



**THE INSTITUTE OF
Company Secretaries of India**
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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e-CS Nitor



National Seminar on “Indian Financial Code” Recommended by Financial Sector Legislative Reforms Commission 29th November, 2014 at Mumbai

Shri Arun Jaitley, Hon'ble Union Minister for Finance, Corporate Affairs and Information & Broadcasting addressing the ICSI National seminar on the “Indian Financial Code” recommended by the Financial Sector Legislative Reforms Commission, in Mumbai on November 29, 2014.

Also seen in the Photograph (from Left to Right): CS Sutanu Sinha, Chief Executive and Officiating Secretary, ICSI, CS R. Sridharan, President, ICSI, Hon'ble Justice Shri B. N. Srikrishna, Former Judge, Supreme Court of India and Chairman of the FSLRC and Shri Ashishkumar Chauhan, Managing Director and CEO, BSE Limited

All India Student Conference – 2014 22nd & 23rd November, 2014 at Mumbai

Standing on the Dais from L to R : CS R Sridharan, President, ICSI &

CS Sutanu Sinha, Chief Executive & Officiating Secretary, ICSI



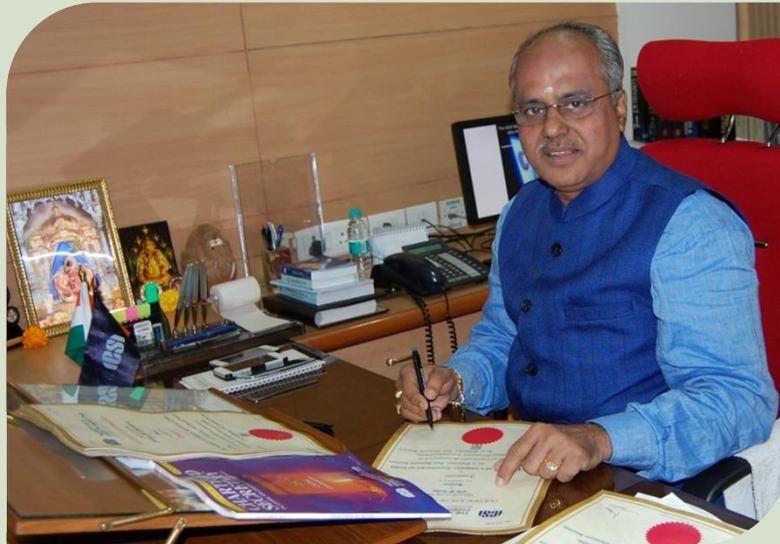
- Message from the President
- Revised Clause 49 of the Listing Agreement: A Brief Overview
- Nomination and Remuneration Committee – A Step Towards Better Governance
- Governance Challenges and the Role of Professionals
- CSBF Brochure
- Circulars, Notifications, Orders, Amendment, Rules under Companies Act, 2013
(since last issue of e-CS Nitor)

ICSI Events



**14th ICSI National Awards for
Excellence in Corporate Governance
on 19th December, 2014 at Delhi**

Message from President



Dear Member,

Coming back to America was, for me, much more of cultural shock than going to India. The people in the Indian countryside don't use their intellect like we do, they use their intuition instead, and their intuition is far more developed than in the rest of the world.
-Steve Jobs

In this issue of *e-CS-Nitor*, I propose to discuss about decision making, more particularly, *intuition*. As professionals, we are making decisions seamlessly and interpret the rules, laws and find out solutions to the problems. Each of these involves varieties of decision making. We should know the underlying principles when a particular decision is being taken. This systematic approach in the course of time make us a robust professional. It is also said that decision implies the end of deliberation and the beginning of action. Peter Drucker puts this thought more forcefully – ***“Unless a decision has degenerated into work, it is not a decision; it is at best a good intention.”***

Most of the decisions, we make based on data and information. While driving our decision making process, the risk awareness acts as rear view mirror. It is also equally important that while making a decision, we should introspect – *How complex is the decision? How important is the decision? How strategic is the decision?* Pattern of decision makings can be divided as – *rationale, intuitive, combinations* and so on and so forth. I do not want to suggest which type of decision making would be appropriate for a given situation, after all decision making cannot be compressed in a definable format, since it is a creative exercise, which is more concerned with the individual and the circumstances, in which one is placed.

As against western mind, which is based rationale choices, whereas eastern mind makes it choices through intuitive process as pointed by Steve Jobs. Let me share some of the traits of intuition. What is intuition? The practical answer to this is the ability to process information not just information available in the environment but also information available internally from past experiences and knowledge. These decisions are not sequential in nature as that of rationale decision making, which are logical and sequential. If we keenly watch the events and happenings around us, they do not follow the routine pattern of cause and effect and they are non-linear. Here we are guided by intuition. In *Yoga Sutras*, intuition is being referred as '*Pratibha*', which is the transcendent spiritual faculty of perception and involves neither the senses nor



the mind, but the consciousness itself. It is a kind of feeling that as if you knew already and it is latent memory rose to the surface.

Intuition guides us in our behaviour towards the people we think that we will get along well. Intuitive decision making is also called as gut *feeling* in management literatures. We often come across many top executives who routinely make big decisions without relying on any logical analysis; instead they call upon their *intuition, gut instinct, hunches or inner voice*. This gut feeling often results solid business partnership. The feeling of being sync with another person's vision is the prerequisite, apart from a great idea. As professionals, we interact with other professionals, associates, stakeholders and clients, that necessitates to strike right cord with them and here we are solely lead by our gut feeling. It is also important to note that there can be no intuition without intellect. Intuition is not about building castles in the air and it's about getting deeper knowledge from what already exists, which I have pointed earlier. You may call it a hunch or an educated guess. Whatever by name you call it, they are grounded in reality and knowledge of the situation. Dr Radhakrishnan, emphasized this aspect in his *Idealist view of Life* - "***In intuitive knowledge, intellect plays a considerable part. If intuition unsupported by intellect, it will lapse into obscurantism. Intuition assumes the continuity and unity of all experiences. Intuition tells us that the idea is not merely an idea but a fact***"

Intuition is an emotional skill that can be developed. Long ago, I read an interesting article, in *The Hindu* newspaper, about enhancing intuitive skills and I am reproducing the same - "***Be aware*** - Tune your eyes, ears and inner self to what is happening around you. Learn about the history of a situation and the cultural aspects of a decision, as this will equip you to anticipate responses and help you take appropriate intuitive decision. ***Be in control***- You must be able to discipline yourself and perceive the difference between an emotional urge and a gut feeling. Self-control will help you to learn, adjust and connect you to others. ***Be confident*** - Build self-confidence and not a false bravado. Know yourself better and build self-respect as opposed to pride. If you respect yourself, you will be open to and respect your inner voice. ***Be accepting*** - Trust yourself and let go of the preconceived notions. Open your mind to other action plans. Accept the connectedness of things and explore options. ***Be unafraid*** - Get rid of fear and stress. They dampen both intuition and intellect. Your insecurities will cut you off from your gut feeling and ruin your focus and disconnect you from your inner self."

Now, the elections to the Council and Regional Councils of the Institute are round the corner. I once again, reproducing my appeal which I have made in the last issue of *Chartered Secretary* for the benefit of the members. "*You are aware that the polling to elect the highest policy making bodies at the Central and Regional levels will be held on Friday & Saturday, the 12th and 13th December, 2014 at Delhi and Mumbai and Friday, the 12th December, 2014 at other places from 8.00 AM to 8.00 PM. With a view to maintain healthy and peaceful atmosphere during the election process, for ensuring free and fair election and to enhance the glory and prestige of the Institute, I appeal to contesting candidates to exercise restraint and adhere to the Company Secretaries (Election to the Council) Rules, 2006 and the ICSI Election Code of Conduct in true letter and spirit. I also appeal to all the eligible voters to respect their vote and exercise their franchise in large numbers to make the election a grand success. Members are expected to take full advantage of the privilege conferred upon them and should indicate as many preferences as there are candidates for election to the Council and Regional Councils.*"

With regards,

CS R. Sridharan
President
president@icsi.edu



Contents

- **Message from President**
- **Revised Clause 49 of the Listing Agreement: A Brief Overview**
- **Nomination and Remuneration Committee - A Step Towards Better Governance**
- **Governance Challenges and the Role of Professionals**
- **CSBF Brochure**
- **Circulars, Notifications, Orders, Amendments, Rules under Companies Act, 2013 (*since last issue of e-CS Nitor*)**



Revised Clause 49 of the Listing Agreement: A Brief Overview

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Prologue

Over the last 20 years, Securities and Exchange Board of India (SEBI) has taken several steps to revamp the corporate governance norms in the form of reports by various expert committees, introduction of Clause 49 of the equity listing agreement and its amendment at regular intervals suiting the international best practices. Based on the recommendations of Shri Kumar Mangalam Birla Committee on Corporate Governance in year 2000, SEBI had specified principles of Corporate Governance and introduced a Clause 49 in the Listing Agreement of the Stock Exchanges.

SEBI, as part of its endeavour to improve the standards of corporate governance in line with the needs of a dynamic market, constituted another committee on Corporate Governance under the Chairmanship of Shri N. R. Narayana Murthy to review the performance of Corporate Governance and to determine the role of companies in responding to rumour and other price sensitive information circulating in the market in order to enhance the transparency and integrity in the market.

To align the clause 49 of equity listing agreement with Companies Act, 2013 and rules made thereunder, SEBI has received representations from market participants including companies and industry associations, highlighting certain practical difficulties in ensuring compliance, seeking clarifications on interpretation of certain provisions and suggesting various options to ease the process of implementation. In order to address the concerns and facilitate the listed companies to ensure compliance with the provisions of the revised Clause 49, SEBI vide its Circular(s) No. CIR/CFD/POLICY CELL/2/2014 dated April 17, 2014 and September 15, 2014 has amended the Clause 49 of Equity Listing Agreement.

Revised Clause 49- Objective and Applicability

The objective of the revised Clause 49 is to align the provisions of Listing Agreement with the provisions of the Companies Act, 2013 and also provide additional requirements to strengthen the corporate governance framework for listed companies in India. The revised clause is based on the principle of ensuring equitable treatment to all shareholders and recognising the rights of various stakeholders in the company. However, certain requirement under the Revised Clause goes a step further and imposes more stringent requirements of corporate governance upon listed companies. The revised Clause is an attempt to achieve this objective by setting up an effective corporate governance framework within the company and to provide timely and accurate disclosures. The revised Clause 49 has come in to force from October 01, 2014 onwards except Clause 49 (II)(A)(1) pertaining to appointment of woman director which shall be applicable with effect from April 01, 2015.

* *The views expressed are personal views of the author and do not necessarily reflect those of the Institute.*



Applicability of Clause 49

Highlights of the revised Clause 49

- Maximum tenure of Independent Directors to be in line with Companies Act 2013 and clarifications issued from time to time [5 years (Two terms)].
- Exclusion of nominee Director from the definition of Independent Director.
- At least one woman director on the Board of the company (to be applicable with effect from April 01, 2015).
- Compulsory whistle blower mechanism.
- Expanded role of Audit Committee.
- Prohibition of stock options to Independent Directors.
- Separate meeting of Independent Directors.
- Constitution of Stakeholders Relationship Committee.
- Enhanced disclosure of remuneration policies.
- Performance evaluation of Independent Directors and the Board of Directors.
- Prior approval of Audit Committee for all material Related Party Transactions (RPTs).
- Approval of all material RPTs by shareholders through special resolution with related parties abstaining from voting.
- Mandatory constitution of Nomination and Remuneration Committee under the Chairmanship of an independent director.
- The maximum number of Boards an independent director can serve on listed companies be restricted to 7 and 3 in case the person is serving as a whole time director in a listed company.
- Disclosure of the terms and conditions of appointment of independent directors.
- The widened definition of RPT to include elements of Companies Act and Accounting Standards.
- Familiarisation programme for independent directors.
- Formulation of Policy for determining material subsidiaries. Selling, disposing and leasing of assets amounting to more than twenty percent of the assets of the material subsidiary on an aggregate basis during a financial year shall require prior approval of shareholders by way of special resolution, unless the sale/disposal/lease is made under a scheme of arrangement duly approved by a Court/Tribunal.
- Constitution of Risk management Committee mandatory, with the Majority of members being Board of Directors.
- Formulation of Policy on materiality of related party transactions and also on dealing with Related Party Transactions and its disclosure on the website.

Applicability of Clause 49

The revised Clause 49 of the Listing Agreement shall be applicable to all companies whose equity shares are listed on a recognized stock exchange. However, compliance with the provisions of Clause 49 shall not be mandatory, for the time being, in respect of the following class of companies:

- a. Companies having paid up equity share capital not exceeding Rs.10 crore and Net Worth not exceeding Rs. 25 crore, as on the last day of the previous financial year;

Provided that where the provisions of Clause 49 becomes applicable to a company at a later date,



such company shall comply with the requirements of Clause 49 within six months from the date on which the provisions became applicable to the company.

- b. Companies whose equity share capital is listed exclusively on the SME and SME-ITP Platforms

Revised Clause 49: Broad Coverage

SHAREHOLDER RIGHTS

Clause 49 gives shareholders right to:

- Participate in and be sufficiently informed on decisions concerning fundamental corporate changes.
- Vote in general shareholder meetings.
- Ask questions to the Board and propose resolutions.
- Participate in nomination and election of Board members.
- Exercise their ownership rights including institutional investors.
- Put forward their grievances to the Company.
- Be protected from abusive actions in the interest of controlling shareholders.

Apart from the above, it also provides the following:

- All shareholders of same series of a class should be treated equally.
- Foreign shareholders should also have voting rights.
- Company should devise a framework to avoid Insider trading and abusive self-dealing.
- Processes and procedures for general shareholder meetings should allow for equitable treatment of all shareholders.
- Company procedures should not make it unduly difficult or expensive to cast votes.
- To obtain effective redress for violation of their rights.
- Access to relevant, sufficient and reliable information on a timely and regular basis to enable them to participate in Corporate Governance process.

DISCLOSURE AND TRANSPARENCY

- The Company should ensure timely and accurate disclosure of information to its shareholders.
- The information should be prepared and disclosed in accordance with the prescribed standards of accounting, financial and non-financial disclosure.
- Channels for dissemination of information should provide for equal, timely and cost efficient access to relevant information by users.
- The company should maintain minutes of the meeting explicitly recording dissenting opinions.
- The company should implement the prescribed accounting standards in letter and spirit in the preparation of financial statements taking into consideration the interest of all stakeholders.

BOARD COMPOSITION

- The Board should have an optimum combination of Executive Directors (ED) and Non- Executive Directors (NED), satisfying the following criteria:
 - At-least half of the Board should be non-executive directors.



- If Chairman is a Promoter or related to a Promoter, at-least half of the Board should be IDs.
 - If Chairman is related to anyone occupying management position at the Board level or one level below the Board, at-least half of the Board should be IDs.
 - If the Chairman is a non-executive director, at-least one-third of the Board should be IDs.
 - If the Board doesn't have a regular non-executive Chairman, at-least half of the Board should be IDs.
- The Board should have at-least one woman director.

INDEPENDENT DIRECTORS

Independent director shall mean a non-executive director, other than a nominee director of the company:

- who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;
- who is or was not a promoter of the company or its holding, subsidiary or associate company;
- who is not related to promoters or directors in the company, its holding, subsidiary or associate company;
- apart from receiving director's remuneration, has or had no material pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;
- none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;
- who, neither himself nor any of his relatives —
 - holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;
 - is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of —
 - a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or
 - any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent or more of the gross turnover of such firm;
 - holds together with his relatives two per cent or more of the total voting power of the company; or
 - is a Chief Executive or director, by whatever name called, of any non-profit organisation that receives twenty-five per cent or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent or more of the total voting power of the company;
 - is a material supplier, service provider or customer or a lessor or lessee of the company;



- who is not less than 21 years of age.

Clause 49 also enforces certain restrictions on the IDs, some of which are:

- A person not to serve as an ID in more than 7 listed companies.
- A whole-time director of one company not to serve as an ID in more than 3 listed companies.
- The maximum tenure of Independent Directors shall be in accordance with the Companies Act, 2013 and clarifications/ circulars issued by the Ministry of Corporate Affairs, in this regard, from time to time.

Some of the mandatory provisions regarding IDs are:

- Issue of formal letter of appointment to IDs and disclosure of such letters to shareholders.
- Performance evaluation of IDs.
- Separate meetings of IDs.
- Familiarisation programme for Independent Directors.

OTHER BOARD PROVISIONS

- Board meeting to be held at-least four times a year with a maximum gap of 120 days between two meetings.
- A director can't be a member in more than 10 committees (Audit and Stakeholders' Relationship) and Chairman of more than 5 committees across all the Boards of Indian listed companies.
- IDs who resign or are removed, are to be replaced with new IDs within 3 months or immediate next Board meeting, whichever is earlier, in case the requirement of IDs is not met.
- Board members have to affirm compliance with a 'Code of Conduct' on an annual basis.
- IDs to be held liable in acts of omission or commission, which occurs in their knowledge.
- Company has to mandatorily establish a whistle blower mechanism.

BOARD COMMITTEES

Clause 49 has the following provisions regarding Audit Committee:

- *Members:* At-least three members, two-thirds of which shall be IDs
- *Chairman:* Chairman to be an ID
- *Attendance:* Chairman of the Committee to be present in AGM
- *Meeting:* At-least four times a year and not more than four months gaps between meetings
- *Quorum:* Two or one-third of the members, whichever is greater, but minimum two IDs should be present
- *Role :* Role of the committee also includes reviewing and monitoring auditor independence, approval of related party transactions, intercorporate loans, valuations, etc.

Clause 49 has the following provisions regarding Nomination and Remuneration Committee:

At-least three members, all non-executive directors and at-least half to be IDs

- The chairperson of the company (whether executive or nonexecutive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.
- Chairman of the committee to be an ID.



Clause 49 has the following provisions regarding Risk Management:

- The Company should form a Risk Management Committee through its Board of Directors
- The Board should be responsible for framing, implementing and monitoring the risk management plan.
- The company should lay down procedures to inform Board members about the risk assessment and minimization procedures.
- The majority of Committee shall consist of members of the Board of Directors.
- Senior executives of the company may be members of the Committee but the Chairman of the Committee shall be a member of the Board of Directors.

Clause 49 has the following provisions regarding Stakeholders Relationship Committee :

- Formulation of 'Stakeholders Relationship Committee' to resolve the grievances of the security holders of the company including complaints related to transfer of shares, non-receipt of balance sheet, non-receipt of declared dividends.

SUBSIDIARIES

Clause 49 has the following provisions regarding subsidiary companies:

- At-least one ID of the company should be a director on the Board of a material non- listed Indian subsidiary.
- The audit committee should review financial statements of and investments made by the unlisted subsidiary.
- The company shall formulate a policy for determining 'material' subsidiaries and such policy shall be disclosed on the company's website and a web link thereto shall be provided in the Annual Report.
- No company can dispose of shares in the material subsidiary, reducing its shareholding below 50%, without passing a special resolution in its general meeting except in cases where such divestment is made under a scheme of arrangement duly approved by a Court/Tribunal.
- Selling, disposing or leasing of more than 20% of assets of the material subsidiary on an aggregate basis during a financial year will require approval of shareholders by way of special resolution unless the sale/disposal/lease is made under a scheme of arrangement duly approved by a Court/Tribunal.

RELATED PARTY TRANSACTIONS

Clause 49 has tightened the provisions and disclosures requirements for related party transactions (RPT). Some of the requirements are:

- RPTs to require prior approval of the audit committee. However, the Audit Committee may grant omnibus approval for Related Party Transactions proposed to be entered into by the company subject to the following conditions:
 - a. The Audit Committee shall lay down the criteria for granting the omnibus approval in line with the policy on Related Party Transactions of the company and such approval shall be applicable in respect of transactions which are repetitive in nature.



- b. The Audit Committee shall satisfy itself the need for such omnibus approval and that such approval is in the interest of the company;
- c. Such omnibus approval shall specify (i) the name/s of the related party, nature of transaction, period of transaction, maximum amount of transaction that can be entered into, (ii) the indicative base price / current contracted price and the formula for variation in the price if any and (iii) such other conditions as the Audit Committee may deem fit;

Provided that where the need for Related Party Transaction cannot be foreseen and aforesaid details are not available, Audit Committee may grant omnibus approval for such transactions subject to their value not exceeding Rs.1 crore per transaction.

- d. Audit Committee shall review, at least on a quarterly basis, the details of RPTs entered into by the company pursuant to each of the omnibus approval given.
 - e. Such omnibus approvals shall be valid for a period not exceeding one year and shall require fresh approvals after the expiry of one year.
- Material RPTs to require shareholder approval through special resolution and concerned related parties to abstain from voting on such resolutions subject to the following:
 - a. transactions entered into between two government companies;
 - b. transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.
 - Disclosure of all material RPTs on a quarterly basis with compliance report on corporate governance.
 - Disclosure of policies on dealing with RPTs on its website and web link thereto in Annual Report.

DIRECTOR REMUNERATION

The provisions relating to director remuneration are kept unchanged. It includes:

- Disclosure of all pecuniary relationships of non-executive directors with the company.
- Disclosure of detailed information on remuneration to directors.
- Disclosure of criteria of making payments to non-executive directors.
- Disclosure of shares/other instruments held by non-executive directors.

NON-MANDATORY REQUIREMENTS OF CLAUSE 49

Most of the provisions in the revised Clause 49 are mandatory in nature. However, there are some, which are non-mandatory and are left in the discretion of the companies to adhere.

The non-mandatory requirements in the revised Clause 49 are:

- The Board may appoint a non-executive Chairman who should be entitled to maintain a Chairman's office at the company's expense and also allowed reimbursement of expenses incurred in performance of his duties.
- Disclosure of half-yearly financial performance including summary of the significant events.
- Moving towards a regime of unqualified financial statements.
- Appointment of separate individuals to the posts of Chairman and MD/CEO.
- Reporting of the internal auditor directly to the audit committee.



Scope for Company Secretaries

Clause 49(XI)(A) states that the company shall obtain a certificate from either the auditors or *practicing company secretaries* regarding compliance of conditions of corporate governance as stipulated in this clause and annex the certificate with the directors' report, which is sent annually to all the shareholders of the company. The same certificate shall also be sent to the Stock Exchanges along with the annual report filed by the company.

End note

In a step towards making listed companies more transparent and to align the provisions related to listing agreement with the Companies Act 2013, SEBI has amended the Clause 49 of the Listing Agreement. The objective of the revised Clause 49 aligns with the provisions of the Companies Act, 2013, focuses on adopting best practices on corporate governance and aims at making the corporate governance framework more effective. It is hoped that the revised clause 49 would go a long way in providing corporate good governance framework.



Nomination and Remuneration Committee – *A Step Towards Better Governance*

CS Khusbu Mohanty*

Assistant Education Officer, Academics, ICSI

Prologue

India's corporate governance reform efforts were initiated by Indian corporate, many of which were active in advocating for and drafting corporate governance guidelines. In this direction on receiving various recommendations from various Corporates, SEBI proceeded to adopt considerable corporate governance reforms. The first phase of India's corporate governance reforms were aimed at "making boards and audit committees more independent, powerful and focused monitors of management" as well as aiding shareholders, including institutional and foreign investors, in monitoring management. These reform efforts were channelled through a number of different paths with both SEBI and the Ministry of Corporate Affairs (MCA) playing important roles. The SEBI has recently come out with the revised clause 49 vide circular dated April 17, 2014 and again amended it on September 15, 2014 to align it with the new Companies Act, 2013. One of the major steps which both the regulatory body initiated is, prescribing the constitution of Nomination and Remuneration Committee as a mandatory requirement.

The Institute of Company Secretaries of India as a pioneer Institute towards promoting good governance had also put forth a series of corporate governance recommendations. ICSI's Recommendation 9 and 10 provides that the constitution of Remuneration Committee and Nomination Committee should be made mandatory and the Chairman of both the committees should be independent directors. This article discusses about the various aspects of Nomination and Remuneration Committees under Companies Act, 2013 and under clause 49 of the listing agreement.

Provision under Companies Act, 2013

Companies falling under the purview of section 178

Section 178 read with rule 6 of the Companies (Meeting of Board and its Powers) Rules, 2014 provides that the Board of directors of every listed company and the following classes of companies shall constitute a Nomination and Remuneration Committee of the Board-

- (i) all public companies with a paid up capital of ten crore rupees or more;
- (ii) all public companies having turnover of one hundred crore rupees or more;
- (iii) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

* *The views expressed are personal views of the author and do not necessarily reflect those of the Institute.*



Composition of Nomination and Remuneration Committee

The Nomination and Remuneration Committee shall consist of three or more non-executive directors out of which not less than one-half shall be independent directors.

Provided that the chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.

Responsibilities of Nomination and Remuneration Committee

- The Nomination and Remuneration Committee shall identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall carry out evaluation of every director's performance.
- The Nomination and Remuneration Committee shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees.
- The Nomination and Remuneration Committee shall, while formulating the policy under sub-section (3) ensure that—
 - the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully;
 - relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and
 - remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals. Provided that such policy shall be disclosed in the Board's report.

Penalty

In case of any contravention of the provisions of section 178, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

Provisions under Clause 49 [Clause 49 (IV)]

Composition

The company through its Board of Directors shall constitute the nomination and Remuneration Committee which shall comprise at least three directors, all of whom shall be non-executive directors and at least half shall be independent. Chairman of the committee shall be an independent director.



Provided that the chairperson of the company (whether executive or nonexecutive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.

Role and Responsibilities

- The role of the committee shall, inter-alia, include the following:
 1. Formulation of the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration of the directors, key managerial personnel and other employees;
 2. Formulation of criteria for evaluation of Independent Directors and the Board;
 3. Devising a policy on Board diversity;
 4. Identifying persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, and recommend to the Board their appointment and removal. The company shall disclose the remuneration policy and the evaluation criteria in its Annual Report.
- The Chairman of the nomination and Remuneration Committee could be present at the Annual General Meeting, to answer the shareholders' queries. However, it would be up to the Chairman to decide who should answer the queries.

It is important to note that the Companies Act, 1956 only provides for remuneration to be approved by the Remuneration Committee for a listed company and subsidiary of a listed company but is silent about constitution of such type of committee whereas the old Clause 49 of the Listing Agreement provided companies with an option to constitute a Remuneration Committee.

The following table provides the provisions relating to Nomination and Remuneration Committee under the Companies Act, 1956/Old Clause 49, Revised Clause 49 and Companies Act, 2013, for a comparative view.

Companies Act, 1956/ Old Clause 49 vis-a-vis Revised Clause 49 vis-a-vis Companies Act, 2013

Sl. No.	Companies Act, 1956/ Old Clause 49	Revised Clause 49	Companies Act, 2013
1.	There was no provision for the constitution of the Nomination and Remuneration Committee in the Companies Act, 1956.	Clause 49 (IV) mandates for a listed company to constitute Nomination and Remuneration Committee.	Section 178(1) read with rule 6 of Companies (Meeting of Board and its Powers) Rules, 2014 prescribes for mandatory constitution of Nomination and Remuneration Committee



			for every listed company and certain prescribed companies.
2.	<p>Under old clause 49 the constitution of Remuneration Committee is a non- mandatory one. It provides that “The board may set up a Remuneration Committee to determine on their behalf and on behalf of the shareholders with agreed terms of reference, the company’s policy on specific remuneration packages for executive directors including pension rights and any compensation payment.”</p>	<p>The role of the committee shall, inter-alia, include the following:</p> <ol style="list-style-type: none">1. Formulation of the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration of the directors, key managerial personnel and other employees;2. Formulation of criteria for evaluation of Independent Directors and the Board;3. Devising a policy on Board diversity;4. Identifying persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, and recommend to the Board their appointment and removal. The company shall disclose the remuneration policy and the evaluation criteria in its Annual Report. <p>[Clause 49 (IV) (B)]</p>	<p>The Nomination and Remuneration Committee shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees. [Section 178 (3)]</p>



3.	<p>Under Clause 49 the Remuneration Committee may comprise of at least three directors, all of whom should be non-executive directors, the Chairman of committee being an independent director.</p>	<p>The company through its Board of Directors shall constitute the nomination and Remuneration Committee which shall comprise at least three directors, all of whom shall be non-executive directors and at least half shall be independent.</p> <p>Chairman of the committee shall be an independent director.</p> <p>Provided that the chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.</p> <p>[Clause 49 (IV) (A)]</p>	<p>The Nomination and Remuneration Committee shall consist of three or more non-executive directors out of which not less than one-half shall be independent directors.</p> <p>Provided that the chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee. [Section 178 (1)]</p>
4.	<ul style="list-style-type: none">• All the members of the Remuneration Committee could be present at the meeting.• The Chairman of the Remuneration Committee could be present at the Annual General Meeting, to answer the shareholder queries. However, it would be up to the Chairman to decide who should answer the queries.	<p>The Chairman of the nomination and Remuneration Committee could be present at the Annual General Meeting, to answer the shareholders' queries. However, it would be up to the Chairman to decide who should answer the queries.</p> <p>[Clause 49 (IV)(C)]</p>	<p>No such provision.</p>



End Note

By prescribing constitution of Nomination and Remuneration Committee as a mandatory requirement for other companies apart from listed companies, MCA goes a step ahead of SEBI and this is a welcome initiative. MCA and SEBI both aims to protect investors' interest and as a part of good Corporate Governance, appropriate disclosure norms with respect to remuneration policy and the remuneration payment are made under the Companies Act, 2013 and the Listing Agreement.



Governance Challenges and the Role of Professionals

Pramod S Shah*

Practising Company Secretary

Introduction

Corporate governance deals with the entire networks of formal and informal relationships with the management of the company and company's stakeholders including employees, customers, creditors, local communities, and society in general. It includes the processes through which corporation's objectives are set and pursued in the context of the social, regulatory and market environment.

Thus, Corporate Governance broadly refers to the mechanisms, processes and relations by which corporations are controlled and directed. The corporate sector has become more and more challenging in recent times with the country working closer with the global community. Further, with the emergence of new technologies in the era of globalization and liberalization the operation of business transactions with corporate governance has become a challenge. Concerns about corporate governance in India were, largely triggered by Harshad Mehta stock market scam of 1992 followed by incidents of companies allotting preferential shares to their promoters at deeply discounted prices and the recent scam of Satyam.

Changes since liberalization

Since liberalization, we have witnessed wide-ranging changes in both laws and regulations driving corporate governance as well as general consciousness about it. Perhaps the single most important development in the field of corporate governance and investor protection in India has been the establishment of the Securities and Exchange Board of India (SEBI) in 1992 and its gradual empowerment since then. SEBI, established primarily to regulate and monitor stock trading has played a crucial role in establishing the basic minimum ground rules of corporate conduct in the country. India's governance reforms were initially spearheaded by corporate India and quickly became an important component of the work of the country's primary capital markets regulatory authority, the Securities Exchange Board of India (SEBI), and the Ministry of Corporate Affairs (MCA).

The concerns about corporate governance stemming from the corporate scandals as well as opening up to the forces of competition and globalization has given rise to investigation into the ways to fix the corporate governance situation in India. One of the first among such endeavors was the CII Code for Desirable Corporate Governance developed by a committee chaired by Rahul Bajaj. The committee was formed in 1996 and submitted its code in April 1998.

Later, SEBI constituted two committees to look into the issue of corporate governance – the first chaired by Kumar Mangalam Birla that submitted its report in early 2000 and the second by Narayana Murthy three years later. SEBI in 2000 introduced unprecedented corporate governance reforms via Clause 49 of the Listing Agreement of Stock Exchanges. Clause 49, a seminal event in Indian corporate

* *The views expressed are personal views of the author and do not necessarily reflect those of the Institute.*



governance, established a number of governance requirements for listed companies with a focus on the role and structure of corporate boards, internal controls and disclosure to shareholders.

Over the past 14 years there has been a sea change in Indian governance. The needs of India's expanding economy, including access to foreign direct investment, the increased presence of institutional investors, and the growing desire of Indian companies to access global capital markets by being listed on stock exchanges outside of India, have spurred corporate governance laws resulting in enactment of Companies Act, 2013 followed by revision of clause 49.

Governance Challenges

- ***Independent Directors***

Independent Director act as a catalyst in promoting good governance practices in the company. Independence of the board and minimum level of external influence is critical for the effectiveness of the board. It may be noted that Independent Directors play a key role in promoting good governance and it is imperative to answer that whether an independent director is really independent or not.

However, they have been largely ineffective in India in monitoring the actions of management because of the factors like influence of shareholders and lack of independence in the real sense resulting in the fact that they rarely differ in their views. The Companies Act, 2013 and the revised clause 49 of the listing agreement have provided for stringent norms which will go a long way in insuring the independence of Independent Directors. The independent director should remain aware of the actions of the company and exercise their due diligence and not blindly rely upon the facts presented before them by the management. "Ignorance" of the system by the director of the company is unacceptable.

In Bhopal Gas tragedy case, role of non-executive became questionable. Bhopal Trial Court on 7th June 2010 has held Keshub Mahindra, a reputed industrialist, the then non executive chairman of Union Carbide India Limited (UCIL), guilty and sentenced him to two years of imprisonment. He was charged of attending only a few meetings in a year and taking only macro view of the company's developments. A non-vigilant act of non-executive chairman, accounted for death of thousands. Role of non executive director in this case is questionable. Later he was granted bail.

Section 184 of Companies Act, 2013 requires directors to disclose their connections and economic interest with the company. The section however remains futile if the board is mixture of friends and allies. In most of the cases Independent Directors are either friends or allies of the promoters/managers resulting in the ineffectiveness of the prescribed provisions of the law in true spirit.

- ***Shareholders***

One more issue is the ineffective meeting of shareholders and dispersed manner of owners. The dispersed shareholders often do not care to attend the General Meetings to elect or change the Board of Directors. Consequently the supervision role of the Board is often severely compromised and the management, who really has the keys to the business, can potentially use corporate resources to further their own self- interests rather than the interests of the shareholders.



The present scenario is that if the shareholders are dissatisfied with a particular management, they would simply dispose of their shares in the company which will bring down the share price. The company would then become a takeover target, when the acquisition actually happens, the acquiring company would get rid of the existing management. It is thus the fear of a takeover rather than shareholder action that is supposed to keep the management.

- ***Enforcement of statutes***

Improvements are also required in the enforcement of certain laws and regulations like those pertaining to stock listing in major exchanges, insider trading and mechanism for dealing with violations of the laws and regulations. Also there are several challenges with respect to enforcement of statutes; a major challenge arises from the lack of effective enforcement of existing laws and regulations. Meeting this challenge requires recognition that the structure and capacity of regulatory and judicial frameworks are integral parts of the corporate governance environment. The challenge is to narrow the gap between 'formal' provisions and actual implementation.

- ***Institutional Investors***

The success of corporate governance across most markets rests on the expectation that institutional investors will responsibly engage with companies in which they have invested. Engagement does not necessarily imply a confrontational or aggressive approach or aggressive and negative posturing.

Institutional investors' accept the funds from the third parties and have specific objectives to achieve. Improvement of corporate governance with regard to the institutional investors should be aimed to encourage and facilitate long-term shareholder engagement behavior.

- ***Some other Challenges under Companies Act, 2013***

- i. Section 167 (1) provided the list of incidences to automatic vacation by director from all companies. The section says that if a director incurs any of disqualifications mentioned in Section 164, then he will have to vacate office. But the disqualifications mentioned in Section 164 are company specific and it would be difficult for a person to control it. Thus it would create anarchy in such defaulting Companies as there will be no director to carry on the affairs of the company and authorized to take corrective steps, which does not seem to be intention of legislature.
- ii. The public companies which satisfy the criteria laid down in Rule 4 of Companies (Appointment and Qualification of Directors) Rules, 2014 have to appoint 2 Independent Director (IDs). IDs are appointed for specific term at the office. Hence they are not liable to retire by rotation. This mandates that the total strength of the Board shall be large enough to comply with the provisions of Section 152 (6). This might mandate certain companies to increase the size of their Board. So restructuring of Board by identifying suitable directors on the Board is a challenge before the Companies.
- iii. New format of Memorandum of Association does not contain the clause for 'Other Objects' as was available in the Companies Act, 1956. Thus, the promoters need to have clarity about their future plans so as to insure that their activities are in sync with their main object.



Role of professionals

According to the Minister of Economy, policy makers and private businesses, professionals face new problems arising in the rapidly changing legal and economic environment. They also see possibilities for improvement of the corporate governance principles and the related regulation. Professionals are like doctors who cannot afford to give wrong prescription to their clients. So all the professionals shall adhere and comply with laws, rules and regulations with due care and awareness. With passage of time, the legal environment has changed a lot, casting onerous responsibilities on professionals like company secretaries, to remain updated with newly made and recently amended provisions of the law. This also means that professionals are now required to move outside of their comfort zone and contribute more to the company's growth.

It is true that the 'corporate governance' has no unique structure or design. There is still lack of awareness about its various issues, like, quality and frequency of financial and managerial disclosure, compliance with the code of best practice, roles and responsibilities of Board of Directors, shareholders rights, etc. There have been many instances of failure and scams in the corporate sector, like collusion between companies and their accounting firms, presence of weak or ineffective internal audits, lack of required skills by managers, lack of proper disclosures, non-compliance with standards, etc. As a result, both management and auditors have to play much responsible roles.



**Circulars, Notifications, Orders, Amendments, Rules
under Companies Act, 2013**
(since last issue of e-CS Nitor)



General Circular No. 43/2014

**No. 1/21/2013-CL-V
Government of India
Ministry of Corporate Affairs**

5th Floor, "A" Wing, Shastri Bhavan,
Dr. R.P. Road, New Delhi
Dated : **13th November, 2014**

To
All Regional Directors,
All Registrars of Companies.

**Subject : Issue of Foreign Currency Convertible Bonds (FCCBs) and Foreign Currency Bonds (FCBs) –
Clarification regarding applicability of provisions of Chapter III of the Companies Act, 2013.**

Sir

The Ministry has been receiving references from stakeholders seeking clarity on applicability of provisions of Chapter III of the Companies Act, 2013 (Act) to the issue of Foreign Currency Convertible Bonds (FCCBs) and Foreign Currency Bonds (FCBs) by Indian companies exclusively to persons resident outside India in accordance with applicable sectoral regulatory provisions.

2. The matter has been examined in the Ministry in consultation with Ministry of Finance and SEBI. The issue of FCCBs and FCBs by companies is regulated by the Ministry of Finance's regulations contained in *Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipts Mechanism) Scheme, 1993* (Scheme) and Reserve Bank of India through its various directions/regulations. It is, accordingly, clarified that unless otherwise provided in the said Scheme or the directions/regulations issued by Reserve Bank of India, provisions of Chapter III of the Act shall not apply to an issue of a FCCB or FCB made exclusively to persons resident outside India in accordance with the above mentioned regulations.

3. This issues with the approval of the competent authority.

Yours faithfully,

Sd/-

**(KMS Narayanan)
Assistant Director (Policy)**

Copy to:-

1. e-Governance Section and web Contents Officer to place this circular on the Ministry website.
2. Guard File



General Circular No. 44/2014

**No. 2/13/2014-CL-V
Government of India
Ministry of Corporate Affairs**

5th Floor, 'A' Wing, Shastri Bhawan,
Dr. R.P. Road, New Delhi

Dated: 14.11.2014

To
All Regional Directors,
All Registrars of Companies,
All Stakeholders.

Subject : COMPANY LAW SETTLEMENT SCHEME, 2014 (CLSS-2014)

Sir,

In continuation to the Ministry's General Circular No. 34/2014 dated 12.08.2014 and 40/2014 dated 15/10/2014 on the subject cited above, this Ministry has, on consideration of requests received from various stakeholders, has decided to extend the Company Law Settlement Scheme (CLSS 2014) upto 31st December, 2014.

2. This issues with the approval of the competent authority.

Yours faithfully,

Sd/-

**(KMS Narayanan)
Assistant Director (Policy)
23387263**

Copy to: - 1. E-Governance Section and Web Contents Officer to place this circular on the Ministry's website.

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General Circular No. 45/2014

F. No. 02/13/2014 CL-V
Government of India
Ministry of Corporate Affairs

'A' Wing, 5th Floor, Shastri Bhawan,
Dr. Rajendra Prasad Road,
New Delhi-110001

Dated: 18.11.2014

All Regional Directors,
All Registrar of Companies,
All Stakeholders.

Subject : Extension of time for holding Annual General Meeting (AGM) under section 96(1) of the Companies Act, 2013-Companies registered in State of Jammu and Kashmir.

Sir,

The State of Jammu and Kashmir faced unprecedented floods, particularly in the Kashmir valley in September 2014. Kashmir Chamber of Commerce and Industry and others have represented that due to the devastation caused by the floods, companies registered in the State could not convene AGMs for the financial year 2013-2014 within the stipulated time as required under the provisions of Companies Act, 2013.

2. In view of the exceptional circumstances, Registrar of Companies Jammu and Kashmir is advised to exercise powers conferred on him under the third proviso to section 96(1) of the Companies Act, 2013 to grant extension of time upto 31/12/2014 to those companies registered in the State of Jammu and Kashmir who could not hold their AGMs (other than first AGM) for the financial year 2013-14 within the stipulated time.

3. This issues with the approval of the competent authority.

Yours faithfully,

Sd/-

(KMS Narayanan)
Assistant Director
23387263

Copy to: -

1. ROC Jammu and Kashmir
2. E-Governance Section and Web Contents Officer to place this circular on the Ministry's website.
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Safeguarding and caring for your well being



COMPANY SECRETARIES BENEVOLENT FUND

Saathi Haath Badhana

साथी हाथ बढ़ाना



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Benefits

Financial Assistance in the event of Death of a member of CSBF

Upto the age of 60 years

- Group Life Insurance Policy for a sum of ₹5,00,000

Above the age of 60 years

- Upto ₹2,00,000 in deserving cases on receipt of request subject to the Guidelines approved by the Managing Committee from time to time

Reimbursement of Medical expenses

- Upto ₹60,000

Education Allowance

- Upto ₹40,000 per child subject to maximum of two children in case of the member leaving behind minor children (one time payment)

Benefits to Members admitted to the CSBF after attaining the age of 60 years

The members above the age of 60 years can be admitted to the Fund. However, in the event of death, financial assistance would be released @ ₹40,000 for every completed year of membership or part thereof in excess of six months subject to a minimum of ₹50,000 and maximum of ₹2,00,000

ICSI has established the Company Secretaries Benevolent Fund (CSBF) in the year 1976 which seeks to create security umbrella for dependent family members

OBJECTIVE

- Benevolence
- Financial assistance to the families
- Medical assistance
- Assistance for Children Education



Nature of Fund

- Fund is a society registered with the Registrar of Societies, New Delhi under the Societies Registration Act, XXI of 1860
- Fund is managed by the Committee consisting of 12 members.
- President, Vice President and Secretary of the ICSI are ex-officio members of the Managing Committee of the Fund.
- The Fund is recognized under Section 12A of the Income Tax Act.
- Contribution to the Fund qualify for the deduction under section 80G of the Income Tax Act, 1961.

Financial position of the Fund (as on 31.03.2014)

- Corpus ₹12,01,78,473
- Investments ₹12,49,35,462
- Total assistance provided in the year 2013-14: ₹53,99,350
(Including ₹15 Lacs from LIC)

Total number of members as on 31/03/2014 - 9940

...And it's all so easy to become a member of the CSBF.

- Make an application in Form-A
(available on the Institute's Web Portal: www.icsi.edu/csbf)
- Form-A and remittance of one time subscription amount of ₹7,500 can be submitted ONLINE through Institute's Web Portal: **www.icsi.edu**. No transaction charges for online payment will be charged from the Members.
- Alternatively, send / deposit Form - A alongwith Demand Draft payable at New Delhi or Cheque at par drawn in favour of 'Company Secretaries Benevolent Fund' at any of the Offices of the Institute / Regional Offices / Chapters.

For further clarification/information please contact Membership Section of the Institute at

Telephone no. 45341049 / 45341047 Fax No. - 24636467

E-mail id : csbf@icsi.edu; member@icsi.edu



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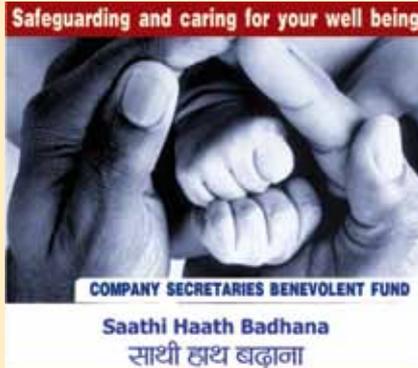
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COMPANY SECRETARIES BENEVOLENT FUND



The Company Secretaries Benevolent Fund (CSBF) provides safety net to Company Secretaries who are members of the Fund and their family members in distress.

CSBF

- Registered under the Societies Registration Act, 1860
- Recognised under Section 12A of the Income Tax Act, 1961
- Subscription / Contribution to Fund qualifies for the deduction under section 80G of the Income Tax Act, 1961
- Has a membership of about 10,000

Eligibility

A member of the Institute of Company Secretaries of India is eligible for the membership of the CSBF.

How to join

- By making an application in Form A (available at www.icsi.edu/csbf) along with one time subscription of ₹ 7,500/-.
- One can submit Form A and also the subscription amount of ₹ 7500 ONLINE through Institute's web portal: www.icsi.edu. Alternatively, he can submit Form A, along with a Demand Draft or Cheque for ₹ 7500 drawn in favour of 'Company Secretaries Benevolent Fund', at any of the Offices of the Institute/ Regional Offices/Chapters.

Benefits

- ₹ 5,00,000 in the event of death of a member under the age of 60 years
- Upto ₹ 2,00,000 in the event of death of a member above the age of 60 years in deserving cases
- Upto ₹ 40,000 per child (upto two children) for education of minor children of a deceased member in deserving cases
- Upto ₹ 60,000 for medical expenses in deserving cases
- Limited benefits for Company Secretaries who are not members of the CSBF

Contact

For further information/ clarification, please write at email id csbf@icsi.edu or contact Ms. Anita Mehra, Assistant Director on telephone no. 011-45341049.

For more details please visit www.icsi.edu/csbf



KIND ATTENTION MEMBERS!

Elections to the Councils and Regional Councils-2014

As you are aware ICSI Elections to the Council and Regional Councils-2014 are scheduled to be held on Friday and Saturday, the 12th and 13th December, 2014 at Delhi and Mumbai and on Friday, the 12th December, 2014 at other places from 8.00 AM to 8.00 PM.

Members are requested to respect their vote and exercise their franchise in large numbers to make the election a success. Members should also take full advantage of the privilege conferred upon them and may indicate as many preferences as there are candidates for election to the Council and Regional Councils.

CS Sutanu Sinha

Returning Officer and Chief Executive & Officiating Secretary



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We invite the members to contribute articles/checklist/reviews/points of view or any other relevant material pertaining to the Companies Act, 2013 for inclusion in the coming issues of ***e-CS nitor*** through e-mail at: ecsnitor@icsi.edu. The article should ordinarily have 1500 to 2000 words.

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• Handbook on Internal Audit of Operations of Depository Participants	150	• Circulars, Notifications, Orders, Amendment Rules under Companies Act, 2013-A Compendium	100
• A Guide a to Company Secretary in Practice	200	• Legal & Professional Writing & Drafting in Plain Language	100
• CG Insights	200	• E-Voting (Ready Reckoner)	100
• DNA of Integrity	200	• Companies Act, 2013 A Ready Referencer (Revised Edition)	100
• Independent Directors	100	• Board Committees - A Handbook	100
• Corporate Social Responsibility	100	• Independent Directors - A Handbook	100
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