board of Directors within 30 days from the date of Registration.</p> <p>2. In the case of failure of the Board to appoint such auditor, it shall inform the members of the company, who shall within ninety days at an extraordinary general meeting appoint such auditor and such auditor shall hold office till the conclusion of the first annual general meeting.</p>	<p>1. Appointed by the Comptroller and Auditor General of India within 60 days from the date of Registration.</p> <p>2. In case of failure, appointment shall be done by Board of Directors within the next 30 days.</p> <p>3. In case of the failure of Board to appoint such auditor within the next thirty days, it shall inform the members of the company who shall appoint such auditor</p>

		within the sixty days at an extraordinary general meeting, and such auditor shall hold office till the conclusion of the first AGM.
2. Appointment of Auditor at First AGM.	The company shall, at the first annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its sixth annual general meeting and thereafter till the conclusion of every sixth meeting.	1. The appointment is done by the C&AG within 180 days from the commencement of financial year.
3. Casual Vacancy	The appointment is done by the Board within 30 days If casual vacancy is resulted due to resignation of the auditor, such appointment shall also be approved by the members at a general meeting convened within three months of the recommendation of the Board and he shall hold the office till the conclusion of the next annual general meeting	The appointment is done by the : -CAG (Comptroller and Auditor General) within 30 days OR -BOD within the next 30 days

The following classes of companies excluding one person companies and small companies:-

(i) Listed Companies;

(i) All unlisted public companies having paid up share capital of rupees ten crore or more;

(ii) All private limited companies having paid up share capital of rupees fifty crore or more;

(iii) All companies having paid up share capital of below threshold limit mentioned in (ii) and (iii) above, but having public borrowings from financial institutions, banks or public deposits of rupees fifty Crores or more,

shall not appoint or re-appoint-

(a) An individual as auditor for more than one term of five consecutive years; and

(b) An audit firm as auditor for more than two terms of five consecutive years.

Provided that—

(i) An individual auditor who has completed his term under clause (a) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term;

(ii) An audit firm which has completed its term under clause (b), shall not be eligible for re-appointment as auditor in the same company for five years from the completion of such term.

Provided further that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

Compliance before appointment of auditor:

Before the appointment, a company shall obtain from the auditor—

a) Written consent of the auditor to such appointment.

b) Certificate that

- i. Auditor is eligible for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules or regulations made there under;
- ii. The proposed appointment is as per the term provided under the Act;
- iii. The proposed appointment is within the limits laid down by or under the authority of the Act;
- iv. The list of proceedings against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

Compliance after Appointment by Company:

A Company shall inform the auditor of his appointment & is to file a notice of appointment with ROC within 15 days of the meeting in which auditor is appointed. (Form No. ADT – 1)

Rights of shareholders/ auditor unharmed:

Nothing contained above with respect to rotation shall prejudice the right of the company to remove an auditor or the right of the auditor to resign from such office of the company.

Section 139 (3): Subject to the provisions of this Act, members of a company may resolve to provide that —

- a) in the audit firm appointed by it, the auditing partner and his team shall be rotated at such intervals as may be resolved by members; or
- b) the audit shall be conducted by more than one auditor.

Re-Appointment of Retiring Auditor

A retiring auditor may be re-appointed at an annual general meeting, if—

- a) He is not disqualified for re-appointment;
- b) he has not given the company a notice in writing of his unwillingness to be re-appointed; and
- c) a special resolution has not been passed at that meeting appointing some other auditor or providing expressly that he shall not be re-appointed.

Section 139 (10): Where at any annual general meeting, no auditor is appointed or re-appointed, the existing auditor shall continue to be the auditor of the company.

Section 139 (11): Where a company is required to constitute an Audit Committee, all appointments, including the filling of a casual vacancy of an auditor under this

section shall be made after taking into account the recommendations of such committee.

Explanation: Appointment includes “re-appointment”.

Section 140: Removal, Resignation of auditor and giving of special notice

The auditor appointed u/s 139 may be removed from his office before the expiry of his tenure only by way previous approval of CG and a special resolution of the company to be passed in a general meeting within 60 days of receipt of approval of CG. However, before such step, the auditor shall be given a reasonable opportunity of being heard. The application to CG has to be made within 30 days of passing the board resolution. (Form No. ADT- 2 along with fees).

Compliance by auditor after resignation:

The auditor who has resigned from the company shall file within a period of 30 days from the date of resignation, a statement in the prescribed form with the company and the ROC, and in case of companies referred to in sub-section (5) of Section 139 (Government company) the auditor shall also file such statement with the Comptroller and Auditor-General of India, indicating the reasons and other facts as may be relevant with regard to his resignation indicating the reasons and other facts as may be relevant. (Form No. ADT-3).

Punishment if auditor doesn't comply with the abovementioned provisions:

Penalty: Fifty thousand rupees or an amount equal to the remuneration of the auditor, whichever is less;

In case of continuing failure: Further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of two lakh rupees.

Appointment of auditor other than retiring auditor by a special notice:

Where a person other than the retiring auditor is proposed to be appointed as an auditor, or where it is proposed that the retiring auditor shall not be re-appointed, a special notice under Section 115 of the companies Act, 2013 has to be given proposing that such a resolution would be moved at the next annual general meeting.

In case where the retiring auditor has completed a consecutive tenure of five years or, as the case may be – ten years then such special notice is not required.

For the purpose of special notice the relevant points are as under:

If the auditor makes a representation in writing to the company and requests for a notification to the members, the company shall state the fact of representation in any notice regarding the resolution

The copy of representation should be sent to those members by the company to whom notice of meeting is sent, whether before or after the receipt of representation.

If the copy of representation is not so sent, copy thereof should be filed with the Registrar.

On receipt of the special notice for removing the auditor, the company should send a copy of the same to the retiring auditor.

Such representation should be of a reasonable length and not too long.

The special notice should not be received by the company too late for the purpose of circulation to members.

Auditor may require the company to read out the representation in the meeting if it is not so notified to members because it was too late or because of company's default.

If the Tribunal is satisfied that the rights are being abused by the auditor based on an application either of the company or of any other aggrieved person, then:

- The copy of the representation may not be sent, and
- The representation need not be read out at the meeting.

Without prejudice to any action under the provisions of this Act or any other law for the time being in force, the Tribunal either suo moto or on an application made to it by the Central Government or by any person concerned, if it is satisfied that the auditor of a company has, whether directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, it may, by order, direct the company to change its auditors.

Provided that if the application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it shall within fifteen days of receipt of such application, make an order that he shall not function as an auditor and the Central Government may appoint another auditor in his place.

Provided further that an auditor, whether individual or firm, against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under Section 447.

Section 141: Eligibility, Qualifications & Disqualifications

Eligibility:

a) Individual: Only if is a CA holding certificate of Practice as per Section 2(17) of the Companies Act, 2013.

b) Audit Firm/LLP: Majority of partners who are CA practicing in India, appointed in Firm name. Only the partner's who are CA's are authorised to act as auditors and sign.

Disqualifications:

The following persons shall not be eligible for appointment as auditors of a company:—

- a) A body corporate other than a LLP registered under the LLP Act, 2008;
- b) An officer or employee of the company;
- c) A person who is a partner, or who is in the employment, of an officer or employee of the company;
- d) A person who, or his relative or partner—
 - i. Is holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company

Provided that the relative may hold security or interest in the company of face value not exceeding 1000 rupees or such sum as may be prescribed; (Prescribed sum is Rs. 1 lakh)
 - ii. Is indebted to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of such amount as may be prescribed; (Prescribed sum is Rs. 5 lakh)
 - iii. has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, for such amount as may be prescribed;(Prescribed sum is Rs. 1 lakh)
- e) a person or a firm who, whether directly or indirectly, has business relationship with the company, or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company of such nature as may be prescribed;

The term "business relationship" shall be construed as any transaction entered into for a commercial purpose, except -

- (i) commercial transactions which are in the nature of professional services permitted to be rendered by an auditor or audit firm under the Act and the Chartered Accountants Act, 1949 and the rules or the regulations made under those Acts;

(ii) commercial transactions which are in the ordinary course of business of the company at arm's length price - like sale of products or services to the auditor, as customer, in the ordinary course of business, by companies engaged in the business of telecommunications, airlines, hospitals, hotels and such other similar businesses.

- f) A person whose relative is a director or is in the employment of the company as a director or key managerial personnel;
- g) a person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such persons or partner is at the date of such appointment or reappointment holding appointment as auditor of more than twenty companies.
- h) A person who has been convicted by a court of an offence involving fraud and a period of ten years has not elapsed from the date of such conviction;
- i) A person who, directly or indirectly, renders any service referred to in section 144 to the company or its holding company or its subsidiary company.

Where a person appointed as an auditor of a company incurs any of the disqualifications mentioned in sub-section (3) after his appointment, he shall vacate his office as such auditor and such vacation shall be deemed to be a casual vacancy in the office of the auditor.

Section 142: Remuneration of Auditors

The remuneration of the auditor of a company shall be fixed in its general meeting or in such manner as may be determined therein;

Provided that the Board may fix remuneration of the first auditor appointed by it.

The remuneration under sub-section (1) shall, in addition to the fee payable to an auditor, include the expenses, if any, incurred by the auditor in connection with the audit of the company and any facility extended to him but does not include any remuneration paid to him for any other service rendered by him at the request of the company.

Section 144 - Auditor not to render certain services :

An auditor appointed under this Act shall provide to the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be, but which shall not include any of the following services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company, namely:—

- a) accounting and book keeping services;
- b) internal audit;
- c) design and implementation of any financial information system;
- d) actuarial services;

- e) investment advisory services;
- f) investment banking services;
- g) rendering of outsourced financial services;
- h) management services; and
- i) any other kind of services as may be prescribed:

Provided that an auditor or audit firm who or which has been performing any non-audit services on or before the commencement of this Act shall comply with the provisions of this section before the closure of the first financial year after the date of such commencement.

Explanation: The term “Directly or Indirectly” shall include rendering of services by the auditor:

Auditor (Individual): either himself or through his relative or any other person connected or associated with such individual or through any other entity, whatsoever, in which such individual has significant influence or control, or whose name or trade mark or brand is used by such individual;

Auditor (Audit Firm): either itself or through any of its partners or through its parent, subsidiary or associate entity or through any other entity, whatsoever, in which the firm or any partner of the firm has significant influence or control, or whose name or trade mark or brand is used by the firm or any of its partners.

Section 145- Auditor to sign Audit Reports, etc.

The person appointed as an auditor of the company shall sign the auditor’s report or sign or certify any other document of the company in accordance with the provisions of sub-section (2) of section 141, and the qualifications, observations or comments on financial transactions or matters, which have any adverse effect on the functioning of the company mentioned in the auditor’s report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

Section 146- Auditors to Attend General Meeting

All notices of, and other communications relating to, any general meeting shall be forwarded to the auditor of the company, and the auditor shall, unless otherwise exempted by the company, attend either by himself or through his authorised representative, who shall also be qualified to be an auditor, any general meeting and shall have right to be heard at such meeting on any part of the business which concerns him as the auditor.

Section 147- Penalty

1. Penalty for the contravention of Section 139 to 146 (both inclusive):

Company: Rs. 25,000 to Rs. 5,00,000

Officer in Default: Rs. 10,000 to Rs. 1,00,000

2. Penalty for Auditor for contravention of provisions of Section 139, 143, 144, 145):

Rs.25000 to Rs. 5,00,000 or four times the remuneration of the auditor, whichever is less.

Provided that if an auditor has contravened such provisions knowingly or willfully with the intention to deceive the company or its shareholders or creditors or tax authorities, he shall be punishable with imprisonment for a term which may extend to one year and with fine which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees or eight times the remuneration of the auditor, whichever is less.

3. Where an auditor has been convicted under sub-section (2), he shall be liable to—

(i) refund the remuneration received by him to the company; and

(ii) pay for damages to the company, statutory bodies or authorities or to members or creditors of the company for loss arising out of incorrect or misleading statements of particulars made in his audit report.

4. The Central Government shall, by notification, specify any statutory body or authority or an officer for ensuring prompt payment of damages to the company or the persons under clause (ii) of sub-section (3) and such body, authority or officer shall after payment of damages to such company or persons file a report with the Central Government in respect of making such damages in such manner as may be specified in the said notification.

(5) Where, in case of audit of a company being conducted by an audit firm, it is proved that the partner or partners of the audit firm has or have acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to or by, the company or its directors or officers, the liability, whether civil or criminal as provided in this Act or in any other law for the time being in force, for such act shall be of the partner or partners concerned of the audit firm and of the firm jointly and severally

Provided that in case of criminal liability of an audit firm, in respect of liability other than fine, the concerned partner or partners, who acted in a fraudulent manner or abetted or, as the case may be, colluded in any fraud shall only be liable."

CIRCULARS

1. General Circular No. 36/2020 dated 20.10.2020

Subject:

Special Measure under the Companies Act, 2013 and Limited Liability Partnership Act, 2008 in view of COVID-19 outbreak-reg.

In continuation to General Circular No. 11/2020 dated 24th March 2020 and keeping in view the requests received from various stakeholders seeking relaxation from the residency requirement of 182 days in a year and after due examination, it is hereby clarified that non-compliance of minimum residency in India for a period of at least 182 days in a year, by at least one director in every company, under section 149 of the Companies Act, 2013 shall not be treated as non-compliance for the financial year 2020-2021 also.

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- **The Companies (Amendment) Act, 2020**
- **The Companies (Prospects and Allotment of Securities) Rules, 2020**
- **The Companies (Meeting of Board and its Powers) Third Amendment Rules, 2020**
- **The Companies (Appointment and Qualification of Directors) 4th Amendment Rules, 2020**
- **The Companies (Acceptance of Deposits) Amendment Rules, 2020**
- **The Companies (Management and Administration) Amendment Rules, 2020**
- **Amendment of the Companies (CSR Policy) Rules, 2014 of the Companies Act, 2013**
- **Companies (Indian Accounting Standards) Amendment Rules, 2020**
- **Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2020**
- **Various Circulars issued by SEBI during the month of October, 2020**

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