

## PROCEDURE FOR APPOINTMENT OF DIRECTOR IN CASUAL VACANCY

18

{Section 161(4) of the Companies Act, 2013}

### Synopsis

18.1	Procedure	408
18.2	Forms to be Filed	410
18.3	List of Documents Required	410
18.4	List of Information Required	411
<b>Appendix 18.1</b>	Format of Letter of Appointment	412
<b>Appendix 18.2</b>	Sample Board Resolutions	412

### 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, 165, 167, 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, 11 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
- ❖ Ordinary resolution in next general meeting after his appointment
- ❖ Nomination letter from the concerned authority

## 18.1 PROCEDURE WITH CHECK POINTS

S. No.	Particulars
1.	<p>Ensure-</p> <ul style="list-style-type: none"> <li>• that articles of association of a public company have provisions to appoint <b>director to fill the casual vacancy</b> and if the articles of association have its procedure for appointment of a director to fill up casual vacancy, then the company must follow that procedure along with the procedure mentioned below {<i>Section 161(4) of the Act</i>} and in case the articles of association have no provisions for appointment of director to fill casual vacancy, then first alter the articles of association so as to include the provisions of appointment of director to fill the casual vacancy. (Please refer procedure for alteration of articles of association of a company).</li> <li>• that the casual vacancy has arisen in case office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course {<i>Section 161(4) of the Act</i>}.</li> <li>• that a person proposed to be appointed as a director in a company other than a Section 8 (non-profit company) company under the Companies Act, 2013- <ul style="list-style-type: none"> <li>- shall not hold office as a director including any alternate directorship in more than 20 companies excluding directorship in dormant companies {<i>Section 165(1) of the Act</i>}</li> <li>- shall not hold office in more than 10 public companies including the private companies which are holding or subsidiary of public companies {<i>Section 165(1) of the Act</i>}</li> <li>- shall not be appointed if such person was associated with the company as a small shareholder's director during a period of 3 years prior to his appointment {<i>Rule 7(9) of the Companies (Appointment and Qualification of Directors) Rules, 2014</i>}.</li> <li>- is not a person who failed to get appointed as a director in general meeting of the company held in the past {<i>Section 161(1) of the Act</i>}.</li> </ul> </li> <li>• a person, who is intended to be appointed, shall not be eligible for appointment, if he/she has any disqualification for appointment as a director under section 164 of the Act.</li> <li>• 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.</li> </ul>
2.	<p>Obtain Digital Signature Certificate and Director Identification Number respectively and thereafter obtain consent in writing, on or before appointment, to act as director in <b>Form DIR-2</b> and an intimation in writing, by director, on or before appointment, in <b>Form DIR-8</b> confirming that he/she is not disqualified under section 164 of Companies Act, 2013.</p>

S. No.	Particulars
	<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+ (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 jointly incorporated companies, 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 companies.</li> </ul> </li> </ul>
2.	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).
3.	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 Appointment and Qualification of Directors) Rule, 2014.
4.	Forms in electronic in writing, on or before appointment, from the appointed director as Form 208-2 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 17 of the Companies Appointment and Qualification of <b>Directors</b> ) Rule, 2014.
5.	The particulars of first directors to be integrated with Form SPICe+ (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 \(in 2 vols.\)](#)**