

Seminar on The Companies Act 2013



- > Incorporation of Companies
- > Directors/ KMPs
- > Professional Liability

North Ex CA Study Circle of NIRC of ICAI

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Presentation...

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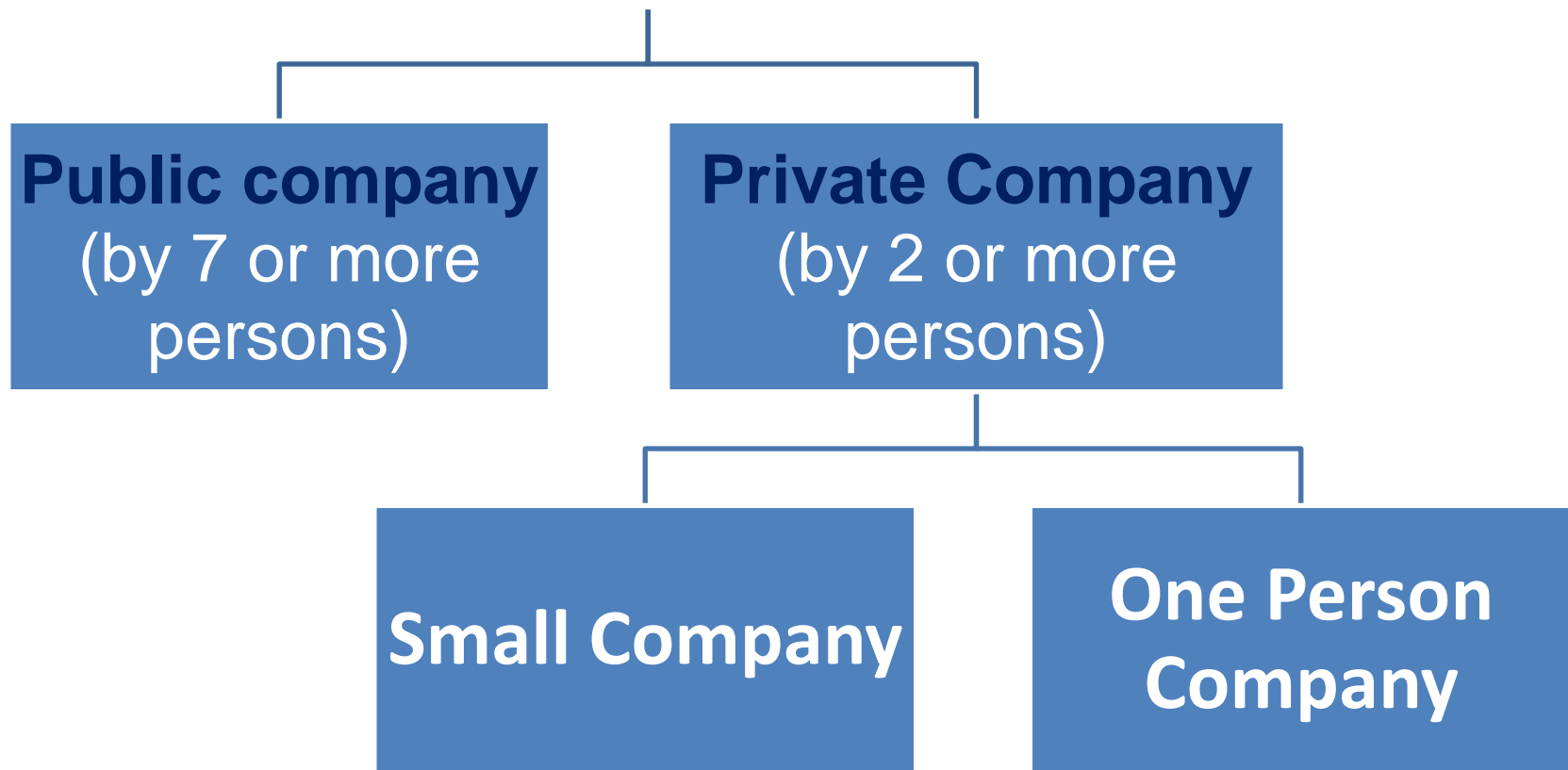
Author – “Law & Practice relating to Special Economic Zones”

Author – “Limited Liability Partnerships –Law & Practice ”

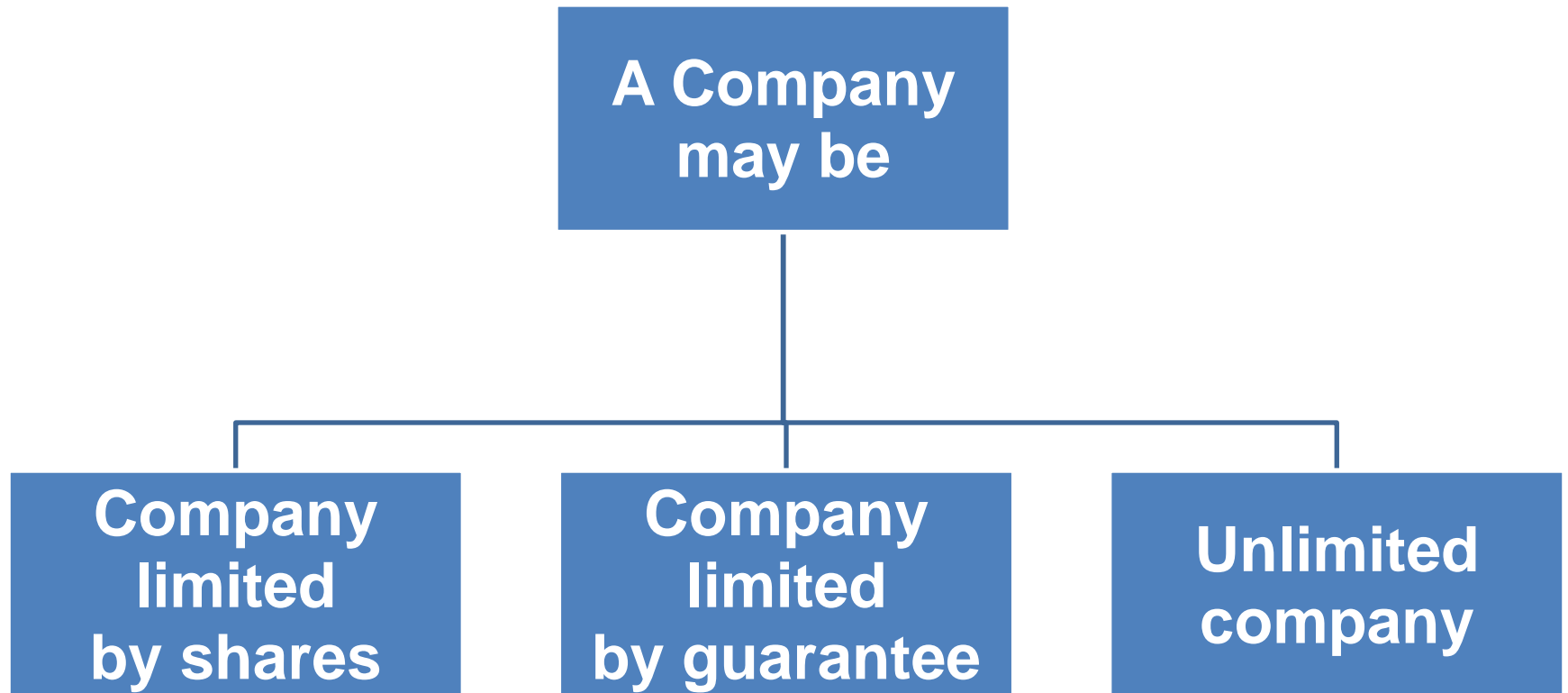
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Formation of Company (Section 3)

A **Company** may
be formed for any
lawful purpose



Formation of Company (Section 3)



INCORPORATION OF COMPANIES

Relevant Sections

- **Incorporation of Company** –Particulars, documents and information to be filed with ROC {Section 7}
- **One Person company** {Section 3(1)(c)} –New Concept
- Memorandum of Association (MoA) {Section 4(1)}
- Articles of Association (AoA) {Section 5}
- Act to Override MoA and AoA {Section 6}
- Reservation of Name {Section 4(2) to 4(5)(i)}
- Cancellation of Name {Section 4(5)(ii)}
- Commencement of Business {Section 11}
- Registered office of the Company and change/s {Section 12}
- Formation of Companies with Charitable objects {Sec. 8}

Public/ Private Co. -Relevant Provisions

- **Public Company –**
Minimum 7 Members [Section 3(1)(a)],
Minimum paid-up Capital of Rs. 5 lakh, or such higher sum as may be prescribed [Section 2(71)]
- **Private Company –**
Minimum 2 Members [Section 3(1)(b)]
Maximum 200 members,
Minimum Paid-up Capital : Rs. 1 lakh or such higher sum as may be prescribed [Section 2(68)]
- **Deemed Public Company –**
Subsidiary of a Public Company deemed to be public even if it continues to be a Private Company in its Articles [Proviso to Sec. 2(71)]

Small Company/ OPC -Relevant Provisions

- **SMALL COMPANY** means, other than a public Company, which has:
 - **Paid up Capital upto Rs.50 lakh** [or, such higher sum as prescribed which shall not be more than Rs.5 Crore]
 - or
 - **Turnover** as per last P&L Account **upto Rs.2 Crore** or such higher amount as may be prescribed which shall not be more than Rs.20 Crore.
- Concept of small company not applicable to holding, subsidiary, companies registered under Section 8 and companies or body corporates governed by Special Acts.

---[Section 2(85)]
- **ONE PERSON COMPANY (OPC)** means a company which has only one person as a member.

---[Section 2(62)]

MOA/ AOA -Relevant Provisions

- Objects for which incorporated and matters necessary in furtherance thereof -present requirements of Sub-clauses main, incidental and other objects has been dispensed with.
- Format of MOA for different type of companies given in tables A to E of Schedule I
- Articles may contain Entrenchment Provisions as provided in Section 5- to provide more restrictive procedure than passing a special resolution for altering certain provisions in the AoA.
- Companies can adopt all any or all regulations in the model AoA for different types of Companies as in tables F to J of Schedule I.
- Act to Override MoA and AoA {Section 6}

Incorporation of Companies

- **Commencement of business:** A company having a share capital shall not commence its business, unless a Declaration in **Form INC. 21** (old Form 19, only in case of public companies) is filed by a director. **(Sec.11)**

Commencement of Business (Sec.11)

- **Mandatory for all companies having share capital.**
- Companies cannot exercise borrowing powers and commence business unless:
 - a declaration is filed **by a director** that all subscribers have paid the value of shares subscribed and minimum capital is maintained as paid,
[ROC can remove the name of the company if declaration is not filed with 180 days from incorporation and has reasonable cause to believe that company is not carrying on any operation in addition to penal action under Section 11(2)]
 - the Company has filed with ROC a verification of the RO as per Section 12(2) -within 30 days

In case of default in filing declaration/ verification report, penalty upto Rs.5,000 /- + every officer in default shall be punishable with a fine @Rs.1,000/ per day

Registered office (Section 12)

- **Registered Office to be established within 15 days from incorporation.**
- **Furnish verification of Regd Office to ROC within 30 days of incorporation in the prescribed manner**
- **Name and Regd Office address to be displayed out side every office and place where business is carried in local language also and name on seal**
- Name, address, CIN with Phone, fax if any , email and website on all official publications, letters, bill etc.
- If name changed in last two years former name also to be displayed with its name (disclosure of former names also)
- “One Person Company” in brackets with name in case of OPC.

ONE PERSON COMPANY (OPC)

**OPC can be registered only as
a Private Company**

[Section 3(1)(c)]

OPC –Relevant Provisions

- **One Person Company (OPC)** means a company which has only one person as a member [Section 2(62)]
- MoA to name another person who shall become the member in case of death or incapacity of the subscriber.
- Prior written consent in the prescribed form, of such other person is required.
- In case of death of subscriber, the person so named, shall become member of OPC.

Incorporation of OPC

- Only a natural person who is an Indian citizen and ‘resident in India’ shall be—
 - eligible to incorporate an OPC
 - a nominee for the sole member of the OPC

[r.3(1) of Companies (Incorporation) Rules, 2014]

‘Resident in India’ means a person who has stayed in India for not less than 182 days during immediately preceding calendar year.

One Person Company (OPC)

- No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company. [r.3(2)]
- Minor cannot become member *or* nominee of the OPC *or* can hold share with beneficial interest. [r.3(4)]
- OPC cannot be incorporated or converted into a company under Section 8 of the Act. [r.3(5)]

One Person Company (OPC)

- **OPC cannot carry out Non-Banking Financial Investment activities including investment in securities of any body corporates. [r.3(6)]**
- No OPC can convert **voluntarily** into any kind of company unless 2 years are expired from the date of incorporation of OPC **EXCEPT** where the paid up capital of OPC increases beyond Rs.50-Lacs, or its average annual turnover during the relevant period exceeds Rs.2-crores. [r.3(7)]

OPC Incorporation

S. No.	Particulars	e-Form
1.	Application for Director Identification Number (DIN)	Form DIR. 3 (old Form DIN1)
2.	Application for availability of name of proposed company. <i>(Name to be reserved for 60 days)</i>	Form INC. 1 (old Form 1A)
3.	Drafting of Memorandum and Articles of Association	
4.	File Form for incorporation, along with the consent of nominee	Form INC. 2 + <i>Form INC. 3 (non e-Form to be filed as an attachment)</i> (New forms)

OPC Incorporation

S. No.	Particulars	Form
5.	File particulars of First Directors, along with their consents	Form DIR. 12 (old Form 32)
6.	Obtain Certificate of Incorporation	Form INC. 11 (New Form)
7.	File verification of registered office, within 30 days of incorporation	Form INC. 22 (old Form 18)
Note:	Fees to be paid as per Companies (Registration offices and fees) Rules, 2014	

OPC -Different Forms

Description	e-Form
Application for reservation of name	<u>INC-1</u>
One Person Company- Application for Incorporation	<u>INC-2</u>
One Person Company- Nominee consent form	<u>INC-3</u>
One Person Company- Change in Member/ Nominee	<u>INC-4</u>
One Person Company- Intimation of exceeding threshold (Paid up capital/ Average Annual Turnover)	<u>INC-5</u>
One Person Company –Application for Conversion of OPC into Pvt./ Public Co. OR Conversion of Pvt. Co. into OPC	<u>INC-6</u>

OPC Incorporation –To sum up

Attachments to Form INC-2, To summarise:

- Memorandum of Association (MOA)
- Articles of Association (AOA)
- Proof of Identity of the member and the nominee
- Copy of PAN card of member and nominee
- Consent of Nominee in Form **INC-3**
- Affidavit from the subscriber and first director to the MOA in Form **INC-9**
- List of all the companies having same registered office address, if any (specifying their CIN)
- Specimen signature in Form **INC-10**

OPC Incorporation

Penalty

- If OPC or any officer of such company contravenes the provisions of the Companies (Incorporation) Rules, OPC or any officer of the OPC shall be punishable with fine which may extend to **Rs.10,000/-** and with a **further fine which may extend to Rs.1,000/- for every day** after the first during which such contravention continues.

PRIVATE/ PUBLIC COMPANY

Incorporation (Public/ Private Co.)

S. No.	Particulars	Form
1.	Application for Director Identification Number (DIN)	Form DIR. 3 (old Form DIN1)
2.	Application for availability of name of proposed company	Form INC. 1 (old Form 1A)
3.	Drafting of Memorandum and Articles of Association	
4.	File Form for incorporation of company	Form INC. 7 (old Form 1) <i>Form INC. 8 & 9 (non e-Form to be filed as an attachment)</i> (New forms)

Incorporation (Public/ Private Co.)

S. No.	Particulars	Form
5.	File particulars of First Directors, along with their consents.	Form DIR. 12 (old Form 32)
6.	Obtain Certificate of Incorporation	Form INC. 11 (New Form)
7.	File verification of registered office, within 30 days of incorporation or at the time of incorporation, if the company has registered office.	Form INC. 22 (old Form 18)

Incorporation of OPC

Attachments to Form INC-7, To summarise:

- Memorandum of Association
- Articles of Association
- Declaration by a professional engaged in the formation of the company in Form **INC-8**
- Affidavit from each of the subscribers to the MOA in Form **INC-9**
- Proof of residential address (first subscribers)
- Proof of identity (first subscribers)

DIRECTORS/ KMPs

Directors



Minimum Number of Directors

Type of company

Minimum number of Directors

1. Public company
2. Private company
3. One Person
Company

3 (Three)

2 (Two)

1 (One)

Appointment of Directors

Section 149

- Every company shall have Board of Directors;
- *Only individuals* shall be directors;
- A company shall have a maximum of 15 directors;

Note: *A company may have more than 15 directors by passing a special resolution.*

Resident Director

Section 149 (3)

- Every company shall have at least one *resident director*;

‘***Resident Director***’ means a director who has stayed in India for a total period of at least 182 days in the previous calendar year.

Woman Director

Class of companies where appointment of at least 1 Woman Director is *mandatory*:-

- i. every listed company;
- ii. every other public company having –
 - a) paid-up share capital of Rs. 100 crores or more;
 - or*
 - b) turnover of Rs. 300 crores or more.

[Rule 3]

Woman Director

- Paid-up share capital or turnover, as the case may be, shall be taken *as on the last date of latest audited financial statements*.
- Any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but:-
 - a) not later than immediate next Board Meeting; *or*
 - b) 3 months from the date of such vacancy; *whichever is later.*

Woman Director

Condition

1. A company which has been incorporated under the new Act and it is mandatory to appoint at least 1 Woman Director.

Transition Period

within a period of 6 months from the date of its incorporation.

Woman Director

Condition

2. Every company existing on or before the date of commencement of this Act.

Transition Period

Within a period of 1 year from such commencement

Independent Director

Section 149 (6): Who is Independent Director?

- A director *other than* a Managing Director or a Whole-time Director or a Nominee Director;
- Not a promoter of the company or its holding, subsidiary or associate company, in past or present;
- Not related to promoters or directors in the company, its holding, subsidiary or associate company;

Independent Director

- No pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters or directors during 2 immediately preceding financial years or during the current financial year;
- Who possess appropriate skills, experience and knowledge in one or more fields of finance, law etc. [*ref.* Rule # 5]

Independent Director

Schedule IV: Code for Independent Directors

Roles & Functions

- Help the Board to bring to an independent judgment;
- Safeguard the interests of all the stakeholders, particularly minority stakeholders;
- Balance the conflicting interest of the stakeholders, *etc.*

Independent Director

Class of companies which are required to appoint Independent Director

- **All Listed Public Companies** shall have at least $1/3^{\text{rd}}$ of the total number of directors as Independent Directors;

Independent Directors

- **Public companies** falling under following criteria, shall have **at least 2 independent directors** :-
 - i) paid up share capital of Rs. 10 crores or more; *or*
 - ii) turnover of Rs. 100 crores or more; *or*
 - iii) outstanding loans, debentures and deposits, exceeding Rs. 50 crores, in aggregate.

Independent Directors

- Paid-up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, shall be taken as on the last date of latest audited financial statements.
- Where a public company ceases to fulfill any of above 3 conditions for 3 consecutive years, it shall not be required to comply with the provisions to appoint independent director until such time as it meets any of such conditions.

[Rule 4]

Appointment of Independent Directors

Appointment & Manner of selection of Independent Director (Section 150)

- Every company existing on or before the date of commencement of this Act, shall comply with the provisions for appointment of independent director **within 1 year of such commencement.**

Code for Independent Directors – Schedule IV

I. Guidelines of Professional Conduct

II. Role & Functions

III. Duties

IV. Manner of Appointment

V & VI. Re-appointment & Resignation or Removal

VII. Separate Meetings

VIII. Evaluation Mechanism

Appointment of Independent Directors

- An Independent Director may be selected from a data bank maintained by any body, institute or association (“agency”);
- Appointment shall be approved in general meeting;
- Explanatory statement annexed to notice of the general meeting called, shall indicate the jurisdiction for choosing the appointee for appointment as Independent Director.

Independent Directors -Term

- **Term of an Independent Director could be up to 5 years. He could re-appointed for 2 such terms *i.e.*, for a maximum of 10 years.**
- **No ID shall hold office for more than two consecutive terms.**
- **Cooling off period – 3 years**
- **Prohibition on grant of stock option**

Appointment of Directors

Small Shareholder's Director (Sec. 151)

- A listed company **may**:-
 - a) upon notice of not less than 1000 small shareholders or $1/10^{\text{th}}$ of the total number of such shareholders, whichever is lower; or
 - b) *suo moto*
- have a small shareholders' director elected by the small shareholders.

Appointment of Directors

- **Small Shareholder's Director** shall:-
 - i) not be liable to retire by rotation;
 - ii) not be eligible for re-appointment;
 - iii) not have a tenure exceeding 3 consecutive years.
- [Rule 7(5)]

Appointment of Directors

First Directors (Section 152)

- In case there is no provision in the articles of the company for the appointment of first directors, individual subscribers to the memorandum shall be deemed to be the first directors;
- In case of an OPC, the only member is deemed to be the first director;

Every person appointed as director shall give his consent in writing to the company;

Appointment of Directors

Additional Director (Section 161)

- Subject to articles, Board may appoint any person as an **Additional Director**, who shall hold the office upto next AGM or the last date on which AGM should have been held, *whichever is earlier*.
- Subject to articles or by a resolution passed in general meeting, Board may appoint a person as an **Alternate Director** for any other director in his absence from India for not less than 3 months.

Retirement of Directors

In case of a **Public company**:-

- Not less than $2/3^{\text{rd}}$ of the total number of directors be the persons who shall be liable to retire by rotation at every Annual General Meeting (AGM) and be appointed in general meeting;
- At every AGM, $1/3^{\text{rd}}$ of such directors who are liable to retire by rotation shall retire from office;

Number of Directorships

Directorships (Section 165)

- A person cannot be a director (including alternate director) in more than 20 companies at the same time;
- Maximum number of public companies (including private companies which are holding or subsidiary of a public company) in which a person can be a director is 10.

Disqualification & Duties of Directors

- **Section 164:** A person shall not be eligible for appointment as director if he possesses any of the disqualifications as mentioned in this section.
- **Section 166:** Duties of Directors has been specifically defined in the Act.

Resignation & Removal of Directors

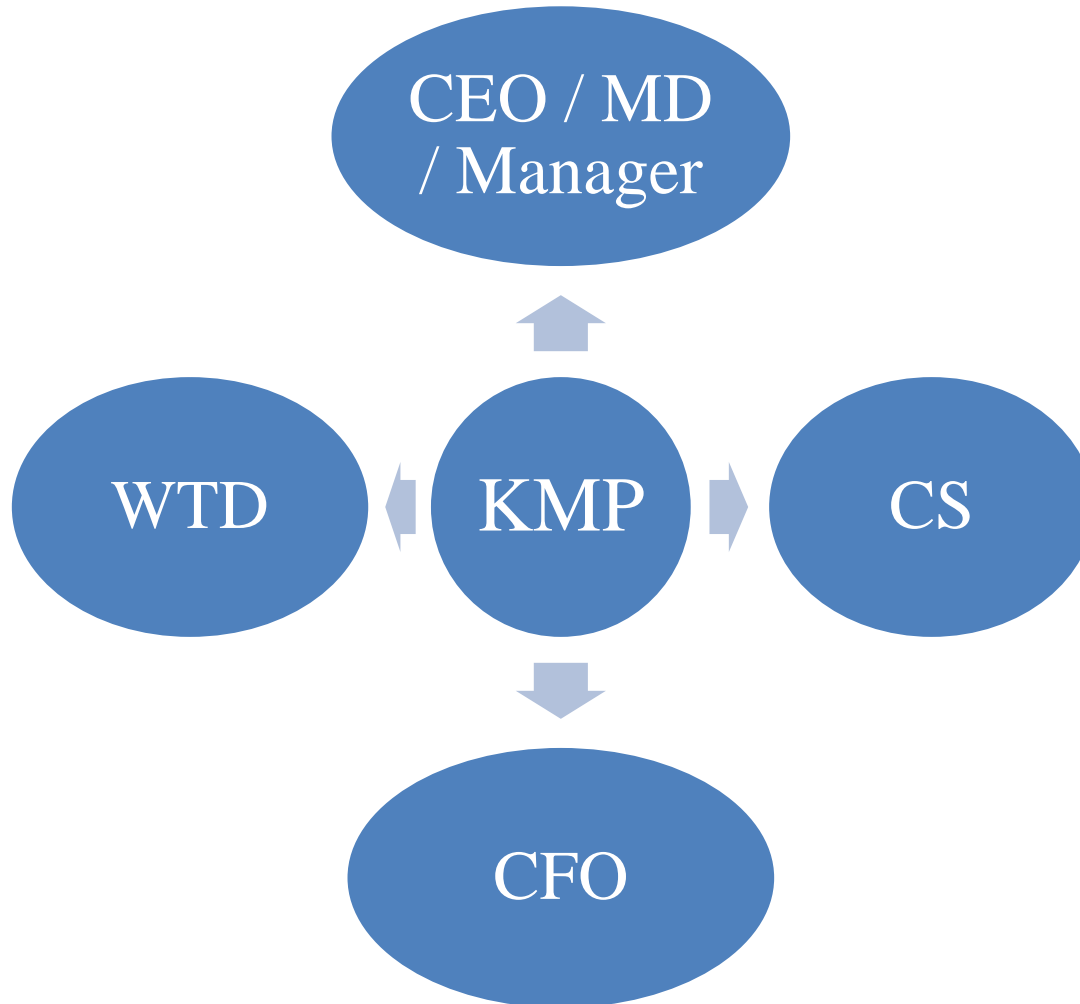
- **Section 168:** A director may resign from the office by giving a notice in writing to the company and the company shall intimate the Registrar within 30 days from the date of receipt of notice of resignation.
- **Section 169:** A company may remove a director by passing an Ordinary Resolution and by giving a special notice.

Directors –Forms to be filed

S. No.	Particulars	Form
1.	Application for name to be included in the data bank of independent directors	Form DIR. 1 (new Form)
2.	Consent to act as a Director	Form DIR. 2 (new Form)
3.	Application for allotment of DIN Verification by the applicant for applying for allotment of DIN	Form DIR. 3 (old Form DIN 1) Form DIR. 4
4.	Surrender for DIN	Form DIR. 5 (new Form)

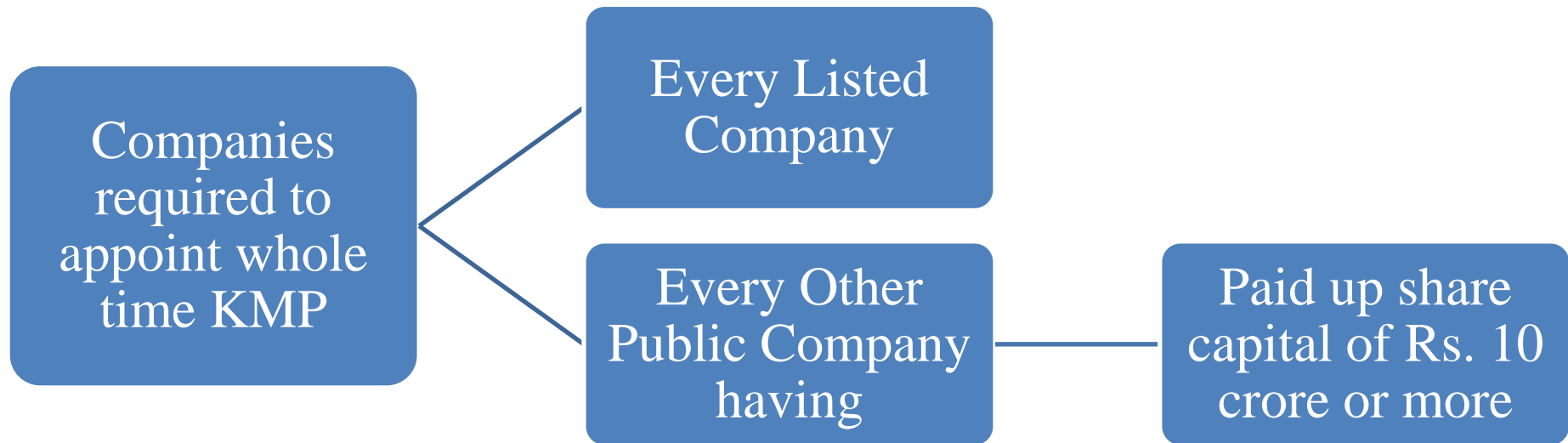
Appointment of KMP

Section 2(51)



Appointment of KMP

- **Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 (Rule 8)**



Appointment of KMP

Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration.

A whole-time key managerial personnel shall not hold office in more than one company **EXCEPT** in its subsidiary company at the same time.

If the office of any whole-time key managerial personnel is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of **6-months** from the date of such vacancy.

Appointment of KMP

Penalty

Company -Fine -Not less than Rs. 1 lakh but which may extend to Rs. 5 lakh.

Every Director and KMP

Fine -May extend to Rs.50,000. If contravention is continuing -further fine which may extend to Rs. 1000 per day after the first during which contravention continues.



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