

Directors' Duties and Liabilities

21 November 2022

Concept and Types of Director

CA 2013 defines the terms – an Executive Director means a Whole-time Director („WTD“) as defined under Section 2(94).

WTD is defined by way of an inclusive definition and it includes a person who is in the whole time employment of the Company

Managing Director and Whole-time Director are general examples of Executive Director

Director

Executive Director

Non-executive Director

As per CA 2013, a company is recognized as an artificial legal entity – however, any act to be carried out by the company would have to be conducted through their elected representatives. The directors are the human agents managing the Company and they must act in a manner best protecting interest of the shareholders – exercising their fiduciary relationship both towards the company and towards every shareholder

This concept is not defined in CA 2013. Based on the concept of an Executive Director, the concept of a Non-executive Director can be understood to be a Director who is not involved in the day to day affairs of the Company and whose contribution to the Board is largely limited to participation at the Board / Committee meetings and the remuneration is paid by way of sitting fee and in certain cases, profit linked commission
Independent Director is an example of a Non-executive Director

Other Types of Directors



Duties of Director – Codified duties under Section 166 of CA 2013

1

Subject to the provisions of this Act, a director of a company shall act in accordance with the articles of the company

2

Act in good faith in order to promote the objects of the company for the benefit of its members, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment

3

exercise duties with due and reasonable care, skill and diligence and shall exercise independent judgment

4

Abstain from a situation where there is a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company

5

Not to achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates

6

Not to assign his office

In case of any contravention of these provisions, the director shall be punishable with fine which shall not be less than one lakh rupees, but which may extend to five lakh rupees.

Duties of Independent Directors – Schedule IV of CA 2013

Guidelines for Professional Conduct

An independent director shall:

1. Uphold ethical standards of integrity and probity;
2. Act objectively and constructively while exercising his duties;
3. Exercise his responsibilities in a *bona fide* manner in the interest of the company;
4. Devote sufficient time and attention to his professional obligations for informed and balanced decision making;
5. Not allow any extraneous considerations that will vitiate his exercise of objective independent judgment in the paramount interest of the company as a whole, while concurring in or dissenting from the collective judgment of the Board in its decision making;
6. Not abuse his position to the detriment of the company or its shareholders or for the purpose of gaining direct or indirect personal advantage or advantage for any associated person;
7. Refrain from any action that would lead to loss of his independence;
8. Where circumstances arise which make an independent director lose his independence, the independent director must immediately inform the Board accordingly;
9. Assist the company in implementing the best corporate governance practices.

Duties of Independent Directors – Schedule IV of CA 2013

Role and Functions

The independent Directors shall:

1. Help in bringing an **independent judgment** to bear on the Board's deliberations especially on issues of strategy, performance, risk management, resources, key appointments and standards of conduct;
2. Bring an objective view in the evaluation of the performance of board and management;
3. Scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance;
4. Satisfy themselves on the integrity of financial information and that financial controls and the systems of risk management are robust and defensible;
5. Safeguard the interests of all stakeholders, particularly the minority shareholders;
6. Balance the conflicting interest of the stakeholders;
7. Determine appropriate levels of remuneration of executive Directors, key managerial personnel and senior management and have a prime role in appointing and where necessary recommend removal of executive Directors, key managerial personnel and senior management;
8. Moderate and arbitrate in the interest of the company as a whole, in situations of conflict between management and shareholder's interest.

Duties of Independent Directors – Schedule IV of CA 2013

The independent Directors shall—

1. Undertake appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the company;
2. Seek appropriate clarification or amplification of information and, where necessary, take and follow appropriate professional advice and opinion of outside experts at the expense of the company;
3. Strive to attend all meetings of the Board of Directors and of the Board committees of which he is a member;
4. Participate constructively and actively in the committees of the Board in which they are chairpersons or members;
5. Strive to attend the general meetings of the company;
6. Where they have concerns about the running of the company or a proposed action, ensure that these are addressed by the Board and, to the extent that they are not resolved, insist that their concerns are recorded in the minutes of the Board meeting;
7. Keep themselves well informed about the company and the external environment in which it operates;
8. Not to unfairly obstruct the functioning of an otherwise proper Board or committee of the Board;
9. Pay sufficient attention and ensure that adequate deliberations are held before approving related party transactions and assure themselves that the same are in the interest of the company;
10. Ascertain and ensure that the company has an adequate and functional vigil mechanism and to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use;
11. Report concerns about unethical behavior, actual or suspected fraud or violation of the company's code of conduct or ethics policy;
12. Acting within his authority, assist in protecting the legitimate interests of the company, shareholders and its employees;
13. Not disclose confidential information, including commercial secrets, technologies, advertising and sales promotion plans, unpublished price sensitive information, unless such disclosure is expressly approved by the Board or required by law.

Duties of Directors – SEBI LODR

Disclosure of information:

1. (1) Members of board of directors and key managerial personnel shall disclose to the board of directors whether they, directly, indirectly, or on behalf of third parties, have a material interest in any transaction or matter directly affecting the listed entity.
2. (2) The board of directors and senior management shall conduct themselves so as to meet the expectations of operational transparency to stakeholders while at the same time maintaining confidentiality of information in order to foster a culture of good decision-making.

Key functions of the board of directors-

1. (1) Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans, setting performance objectives, monitoring implementation and corporate performance, and overseeing major capital expenditures, acquisitions and divestments.
2. (2) Monitoring the effectiveness of the listed entity's governance practices and making changes as needed.
3. (3) Selecting, compensating, monitoring and, when necessary, replacing key managerial personnel and overseeing succession planning.
4. (4) Aligning key managerial personnel and remuneration of board of directors with the longer term interests of the listed entity and its shareholders.
5. (5) Ensuring a transparent nomination process to the board of directors with the diversity of thought, experience, knowledge, perspective and gender in the board of directors.
6. (6) Monitoring and managing potential conflicts of interest of management, members of the board of directors and shareholders, including misuse of corporate assets and abuse in related party transactions.
7. (7) Ensuring the integrity of the listed entity's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.
8. (8) Overseeing the process of disclosure and communications.
9. (9) Monitoring and reviewing board of director's evaluation framework.

Duties of Directors – SEBI LODR

Other responsibilities:

1. The board of directors shall provide strategic guidance to the listed entity, ensure effective monitoring of the management and shall be accountable to the listed entity and the shareholders.
2. The board of directors shall set a corporate culture and the values by which executives throughout a group shall behave.
3. Members of the board of directors shall act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the listed entity and the shareholders.
4. The board of directors shall encourage continuing directors training to ensure that the members of board of directors are kept up to date.
5. Where decisions of the board of directors may affect different shareholder groups differently, the board of directors shall treat all shareholders fairly.
6. The board of directors shall maintain high ethical standards and shall take into account the interests of stakeholders.
7. The board of directors shall exercise objective independent judgement on corporate affairs.
8. The board of directors shall consider assigning a sufficient number of non-executive members of the board of directors capable of exercising independent judgement to tasks where there is a potential for conflict of interest.
9. The board of directors shall ensure that, while rightly encouraging positive thinking, these do not result in over-optimism that either leads to significant risks not being recognised or exposes the listed entity to excessive risk.
10. The board of directors shall have ability to 'step back' to assist executive management by challenging the assumptions underlying: strategy, strategic initiatives (such as acquisitions), risk appetite, exposures and the key areas of the listed entity's focus.
11. When committees of the board of directors are established, their mandate, composition and working procedures shall be well defined and disclosed by the board of directors.
12. Members of the board of directors shall be able to commit themselves effectively to their responsibilities.
13. In order to fulfil their responsibilities, members of the board of directors shall have access to accurate, relevant and timely information.
14. The board of directors and senior management shall facilitate the independent directors to perform their role effectively as a member of the board of directors and also a member of a committee of board of directors.

Powers of the Board



Background

The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do.

In exercising such powers, the Board shall act within the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting. Further, the Board is prohibited to exercise any power which otherwise is a prerogative of the shareholders.

CA 2013 further provides certain restrictions on certain powers of the Board. Certain restrictions are provided inter-alia on the following powers;

Borrowings, lending, making grants / donations, making political contributions, related party transaction etc. beyond a threshold as prescribed under CA 2013 can be exercised subject to approval of the shareholders in the General Meeting.



Powers prescribed under Section 179

- to make calls on shareholders in respect of money unpaid on their shares
- to authorise buy-back of securities under section 68
- to issue securities, including debentures, whether in or outside India
- to borrow monies
- to invest the funds of the company
- to grant loans or give guarantee or provide security in respect of loans
- to approve financial statement and the Board's report
- to diversify the business of the company
- to approve amalgamation, merger or reconstruction
- to take over a company or acquire a controlling or substantial stake in another company
- to make political contributions
- to appoint or remove KMPs
- to appoint internal auditors or secretarial auditors

These powers can either be exercised by the Board itself or the Board can delegate some of these powers to the committees of the Board.

Roles & Responsibilities – Directors' Responsibility Statement

a

In the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures

b

accounting policies are selected and consistently applied and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year

c

Proper and sufficient care is taken for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company

d

Annual accounts are prepared on a going concern basis

e

Internal financial controls are laid down to be followed by the company and that such internal financial controls are adequate and were operating effectively (Applicable only for listed companies)

f

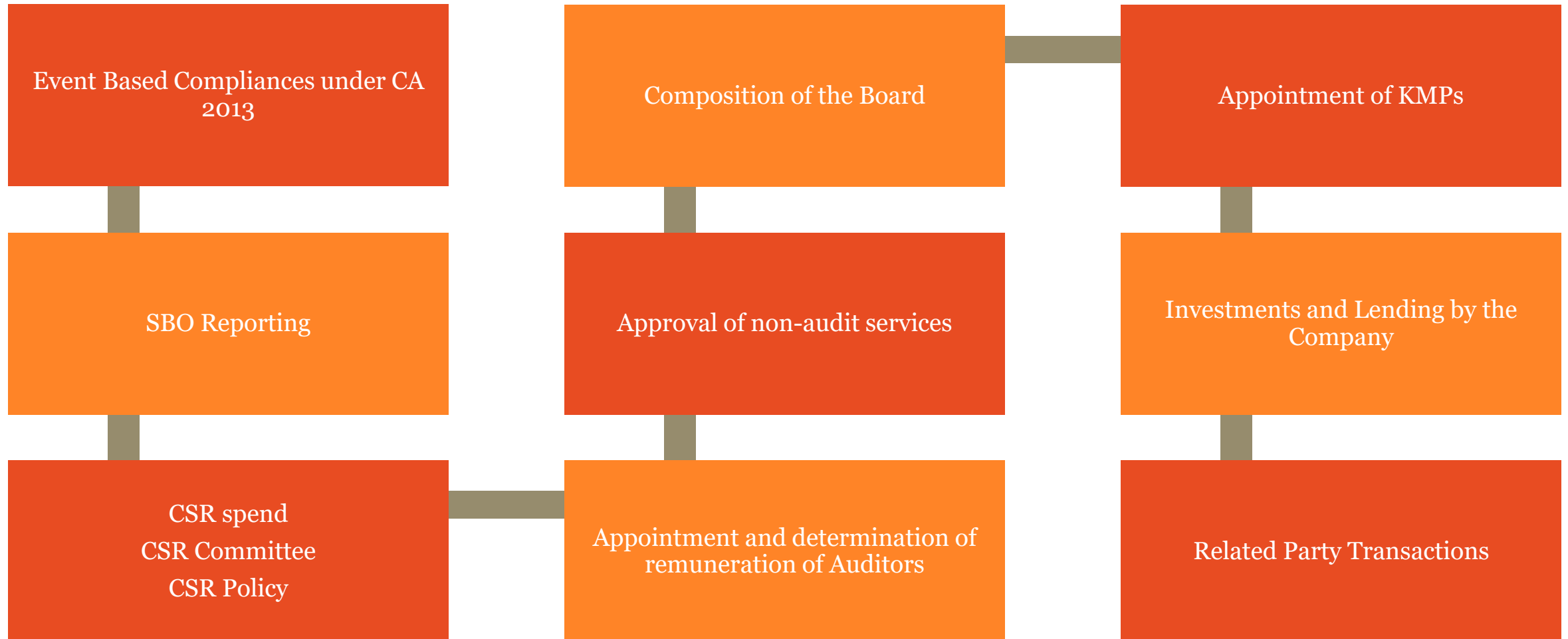
Proper systems are devised to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively

Roles & Responsibilities – Board’s Report

Board’s Report is the important communication by the Board with the shareholders. It is a comprehensive document which speaks about performance and various other aspects of the company, its major policies, relevant changes in management, future programs of expansion, modernization and diversification, capitalization or reserves, etc. The Board’s Report enables not only the shareholders but also the lenders, bankers, government and the public to make an appraisal of the company’s performance and provides an insight into the future growth and profitability of the company.

Key Contents	Financial Information	<ul style="list-style-type: none">• Financial results of current year and previous year;• Dividend declared during the year and amount transferred to general reserve;• Material changes and commitments, if any, affecting financial position
	Board Meeting & Directors	<ul style="list-style-type: none">• Details of Board meetings and CSR committee meetings held during the year;• Particulars of appointment, resignation and vacation of Directors;• Directors Responsibility Statement (Refer next slide for more details)
	Loans, Deposits & Contracts	<ul style="list-style-type: none">• Particulars in relation to loans, guarantee or investments made by the company;• Details in relation to deposits accepted by the company, if any;• Details in relation to contracts and arrangements with related parties
	Policies and procedures	<ul style="list-style-type: none">• Development and implementation of a risk management policy;• The details in relation to CSR policy and initiative taken during the year and also reasons if the entire CSR amount is not spent during the year;• Statement on compliance with SS-1 and SS-2
	Others	<ul style="list-style-type: none">• Details in relation to conservation of energy, technology absorption, foreign exchange earnings/ outgo;• Explanations or comments on every qualification, reservation or adverse remark made by the Auditors

Roles & Responsibilities – Other Key Compliances under CA 2013



Liabilities of Directors



Liabilities







In case of default in complying with any of the regulations, both executive and non-executive Directors, whether Foreign national or Indian national would be held liable. However, the non-executive Director shall be held 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 or connivance or where he had not acted diligently

Liability in case of debt of the Company

Recovery of taxes

Dishonour of cheques

Officer in Default

-  A whole time director
-  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
-  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 this 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

“**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

Liabilities of Directors



Penal Consequences

- In case of default in compliance with any provision of the CA 2013, the Director and the Company will be liable for the fine or imprisonment based on contravention of the provision
- The fine/ penalty that can be imposed by the regulator range from INR 10,000 to INR 25,00,000 on the Company or Director/ Officer in Default
- The maximum imprisonment that can be sentenced by the regulators shall not exceed 5 years
- CA 2013 also provides a way to reduce the burden of the punishment by filing a compounding application for any non-compliances. Not all offences under CA 2013 can be compounded

Following offences as mentioned below can be compounded under the CA, 2013.

- Offence punishable with fine only - by any officer authorized by Central Government, as the case may be;
- Offence punishable with “fine or imprisonment or both” or “fine or imprisonment” - by Special Court

Thank you

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