

## PROCEDURE FOR APPOINTMENT OF NOMINEE DIRECTOR

{Section 161(3) of the Companies Act, 2013}

### Synopsis

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### Relevant Sections, Rules and Forms at a Glance

Particulars	Section(s), Rule(s) and Name of e-Form(s)
The Companies Act, 2013	Sections 118, 149, 152, 153, 154, 158, 159, 161, 164, 170, 173 and 403
The Companies (Incorporation) Rules, 2014	Rule 25A
The Companies (Appointment and Qualification of Directors) Rules, 2014	Rules 8, 9, 10, 14, 17 and 18
The Companies (Meetings of Board and its Powers) Rules, 2014	Rules 9, 15 and 16
The Companies (Registration Offices and Fees) Rules, 2014	Rules 7, 8 and 12
Secretarial Standard-1 of ICSI	Clauses 3, 4, 5, 6, 7 and 8
e-Forms to be filed	DIR-12
Forms to be filed as an attachment with respective form	DIR-2

### Significant Relevant Approvals and Requirements

- ❖ DIN of the concerned person
- ❖ Consent to act as director in Form DIR-2
- ❖ Intimation of eligibility regarding non-disqualification in Form DIR-8
- ❖ Board Resolution
- ❖ Nomination letter from the concerned authority

### 17.1 PROCEDURE WITH CHECK POINTS

S. No.	Particulars
1.	Ensure that the articles of association of the company have provisions to appoint a <b>nominee director</b> {Section 161(3) of the Act} and if the articles of association have its procedure for appointment of nominee director, then the

S. No.	Particulars
	company must follow the procedure along with the procedure mentioned below. If the articles of association have no provisions for appointment of a nominee director, then first amend the articles of association so as to include the provisions of appointment of nominee director.
2.	Ensure that person is appointed by the board as a nominee director of any institution in pursuance of the provision of any law for the time being in force or of any agreement or by the Central or State Government by virtue of its shareholding in a Government Company and the letter, proposing a person as a nominee director to be appointed, is received from the concerned authority { <i>explanation to section 149(7) of the Act</i> }.
3.	Ensure that the company is incorporated <b>before 1<sup>st</sup> January, 2018</b> and the status of the company is ' <b>ACTIVE COMPLIANT COMPANY</b> ' otherwise the Registrar shall not accept and take on record <b>the e-Form DIR-12</b> which is required to be filed in case of change in director. ( <i>Fourth Proviso of Rule 25A of the Companies (Incorporation) Rules, 2014</i> ), and if the status of the company is ' <b>ACTIVE NON-COMPLIANT</b> ', then first complete the formalities of filing of e-FORM INC-22A as per rule 25A of the Companies (Incorporation) Rules, 2014.
4.	Obtain Digital Signature Certificate (DSC) and Director Identification Number (DIN) respectively of the appointee director and thereafter obtain consent in writing, on or before appointment, from the appointee director to act as director in <b>Form DIR-2, not required in Government Company</b> and an intimation by director in writing, on or before appointment, in <b>Form DIR-8 , not required in Government Company</b> , confirming that he/she is not disqualified to act as director under Section 164 of Companies Act, 2013.
5.	Complete formalities regarding calling of board meeting in the following manner: <ul style="list-style-type: none"> <li>• Prepare notice of board meeting along with draft resolution(s) to be passed in the board meeting.</li> <li>• Send notice of board meeting to all the directors <ul style="list-style-type: none"> <li>- at least 7 days before the date of board meeting or</li> <li>- in such manner as prescribed under section 173(3) of the Companies Act, 2013 and clause 1 of the Secretarial Standard-1.</li> </ul> </li> </ul>
6.	Convene board meeting and pass board resolutions for – <ul style="list-style-type: none"> <li>• Appointment of nominee director</li> <li>• Authorisation to director/company secretary to sign the documents</li> </ul>
7.	Complete formalities regarding minutes of the board meeting as per Section 118 of the Companies Act, 2013 in the following manner: <ul style="list-style-type: none"> <li>• Prepare draft minutes of the board meeting and circulate, within a period of fifteen days from the date of conclusion of that meeting, to all directors, by hand/speed post/registered post/courier/e-mail or by any recognised electronic means, for their comment(s).</li> <li>• All directors shall communicate their comment(s), if any, on the draft circulated minutes within a period of seven days from the date of circulation of the draft minutes.</li> </ul>

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	<p>The subscribers, who are individuals in the Memorandum of Association (MOA) shall be deemed as first directors until the directors are duly appointed by the members in accordance with Section 152 of the Companies Act, 2013 and rules made thereunder (Section 152 of the Act).</p> <ul style="list-style-type: none"> <li>• Not the person intended/proposed to be appointed a director of a company has a valid Director Identification Number (DIN) under section 174 or any other number as may be prescribed under section 174 of the Companies Act, 2013, however, in case of first directors of a new company, the DIN up to 3 (three) persons can be obtained through incorporation with integrated form SPICe-1 (INC-32) (Section 152 of the Act read with rule 152 of the Companies Incorporation Rules, 2014).</li> <li>• Not a total number of directors, at least one director has stayed in India for a total period of not less than 182 days during the financial year. Provided that in case of newly incorporated company, residential status shall be determined proportionately. However, it is not required in case the director is appointed by the Central Government or State Government (Section 152 of the Act).</li> <li>• A person, who is intended to be appointed, shall not be eligible for appointment, if he/she has any disqualification for appointment under section 164 of the Act (Section 164 of the Act read with companies provisions a government company and regulations in COA 2012 about COA 2012).</li> <li>• A person proposed to be appointed as a director in a company other than a company registered under Section 8 (non-profit company) of the Companies Act, 2013 (Section 152 of the Act)             <ul style="list-style-type: none"> <li>- shall not hold office as a director including any alternate directorship in more than 20 companies including directorship in dormant companies.</li> <li>- shall not hold office in more than 10 public companies including the private companies which are holding or subsidiary of public company.</li> </ul> </li> </ul>
1.	In case of one person company, an individual being sole member is deemed to be the first director of the company, if the articles of association has not mentioned the names of first directors (Section 152 of the Act).
2.	Forms created in writing, on or before appointment, from the appointed director to act as director in the company as Form 208-2 (Part 2 of the Companies Incorporation and Qualification of Directors Rules, 2014).
3.	Form created in writing, on or before appointment, from the appointed director as Form 208-3 regarding that he/she is not disqualified under Section 164 of Companies Act, 2013, to act as a Director (Section 164 of the Act read with rule 164 of the Companies Incorporation and Qualification of <u>Directors</u> Rules, 2014).
4.	The particulars of first directors to be integrated with Form SPICe-1 (INC-32) at the time of incorporation of company.

For the detailed procedure, please refer Company Law Procedures & Compliances by Dr. Sanjeev Gupta, 2nd edn, 2021. You can buy from your bookseller or online at [www.bharatlaws.com](http://www.bharatlaws.com)

[COMPANY LAW Procedures & Compliances \(in 2 vols.\)](#)