

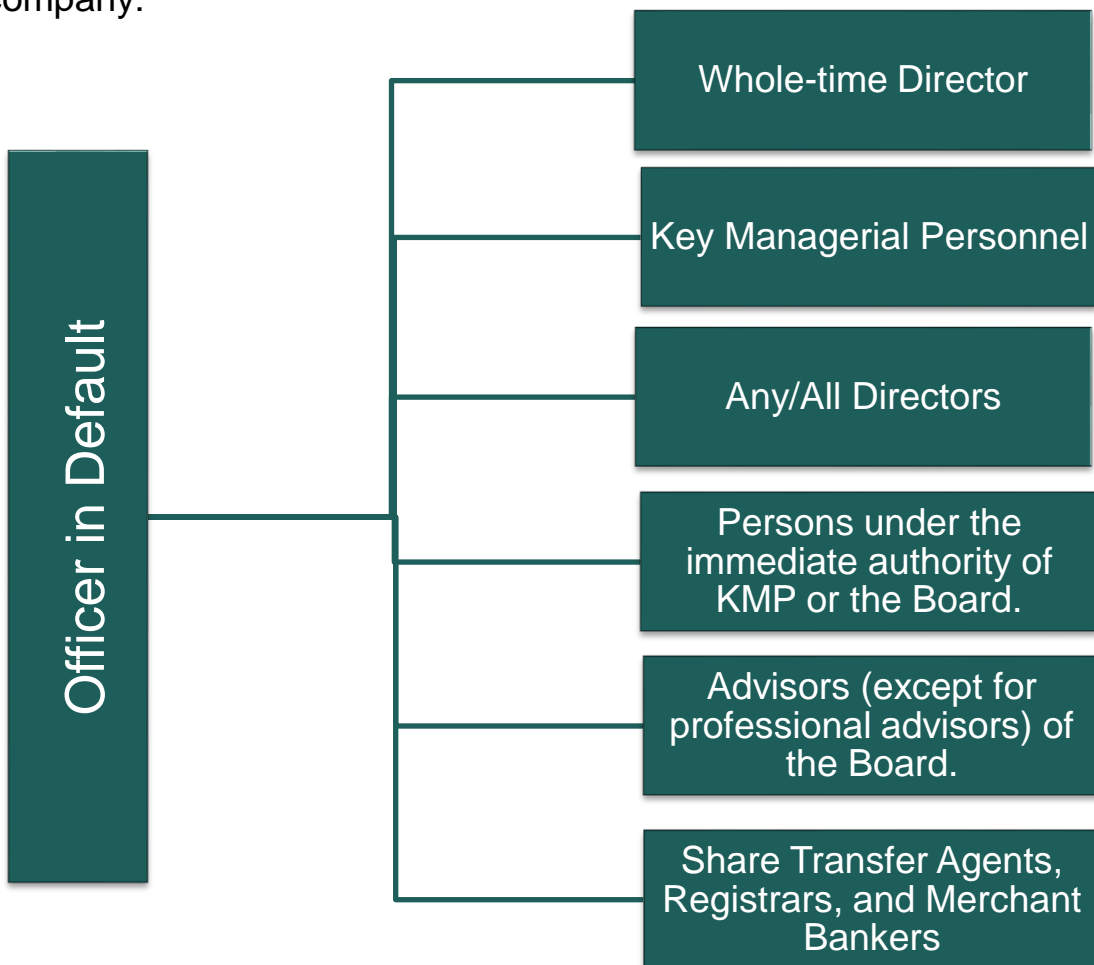
Decoding 'Officer-in-Default' under the Companies Act, 2013

Introduction

An officer-in-default is a person associated with a company who is held liable for any penalty or punishment in case of default committed by the company under the Companies Act, 2013.

Who is qualified as an officer in default?

Section 2(60) of the Companies Act 2013 makes provision for identifying specific persons who may be held liable in case of a default by the company:



Officer who is in default

Now let us look at the definition of 'officer who is in default' in greater detail:

1. Whole-time director
2. Key Managerial Personnel (KMP) includes:
 - CEO/CFO/MD/ CS/Manager
 - Whole-time director
 - Other officers designated as a KMP by the Board, not more than one level below the whole-time director.
3. Every director if:
 - There is no KMP and the board fails to identify specific directors who would be held liable in case of a default; and
 - They are aware of the contravention of the act by being a part of such board proceeding or such act/omission occurring subject to their consent or connivance.
4. Any person who, under the immediate authority of the Board or any KMP, is charged with any responsibility and actively participates, permits, or fails to omit any default.
5. Any person under whose advice the Board is accustomed to act, other than a person who advises the Board in a professional capacity.
6. In respect of the issue or transfer of any shares of a company, the share transfer agents, registrars, and merchant bankers to the issue or transfer.

Investor Protection

Despite providing respite to the independent directors and non-executive directors under the Companies Act, 2013, investors who appoint nominee directors are subject to the risk of being penalized for the acts/omissions of the Company leading to a default. The investors can minimize their risk by ensuring the implementation of the below:

Effective Due Diligence Exercises

It is pertinent that the investors conduct effective legal due diligence to ensure that there are no leakages in the compliances by the company. In case of any defaults, the investors should ensure that the company corrects such defaults before closing the investment.

D&O Insurance

Investors nominating directors on the board of the Company may safeguard themselves from potential liability by ensuring that the Company procures Directors' and Officers' Liability Insurance of an appropriate value.

Identify Officer-In-Default

The Investors may ensure that a person is appointed as an officer-in-default in accordance with the provisions of the Companies Act, 2013 by filing form GNL – 3.

Affirmative Vote Matters

Investors are mainly concerned about certain affirmative vote matters which may be discussed and decided in the meeting of the board. In such cases, investors may choose not to nominate a director to the board, while ensuring that the Company procures the prior written consent of the investors even before discussing such matter in the meeting of the Board.

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