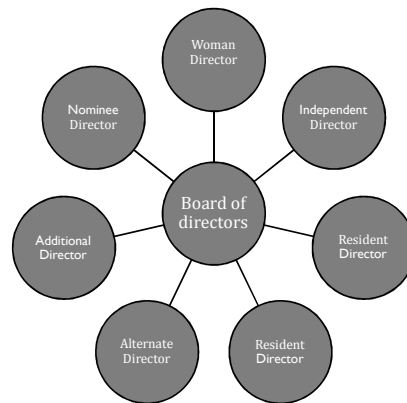


Director's roles ,responsibilities and disqualification under the Companies Act 2013

Presented by
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28th December 2017

Pimpri Chinchwad Branch
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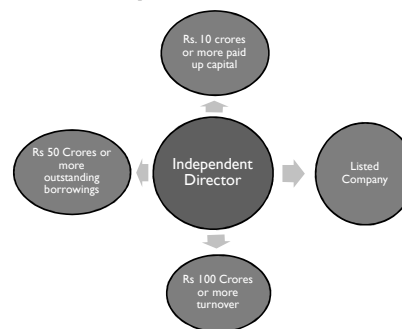
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Who is a Director? - 2(34)

- An appointed or elected member of the board of directors of a company.
- He has the responsibility for determining and implementing the company's policy.
- A company director need not to be a shareholder or an employee
- Directors derive their powers emanating from board resolutions
- Unlike shareholders, directors cannot participate through proxy.
- Unlike employees, cannot absolve themselves of their responsibility for the delegated duties.

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Independent director- Sec 149 applicable to public co.



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Director as Officer

Officer includes

- any director, manager or key managerial personnel
- or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act.

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Director as officer in default

- Officer who is in default for the purpose of any provision in this Act
- an officer of the company who is in default shall be liable to any penalty or prosecution
- He can be any of the following officers of a company, namely:
 - ✓ whole-time director;

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Director as Key Managerial Personnel

Key managerial personnel, in relation to a company means:

- the Chief Executive Officer or
- the managing director or
- the manager;
- the company secretary;
- the whole-time director;
- the Chief Financial Officer; and
- such other officer as may be prescribed

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Director as officer in default contd..

- key managerial personnel;
 - ✓ where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or
- all the directors,
 - ✓ if no director is so specified; any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;

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Director as officer in default

contd..

- ✓ any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity
- ✓ every director, in respect of a contravention of any of the provisions of his Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;

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Liabilities of a Director

- Non Executive/Independent Directors
- Who are not promoter or KMP
- Only if the acts were omitted or committed with :
 - ✓ His knowledge
 - ✓ His connivance
 - ✓ His consent
 - ✓ He has not acted diligently
- Officer – Whole Time – Managing Director
 - ✓ All acts of omission and commission

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Duties of a Director

- Director to act in accordance with AOA.
- A director of a company shall act in good faith
 - ✓ in order to promote the objects of the company for the benefit of its members in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- shall not involve in a situation in which he may have a conflict of interest
- shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates
- shall not assign his office and any assignment so made shall be void.

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Reduction of Capital – Section 66

- Knowingly conceals names of the creditors
- Liable to be punished – Section 447

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Proxies – Section 105

- Any director who at expense of company invites proxies for attending meeting
- Penalty upto Rs.1 lac

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Secretarial Audit – Section 204

- Audit not carried out – Penalty from Rs. 1lac to Rs.5 lacs

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Meetings of the Board – Section 173

- Failure to give notice – Penalty Rs.25000/-

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Inspection and Audit – Section 207

- Any director who disobeys direction of Registrar
- Prosecution – 1 year
- Penalty – Rs.25000 to Rs.1 lac

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Filing of Statement on Affairs - Winding up by Tribunal – Sec 274

- Contravention
- Prosecution – 6 months
- Fine – Rs.25000 to Rs. 1 lac

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Liability as Officer in Default contd..

- Subject to an
 - approval ,
 - consent,
 - confirmation or
 - exemption has been given or granted
 - For which no penalty or punishment is provided else where in the act
 - Shall be punishable with a fine which may extend to **Rs 10,000/-**
 - And where the contravention is continuing one with a further fine which may extend to **Rs1000/- for each day** after the contravention continues

Liability as Officer in Default

- No specific Penalty provided
- Penalty as per Section 450
 - ✓ Section 450 says that : if a
 - company or
 - Any officer of the company or
 - any other person
- Contravenes any of the
 - provision of this act, or
 - Rules made thereunder
 - Or any condition
 - Limitaton or
 - Restriction

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Personal Liability

Directors can be made personally liable if:

- When the directors enter into contract in their own name.
- When they enter into contracts on behalf of company but fails to use LTD. or PVT LTD.
- When director exceeds their powers
- The BOD should act as an agent of company, not of a single director.
 - ✓ Therefore, a single director cannot enter into a contract on behalf of company unless the BOD authorises

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Civil Liability for mis-statement in prospectus – Sec 35

- Prospectus is an invitation to subscribe to shares
- The investor relies on the same before investing
- Promoters as well as auditors are also responsible for any misstatements
- Financial statements issued with an intent to defraud
- No limitation of liability
- All losses and damages incurred by subscriber

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Liability for fraudulent conduct of business - Sec 339

- In course of winding up
- Business conducted in a manner prejudicial to the interest
- Official Liquidator – appoints auditor
- Auditors Report
- NCLT – will require to recover damages
 - ✓ Without any limitation of liability

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Damages for Fraud - Section 75

- Failure to repay deposit or part or interest within time limit
- Deposit accepted with an intent to defraud
- Liable for losses and damages
- No limit on liability
- Section 447 – Personally liable

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Nature of Contraventions under CA 2013

Compoundable Offences:	Non-Compoundable Offences:
<ul style="list-style-type: none"> • Are in the nature of non-compliances • which attract either <ul style="list-style-type: none"> • fines or • imprisonment or • both 	<ul style="list-style-type: none"> • Are in the nature of offences of fraud • which attract <ul style="list-style-type: none"> • imprisonment or • imprisonment with fines

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Nature of Contraventions under CA 2013 contd..

Compoundable Offences:	Non-Compoundable Offences:
<ul style="list-style-type: none"> Such offences can be remedied or compounded, subject to relevant provisions in the Act, by paying late fees/penalties/fines as applicable. 	<ul style="list-style-type: none"> Such offences cannot be remedied/compounded merely by depositing fines/penalties.

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Nature of Contraventions under CA 2013 contd..

Compoundable Offences:	Non-Compoundable Offences:
	<ul style="list-style-type: none"> These liabilities can be imposed on the directors if they are in default (including non-executive directors) regardless of the fact that they are the executive directors of the company or not.

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Nature of Contraventions under CA 2013 contd..

Compoundable Offences:	Non-Compoundable Offences:
<ul style="list-style-type: none"> Examples: failure to file annual return, contravention of provisions with respect to related party transactions, acceptance of deposits, giving of loans to directors etc. 	<ul style="list-style-type: none"> Examples: offences of fraud where officers of the company who are in default or persons concerned with formation of the company or the management of its affairs become liable

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Liability under other legislations

- As owner and occupant – Factories Act
- Provident Fund/ESIC
- Compliance with Labour Laws
- Compliance with Development Regulations
- Compliance with Taxes
 - ✓ both Direct and Indirect
 - ✓ particularly TDS
- Averment in Directors Report that all laws complied
- Set up and Compliance with Internal Financial Controls
- Executive and Non Executive Director both can be implicated.

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SFIO - Serious Fraud Investigation Office



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SFIO - Serious Fraud Investigation Office

- Serious Fraud Investigation Office (section 211)
 - ✓ Established by notification of Central Government dated 2nd July, 2003
 - ✓ Headed by Director (i.e. Officer not below the rank of Joint Secretary to Government of India) and consists of experts of following fields-
 - Banking
 - Corporate Affairs
 - Taxation
 - Forensic Audit
 - Capital Market
 - law or such other fields.

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Inspection by SFIO – Section 212

- Receipt of Report by Central Government
- Direct SFIO to take action
- Prosecution
- Report deemed to be report of a Police Officer

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SFIO - Serious Fraud Investigation Office contd ..

- SFIO has power to arrest in respect of cognizable offences like fraud (section 447) and person accused shall be released on bail subject to conditions in relevant section of the Act.
- Powers to Search and Seizure even KMP, Auditors, CS etc

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CLASS ACTION SUITS



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Class Action Suits contd...

- Auditors would be liable for damages [147(3)]
 - ✓ Incorrect or misleading statements in Audit Report
- In case of Audit Firm : Liability on the firm
- All partners of the firm :
 - ✓ Involved in improper or misleading statement
 - ✓ Acted in improper, fraudulent and wrongful manner.

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Class Action Suits

- Remedy to investors for any wrong and malafide actions/reports by management and auditors
- Liability of management and auditors (section 447)
- Specified percentage of members or depositors can claim damages
- They will have to file claim through Tribunal
- Tribunal will order damages to be paid by any member, company, auditor, experts, consultants, advisors to the company.

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Safeguards – Adopt a Precautionary Approach.

- To attend meetings regularly;
- To be inquisitive and peruse agendas for unusual items and seek additional information in writing, if necessary;
- To ensure that disagreements/dissenting views are recorded in the minutes;
- To act honestly and with reasonable justifications;
- To report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy;

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Safeguards – Adopt Precautionary Approach contd..

- To seek professional advice, establish audit committees, engage external agencies, if situation demands;
- To engage external agencies for addressing whistleblowing issues. The Company may consider appointing an external agency for whistleblowing reporting;
- To provide requisite disclosures of interests/conflicts, consider excusing oneself from participation in proceedings in cases of conflict;

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TEA BREAK

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Safeguards – Adopt Precautionary Approach contd..

- For ongoing and day to day compliances, have a competent compliance team and establish committees (for regular internal audits etc.); and
- To include indemnity provisions in the letter of appointment and seek Directors & Officers Liability insurance from the company to protect against malicious actions.

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Disqualifications of a Director Under Companies Act 2013

Disqualifications of a Director Under Companies Act 2013

- Types of Disqualification – Section 164
 - ✓ On his personal account – Section 164(1)
 - ✓ On account of Company's Default – Section 164(2)
- Under Companies Act 1956 – Section 274(1)(g) did not apply to Private Limited Companies
- Above sections apply to all companies

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Disqualification – Personal Account – Section 164(1)

Shall not be eligible for appointment if:

- he is of unsound mind so declared by a competent court;
- he is an undischarged insolvent;
- he has applied to be adjudicated as an insolvent and his application is pending;
- he has been convicted by a court of any offence - sentenced to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence:

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Disqualification – Personal Account – Section 164(1)



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Disqualification – Personal Account – Section 164(1) contd..

- If sentenced for seven years or more – permanent disqualification
- an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;
- he has not paid any calls in respect of any shares of the company held by him and six months have elapsed from the last day fixed for the payment of the call;
- he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or

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Disqualification – Personal Account – Section 164(1) contd..

- he has not obtained DIN - Section 152 (3) .
- In respect of (d), (e) and (g) effect takes place after 30 days from date of order – time to appeal – If appeal find – disqualification will be deferred on final disposal of appeal

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Disqualification – Company's Default – Sec 164(2)

No person who is or has been a director of a company shall be reappointed in same company or appointed in other company in which :

- He has not filed financial statements or annual returns for any continuous period of three financial years; or
- has failed to :
 - ✓ repay the deposits accepted by it or
 - ✓ pay interest thereon or
 - ✓ to redeem any debentures on the due date or

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Disqualification – Company's Default – Sec 164(2)



Disqualification – Company's Default – Sec 164(2) contd..

- ✓ pay interest due thereon or
- ✓ pay any dividend declared and such failure to pay or redeem continues for one year or more
- A private company may provide in Article any other disqualifications also.
- Disqualification continues for a period of five years from the date on which the said company fails to do so.

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Disqualification – Company's Default – Sec 164(2) contd..

- Presently, disqualified directors on above account are being restored within 5 years ?
- Act overruled by executive action. (Section 403, 459 and 460)
- Every director to intimate about his disqualification in DIR 8.
- Every Company which defaults – file form DIR 9
- Application for removal disqualification – Form DIR 10

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Vacation of Office by a Director -Sec 167 (1) contd..

- Appointment was ex-officio and the base office is vacated
- If he continues in office – prosecution 1 year – Fine 1 lacs to five lacs
- If entire board vacates – promoters take office or central government appoints

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Vacation of Office by a Director -Sec 167 (1)

- Disqualified as per Section 164
- Absents from Board Meetings during 12 months with or without leave
- Acts in contravention of S 184 – Contracts where interested
- Fails to disclose his interest in contract
- Disqualified by a Court or NCLT
- Convicted for sentence of six months or more – vacate even if he files appeal – contradicts with Section 164(2) – where during pendency of appeal no disqualification.
- Removed as a director

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Section 164 and 167

- Provisions of 164 applies at the time of appointment or re-appointment
- Provisions of 167 applies to existing directors (however this section brings in disqualifications of 164 also)
- Reading two sections together – Section 164 applies to existing directors also

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Auditors reporting on disqualification

- Statutory Auditors Report requires reporting whether any Director is disqualified u/s 164(2) – Section 143(3)(g)
- Whether reporting as on date of signing or at the beginning of the year ?

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How the auditor to find out the disqualifications? contd..

- Under Companies Amendment Bill 2017 following is provided u/s 164(2):
 “Where a person is appointed as a director in a Company which is in default of clause (a) or clause (b),
 he shall not incur the disqualification for a period of six months from the date of appointment”
- Even independent directors covered – Whether Immunity u/s 149(12) will protect ?

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How the auditor to find out the disqualifications?

- If a Director is newly appointed after the default happens
- Company has not filed BS for three years March 14, 15 and 16 – three years period ends on 31st October 2016
- A director appointed on 30th October 2016. Whether he also disqualifies?
 ✓ The Section 164(2) says “No person who is or has been a director of Company.”
- Hence no distinction between person responsible and not responsible

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Case Study :-

- Suppose all directors of the Company vacate as per Section 167
- Promoters are required to take over
- What if the promoters and vacating directors are same?
- Can the same person be take charge as promoter director in its own place ?
- How can promoters be identified ?
- Based on the Annual Return.
- What if it is not filed ?

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Independent Director – Section 149(12) and 167

- As per Section 149(12):
"Notwithstanding anything contained in this Act :
 - ✓ An independent director
 - ✓ A non executive director not being promoter or KMP
 - Shall be liable, only in respect of such acts of omission or commission by a Company which had occurred with his knowledge, attributable through board processes, and with his consent, connivance or where he had not acted diligently."

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Mismatch of provisions 167 vs. 164 (2)

- 164(2) states that the person who disqualifies cannot be reappointed
- 167 states on incurring disqualifications u/s 164, the directors vacate immediately
- What prevails ?
 - ✓ Under Companies Amendment Bill 2017, proviso is added in Section 167(1)(a):
When one incurs disqualification u/s 164(2), he vacates office in all companies except where the default has incurred.

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Independent Director – Section 149(12) and 167 contd..

- A non obstante clause overrules other provisions of Act which are contradictory. Hence on plain reading – 167 cannot apply
- But whether the independent or non executive director ought to ensure that compliance of filing is being done properly?
- While disqualifying directors recently no opportunity was given

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- Whether the period for commencement of default will be the last date of filing forms without additional filing fees ?
- What about 270 days for filing with additional fees ?

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Prospective or Retrospective Application

- Default should commence only after Companies Act 2013
- Defaults after 1st April 2014 only to be considered

Financial Year	Due date
2013-14	31 st October 2014
2014-15	31 st October 2015
2015-16	31 st October 2016

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Process for Restoration

- For restoration of Companies, petition was required to be filed with NCLT
- In some cases NCLT refused to restore
- NCLT levied penalty of Rs.25000
- The form INC28 was required to be filed within 30 days from date of order
- In the meantime – all directors were also disqualified
- Who will file form ?
- Backend appointment of additional directors through ROC
- Application to RD for removal of disqualified
- Delay in filing of form due to this – whether default again ?

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Bulk Strike off and Disqualification by MCA

- MCA struck off with one stroke about 2 lacs shell companies
- Where filings were pending for three years (2013-14 to 2015-16)
- However, companies where charges were existing were not struck off
- 309614 Directors of such companies were disqualified and their DIN blocked
- Two notices were given to Companies before strike off
- However, if filings done after the notices even then they were struck off

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- Role of professionals in Shell Companies questioned
- List sent to ICAI/ICSI/ICWI by MCA for abetting shell companies post demonetisation
- Only if involved in offense then professionals will be implicated and not for routine jobs

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Condonation of Delay Scheme 2018

- This overrules provisions of Companies Act 2013 – validity – Section 403, 459 and 460.
- In force from 1st January 2018 till 31st March 2018
- Applicable only to defaulting companies which are not struck off
- If struck off but NCLT order restoring the same is passed - eligible

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- Prosecution for above default will be dropped.
- However, default u/s 167 will be liable for penalties/prosecution

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Procedure

- DIN of disqualified directors will be activated temporarily
- Defaulting companies shall file overdue documents with additional fees
- Defaulting company after filing documents to file e-CODS2018 with fee of Rs.30,000/- before 31st March 2018
- If defaulting companies do not file documents before 31st March 2018 – DIN of those directors will again be de-activated
- Only documents relating to Annual Return, Balance Sheet, Compliance Report and Auditors Appointment permitted under the Scheme.

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Any Questions ?



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