



PROCEDURE FOR APPOINTMENT OF COMPANY AUDITOR UNDER COMPANIES ACT, 2013

Commerce

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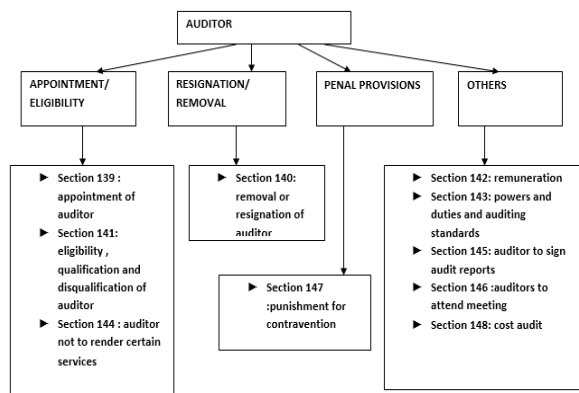
ABSTRACT

This paper reveal about the auditor's appointment under the companies act, 2013. The paper clearly indicates the section 139 deals with the appointment of the auditor and company auditor appointment procedure and tenure has been changed in companies act 2013 compare to the old provisions of companies act , 1956. Sub section 1 of section 139 endeavours that company shall appoint an individual or a firm of chartered accountants as company auditor in the first annual general meeting. As per the new companies act 2013, certain companies are required to rotate their auditor compulsorily after a fixed tenure.

KEYWORDS

Introduction

The Companies Act, 2013 has changed the rules of the game. There has been a paradigm shift in the provisions relating to appointment of Statutory Auditors. The companies act, 2013 (18 of 2013) is a modern, forward looking and international level corporate law in india. It replaces the old companies act, 1956 (1 of 1956) which was amended lots of time. After having obtained the assent of the president of india on 29th of august, 2013 , it has now become the companies act, 2013 . The new companies act has contain 470 sections under 29 chapters with seven schedules.



Appointment of first auditor

As per section 139(6) the first auditor of the company shall be appointed by the Board within 30 days of Incorporation. In case of *Board's failure*, an EGM shall be called within 90 days to appoint the first auditor. The law is silent regarding from when this time limit of 90 days be reckoned, it is better to take a stricter view and interpret that the 90 days limit starts from Incorporation rather than expiry of 30 days(i.e. failure of Board) from it.

Tenure: – Till conclusion of 1st annual general meeting.

Remuneration: – As per proviso to section 142(1) remuneration of the first auditor can be decided by the Board.

The appointment of first auditor is governed through section 139(6) which starts with a non-obstante clause [notwithstanding anything contained in sub-section (1)] and it is sub-section (1) which requires obtaining consent & certificate from auditor and filing of form ADT-1 with ROC.

Interpretation of “notwithstanding anything contained....”:- As per Supreme court, the non-obstante clause is used to avoid the operation and effect of all contrary provisions. In case any departure between non-obstante clause and other provisions, no-obstante clause will prevail.

Since section 139(6) does not speak anything contrary to section 139(1) as far as obtaining of consent, certificate and filing of form is

concerned therefore in can be interpreted that ADT-1 should be filed with ROC for first auditor also.

Procedure for appointment of auditor

1. Intimate the proposed auditor(s) regarding the intention of appointing him/it as auditor and ask whether he/ it is eligible and not disqualified to be appointed as auditor of the company.

2. Obtain consent & certificate from auditor.

3. If audit committee required to be constituted under section 177, then obtain its recommendation (Section 139(11)).

4. Call Board meeting.

5. Approve the appointment of auditor at the first Board Meeting.

6. Intimate the auditor and file with ROC form ADT-1(to be attached in form GNL-2 as per MCA circular 09/2014 dated 25th April, 2014) within 15 days.

Appointment of First Auditors In Government and Other Govt. Controlled Companies

New provisions introduced in Companies Act 2013 As per section 139(7) the first auditor of Government Company and Company owned or controlled directly or indirectly by the Govt. the appointment shall be made by the C & AG of India within 60 days of Incorporation. In case of C & AG of India 's failure, the Board of Directors appointment shall be made by the C & AG of India within 60 days of Incorporation. In case of C & AG of India 's failure, the Board of Directors shall appoint such auditor within the next 30 days. In case of Board 's failure, Then an EGM shall be called within 60 days to appoint the first auditor. Tenure: – Till conclusion of 1st Annual General Meeting. Remuneration: – As per proviso to section 142(1) Remuneration of the first auditor can be decided by the Board.

Appointment of Subsequent Auditors In Government and Other Govt. Controlled Companies

New provisions introduced in Companies Act 2013 As per section 139 (5), the appointment of Auditor in a Government Company in every subsequent financial year shall be made by C & AG within period of 180 days from the commencement of the financial Appointment of Subsequent Auditors In Government and Other Govt. Controlled Companies within period of 180 days from the commencement of the financial year who shall holds office up to the conclusion of the Annual General Meeting. Where a casual vacancy arise in the office of the Auditor in a Government Company other than by resignation of Auditor, the casual vacancy will be filled by the Comptroller and Auditor General of India within 30 days

Appointment of auditor at 1st AGM

As per section 139(1) every company shall appoint at its 1st annual general meeting an individual or a firm as an auditor of the company who shall hold office 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

Tenure subject to ratification :- The tenure of 5 consecutive years is subject to ratification by shareholders at every AGM.

Remuneration: – As per section 142(1) remuneration of the auditor of a company shall be fixed in its general meeting or in such manner as may be determined therein.

Written consent and certificate from the auditor for appointment of auditor :

As per 2nd proviso to section 139(1) auditor has to give a written consent to become auditor of the company & a certificate stating that appointment is in accordance with conditions prescribed.

Contents of the certificate (rule 4(1) of Companies (Audit and Auditor) rules, 2014) are:-

1. The person being appointed is eligible for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules or regulations made thereunder.
2. The proposed appointment is as per the term provided under the Act.
3. The proposed appointment is within the limits laid down by or under the authority of the Act.
4. The list of proceedings pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

Re-appointment of Auditor

After completion of tenure of 5 consecutive years the auditor may be re-appointed by complying with the provisions of section 139(9) which states that subject to the provisions of sub-section (1) & the rules made there under, a retiring auditor may be re-appointed at an annual general meeting, if-

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

Rotation of auditor

As per section 139(2) no listed company or companies as prescribed shall appoint or re-appoint :-

- An **individual** as auditor for more than **one term** of 5 consecutive years; and
- An audit **firm** as auditor for more than **two terms** of 5 consecutive years

Note: 1. Break in the term for a continuous period of 5 years will be considered as fulfillment of criteria of rotation. (explanation 2 to rule 6(3)(ii))

2. the period for which the individual or the firm has held office as auditor prior to the commencement of the Act shall be taken into account for calculating the period of five consecutive years or ten consecutive years, as the case may be (rule 6(3)(i))

Cooling period: – 5 years from completion of tenure as said above. Casual Vacancy

As per section 139(8) any casual vacancy, shall be filled by the Board within 30 days. If the vacancy has arisen due to resignation of auditor then such appointment shall also be approved by the company at a general meeting convened within 3 months of the recommendation of the Board.

Instances of casual vacancy :-

- Death
- Resignation
- **Disqualification** – If an existing auditor gets disqualified under Section 141 then he shall inform the company and the situation will be treated as casual vacancy (Section 141(4))
- **Failure of ratification at AGM** – If the ratification resolution fails at the AGM of company then this also tantamount to casual vacancy (explanation to rule 3).

Tenure: – Till conclusion of forthcoming annual general meeting.

Remuneration: – Section 142 deals with remuneration of auditor. The section expressly empowers the shareholders to fix the remuneration except in case of 1st auditor. The law is silent for fixing remuneration for auditor being appointed in casual vacancy, since the law being silent and going with the purposeful interpretation of law the remuneration can be decided by the Board as the appointing authority is the Board itself moreover section 224(8) of Companies Act, 1956 also enumerated the same principle. However, this shall not be the case where casual vacancy has arisen due to resignation.

Procedure

1. Intimate the proposed auditor(s) regarding the intention of appointing him/it as auditor and ask whether he/ it is eligible and not disqualified to be appointed as auditor of the company.
2. Obtain consent & certificate from auditor.
3. If Audit Committee required to be constituted under section 177, then obtain its recommendation (Section 139(11)).
4. Call Board meeting.
5. Approve the appointment of auditor in casual vacancy at the Board meeting.
6. Intimate the Auditor and file with ROC form ADT-1 (to be attached in form GNL-2 as per MCA circular 09/2014 dated 25th April, 2014) within 15 days.

Procedure – where casual vacancy arises due to resignation of existing auditor

1. Intimate the proposed auditor(s) regarding the intention of appointing him/it as auditor and ask whether he/ it is eligible and not disqualified to be appointed as auditor of the company.
2. Obtain consent & certificate from auditor.
3. If Audit Committee required to be constituted under section 177, then obtain its recommendation (Section 139(11)).
4. Call Board meeting for the purpose of following:-

- Appointment of auditor in casual vacancy.
- Considering that the qualification & experience are commensurate with the size & operations of the company.
- Recommending the members to approve the appointment.
- Calling of EGM (to be held within 3 months from date of Board meeting).

5. Intimate the Auditor and file with ROC form ADT-1 (to be attached in form GNL-2 as per MCA circular 09/2014 dated 25th April, 2014) within 15 days of EGM (since the appointment is not final until approval of members).

Resignation of Auditor

As per section 140(2) 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 ROC indicating the reasons and other facts as may be relevant with regard to his resignation in form ADT-3 (to be attached in form GNL-2 as per MCA circular 09/2014 dated 25th April, 2014). If the auditor does not comply with these requirements, he or it shall be punishable with fine which shall not be less than 50,000/- rupees but which may extend to 5,00,000/-. After resignation the provisions of casual vacancy shall be triggered which has been explained above

Removal of auditor and Giving special notice

The auditor appointed under Section 139 may be removed from his office before the expiry of his term only by a special resolution of the company, after obtaining the previous approval of the Central Government in that behalf in the prescribed manner in Form No. ADT-2 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 Section 140 30 days from the date of resignation, a statement in the prescribed form with the company and the Registrar. In the case of non-compliance, the auditor shall be punishable with fine which shall not be less than Rs.50000 to Rs.500000

Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor or specifically providing that retiring auditor shall not be reappointed.

References:

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3. www.mca.gov.in
4. www.icma.in