GUIDANCE NOTE
ON
INDEPENDENT DIRECTORS
(Revised Edition)

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

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PREFACE TO REVISED EDITION

The Institution of independent directors is playing an important role in the corporate governance framework and keeps on evolving to raise the standards of independence. While, it may take some time before institutional wisdom takes deeper roots in the governance fabric, the regulators across the jurisdictions are emphasizing on various parameters that determine the independence of directors and necessary to balance the interest of all stakeholders in corporate democracy.

The effectiveness of the institution of independent directors can be improved to a great extent if independent directors are made aware of the issues, challenges, responsibilities, statutory duties, liabilities and expectations associated with their position. Keeping this in mind, the Institute of Company Secretaries of India (ICSI) has introduced a comprehensive Guidance Note on Independent Directors in the year 2020.

Subsequent to the release of the Guidance Note on Independent Directors certain provisions of the Companies (Amendment) Act, 2020 were notified by the Ministry of Corporate Affairs and major amendments were introduced by SEBI in the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 to further strengthen the institution of independent directors. These recent amendments have significantly evolved the legal framework pertaining to Independent Directors, which essentially lead to revision of the Guidance Note on Independent Directors with an objective to provide updated guidance on the subject to all stakeholders.

This revised edition of the Guidance Note on Independent Directors besides covering the issues and challenges, also includes updated statutory and regulatory provisions, code of conduct and compliances pertaining to independent directors. In addition, the Guidance Note also provides considered views on various aspects of the subject to facilitate easy understanding and compliance of law both in letter and spirit.

I place on record my sincere thanks to all the members of Secretarial Standards Committee (SSC) and Expert Group on Secretarial Standards, for their valuable contribution in finalising this revised edition of the Guidance Note on

Independent Directors, under the leadership of CS B. Narasimhan, Chairman-SSC and CS Satwinder Singh. My special thanks to CS Manikantha AGS (Group Convener) for his immense contribution during this exercise.

I also commend the dedicated efforts put in by CS Rakesh Kumar, Assistant Director under the guidance of CS Saurabh Jain, Joint Director in bringing out this revised edition of the Guidance Note on Independent Directors under the stewardship of CS Asish Mohan, Secretary, ICSI.

I am sure that this revised edition of the Guidance Note on Independent Directors will be immensely useful for all stakeholders especially the independent directors and will be of practical value to those entrusted with the compliance of provisions pertaining to independent directors.

I request my professional colleagues to ensure compliance of legal provisions on the subject and promote good corporate governance in the light of this Guidance Note.

Improvement is a continuous process and equally applicable to this Guidance Note. I would personally be grateful to the readers for offering their suggestions/ comments for further advancement of this Guidance Note.

Place: Bengaluru
Date: 06.01.2022

CS Nagendra D. Rao
President
The Institute of Company Secretaries of India

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PREFACE

The very basis of the institution of independent directors is to ensure board independence, protect the company from any opportunistic indiscretion that could be committed by the promoters and the management and promoting investor protection through good corporate governance, integrity and accountability. In a three layered corporate structure, the Board which includes independent directors, act as a bridge between the management and stakeholders. The presence of independent directors in the boardroom to a large extent is considered as an assurance in terms of protection of interest of stakeholders especially minority shareholders; balancing the conflicting interest of the stakeholders; moderate and arbitrate in the interest of the company as a whole, in situations of conflict between management and shareholders' interest.

Given the altering dynamics of the India Inc., not only has the designation of the independent directors elevated immensely, the responsibilities attached have expanded greatly. The Institution of independent directors is still evolving in India and it may take some more time before institutional wisdom takes deeper roots. The effectiveness of the institution of independent directors can be improved to a great extent if independent directors are made more aware of the issues, challenges, responsibilities, statutory duties and liabilities involved with the position of independent directors.

In this backdrop, the Institute of Company Secretaries of India (ICSI) is pleased to introduce a comprehensive Guidance Note on Independent Directors, which besides covering the issues and challenges, also includes statutory and regulatory provisions, code of conduct and compliances pertaining to independent directors.

I place on record my sincere thanks to CS Satwinder Singh, Chairman-Secretarial Standards Board (SSB), CS Sudhakar Saraswatula, Vice-Chairman SSB and all eminent members of the SSB for their efforts and contribution made in the preparation and finalisation of this Guidance Note.

I commend the dedicated efforts put in by CS Rakesh Kumar, Assistant Director under the guidance of CS Banu Dandona, Joint Director in bringing out this Guidance Note under the stewardship of CS Asish Mohan, Secretary, ICSI.

I am confident that this Guidance Note will be immensely useful for all readers and those intending to take up the role of independent directors as well as the professionals guiding them.

I urge upon the Corporates as well as all my professional colleagues to facilitate independent directors in promoting good corporate governance in the light of this Guidance Note. Improvement is a continuous process and therefore, suggestions of the readers to improve this Guidance Note are most welcome.

CS Ashish Garg

Place: New Delhi
Date: 4th October, 2020

President
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ON
INDEPENDENT DIRECTORS

INTRODUCTION

The Board of Directors of a company play a key role in providing direction to the management in the areas of strategy and governance and also in ensuring that the company conducts its business in the best interests of all its stakeholders. The presence of independent directors on the boards of public companies is the sine quo non for a strong governance system. In view thereof, the statutes provide for a board structure which has an optimum blend of both independent and non-independent directors for listed companies and for large unlisted companies.

The corporate form of business has multifarious stakeholders *viz.*, shareholders, creditors, banks/financial institutions, vendors, customers, the Government, employees, community and environment. The functioning of the ecosystem hinges on how well the interests of these stakeholders are integrated and sub-served. Conceptually, the institution of independent directors is designed to ensure that they play a pivotal role in enhancing and maintaining highest standards of corporate governance. In a three layered corporate structure, the Board which includes independent directors, acts as a bridge between the management and stakeholders. The presence of independent directors in the boardroom to a large extent is considered an assurance in terms of protection of interest of stakeholders especially minority shareholders; balancing the conflicting interest of the stakeholders; moderate and arbitrate in the interest of the company as a whole, in situations of conflict between management and shareholders' interest.

It is important to examine following excerpts from the report of the Expert Committee on Company Law constituted under the chairmanship of Dr. J J Irani, which emphasizes on the role of independent directors in corporate structure:

> *"8.1 The Committee is of the view that given the responsibility of the Board to balance various interests, the presence of Independent directors on the Board of a Company would improve corporate governance. This is particularly important for public companies or companies with a significant public interest. While directors representing specific interests would be confined to the perspective dictated by such interests, independent directors would be able to bring an element of*

objectivity to Board process in the general interests of the company and thereby to the benefit of minority interests and smaller shareholders.

Independence, therefore, is not to be viewed merely as independence from Promoter Interests but from the point of view of vulnerable stakeholders who cannot otherwise get their voice heard. Law should, therefore, recognize the principle of independent directors and spell out their role, qualifications and liability. However requirement of presence of independent directors may vary depending on the size and type of company. There cannot be a single prescription to suit all companies…."

The institution of independent directors is still evolving in India and it may take some more time before institutional wisdom takes deeper roots. The effectiveness of the institution of independent directors can be improved to a great extent if independent directors are made more aware of the issues, challenges, responsibilities, statutory duties and liabilities involved with the position of independent directors. Hence, this Guidance Note, besides covering the issues and challenges, also covers statutory and regulatory provisions, code of conduct and compliances pertaining to independent directors.

SCOPE

This Guidance Note covers the relevant provisions of the following:

- Companies Act, 2013 read with the Rules made thereunder;
- Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015;
- Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015;
- Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;
- Secretarial Standards (SS-1 & SS-2) specified by the Institute of Company Secretaries of India and approved as such by the Central Government under section 118(10) of the Companies Act, 2013.

This Guidance Note is prepared on the basis of the above stated laws and regulations as amended from time to time. If due to subsequent changes, any part of the Guidance Note becomes inconsistent with any of the applicable laws, rules and regulations, the applicable laws, rules and regulations shall prevail.

In addition to the requirements stated in this Guidance Note, some sector specific

Regulations/Guidelines may require additional compliances by companies operating in specific sectors such as Public Sector Undertakings (PSUs), Banking and Insurance Companies, Non-Banking Financial Companies, Housing Finance Companies etc. Hence, such companies should ensure compliance of applicable sector specific Regulations/ Guidelines.

DEFINITIONS

The following terms are used in this Guidance Note with the meanings specified:

"Act" means the Companies Act, 2013 (Act No. 18 of 2013) or any previous enactment thereof, or any statutory modification thereto or re-enactment thereof and includes any Rules and Regulations framed thereunder.

"Board of Directors" or "Board", in relation to a company, means the collective body of the Directors of the company.

"Committee" means a committee constituted by the Board under the Act or the Listing Regulations.

"Listed Company"[1&2] means a company which has any of its securities listed on any recognised stock exchange.

Provided that such class of companies, which have listed or intend to list such class of securities, as may be prescribed in consultation with the Securities and Exchange Board of India, shall not be considered as listed companies.

"Listing Regulations" means the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, including any amendments thereto.

"PIT Regulations" means the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, including any amendment thereto.

"High Value Debt Listed Company" means an entity which has listed its non-convertible debt securities and has an outstanding value of listed non-convertible debt securities of rupees five hundred crore and above.

"Takeover Regulations" means the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, including any amendment thereto.

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1. Note: Entity other than company incorporated under the Act, whose securities are listed, would be regulated by the Listing Regulations but provisions of the Act would not be applicable to it. This Guidance Note should be read by those entities accordingly.

2. Note: Compliances arising out of the Listing Regulations with respect to independent directors shall apply to only those entities whose equity is listed or to those entities which are high value debt listed entities.

"SR equity shares" means the equity shares of an issuer having superior voting rights compared to all other equity shares issued by that issuer.

Words and expressions used and not defined herein shall have the same meaning respectively assigned to them under the Act, the Listing Regulations and the Secretarial Standards, as may be applicable.

GUIDANCE NOTE

1. EVOLUTION OF CONCEPT OF INDEPENDENT DIRECTORS IN INDIA

Corporate Governance models in India, while being unique in themselves, also borrow from models adopted by the US and UK; which were influenced by recommendations of Cadbury Committee and several other Committees and by the Sarbanes-Oxley Act.

In the year 1996, the Confederation of Indian Industry (CII) formed a task force. The objective was to develop and promote a code for Corporate Governance to be adopted and followed by Indian companies. The CII Task Force recommended a "Desirable Corporate Governance: A Code" in 1998 which has extensively debated the issue of independent directors.

In the year, 1999, the Securities and Exchange Board of India (SEBI) set up a committee under the chairmanship of Shri Kumar Mangalam Birla to promote and raise standards of corporate governance in India. The recommendations put forward by the Kumar Mangalam Birla Committee led to the addition of "Clause 49 on Corporate Governance" in the listing agreement in the year 2000. Its applicability was to listed companies satisfying the prescribed thresholds.

In the year 2002, the Government appointed the Naresh Chandra Committee, which, among other recommendations in line with international best practices, recommended that the extant definition of independent director be made more precise.

Another major development took place in the year 2002, when a committee was formed by SEBI under the chairmanship of Shri N R Narayana Murthy for reviewing the implementation of corporate governance code by listed companies. The committee recommended revisions in Clause 49, *inter-alia*, to include the revised definition of 'independent director'.

In the year 2008, SEBI further amended the listing agreement whereby the minimum age for independent directors was prescribed as 21 years. [*Reference SEBI Circular SEBI/CFD/DIL/CG/1/2008/08/04 dated April 08, 2008*]

Consequent upon the enactment of the Act, SEBI amended the corporate governance norms including aligning the definition of the term 'independent director' for listed companies in India.

While the term 'independent director' has been in use since the introduction of Clause 49 in the listing agreement, the concept of independent directors was first proposed in the company legislation through the Companies Bills, 2009 and 2011 which were finally enacted in the form of the Companies Act, 2013. The Act and the relevant Rules made thereunder contain extensive provisions dealing with independent directors. Schedule IV has been prescribed under the Act which contains the "code for independent directors".

On 2nd September 2015, SEBI notified the Listing Regulations effective from 1st December 2015. The Listing Regulations use the similar definition of independent director as used in section 149 (6) of the Act. However, it lays down certain additional parameters such as minimum age of 21 years for appointment as independent director.

With the objective to specify limits with respect to pecuniary relationship of a director for eligibility to be appointed as an Independent Director and to specify the scope of restriction on pecuniary relationship entered into by a relative, the Companies (Amendment) Act, 2017 amended the definition of independent director.

In 2017, the SEBI Committee on Corporate Governance was constituted under the Chairmanship of Shri Uday Kotak. The scope of the committee, *inter-alia,* included 'ensuring independence in spirit of independent directors and their active participation in functioning of a company'. Most of the recommendations were accepted by SEBI and accordingly, the Listing Regulations were amended in May 2018.

Amendments introduced by the SEBI (LODR) (Third Amendment) Regulations, 2021 notified on 3rd August, 2021 provide for a more rigorous regime in relation to the criteria for determining the independence of independent directors and other aspects of governance pertaining to independent directors.

The comparative table highlighting the provisions with regard to independent directors in terms of the Act and Listing Regulations is placed as *Annexure-I.*

2. INDEPENDENT DIRECTORS: ISSUES, CHALLENGES AND EXPECTATIONS

2.1 Issues and Challenges – Industry Perspective

The institution of independent directors continues to face various issues and challenges. Some of the issues and challenges are universal in character while some are endemic to the Indian scenario. The pertinent issues, which need attention and must be addressed, are listed below:

(i) *Ownership character of the Indian corporate:* One of the major challenges to the institution of independent directors is the ownership character of Indian corporate which, if not unique to India, is certainly very different from most developed jurisdictions. Most of the Indian companies are predominantly owned and controlled by promoters. Many independent directors might be familiar with promoter(s) or from a known group / circle. Fully realising and appreciating that independence is a state of mind and largely a personal trait, still the familiarity between promoters and independent directors may impact their independence.

(ii) *Availability:* Finding an independent director with requisite experience and knowledge, who is unknown to promoter(s) is a challenge. The challenge is not only to appoint a capable person but also to retain him with the company due to increased demand for quality independent directors. There is a need to increase the 'supply side' of independent directors, to match the 'demand side'.

(iii) *Knowledge of operations:* Executive directors are involved in day to day affairs of a company and have functional expertise with in-depth knowledge about its operations. On the other hand, independent directors do not have to necessarily possess such detailed knowledge about the operational aspects of the company at the time of their appointment. The first challenge is to familiarise independent directors with the operations of the company to bridge the knowledge gap and to facilitate effective discussions and decision making by the Board. Once familiar, it is equally important for independent directors to get updated knowledge on the latest developments and technologies which impact the business of the company.

A person who has knowledge of the business of the company and who possesses and adheres to strong virtues of independence would be able to uphold the spirit of independence bearing in mind the interests of all the stakeholders.

(iv) *Ability to look beyond:* The challenge for independent directors is to develop their ability to look beyond, what is presented by the management. They must identify the danger signals and also plan for future taking into account recent developments, competition and numerous factors impacting the business. Independent directors should raise their questions without any fear or favour on the proposals placed for consideration of the Board, their impact on the company and its stakeholders and seek additional information, wherever considered necessary. Independent directors are expected to give objective

inputs and advice drawing from their repertoire of varied experience and knowledge.

(v) *Liability:* Legally, as the non-executive directors, independent directors are not involved in day to day management of a company, they can be held liable only in respect of such acts of omission or commission by a company which have occurred with their express/ implied or tacit consent, knowledge and connivance or where they had not acted diligently.

However, there have been cases where a few independent directors have been drawn into the vortex of legal battles relating to liability for mismanagement or failure. While such situations may arise in any profession or with any person, still there is a need to protect independent directors from such unwarranted legal disputes, as without such protection, competent persons may shy away from taking up the responsibilities.

To address this issue, the Ministry of Corporate Affairs (MCA) vide general circular dated 2nd March, 2020 has issued certain clarifications and directives on prosecution initiated against independent directors and other non-executive directors, relevant excerpts of which are as under:

(a) Section 149 (12) of the Act is a non obstante clause which provides that notwithstanding anything contained in the Act, the liability of an independent director (ID) or a non-executive director (NED) not being promoter or key managerial personnel would be 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.

(b) In view of the express provisions of section 149(12) of the Act, IDs and NEDs (non-promoter and non-KMP), should not be implicated in any criminal or civil proceedings under the Act, unless the above mentioned criteria is met.

(c) All instances of filing of information/records with the registry, maintenance of statutory registers or minutes of the meetings, or compliance with the orders issued by the statutory authorities, including the NCLT under the Act are not the responsibility of the IDs or NEDs, unless any specific requirement is provided in the Act or in such orders, as the case may be.

(d) At the time of serving notices to the company, during inquiry, inspection, investigation, or adjudication proceedings, necessary documents may be sought so as to ascertain the involvement of the concerned officers of the company. In case, lapses are attributable to the decisions taken by the Board or its Committees, all care must be taken to ensure that civil or criminal proceedings are not initiated unnecessarily against the IDs or NEDs, unless sufficient evidence exists to the contrary.

(e) In case of any doubts, with regard to the liability of any IDs or NEDs, for any proceeding to be initiated by the Registrar of Companies (RoCs), guidance may be sought from the MCA. Consequently any such proceedings must be initiated after receiving due sanction from the MCA.

The MCA has issued the above circular to all its Regional Directors, Registrars of Companies and Official Liquidators with respect to prosecution proceedings. The said circular articulates the protection to independent directors and other non-executive directors from unnecessary prosecution, unless sufficient evidence exists to the contrary.

(vi) *Balancing of Interest:* The primary role of independent directors is to ensure that the decisions taken by the Board are in the interest of all stakeholders. Independent directors need to ensure that they do not have any conflict of interest with the decision taken by the Board. From industry perspective, balancing between efforts, obligations and remuneration of independent directors remains a challenge.

2.2 Issues and Challenges – Regulatory Perspective

The very basis of the institution of independent directors is to ensure board independence, protect the company from any opportunistic indiscretions that could be committed by the promoters and the management, and promoting investor protection through good corporate governance, integrity and accountability. Further, the regulator expects that the mindset of persons being appointed as an independent director(s) must be to act without fear or favor and if in their capacity as an independent director, they feel that the company is not acting in the interest of the stakeholders, they must question such actions and ensure that their views are recorded in the minutes.

However, the independence of independent directors is one of the questions which remains at the forefront and especially when some regulatory action is taken for the

wrongs committed by the corporate entity. The questions raised include the manner of selection of the independent directors, their conduct, role and responsibilities and even the reasons for their exits from the company, if any.

The Kotak Committee in its report dated 5th October, 2017, noted that independent directors are in a unique position, not being a part of the executive management but having overall insight into the functioning of the listed company and their resignation (prior to expiry of their term) may be occasioned by reasons that need wider disclosure (including material negative developments or governance concerns). Also, such resignations can be construed as a worrisome sign for external stakeholders, in order to provide greater clarity and reassurance to the stakeholder community, it is considered a good practice for companies to provide full disclosure on the reasons for resignation by an independent director.

Pursuant to the recommendations of the Kotak Committee, the amended Listing Regulations provide that in case of resignation of an independent director of a listed company, the following disclosures shall be made to the stock exchanges within seven days from the date of resignation:

(i) Detailed reasons for the resignation of independent directors as given by the said director shall be disclosed by the listed companies to the stock exchanges.

(ii) The independent director shall, along with the detailed reasons, also provide a confirmation that there are no other material reasons for his resignation other than those provided.

(iii) The confirmation as provided by the independent director above shall also be disclosed by the listed companies to the stock exchanges along with the detailed reasons as specified in sub- clause (i) above.

Amendments introduced by the SEBI (LODR) (Third Amendment) Regulations, 2021 notified on 3rd August, 2021 and effective from 1st January, 2022 have made it mandatory for the company to attach the letter of resignation with the intimation of resignation given to stock exchanges, which is expected to provide the detailed reasons for the resignation.

Along with the letter of resignation, the company should also provide the details of listed companies with which the outgoing independent director is associated indicating the category of directorship and committee memberships.

This will bring in greater degree of transparency in the matter of informing the public about the reasons for the resignation by independent directors.

It is imperative to create a conducive environment for the functioning of independent directors and to harness their skills for creating a better corporate India.

2.3 Stakeholders Expectations from Independent Directors

A corporate entity has many stakeholders. Independent directors without owing allegiance to any constituency of stakeholders are expected to work in the best interest of company, thus taking care of the interest of all stakeholders.

Stakeholders' expectations

(i) *Investors/Shareholders:* Independent directors are expected to be independent of the management and act as trustees of shareholders, although it is fair to state that this trait applies to all the directors. This implies that they should actively participate in Board/Committee meetings, seek answers to questions that cross their minds, evaluate proposals from the perspective of the minority shareholders, review current information flow and suggest necessary changes wherever required.

(ii) *Regulators*: Regulators expect that independent directors must institutionalise compliance with applicable laws/regulations and ensure timely and complete disclosures by the company. Any non-compliance must be discussed and handled effectively to ensure that the same is not repeated. In addition, Regulators also expect independent directors to blow the whistle against any issue which may adversely affect the interest of the company and its stakeholders. In case there are some governance issues, the same should be raised in Board meetings and if required, communicated to the Regulators.

(iii) *Board of Directors/ Promoters:* The Board expects that independent directors should add value during the deliberations at meetings of the Board/ Committees and act objectively in evaluation of various proposals placed before the Board/Committees, as the case may be. They must especially look into the matters which do not impinge on the rights of the minority shareholders, and are in the overall interests of all stakeholders. Independent directors are also expected to play a key role if the Board is acrimonious, or act as mediators in case of sparring promoters, so that overall interests of the company and its stakeholders remain intact. Independent directors are also expected to play an active role in the Board evaluation process and provide constructive feedback in the overall functioning of the Board.

(iv) *Banks and Financial Institutions*: Banks and financial institutions are one of the major stakeholders of companies as they have invested public money

in companies. These institutions expect that the independent directors shall work in a manner which ensures that their investment remains safe with the expected return thereon.

(v) *Employees*: Employees expect that independent directors should ensure that they are treated as stakeholders in the decision making process. No organisation can prosper if human resources are not utilized properly and given due importance. Independent directors should ensure fair treatment to the employees and that their remuneration and benefits including statutory dues are paid on time. Further, the Audit Committee which comprises majority of the independent directors (atleast[1] two-thirds in case of listed companies) is charged with the responsibility of overseeing the whistle blower mechanism in a company. While this mechanism is available to all stakeholders, it is predominantly used by the employees of the company, for reporting of processes and transactions which are in the nature of fraud or misappropriation. Employees should feel assured about the genuine reporting of whistle blower complaints without any victimization. Hence, independent directors should ensure that such mechanism aptly provides for access to the chairperson of the Audit Committee.

Section 177(9) of the Act read with Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides for establishment of Vigil Mechanism as under:

(1) Every listed company and the companies belonging to the following class or classes shall establish a vigil mechanism for their directors and employees to report their genuine concerns or grievances-

a. the companies which accept deposits from the public;

b. the companies which have borrowed money from banks and public financial institutions in excess of fifty crore rupees.

(2) The companies which are required to constitute an audit committee shall oversee the vigil mechanism through the committee and if any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the others on the committee would deal with the matter on hand.

(3) In case of other companies, the Board of Directors shall nominate a

1. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022

director to play the role of audit committee for the purpose of the vigil mechanism to whom other directors and employees may report their concerns.

(4) The vigil mechanism shall provide for adequate safeguards against victimisation of employees and directors who avail of the mechanism and also provide for direct access to the chairperson of the audit committee or the director nominated to play the role of audit committee, as the case may be, in exceptional cases.

(5) In case of repeated frivolous complaints being filed by a director or an employee, the audit committee or the director nominated to play the role of audit committee may take suitable action against the concerned director or employee including reprimand.

It may be noted that while section 177(9) of the Act mandates to establish a vigil mechanism for directors and employees to report genuine concerns, in case of a listed company, such mechanism is available to all stakeholders.

Regulation 4(2)(d)(iv) of Listing Regulations provides that the listed company shall devise an effective vigil mechanism/whistle blower policy enabling stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices.

Further, the Regulation 22 of the Listing Regulations provides that the listed company shall formulate a vigil mechanism/ whistle blower policy for directors and employees to report genuine concerns and such mechanism shall provide for adequate safeguards against victimization of director(s) or employee(s) or any other person who avail the mechanism and also provide for direct access to the chairperson of the audit committee in appropriate or exceptional cases.

(vi) *Society*: The society as a stakeholder, to whom ultimately all resources belong to, expects independent directors to ensure that the company conducts its business responsibly and sustainably while deploying the monies in the societal activities in the best manner and pervades to the larger section of the society. Independent directors are expected to ensure that the performance of the company on principles enshrined under the Business Responsibility Reporting / Business Responsibility and Sustainability Reporting (wherever applicable) and the Corporate Social Responsibility (CSR) obligations are followed both in letter and spirit.

(vii) *Auditors*: Independent directors as audit committee members have to make recommendations to the Board for the appointment, retention, termination, remuneration/compensation, and terms of appointment of Statutory Auditors, Internal Auditors and Secretarial Auditors. An independent director is also expected to use his diligence to review, discuss and provide inputs on the company's internal controls and the integrity of the company's audited financial statements. One-to-one meetings with auditors by independent directors of the audit committee will provide a platform for the auditors to raise critical concerns which are vital for the financial health of the company.

(viii) *Customers/Clients*: Every transaction in a company should be fair and transparent to its stakeholders. A company having good corporate governance and an effective Board will be better equipped to deliver quality product/services to their customers/clients. Strong decision making skills at the board level upholds ethical conduct of the company ensuring value addition to customers and business partners. More the independent representations on highest governing body of the company, more will be the confidence of customers.

(ix) *Vendors*: The Board having experienced and well qualified independent directors can ensure compliance of the value chain partners in turn contributing for their overall growth and better reputation.

To conclude, the independent directors should act in the company's best interests by using their skills, knowledge and resources available with the company towards maximization of stakeholder's value and well-being.

2.4 Expectations vs. Delivery Gap Matrix

As it happens in all cases involving human beings, performance of independent directors varies from individual to individual and at times there are cases which reveal that some of the independent directors did not discharge their responsibilities seriously and failed in their duties. While, the Act and Listing Regulations demand more active participation by independent directors in Board and Committee meetings, the gap between expectations and delivery arises mainly out of two issues *viz.*, capability and real independence. True independence is a function of behaviour, which is expected to bring objectiveness to deliberations at Board / Committee meetings and in overall decision making. The quality can only improve with competence.

2.5 Independence – a State of Mind or a Legal Determination

The term 'independent' before the word 'director' is not just a nomenclature, it is more than that. The essence lies in the role of such person on the Board of a company and the humongous responsibilities it carries towards stakeholders.

Commonly dissent and confrontation are perceived to be signs of independence. Nothing can be farther from the truth than this erroneous belief. Independence must be of the thought process and it is not necessary to demonstrate the same by opposition. Maturity at all levels is required to appreciate the role of independent directors.

2.6 Factors affecting Independence

The law has laid down the criteria of independence in section 149(6) of the Act and Regulation 16(1)(b) of the Listing Regulations. It deems that any infirmity in the same will affect the independence of a director.

There are many factors that might affect the independence of a director such as his relations with promoters, other directors on the Board, pecuniary relationships, the length of his tenure with the company etc.

2.7 Lead Independent Director

There are several countries like Singapore, Australia and UK which have adopted the concept of lead independent directors in their jurisdictions. Internationally, it is considered a good practice to designate an independent director as a lead independent director. However, both the Act and the Listing Regulations are silent on the position or designation of a lead independent director.

SEBI's Kotak Committee on corporate governance, in its report while acknowledging that independent directors have equal fiduciary responsibility as other directors on the board, was of the view that their role is more defined and distinct and needs better coordination amongst them to improve effectiveness. In this, it was felt that the appointment of a lead independent director may facilitate better engagement of, and by, the independent directors. There was a role specified for lead independent director in the Kotak Committee Report, but this recommendation was not accepted by SEBI. However, some companies in India are still following this practice to designate one of their independent directors as the senior or lead independent director on a voluntary basis.

A lead independent director may be assigned the following roles:

- To preside over the meetings of independent directors;

- To ensure that there is an adequate and timely flow of information to independent directors;
- To liaise between the chairman, executive directors, management and independent directors;
- To preside over meetings of the Board and shareholders when the chairman is not present or where he is an interested party;
- To ensure Board effectiveness in order to maintain high-quality governance and functioning of the Board;
- To perform such other role as may be assigned.

2.8 Attendance of an Independent Director

In case of listed companies, there is a legal requirement for an independent director to attend the Board meetings and certain committee meetings to constitute a valid quorum, corresponding legal requirement does not exist for an independent director in unlisted companies to attend minimum number of Board meetings. This indicates that in such companies an independent director may avoid vacation of office as a director as per section 167 of the Act if he attends only one Board meeting in the last twelve months. However, such action will not be justified from the governance perspective as he will not be able to perform the duties expected of him.

3. INDEPENDENT DIRECTORS AND LEGAL REQUIREMENTS

3.1 Who can be an independent director

3.1.1 As per the Companies Act, 2013

Section 2(47) of the Act defines that 'independent director' means an independent director referred to in sub-section (6) of section 149 of the Act.

Section 149(6) of the Act defines the term 'Independent Director' as under:

An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director:

(a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

(b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company ,

(ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;

(c) who has or had no pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent of his total income or such amount as may be prescribed, 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.

(d) none of whose relatives –

(i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year:

Provided that the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or two per cent of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed;

(ii) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year;

(iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; or

Rule 5(2) of Companies (Appointment and Qualifications of Directors) Rules, 2014 provides that none of the relatives of an independent director, for the purposes of sub-clauses (ii) and (iii) of clause (d) of sub-section (6) of section 149, (i) shall be indebted to the company, its holding, subsidiary or associate company or their promoters, or directors; or (ii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for an amount of fifty lakhs rupees, at any time during the two immediately preceding financial years or during the current financial year.

(iv) has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to two per cent or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii);

(e) who, neither himself nor any of his relatives –

(i) 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;

Provided that in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding three financial years.

(ii) 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) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

(B) 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;

(iii) holds together with his relatives two per cent or more of the total voting power of the company; or

(iv) 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; or

(f) who possesses such other qualifications as may be prescribed.

3.1.2 As per the Listing Regulations

According to Regulation 16(1)(b) of the Listing Regulations, "independent director" means a non-executive director, other than a nominee director of the listed entity:

(i) who, in the opinion of the board of directors, is a person of integrity and possesses relevant expertise and experience;

(ii) who is or was not a promoter of the listed entity or its holding, subsidiary or associate company or member of the promoter group of the listed entity;

(iii) who is not related to promoters or directors in the listed entity, its holding, subsidiary or associate company;

(iv) who, apart from receiving director's remuneration, has or had no material pecuniary relationship with the listed entity, its holding, subsidiary or associate company, or their promoters, or directors, during the three[1] immediately preceding financial years or during the current financial year;

(v) none of whose relatives

[2][A. is holding securities of or interest in the listed entity, its holding, subsidiary or associate company during the three immediately preceding financial years or during the current financial year of face value in excess of fifty lakh rupees or two percent of the paid-up capital of the listed entity, its holding, subsidiary or associate company, respectively, or such higher sum as may be specified;

B. is indebted to the listed entity, its holding, subsidiary or associate company or their promoters or directors, in excess of such amount as may be specified during the three immediately preceding financial years or during the current financial year;

C. has given a guarantee or provided any security in connection with the indebtedness of any third person to the listed entity, its holding, subsidiary or associate company or their promoters or directors,

1. Substituted for the word "two" by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022

2. Substituted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations 2021, w.e.f. 1.1.2022, for the following wordings:

"has or had pecuniary relationship or transaction with the listed entity, 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 from time to time, whichever is lower, during the two immediately preceding financial years or during the current financial year."

for such amount as may be specified during the three immediately preceding financial years or during the current financial year; or

D. has any other pecuniary transaction or relationship with the listed entity, its holding, subsidiary or associate company amounting to two percent or more of its gross turnover or total income:

Provided that the pecuniary relationship or transaction with the listed entity, its holding, subsidiary or associate company or their promoters, or directors in relation to points (A) to (D) above shall not exceed two percent of its gross turnover or total income or fifty lakh rupees or such higher amount as may be specified from time to time, whichever is lower.]

(vi) who, neither himself[/herself][1], nor whose relative(s) –

(A) holds or has held the position of a key managerial personnel or is or has been an employee of the listed entity or its holding, subsidiary or associate company [or any company belonging to the promoter group of the listed entity,][2] in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;

[Provided that in case of a relative, who is an employee other than key managerial personnel, the restriction under this clause shall not apply for his / her employment.][3]

(B) 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 –

(1) a firm of auditors or company secretaries in practice or cost auditors of the listed entity or its holding, subsidiary or associate company; or

(2) any legal or a consulting firm that has or had any transaction with the listed entity, its holding, subsidiary or associate company amounting to ten per cent or more of the gross turnover of such firm;

1. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022.

2. Inserted *ibid*

3. Inserted *ibid*

(C) holds together with his relatives two per cent or more of the total voting power of the listed entity; or

(D) 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 or corpus from the listed entity, 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 listed entity;

(E) is a material supplier, service provider or customer or a lessor or lessee of the listed entity;

(vii) who is not less than 21 years of age.

(viii) who is not a non-independent director of another company on the board of which any non-independent director of the listed entity is an independent director:

Explanation- In case of a 'high value debt listed entity':

(a) which is a body corporate, mandated to constitute its board of directors in a specific manner in accordance with the law under which it is established, the non-executive directors on its board shall be treated as independent directors;

(b) which is a Trust, mandated to constitute its 'board of trustees' in accordance with the law under which it is established, the non-employee trustees on its board shall be treated as independent directors.

Listing Regulations restricts 'Board interlocks' arising due to common non-independent directors on the boards of listed companies (i.e., a non-independent director of a company on the board of which any non-independent director of the listed company is an independent director, cannot be an independent director on the board of the listed company). For instance, if Mr. X is an executive director on a listed company A and is also an independent director on company B, then no non-independent director of company B can be appointed as an independent director on the board of company A.

Material Transactions

It is worthwhile to mention following excerpts from report of the Expert Committee on Company Law constituted under the chairmanship of Dr. J J Irani, which emphasized on defining the material pecuniary relationship as under:

"11.1 The term material pecuniary relationship should also be clearly defined for the purpose of determining whether the director is independent or not. The concept of "Materiality' is relevant from the recipient's point of view and not from that of the company.

11.2 The term 'material' needs to be defined in terms of percentage. In view of the Committee, 10% or more of recipient's consolidated gross revenue / receipts for the preceding year should form a material condition affecting independence.

11.3 For determining materiality of pecuniary relationship, transactions with an entity in which the director or his relatives hold more than 2% shareholding, should also be considered.

11.4 An independent director should make a self-declaration in format prescribed to the Board that he satisfies the legal conditions for being an independent director. Such declaration should be given at the time of appointment of the independent director and at the time of change in status.

11.5 Board should disclose in the Director's Report that independent directors have given self-declaration and that also in the judgment of the Board they are independent. The Board should also disclose the basis for determination that a particular relationship is not material."

It may be noted that section 149(6)(c) of the Act reads as under:

"(c) who has or had no pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent. of his total income or such amount as may be prescribed, 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;"

While the Listing Regulations uses the word "material pecuniary relationship", the Act clearly articulates the limit of pecuniary relationship with independent directors. Hence, it can be construed that any pecuniary relationship beyond the threshold prescribed under the Act would be considered material for the purpose of determining the criteria of independence.

Compliance of Listing Regulations by High Value Debt Listed Companies

SEBI vide notification dated 7th September, 2021 has inserted a new sub-regulation (1A) to regulation 15 under Chapter IV which deals with obligations of a listed company which has listed non-convertible debt securities.

The new sub-regulation (1A) provides as under:

(i) Provisions of regulation 15 to regulation 27 of Chapter IV of Listing Regulations shall apply to a listed company which has listed its non-convertible debt securities and has an outstanding value of listed non-convertible debt securities of Rupees Five Hundred Crore and above;

(ii) In case a company that has listed its non-convertible debt securities triggers the specified threshold of Rupees Five Hundred Crore during the course of the year, it shall ensure compliance with these provisions within six months from the date of such trigger;

(iii) These provisions shall be applicable to a 'high value debt listed company' on a 'comply or explain' basis until March 31, 2023 and on a mandatory basis thereafter.

Explanation:

(1) The companies referred in sub-regulation (1A) of regulation 15 are referred to as 'high value debt listed companies' for the purpose of this chapter.

(2) The 'high value debt listed companies' on the date of notification of this amendment would be determined on the basis of value of principal outstanding of listed debt securities as on March 31, 2021.

(3) 'Comply or explain' for the purpose of the second proviso to sub-regulation (1A) of regulation 15 shall mean that the company shall endeavour to comply with the provisions and achieve full compliance by March 31, 2023. In case the company is not able to achieve full compliance with the provisions, till such time, it shall explain the reasons for such non-compliance/ partial compliance and the steps initiated to achieve full compliance in the quarterly compliance report filed under clause (a), sub-regulation (2) of regulation 27 of these regulations.

(4) (a) In case of a 'high value debt listed entity' that is a Real Estate Investment Trust (REIT), the Board of the Manager of the Real Estate Investment Trust (REIT), shall comply with regulation 15 to regulation 27 of these regulations related to corporate governance;

(b) In case of a 'high value debt listed entity' that is an Infrastructure Investment Trust (InvIT), the Board of the Investment Manager of the Infrastructure Investment Trust (InvIT), shall comply with regulation 15 to regulation 27 of these regulations related to corporate governance.

Extracts from interpretive letter dated 15th October, 2018 issued under the SEBI (Informal Guidance) Scheme, 2003 in the matter of Sundaram Finance Ltd.

Facts of the case:

a. Ms. Shobhana Ramachandhran, an independent director of Sundaram Finance Ltd., is a non-independent director on the board of India Motor Parts & Accessories Limited, a listed company, on whose board there is an independent director (Mr. S Ravindran), who is a non-independent director of Sundaram Finance Ltd.

b. The aforesaid situation is covered under Regulation 16(1)(b)(viii) of Listing Regulations which was introduced by SEBI vide notification dated 9th May, 2018 made effective from 1st October, 2018.

c. It is interpreted that the aforesaid amendment does not apply to the existing independent directors (IDs) who have been appointed by shareholders under section 149 of the Companies Act, 2013 who continue to be on the Board of the listed company, and whose term will expire as per the tenor approved by the shareholders.

Query:

Sundaram Finance Ltd. have sought informal guidance on whether the above interpretation is correct and that they need to apply the requirements of Regulation 16(1)(b)(viii) of Listing Regulations only for new appointments/ re-appointments of directors.

Guidance from SEBI:

(i) SEBI has, *inter alia*, revised the definition of the independent directors by inserting a new clause (viii) in the Regulation 16(1)(b) vide the SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018 ("Amendment Regulations 2018").

(ii) The aforesaid Amendment Regulations were notified on 9th May, 2018. The said amendment has come into effect on October 01, 2018. Hence, all listed companies were given time till October 01, 2018 to comply with the said clause (viii) of Regulation 16(1)(b) of the said Amendment Regulations.

(iii) Thus, Regulation 16(1)(b)(viii) of Listing Regulations would apply both to existing directors and to new appointments/ re- appointments of directors made with effect from October 1, 2018.

3.2 Qualifications of Independent Director

Both the Act and the Listing Regulations stipulate general qualifications of independent directors. However, a company may require some specific qualifications, like domain knowledge of sector in which company operates, etc.

Rule 5 of Companies (Appointment and Qualification of Directors) Rules, 2014 prescribes the following qualifications of an independent director:

(1) An independent director shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business.

(2) None of the relatives of an independent director, for the purposes of sub-clauses (ii) and (iii) of clause (d) of sub-section (6) of section 149, –

(i) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors; or

(ii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company,

for an amount of fifty lakhs rupees, at any time during the two immediately preceding financial years or during the current financial year.

MCA vide General Circular No. 1/22/2013-CL-V dated 09.06.2014 has issued the following clarifications with respect to '**Pecuniary Relationship**' of an independent director:

- In case, a company carries out transactions in the ordinary course of business on an arm's length price with an independent director, such independent director would not be said to have 'pecuniary relationship' with the company.
- In case of independent directors, 'Pecuniary Relationship' does not include receipt of remuneration by way of sitting fees, reimbursement of expenses for participation in the Board and other meetings and remuneration in the form of commission.

Who can be an independent director	Who cannot be considered as an independent director
A person of integrity who possesses relevant expertise and experience	Who is Managing Director, Nominee Director, Whole time Director of the company
Who is or was not a promoter of the company or its holding, subsidiary or associate company*.	Who is related to promoters or directors in the company its holding, subsidiary or associate company*
Who neither himself nor any of his relatives have pecuniary relationship/transaction with the Company, its holding, subsidiary or associate company* as prescribed under the Act / Listing Regulations.	Who has or had pecuniary relationship with the company, its holding, subsidiary or associate company* as prescribed under the Act/Listing Regulations.
Who, neither himself nor any of his relatives holds position of KMP or is or has been employee of the company or its holding, subsidiary or associate company* as prescribed under the Act/ Listing Regulations.	Who, either himself or any of his relatives who is or has been an employee or proprietor or a partner of Audit firm of the company or its holding, subsidiary or associate company* or any legal firm/consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company as prescribed under the Act/Listing Regulations.
Who, neither himself nor any of his relatives 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;	Who, either himself or together with his relatives, holds two per cent or more of the total voting power of the company.

Who possess such other qualification as may be prescribed.	Who, either himself or any of his relatives who is or has been an employee of the company or its holding, subsidiary or associate company* as prescribed under the Act and Listing Regulations.
Who fulfill all other criteria prescribed for an independent director under the Act / Listing Regulations.	Non-compliance of any criteria prescribed for an independent director under the Act/ Listing Regulations.

*Note: Section 2(6) of the Act defines the term associate company as under:

"Associate company", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

Issue: Whether the spouse of Secretarial Auditor or Statutory Auditors of the company, be appointed as an independent director in the company?

View: According to section 149(6)(e)(ii) of the Act, an independent director in relation to a company, means one who neither himself nor any of his relatives 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.

Hence such a person whose spouse is the secretarial auditor/statutory auditor of the company cannot be appointed as an independent director in that company.

Issue: Can a friend of a director be considered as independent?

View: Law does not prohibit the appointment of a friend of a director of the company as an independent director if he fulfils all the legal requirements.

Issue: Can a Spouse of an independent director be appointed as an independent director?

View: No, a Spouse of an independent director cannot be appointed as an independent director. Section 149(6)(b)(ii) provides that an independent director in relation to a company means one who is not related to promoters or directors in the company, its holding, subsidiary or associate company.

Can a Nominee Director be considered as an independent director?

As per section 149(6) of the Act and Regulation 16(1)(b) of the Listing Regulations the nominee director is not an independent director. This is because of the fact that the nominee directors represent the interests of specific stakeholders.

Extracts from SEBI Adjudication Order dated 20th December, 2019 in the matter of Kausambi Vanijya Ltd.

The condition stipulated for an independent director is that he should be a non-executive director who *inter alia* should not be related to promoters and should not have pecuniary relationship with the company or its promoters.

In this case, the status of an individual who was an independent director since some time had been changed to that of a promoter (when he got associated with one promoter), while he also continued to be an independent director of company, which is contrary to the essence and objective of the corporate governance provisions of the listing agreement. Hence, it was violation of the provisions of section 21 of Securities Contracts (Regulation) Act, 1956 read with clause 49 of the listing agreement.

3.3 Disqualifications for appointment as Independent Director

Independent directors being the directors of a company attract general disqualifications as applicable to any other director of the company. Apart from the fulfillment of criteria of independence as discussed above, a person intended to be an independent director should also not be disqualified under section 164 of the Act, which deals with disqualifications for appointment as a director.

Section 164 of the Act provides that a person shall not be eligible for appointment as a director of a company, if –

(a) he is of unsound mind and stands so declared by a competent court;

(b) he is an undischarged insolvent;

(c) he has applied to be adjudicated as an insolvent and his application is pending;

(d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof 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:

Provided that if a person has been convicted of any offence and sentenced

in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;

(e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

(f) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;

(g) 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

(h) he has not complied with sub-section (3) of section 152.

(i) he has not complied with the provisions of sub-section (1) of section 165.

The disqualifications referred to in (d), (e) and (g) hereinabove shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification.

Further, no person who is or has been a director of a company which –

a. has not filed financial statements or annual returns for any continuous period of three financial years; or

b. has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur any disqualification for a period of six months from the date of his appointment.

Rule 14 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 prescribes that every director shall inform to the company concerned about his disqualification under section 164(2), if any, in Form DIR-8 (Intimation by Director) before he is appointed or re-appointed. In other words, all companies, prior to appointing / re-appointing a person as an Independent director, should take confirmation from such person that he is not disqualified to be appointed as a director.

A private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified hereinabove.

3.4 Number of Independent Directors on Board

Section 149 (4) of the Act, requires every listed public company to have at least one-third of the total number of directors as independent directors. Any fraction contained in such one-third number shall be rounded off as one.

It may be noted that section 149(4) of the Act shall not apply to a company licensed under section 8 of the Act, and an unlisted public company which is licensed to operate by the RBI or the SEBI or the IRDAI from the International Financial Services Centre located in an approved multi services Special Economic Zone set-up under the Special Economic Zones (SEZ) Act, 2005 read with SEZ Rules, 2006.

In terms of Rule 4(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class or classes of companies should have at least two independent directors –

(i) Public companies having paid up share capital of Rs.10 crore or more; or

(ii) Public companies having turnover of Rs.100 crore or more; or

(iii) Public companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding Rs.50 crore.

Where a company ceases to fulfill any of the three conditions laid down above for three consecutive years, it shall not be required to appoint independent directors until such time as it meets any of such conditions. [Third proviso to Rule 4(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014]

Further, Rule 4(2) of the Companies (Appointment and Qualification of Directors) Rules, 2014 exempted the following classes of unlisted public companies from the application of sub-rule (1), namely:-

(a) a joint venture;

(b) a wholly owned subsidiary; and

(c) a dormant company as defined under section 455 of the Act.

A company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law. [Fourth proviso to Rule 4(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014]

Regulation 17 of the Listing Regulations mandates a higher number of independent directors, for listed companies as below:

1. The Board of Directors shall have an optimum combination of executive and non-executive directors with at least one-woman director and not less than fifty per cent of the Board of Directors shall comprise of non-executive directors.

   Provided that the Board of Directors of the top 500 listed companies shall have at least one independent woman director by April 1, 2019 and the Board of Directors of the top 1000 listed companies shall have at least one independent woman director by April 1, 2020.

   Explanation: The top 500 and 1000 companies shall be determined on the basis of market capitalisation, as at the end of the immediate previous financial year.

2. Where the chairman of the Board of Directors is a non-executive director, at least one-third of the Board of Directors shall comprise of independent directors and where the listed company does not have a regular non-executive chairman, at least half of the Board of Directors shall comprise of independent directors:

   Provided that where the regular non-executive chairman is a promoter of the listed company or is related to any promoter or person occupying management positions at the level of Board of Directors or at one level below the Board of Directors, at least half of the Board of Directors of the listed company shall consist of independent directors.

   Explanation.- For the purpose of this clause, the expression "related to any promoter" shall have the following meaning:

   (i) if the promoter is a listed company, its directors other than the independent directors, its employees or its nominees shall be deemed to be related to it;

   (ii) if the promoter is an unlisted company, its directors, its employees or its nominees shall be deemed to be related to it.

3. The Board of Directors of the top 1000 listed companies (with effect from April 1, 2019) and the top 2000 listed companies (with effect from April 1, 2020) shall comprise of not less than six directors.

   Explanation: The top 1000 and 2000 companies shall be determined on

the basis of market capitalisation as at the end of the immediate previous financial year.

4. Where the listed company has outstanding SR equity shares, at least half of the Board of Directors shall comprise of independent directors.

Regulation 18 (1) of the Listing Regulations requires every listed company to constitute a qualified and independent audit committee with a minimum of three directors as members; it also requires at least[1] 2/3rd of the members of audit committee to be independent directors. Further, in case of a listed company having outstanding SR equity shares, the audit committee shall only comprise of independent directors.

Accordingly, in case a company is required to appoint higher number of independent directors due to composition of its audit committee, the company must appoint such higher number of independent directors. [First proviso to Rule 4(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014]

Illustration: As per section 177(2) of the Act, the audit committee shall consist of a minimum of three directors with independent directors forming a majority. ABC Ltd., an unlisted company is having 6 directors in its audit committee, then 4 directors out of 6 must be independent directors (4 is forming majority). Although in terms of the Companies (Appointment and Qualification) Rules, 2014 the company is required to have at least 2 independent directors, but in the case of ABC Ltd. the limit of 2 will increase to 4 as the company is required to appoint a higher number of independent directors due to composition of its audit committee.

Appointment of independent director on unlisted material subsidiary company

As per Regulation 24(1) of the Listing Regulations, at least one independent director on the Board of Directors of the listed company shall be a director on the Board of Directors of an unlisted material subsidiary, whether incorporated in India or not.

Explanation- For the purposes of this provision, notwithstanding anything to the contrary contained in Regulation 16, the term "material subsidiary" shall mean a subsidiary, whose income or net worth exceeds twenty percent of the consolidated income or net worth respectively, of the listed company and its subsidiaries in the immediately preceding accounting year.

It follows from the above that the need to appoint an independent director on the Board of the subsidiary shall arise only if the subsidiary is a material subsidiary under Regulation 24(1) and not under Regulation 16.

1. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022

3.5 Limit on Number of Directorships

As per the provisions of section 165(1) of the Act, the maximum number of directorships shall be as under:

(i) Maximum directorships in aggregate (including alternate directorships) is twenty companies;

(ii) Maximum directorship in public companies is 10 companies. This includes directorship in private companies that are either holding or subsidiary company of a public company.

In case of companies registered under section 8 of the Act, section 165(1) of the Act shall not apply.

For reckoning the limit of public companies in which a person can be appointed as a director, directorship in private companies that are either holding or subsidiary company of a public company shall be included. For reckoning the limit of directorships of 20 companies, the directorship in a dormant company shall not be included.

The members of a company may, however by passing a special resolution specify any lesser number of companies in which a director of the company may act as a director.

Regulation 17A of the Listing Regulations has also laid down restriction on number of directorships as under:

The directors of listed companies shall comply with the following conditions with respect to the maximum number of directorships, including any alternate directorships that can be held by them at any point of time -

(1) A person shall not be a director in more than eight listed companies with effect from April 1, 2019 and in not more than seven listed companies with effect from April 1, 2020:

Provided that a person shall not serve as an independent director in more than seven listed companies.

(2) Notwithstanding the above, any person who is serving as a whole time director / managing director in any listed company shall serve as an independent director in not more than three listed company.

Explanation to Regulation 17A of Listing Regulations, provides that for the purpose of this regulation, the count for the number of listed companies on which a person is a director/independent director shall be restricted only to those companies whose equity shares are listed on a stock exchange.

No person shall be appointed or continue as an alternate director for an independent director of a listed company with effect from 1st October, 2018. [Regulation 25 (1) of Listing Regulations].

3.6 Limit on Membership of Board Committees

Regulation 26 of the Listing Regulations prescribes the limit on membership of committees of the Board. A director shall not be a member in more than ten committees or act as a chairman of more than five committees across all listed companies in which he/she is a director which shall be determined as follows:

(a) the limit of the committees on which a director may serve in all public limited companies, whether listed or not, shall be included and all other companies including private limited companies, foreign companies, high value debt listed companies and companies under Section 8 of the Act shall be excluded;

(b) for the purpose of determination of limit, chairmanship and membership of the audit committee and the stakeholders' relationship committee (SRC) alone shall be considered.

It may be pertinent to note that while the limit of ten committee (audit committee and SRC committee) memberships is for all public limited companies, the limit of five chairmanships apply only to audit committee and SRC of listed companies.

4. APPOINTMENT OF INDEPENDENT DIRECTORS

The appointment process of independent directors is provided hereunder:

4.1 Triggering the applicability of Section 149

Section 149(4) of the Act prescribes that the appointment of independent directors shall be necessary for a listed company or a company as soon as it initiates the process of listing or a unlisted public company, upon crossing any one of the thresholds of paid up share capital or turnover or outstanding loans, debentures and deposits as specified in Rule 4(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014. As per the explanation to the said rule, these thresholds as existing on the last date of latest audited financial statements shall be taken into account for the purpose of triggering the applicability of section 149(4) of the Act.

As per section 149(5) of the Act, the transition period of one year for complying with the requirement of section 149(4) of the Act was available only for companies existing

on or before the commencement of the Act. Hence, any company which crosses these thresholds at any time after the commencement of the Act, needs to appoint independent directors immediately as there is no transition period now available.

4.2 Obtaining of Director Identification Number (DIN)

Section 152 of the Act mandates obtaining a DIN to become a director in a company. DIN is a unique identification number allotted to an individual who intends to be appointed as director of a company.

DIN serves to ascertain the identity of the person proposed to be appointed as a director of a company. DIN also helps correlating directorship held by an individual in multiple companies. Simultaneously, DIN helps the Government in creating a database of directors.

Any company proposing to appoint an individual as a director should ensure that he/she possesses valid DIN. In case where the proposed appointee does not have DIN, then suitable board resolution shall be passed indicating the intent to appoint such individual as director, so that he/she can apply for DIN.

4.3 Registration with Databank

Pursuant to section 150 of the Act read with rule 6 of the Companies (Appointment and Qualification of Directors) Rules, 2014 any individual proposed to be appointed as independent director should have his name registered in the data bank of independent directors maintained by the Indian Institute of Corporate Affairs (IICA), before his appointment as independent director. Any individual, including an individual not having DIN, may voluntarily apply for inclusion of his/her name in the said data bank.

4.4 Recommendations of Nomination and Remuneration Committee

Section 178(3) of the Act provides that the Nomination and Remuneration Committee (NRC) shall formulate the criteria for determining qualifications, positive attributes and independence of a director. In addition, the Listing Regulations provide that the NRC should recommend to the Board of Directors a policy relating to the remuneration of the directors, key managerial personnel and other employees.

The Listing Regulations (Part D of Schedule II read with Regulation 19(4)) cast a responsibility on the NRC to identify 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 of Directors their appointment and removal.

Part D of Schedule II to the Listing Regulations specifies that the role of the NRC shall include formulation of the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board of Directors a policy relating to the remuneration of the directors, key managerial personnel and other employees.

As per amendments made to the Listing Regulations which are effective from 1st January, 2022, for every appointment of an independent director, the NRC shall evaluate the balance of skills, knowledge and experience on the Board and on the basis of such evaluation, prepare a description of the role and capabilities required of an independent director. The person recommended to the Board for appointment as an independent director shall have the capabilities identified in such description. For the purpose of identifying suitable candidates, the NRC may:

a. use the services of external agencies, if required;

b. consider candidates from a wide range of backgrounds, having due regard to diversity; and

c. consider the time commitments of the candidates.

In addition, the NRC shall decide whether to extend or continue the term by way of re-appointment of the independent director, on the basis of their performance evaluation.

Extracts from SEBI WTM order dated 20th October, 2020 in the matter of Majestic Auto Ltd.

In this case, resolutions were proposed at EGM for appointment of 3 candidates as 3 independent directors. The SEBI Whole Time Member noted that the records of the company revealed that only the name of 1 candidate was proposed, discussed but was not recommended by the NRC as it noted that "proper due diligence and detailed discussion on the qualification/expertise of the proposed candidate was required, for making any recommendation". The records also showed that the said proposal was also considered by the Board of Directors (BoD) on the same day, but the BoD did not pass any resolution for the appointment nor expressed any opinion about his integrity and relevant expertise or experience. However the names of other two persons for the post of independent director (IDs) were never proposed and discussed either in the NRC or in the Board.

All the three persons proposed to be appointed as IDs by the requisitionist shareholders have submitted declarations that they meet the criteria for independence as per regulation 16 (1) (b) of the LODR Regulations. However, the above declarations cannot and shall not substitute the requirement of giving opinion by the BoD of the company regarding the integrity, expertise and experience of the persons coupled with justification for the appointment of those persons as IDs before the said proposal was placed before the shareholders in the EGM.

As regard to the invocation of section 160 of the Companies Act, is concerned, the perusal of the same shows that it *inter alia* gives right to a member/shareholder of a company to propose name of himself or of any third person for appointment as director. However, the said provision does not render the other provisions related to appointment of IDs provided under the Companies Act and the LODR Regulations inapplicable to the proposal of appointment of IDs by shareholders within the framework provided under section 160 of the Companies Act. In the extant matter, simply because, the shareholders have proposed certain names to be appointed as IDs by invoking section 160 of the Companies Act, that does not mean the other requirements contemplated under the Companies Act and the LODR Regulations can be ignored by the company especially being a listed company governed by specific provisions of the Companies Act and the LODR Regulations.

Rule 17(5) of the Companies (Management and Administration) Rules, 2014 reads as under:

> "(5) No explanatory statement as required under section 102 need be annexed to the notice of an extraordinary general meeting convened by the requistionists and the requistionists may disclose the reasons for the resolution(s) which they propose to move at the meeting."

In this respect, from the bare perusal of the said provision, it is noted that as per this Rule the exemption from annexing explanatory statement is available for the items listed under section 102 of the Companies Act which is a general provision whereas the issue at hand is that the company did not provide explanatory statement as mandated under proviso to section 152(5) of the Companies Act, which is a special provision.

Therefore, it raises serious doubts not only on the legal validity of such appointment but also on the fairness and independence essentially required to be followed by a listed company, when it comes to the appointment of directors, particularly in the appointment of IDs. This conduct of the CMD of the company in piloting such a legally untenable process of appointing IDs under the shelter of the section 160(1) of the Companies Act by shrewdly overlooking and ignoring all other statutory and regulatory provisions as the CMD of the company not only reflects very poorly on the governance standard of the company but also cast a serious aspersion on the fairness of the process adopted by the company.

4.5 Selection by the Board

According to paragraph IV of schedule IV to the Act, appointment process of independent directors shall be independent of the company management and while selecting such independent directors, the Board shall ensure that there is appropriate balance of skills, experience and knowledge in the Board, so as to enable the Board to discharge its functions and duties effectively.

The Board may select an independent director from the data bank maintained by any body, institute or association as notified by the Central Government or other independent sources as may be available to the Board. The responsibility of exercising due diligence before selecting a person from the data bank will be with the company making such appointment.

In case of re-appointment of independent director for a second term, the Board shall recommend the appointment based on the recommendation of the NRC and company shall pass a special resolution at the shareholders meeting or by way of a postal ballot.

As per regulation 25(2A) of Listing Regulations, with effect from 1st January, 2022 the appointment, re-appointment or removal of an independent director of a listed company, shall be subject to the approval of shareholders by way of a special resolution. Further, Regulation 17(1C) of Listing Regulations provides a window of three months or next general meeting, whichever is earlier, to take such approval.

Enforcement of SEBI orders regarding appointment of directors by the listed companies

SEBI has issued instructions to the Stock Exchanges vide its letter dated June 14, 2018 for enforcement of its orders debarring entities/individuals from accessing the capital markets and/or restraining persons from holding position of directors in any listed company.

SEBI has issued certain directions regarding enforcement and monitoring of appointment of restrained persons mentioned in SEBI orders. Accordingly, companies are required to ensure compliance with the following:

a. Listed companies and its NRC while considering a person for appointment as director, shall verify that the said person is not debarred from holding the office of director pursuant to any SEBI order.

b. The listed companies shall, while informing the Exchange through corporate announcements for appointment of director, specifically affirm that the director being appointed is not debarred from holding the office of director by virtue of any SEBI order or any other such authority. Non-inclusion of such fact will be regarded as inadequate submission and the same would be subject to action as deemed fit under Regulation 30 of the Listing Regulations.

c. In case an existing director is restrained from acting as a director by virtue of any SEBI order or any other such authority, the director shall voluntarily resign with immediate effect, failing which the listed company shall initiate the process of removal of such director in terms of relevant sections of the Companies Act, 2013, and inform the Exchange about the same.

Issue: Can an independent director be appointed for the first term as an additional director by the Board of Directors of a company?

View: Section 150(2) of the Act provides that "the appointment of independent director shall be approved by the company in general meeting as provided in sub-section (2) of section 152". Section 152(2) of the Act mandates that save as otherwise expressly provided in the Act, every director shall be appointed by the company in general meeting.

Section 161(1) of the Act confers on the Board of Directors of a company the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

On a holistic reading of sections 150(2), 152(2) and 161(1) of the Act, it is clear that the Act confers the power on the Board to appoint additional directors designated as independent directors subject to approval of the shareholders at the general meeting of the company.

Further schedule IV to the Act provides that "the appointment of independent director(s) of the company shall be approved at the meeting of the shareholders."

The requirement of the above sections read with schedule IV and section 149 (4) of the Act do not imply that there is a requirement of prior approval of shareholders for appointment of an independent director. Therefore, it can be said that an independent director can be appointed by the Board as an additional director and his appointment can be approved by the shareholders at the next annual general meeting, as required under section 161(1) and schedule IV to the Act, with effect from the date of the Board meeting. The period of five years shall be counted from the effective date of appointment as approved by the Board in its meeting. Hence, the period between the effective date of appointment of independent director by the Board and the date of approval by the shareholders shall be considered as part of the first term of the independent director.

Further as per second proviso to rule 4(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014, any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later. This further substantiates the above conclusion that appointment of independent directors can be made by the Board as additional director subject to approval of shareholders at the general meeting.

In case of listed companies, with effect from 1st January, 2022:

(i) the appointment, re-appointment or removal of an independent director shall be subject to the approval of shareholders by way of a special resolution. [Regulation 25(2A) of Listing Regulations]

(ii) Listed company shall ensure that approval of shareholders for appointment of a person on the Board of Directors is taken at the next general meeting or within a time period of three months from the date of appointment, whichever is earlier. [Regulation 17 (1C) of Listing Regulations]

Issue: Can an independent director be appointed as an additional director by the Board of Directors of a company for a second term once his first term is over?

View: In order to reply to the aforesaid, it is imperative to look into the provisions of section 149(10) of the Act which provides as under:

"an independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be **eligible for re-appointment on passing of a special resolution by the company**." (emphasis supplied)

Further section 149(11) of the Act provides as under:

"Notwithstanding anything contained in sub-section (10), no independent director shall hold office for more than **two consecutive terms**, but such independent director shall be eligible for appointment after the expiration of three years of ceasing to become an independent director" (emphasis supplied).

- The term "consecutive" has not been defined in the Act. However reference of the word "consecutive" can be drawn from Merriam Webster dictionary, which provides the meaning as following one after the other or successive. This effectively means both the terms have to follow each other.
- Similarly, in the Webster dictionary, the term "eligible" is referred to in the context a person or thing that is qualified or permitted to do or be something.
- The term "re-appointment" is also defined in the webster dictionary as "to name officially to a position for a second or subsequent time".
- While going through the aforesaid definitions as used in sections 149(10) and 149(11) of the Act, it becomes clear that an independent director is eligible to be re-appointed for a second term only on passing of special resolution by the shareholders and not before. Therefore, obtaining shareholders' consent prior to his re-appointment for a second term, in considered view, is a pre-requisite for the independent director to be eligible to serve on the Board of the company for a second term.
- If the shareholders' approval by special resolution for his re-appointment for second term is not taken as on the last date of the first term, then such independent director cannot be re-appointed by Board as an additional director for second term, as he does not possess the eligibility to get re-appointed for second term and hence, he ceases to be a director at the end of his first term.

Issue: Whether resolution by circulation is allowed for appointment of an independent director by the Board while appointing him for the first term?

View: There is no restriction on appointment of an independent director by way of a resolution by circulation, if he is to be appointed by the Board as an additional director. However, it must be ensured that Nomination and Remuneration Committee of the company has duly discussed and recommended the candidate, before circulation of Board resolution. Considering the above, as a good governance practice it is recommended that such appointment be approved at a duly convened meeting.

Issue: Can appointment of independent director be done to fill the casual vacancy created by resignation of any other independent director?

View: Whenever any existing independent director ceases to be a director of company either due to resignation, death or otherwise, in order to ensure the requisite Board composition, a new independent director should be appointed. The Board can appoint an individual either as an additional director under section 161(1) of the Act to hold office till the next annual general meeting of the company or he can be appointed as a director in the casual vacancy to fill the vacancy created in the office of independent director.

It may be noted that if a director is appointed by the Board to fill the casual vacancy (as mentioned above), then as per section 161(4) of the Act read with Annexure A to the Secretarial Standard on Meetings of the Board of Directors (SS-1), his appointment should be approved at a Board meeting and not through resolution by circulation. Such appointment should also be approved by the members in the immediate next general meeting.

Further, as per proviso to section 161(4) of the Act, such director shall hold office only up to the date up to which the director in whose place he is appointed would have held the office of independent director, if had not been vacated. Hence, the first term of such newly appointed independent director shall be for a term lesser than 5 years, which he would have otherwise got if he had been appointed as an additional director.

In case of listed companies, with effect from 1st January, 2022[1], an independent director who resigns or is removed from the Board of Directors shall be replaced by a new independent director at the earliest but not later than three months from the date of such vacancy. [Regulation 25(6) of Listing Regulations].

Where the listed company fulfils the requirement of independent directors in its Board of Directors without filling the vacancy created by such resignation or removal, the requirement of replacement by a new independent director shall not apply.

Issue: Whether end of first term of director without re-appointment for second term or end of the second term of an independent director terminates directorships of a director?

1. Provision applicable till 31.12.2021 as under:

"An independent director who resigns or is removed from the board of directors of the listed company shall be replaced by a new independent director at the earliest but not later than the immediate next meeting of the board of directors or three months from the date of such vacancy, whichever is later:"

View: Under section 149(10) of the Act, an independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for re-appointment on passing of a special resolution by the company based on the recommendation of the NRC and Board of Directors of the company and disclosure of such appointment shall be made in the Board's Report.

Since the term used is holding office for a term up to five consecutive years the independent director will cease to be a director on the expiry of his term of five years. Hence, the director will lose/ vacate his directorship also on the expiry of the first term or the second term as the case may be.

4.6 Consent to act as Director

As per section 152 (5) of the Act, a person appointed as a director shall not act as a director unless he gives his consent to hold the office as a director. The consent should be in writing in Form DIR-2. (Refer *Annexure-II*)

In case of Government companies, consent is not required where appointment of such director is made by the Central Government or State Government, as the case may be.

4.7 Disclosure of interest in other entities

In terms of section 184 of the Act, every director should inform the company about his interest in other entities. The director should submit a list of his relatives to the company. Further, these lists should be updated, as and when there is any change, so that the non-compliance with legal provisions can be avoided.

Mainly following disclosures should be provided by a proposed independent director at the time of his appointment or re-appointment:

- Form: MBP-1 (Notice of interest by director) (*Refer Annexure- III*)
- Form: DIR-8, Intimation by director of previous companies and declaration about his disqualification under section 164 of the Act. (*Refer Annexure-IV*)
- Declaration of Independence (*Refer Annexure-V*)

Other disclosures by directors as discussed later in this guidance notes are applicable to independent directors also. Hence such disclosures should also be made from time to time.

Issue: Whether the independent director who is proposed to be re-appointed should provide a fresh consent to hold the office as a director and disclosure of interest.

View: Under section 149(10) of the Act, an independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for re-appointment on passing of a special resolution by the company based on the recommendation of the NRC and Board of Directors of the company and disclosure of such appointment shall be made in the Board's Report.

Since the tenure of the director ends upon the conclusion of first term, any re-appointment should be treated as fresh appointment and all the compliances including receiving consent, disclosure of interest, etc., needs to be obtained.

4.8 Profile of an independent director

The profile of an independent director reflects not only his credentials but also depicts some important aspects which are necessary for being independent. The profile of an independent director proposed to be appointed should be attached to the notice in the form of explanatory statement to enable members to make appropriate decision. Further, the profile shall also be uploaded on the website of the company.

Pursuant to SEBI circular dated 9th September, 2015, in case of listed companies, the profile of director appointed should be filed with the stock exchanges as part of corporate disclosure.

4.9 Approval by the Shareholders

The appointment of an independent director requires approval of the shareholders in General Meeting. Such approval may be given either in annual general meeting or an extra ordinary general meeting or through a postal ballot.

The notice convening the meeting must be accompanied by an explanatory statement indicating the justification for choosing the appointee [section 150(2) of the Act]. Further, the explanatory statement should include a statement that in the opinion of the Board, the person proposed to be appointed as an independent director fulfils the conditions specified in the Act and the rules made thereunder and that the proposed director is independent of the management. [Proviso to section 152(5) read with schedule IV to the Act].

Section 160(1) of the Act provides that a person who is not a retiring director in terms of section 152 shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he, or some member intending to

propose him as a director, has, not less than fourteen days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director or, as the case may be, the intention of such member to propose him as a candidate for that office, along with the deposit of one lakh rupees or such higher amount as may be prescribed which shall be refunded to such person or, as the case may be, to the member, if the person proposed gets elected as a director or gets more than twenty-five per cent of total valid votes cast either on show of hands or on poll on such resolution.

However, requirement of deposit of amount shall not apply in case of appointment of an independent director or a director recommended by the NRC, if any, constituted under section 178(1) of the Act or a director recommended by the Board, in the case of a company not required to constitute NRC.

According to paragraph 1.2.5 of the Secretarial Standard on General Meetings (SS-2), in case of appointment of independent directors, the justification for choosing the candidates shall be disclosed and in case of re-appointment, performance evaluation report of such director or summary thereof shall be included in the explanatory statement.

Schedule IV to the Act also provides that, on the basis of the report of performance evaluation, it should be determined whether to extend or continue the term of appointment of the independent director. Performance evaluation of independent directors is important as their re-appointment would be recommended by the Board only when the evaluation is positive.

According to Regulation 36(3) of the Listing Regulations, in case of an appointment of a new director or re-appointment of a director the shareholders must be provided with the following information:

(a) a brief resume of the director;

(b) nature of expertise in specific functional areas;

(c) disclosure of relationships between directors *inter-se*;

(d) names of the listed companies in which the person also holds the directorship and the membership of committees of the Board and with effect from 1st January, 2022 list of listed companies from which the person has resigned in the past three years;

(e) shareholding of non-executive directors in the listed company, including shareholding as a beneficial owner; and

(f) With effect from 1st January, 2022, in case of independent directors, the skills and capabilities required for the role and the manner in which the proposed person meets such requirements should also be provided.

According to Regulation 17(1A) of the Listing Regulations, no listed company shall appoint a person or continue the directorship of any person as a non-executive director who has attained the age of seventy five years unless a special resolution is passed to that effect, in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such a person.

In terms of Regulation 17(1C) of the Listing Regulations, with effect from 1st January, 2022, Listed companies shall ensure that approval of shareholders for appointment of a person on the Board of Directors is taken at the next general meeting or within a time period of three months from the date of appointment, whichever is earlier.

It may be noted that in terms of Regulation 25(11) of the Listing Regulations, with effect from 1st January, 2022 no independent director, who resigns from a listed company, shall be appointed as an executive / whole time director on the Board of the listed company, its holding, subsidiary or associate company or on the Board of a company belonging to its promoter group, unless a period of one year has elapsed from the date of his resignation as an independent director.

4.10 Letter of Appointment

The appointment of independent directors should be formalised through a letter of appointment which shall set out:

i. the term of appointment, i.e., the tenure for which the independent director has been appointed;

ii. the expectation of the Board from the appointed director and committees of the Board in which the director is expected to serve and its tasks;

iii. the fiduciary duties and liabilities that come with such an appointment;

iv. the code of business ethics that the company expects its directors and employees to follow;

v. the list of actions that a director should not do while functioning as such in the company;

vi. company's code on PIT Regulations;

vii. the remuneration, periodic fees, reimbursements of expenses for

participating in the Board and other meetings and profit related commission, if any;

viii. provision for 'directors & officers' insurance, if any;

ix. training and familiarization programmes;

x. Board evaluation mechanism and expectation.

The terms and conditions of appointment of independent directors shall be open for inspection at the registered office of the company by any member during the business hours and are also required to be posted on the company's website. [Para IV(5)(6) of schedule IV to the Act].

Regulation 46(2) of the Listing Regulations also prescribes that the terms and conditions of appointment of an independent director should be disclosed under a separate section on the website of the company.

Specimen appointment letter for independent director is placed at *Annexure-VI.*

4.11 Directors and Officers insurance

Regulation 25(10) of the Listing Regulations provides that with effect from [1st January, 2022][1] the top [1000][2] listed companies by market capitalization calculated as on 31st March of the preceding financial year, shall undertake Directors and Officers insurance ('D & O insurance') for all their independent directors of such quantum and for such risks as may be determined by its Board of Directors.

Further Regulation 25(12) of the Listing Regulations provides that a 'high value debt listed company' shall undertake D & O insurance for all its independent directors for such sum assured and for such risks as may be determined by its Board of Directors.

D & O insurance provides liability cover for the directors / officers of the company to protect them from the legal liabilities / claims which may arise from the decisions and actions taken while performing their duties. Checklist with respect to D & O policy is placed at *Annexure-VII.*

4.12 Entry in Statutory Registers and Disclosures

After appointment of the independent director, entry in the statutory registers maintained under the Act, *viz.*, Register of Directors and Key Managerial Personnel &

1. Substituted for the word, numbers and symbol "October 1, 2018" by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022.

2. Substituted for the number "500" by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022.

their shareholdings prepared under section 170 of the Act and the Register mentioning particulars of company or companies or bodies corporate, firms or other association of individuals, in which any director has any concern or interest, as prepared under section 189 of the Act read with Rule 16 of the Companies (Meetings of Board and its Powers) Rules, 2014 in the format of MBP-4 Part A, should be made promptly.

In case of listed companies, the change of directors shall be disclosed to the stock exchanges within 24 hours of the appointment made by the Board, pursuant to Regulation 30 (6) of the Listing Regulations read with SEBI Circular No. CIR/CFD/CMD/4/2015 dated 9th September, 2015; and

Every company shall file e-form DIR -12 (Particulars of appointment of directors and the key managerial personnel and the changes among them) within 30 days of the appointment by the Board.

5. DATABANK OF INDEPENDENT DIRECTORS

In exercise of the powers conferred by section 150(1) of the Act, the Central Government has notified that the Indian Institute of Corporate Affairs ("the Institute") shall create and maintain a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, for the use of the company making the appointment of such directors.

The above data bank shall be maintained in accordance with Rule 6 of Companies (Appointment and Qualification of Directors) Rules, 2019 which read as under:

(1) Every individual (a) who has been appointed as an independent director in a company, as on 1st December 2019, shall within a period of thirteen months; or (b) who intends to get appointed as an independent director in a company after 1st December, 2019 shall before such appointment, apply online to the Institute for inclusion of his name in the data bank by making the payment of the relevant fee for a period of one year or five years or for his life-time, and from time to time take steps as specified in sub-rule (2), till he continues to hold the office of an independent director in any company:

Provided that any individual, including an individual not having DIN, may voluntarily apply to the Institute for inclusion of his name in the data bank.

(2) Every individual whose name has been so included in the data bank shall file an application for renewal for a further period of one year or five years or for his life-time, within a period of thirty days from the date of expiry of the period up to which the name of the individual was applied for inclusion in the data bank, failing which, the name of such individual shall stand removed from the data bank of the Institute:

Provided that no application for renewal shall be filed by an individual who has paid life-time fees for inclusion of his name in the data bank.

(3) Every independent director shall submit a declaration of compliance of sub-rule (1) and sub-rule (2) to the Board, each time he submits the declaration required under sub-section (7) of section 149 of the Act.

(4) Every individual whose name is so included in the data bank under sub-rule (1) shall pass an online proficiency self-assessment test conducted by the Institute within a period of two years from the date of inclusion of his name in the data bank, failing which, his name shall stand removed from the databank of the Institute:

Provided that an individual shall not be required to pass the online proficiency self-assessment test when he has served for a total period of not less than three years as on the date of inclusion of his name in the data bank:

(A) as a director or key managerial personnel, as on the date of inclusion of his name in the databank, in one or more of the following, namely:-

(a) listed public company; or

(b) unlisted public company having a paid-up share capital of rupees ten crore or more; or

(c) body corporate listed on any recognized stock exchange or in a country which is a member State of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member State is a member of the International Organization of Securities Commissions; or

(d) bodies corporate incorporated outside India having a paid-up share capital of US$ 2 million or more; or

(e) statutory corporations set up under an Act of Parliament or any State Legislature carrying on commercial activities; or

(B) in the pay scale of director or equivalent or above in any Ministry or Department, of the Central Government or any State Government, and having experience in handling,—

(i) the matters relating to commerce, corporate affairs, finance, industry or public enterprises; or

(ii) the affairs related to Government companies or statutory

corporations set up under an Act of Parliament or any State Act and carrying on commercial activities.

(C) in the pay scale of Chief General Manager or above in the Securities and Exchange Board or the Reserve Bank of India or the Insurance Regulatory and Exchange Board or the Reserve Bank of India or the Insurance Regulatory and Development Authority of India or the Pension Fund Regulatory and Development Authority and having experience in handling the matters relating to corporate laws or securities laws or economic laws:

Provided further that for the purpose of calculation of the period of three years referred to in the first proviso, any period during which an individual was acting as a director or as a key managerial personnel in two or more companies or bodies corporate or statutory corporations at the same time shall be counted only once.

Explanation: For the purposes of this rule,-

(a) the expression "institute" means the 'Indian Institute of Corporate Affairs at Manesar' notified under sub-section (1) of section 150 of the Companies Act, 2013 as the institute for the creation and maintenance of data bank of independent directors;

(b) an individual who has obtained a score of not less than fifty percent in aggregate in the online proficiency self-assessment test shall be deemed to have passed such test;

(c) there shall be no limit on the number of attempts an individual may take for passing the online proficiency self-assessment test.

Provided also that the following individuals, who are or have been, for at least ten years:

(A) an advocate of a court; or

(B) in practice as a chartered accountant; or

(C) in practice as a cost accountant; or

(D) in practice as a company secretary,

shall not be required to pass the online proficiency self-assessment test.

Rule 3 of Companies (Creation and Maintenance of databank of independent directors) Rules, 2019 provides as under:

(1) The institute shall create and maintain a databank of persons willing and eligible to be appointed as independent directors, and such databank shall be an online databank which shall be placed on the website of the institute.

(2) The data bank shall contain the following details in respect of each person included in the data bank to be eligible and willing to be appointed as independent director

(a) DIN (Director Identification Number), if applicable;

(b) Income Tax PAN;

(c) the name and surname in full;

(d) the father's name;

(e) the date of Birth;

(f) gender;

(g) the nationality;

(h) the occupation;

(i) full Address with PIN Code (present and permanent);

(j) phone number;

(k) e-mail id;

(l) the educational and professional qualifications;

(m) experience or expertise, if any;

(n) any pending criminal proceedings as specified in clause (d) of sub-section (1) of section 164;

(o) the list of limited liability partnerships in which he is or was a designated partner along with-

(i) the name of the limited liability partnership;

(ii) the nature of industry; and

(iii) the duration- with dates;

(p) the list of companies in which he is or was director along with-

(i) the name of the company;

(ii) the nature of industry;

(iii) the nature of directorship-executive or non-executive or managing director or independent director or nominee director; and

(iv) duration – with dates.

(3) The information available in the data bank shall be provided only to companies required to appoint independent director after paying a reasonable fees to the Institute.

(4) A person whose name is included in the data bank, may restrict his personal information to the Institute, to be disclosed in the data bank.

(5) Any individual whose name appears in the data bank, shall make changes in his particulars within thirty days of such change through web based framework made available by the Institute for this purpose.

(6) A disclaimer shall be conspicuously displayed on the website hosting the data bank that a company must carry out its own due diligence before appointment of any person as an independent director.

(7) The Institute, shall with the prior approval of the Central Government, fix a reasonable fee to be charged from:

(a) individuals for inclusion or renewal of their names in the data bank of independent directors; and

(b) companies for providing the information on independent directors available on the data bank.

(8) In case of delay on the part of an individual in applying to the institute for inclusion of his name in the data bank or in case of delay in filing an application for renewal thereof, the institute shall allow such inclusion or renewal, as the case may be, after charging a further fees of one thousand rupees on account of such delay.

Explanation:- For the purpose of this rule, the expression "persons willing and eligible to be appointed as independent director" shall include individuals already serving as independent directors on the Boards of companies.

Issue: If a known person is to be appointed as independent director, should his name be mentioned in databank?

View: Any individual who intends to get appointed as an independent director in a company shall before such appointment register his name with the databank of independent directors.

Annual report on the capacity building of Independent Directors

The institute shall within sixty days from the end of every financial year send an annual report to every individual whose name is included in the data bank and also to every company in which such individual is appointed as an independent director in format provided at *Annexure-VIII*.

6. OTHER PROVISIONS PERTAINING TO INDEPENDENT DIRECTORS

6.1 Remuneration of Independent Directors

The Act expressly disallows independent directors from being entitled to stock options and remuneration other than sitting fees for participation in the Board and other committee meetings. Profit related commission may be paid to them within the permissible limit as per section 197 of the Act, subject to approval of the shareholders. Further, the remuneration of directors should be in accordance with the policy formulated by the nomination and remuneration committee.

According to Regulation 17(6) of Listing Regulations, the Board of Directors shall recommend all fees or compensation, if any, paid to non-executive directors, including independent directors and shall require approval of shareholders in general meeting. However, the requirement of obtaining approval of shareholders in general meeting shall not apply to payment of sitting fees to non-executive directors, if made within the limits prescribed under the Act for payment of sitting fees without approval of the Central Government.

In addition, independent directors are entitled to get reimbursement of expenses incurred by them for the purpose of participation in the meetings. The expenses may relate to travelling, accommodation, etc. in connection with activities of the company.

Issue: Whether remuneration paid to non-executive directors including independent directors requires prior approval of audit committee?

View: All related party transactions require approval of the audit committee. In terms of section 188 of the Act read with rule 15 of the Companies (Meetings of Board and its Powers) Rules 2014, payment of remuneration to non-executive directors will not be considered as a related party transaction. Similar view is given under paragraph 6.1.2 of the Guidance Note on Related Party Transactions issued by the ICSI.

Accordingly, it can be construed that it is not mandatory to have prior approval of the audit committee.

As stated earlier in this Guidance Note, following clarification with respect to 'Pecuniary Relationship' of an independent director was issued by MCA vide circular dated 9th June, 2014:

- In case, a company carries out transactions in the ordinary course of business on an arm's length price with an independent director, such independent director would not be said to have 'pecuniary relationship' with the company.
- In case of independent directors, 'pecuniary relationship' does not include receipt of remuneration by way of sitting fees, reimbursement of expenses for participation in the Board and other meetings and remuneration in the form of commission.

Issue: Can sitting fees be paid for separate meeting of independent directors. What if an independent director demands sitting fee for such meeting?

View: A company may pay sitting fee to a director for attending meetings of the Board or committees thereof, such sum as may be decided by the Board of directors which shall not exceed one lakh rupees per meeting. Hence, the payment of sitting fees for such meeting would be at the discretion of the Board. It may be noted that section 197(5) of the Act allows payment of fees for such purposes as may be decided by the Board.

Issue: Can sitting fees be paid for attending Annual General Meeting (AGM)?

View: As per Section 197(1) of the Act, the remuneration payable to directors, who are neither managing directors nor whole-time directors, shall not exceed:

(a) one per cent of the net profits of the company, if there is a managing or whole-time director or manager;

(b) three per cent of the net profits in any other case.

As per Section 197(2) of the Act, the percentages aforesaid shall be exclusive of any fees payable to directors under sub-section (5).

As per Section 197(5) of the Act, a director may receive remuneration by way of fee for attending meetings of the Board or committee thereof or for any other purpose whatsoever as may be decided by the Board. There is however, a proviso which says that the amount of such fees shall not exceed the amount as prescribed in rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.This rule provides for limit of payment of sitting fees for Board and committee meetings only.

There is a view which has emerged that because of the words 'or for any other purpose whatsoever as may be decided by the Board', appear in section 197(5) of the Act, the fees payable are no longer only 'sitting fees', meaning fees paid to directors for attending Board and committee meetings. A company may pay fees for any other meetings as well, such as when a director is called upon to attend any special meeting or even attending general meetings, if the Board so decides and the articles of association of the company does not restrict such payment.

Issue: Can a company which is not making profits give remuneration other than sitting fees to independent directors?

View: As per the second proviso to section 197(1) of the Act, the remuneration payable to directors who are neither managing directors nor whole-time directors shall not exceed (A) one per cent of the net profits of the company, if there is a managing or whole-time director or manager; or (B) three per cent of the net profits in any other case.

Section 149(9) of the Act provides that Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198 of the Act, an independent director shall not be entitled to any stock option and may receive remuneration by way of fee provided under section 197(5) of the Act, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.

The Companies (Amendment) Act, 2020 has inserted the following proviso to section 149 (9) of the Act:–

"Provided that if a company has no profits or its profits are inadequate, an independent director may receive remuneration, exclusive of any fees payable under sub-section (5) of section 197, in accordance with the provisions of Schedule V to the Act.

Further, sub-section (3) to section 197 has also been amended whereby non-executive director including an independent director may be paid remuneration in accordance with Schedule V.

Hence, remuneration to non-executive directors and independent directors as permitted under the Act may be paid in accordance with the provisions of Schedule V.

6.2 Training of Independent Directors

One of the duties laid down in the code for independent directors (schedule IV to the

Act), provides that the independent directors shall undertake appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the company.

The listed company should familiarise the independent directors through various programmes, including the following:

(a) nature of the industry in which the company operates;

(b) business model of the company;

(c) roles, rights, responsibilities of independent directors; and

(d) any other relevant information.

The details of familiarization programmes imparted to independent directors should be disseminated on the company's website including the following details:-

(i) number of programmes attended by the independent directors (during the year and on a cumulative basis till date),

(ii) number of hours spent by the independent directors in such programmes (during the year and on cumulative basis till date), and

(iii) other relevant details.

According to Regulation 46(3)(b) of Listing Regulations, a listed company needs to update any change in the content of its website within two working days from the date of such change in content.

A model policy on familiarisation programme for independent directors is placed at *Annexure-IX*.

6.3 Self-declaration of independence

A statement/declaration by an independent director that he meets the criteria of independence is a good governance practice. Companies should obtain such a certificate at the time of appointment as well as annually. There is always a possibility that independent director could lose his independent status while holding his office. In such a situation the director must approach the Board and communicate his status. In turn, the company is expected to make adequate disclosures to the shareholders.

Section 149(7) of the Act requires every independent director to give a declaration that he meets the criteria of independence as required under section 149(6) of the Act at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change

in the circumstances which may affect his status as an independent director. Such self-declaration is not required in case of Government Companies, where:

(a) a Government company, which is not a listed company, in which not less than fifty-one per cent of paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;

(b) a subsidiary of a Government company, referred to in (a) above.

Regulation 25(8) of the Listing Regulations also requires similar declaration from independent directors.

The Board of Directors of the listed company shall take on record such declaration and confirmation submitted by the independent director after undertaking due assessment of the veracity of the same. The publicly available information and the previous records of such directors may be used to do the assessment.

6.4 Disclosure requirements pertaining to Independent Directors

6.4.1 Disclosures by Independent Directors

An independent director should make the following disclosures:

(a) Any change in the circumstances that may/have led to change in his independence status, whenever there is such change [Section 149(7) of the Act].

(b) Every independent director shall submit a declaration of compliance of Rule 6(1) and 6(2) of the Companies (Appointment and Qualifications of Directors) Rules, 2014, to the Board, each time he submits the declaration required under section 149(7) of the Act.

(c) Concern or interest which shall include the shareholding in any company or companies or bodies corporate, firms, or other association of individuals at first meeting of the Board in which he participates and then at the first Board meeting in each financial year. If there is any change in such concern/ interest, such change should be intimated to the Board in the immediate next Board meeting held after such change [section 184(1) of the Act]. In terms of section 189 of the Act, such changes in directorships in other companies is required to be disclosed within 30 days.

According to Regulation 26(6) of Listing Regulations, no employee including key managerial personnel or director or promoter of a listed company shall

enter into any agreement for himself/herself or on behalf of any other person, with any shareholder or any other third party with regard to compensation or profit sharing in connection with dealings in the securities of such listed company, unless prior approval for the same has been obtained from the Board of Directors as well as public shareholders by way of an ordinary resolution. Any such agreement, whether subsisting or expired, entered during the preceding three years from the date of coming into force of this sub-regulation, shall be disclosed to the stock exchanges for public dissemination.

(d) Concern or interest in contracts/arrangements entered/proposed to be entered into–

- with a body corporate in which such director or such director in association with any other director, holds more than 2% shareholding of that body corporate, or is a promoter, manager, chief executive officer of that body corporate; or
- with a firm or other entity in which, such director is a partner, owner or member, as the case may be.
- at the Board meeting at which such contract/arrangement is discussed. The director is also prohibited to participate in such meeting. If the concern or interest originates after the contract is entered, such concern/interest should be disclosed forthwith or at the immediate next meeting of the Board held after the director become interested [section 184(2) of the Act].
- It is mandatory for every director to inform the company about the committee positions he or she occupies in other companies, and notify changes as and when they take place [Regulation 26(2) of the Listing Regulations].
- Regulation 26(3) of Listing Regulations – affirm compliance with the code of conduct of board on an annual basis.
- In case of RBI regulated entities, an additional declaration and deed of covenant as required under Fit & Proper Criteria shall also be needed.
- List of relatives under the Act and the Listing Regulations.

6.4.2 Disclosures by Company

The law requires the following disclosures to be made/ information to be provided by the company in relation to independent directors:

a. Disclosures in Board's Report:

- a statement from the Board on declaration of independence given by the independent directors under section 149 of the Act [section 134(3)(d) of the Act].
- the composition of CSR committee, in which at least one director should be an independent director [section 135(2) of the Act].
- the composition of the audit committee with details of independent directors [section 177(8) of the Act].
- Policy relating to the remuneration for the directors including independent directors, key managerial personnel and other employees recommended by the NRC [section 178(3) of the Act].
- In respect of newly appointed independent director during the year, if any, the Board's Report for that financial year should give a statement regarding opinion of the Board with regard to integrity, expertise and experience (including the proficiency) of the independent directors appointed during the year. ["proficiency" means the proficiency of the independent director as ascertained from the online proficiency self-assessment test conducted by IICA]. [Rule 8(5)(iiia) of the Companies (Accounts) Rules, 2014]

b. The terms and conditions of the appointment of an independent director should be open for inspection at the registered office of the company by any member during normal business hours. Simultaneously, the terms and conditions should also be posted on the company's website [Schedule IV to the Act].

c. According to Schedule V to the Listing Regulations, the Report on Corporate Governance, which is a part of the Annual Report, should contain various details as to the Board as under :

(a) composition and category of directors (e.g., promoter, executive, non-executive, independent non-executive, nominee director - institution represented and whether as lender or as an equity investor);

(b) attendance of each director at the meeting of the Board of Directors and the last annual general meeting;

(c) number of other Boards of Directors or committees in which a director is a member or chairman, and with effect from the Annual Report for the year ended 31st March 2019, including separately the names of the listed companies where the person is a director and the category of directorship;

(d) number of meetings of the Board of Directors held and dates on which held;

(e) disclosure of relationships between directors *inter-se*;

(f) number of shares and convertible instruments held by the non-executive directors;

(g) web link where details of familiarisation programmes imparted to independent directors is disclosed;

(h) A chart or a matrix setting out the skills/expertise/competence of the Board of Directors specifying the following:

(i) With effect from the financial year ending March 31, 2019, the list of core skills/expertise/competencies identified by the Board of Directors as required in the context of its business(es) and sector(s) for it to function effectively and those actually available with the Board; and

(ii) With effect from the financial year ended March 31, 2020, the names of directors who have such skills / expertise / competence.

(i) confirmation that in the opinion of the Board, the independent directors fulfill the conditions specified in these regulations and are independent of the management.

(j) detailed reasons for the resignation of an independent director who resigns before the expiry of his/her tenure along with a confirmation by such director that there are no other material reasons other than those provided.

6.5 Separate meetings of Independent Directors

Paragraph VII of the code for independent directors (Schedule IV to the Act) requires conducting of at least one separate meeting of independent directors in a financial year without the presence of non-independent directors and members of the

management. All the independent directors of the company shall strive to be present at such meeting. Listing Regulations also contain similar provisions.

In the separate meeting, the independent directors shall:

(i) review the performance of non-independent directors and the Board as a whole;

(ii) review the performance of the chairman of the company, taking into account the views of executive directors and non-executive directors;

(iii) assess the quality, quantity and timeliness of flow of information between the company management and the Board that is necessary for the Board to effectively and reasonably perform their duties.

This is to clarify that the meeting of independent directors is not a meeting of the Board or of a committee of the Board. Therefore, provisions of Secretarial Standard on Meetings of the Board of Directors (SS-1) shall not be applicable to such meetings. However, a record of the proceedings of such meeting may be kept though there is no specific legal requirement to do so.

As per paragraph 2.3 of SS-1, the company secretary, wherever appointed, shall facilitate convening and holding of such meeting, if so desired by the independent directors.

In order to seek some clarification, opinion, views, etc., the independent directors may invite the company secretary or the managing director or any other directors/ officers of the company or any outside expert to attend such meeting or a part thereof. Items arising out of the separate meeting of the independent directors, if so decided by the independent directors, should not be passed by circulation and shall be placed before the Board at its meeting. [Annexure to SS-1]

The independent directors may meet more than once during a financial year as and when required.

Issue: Can meeting of independent directors be held through video conferencing (VC)? If independent directors meet through VC will that not be breaking confidentiality due to recordings available with the company?

View: Yes, meeting of independent directors may be held through video conferencing. The company should take appropriate measures to maintain the confidentiality of such meeting. No recording of such video conferencing is required.

Issue: Does the provisions of SS-1 apply on the meeting of independent directors and in what manner the company can demonstrate compliance with regard to such meetings?

View: A meeting of independent directors is not considered as a meeting of the committee of the Board and therefore the provisions of SS-1 are not applicable to such meeting(s). A record of separate meeting of independent directors may be maintained in the manner as may be advised by the independent directors. If the independent directors may advise so, the company secretary may provide requisite administrative support.

Issue: Should a summary note or the minutes of the meeting of independent directors be placed before the Board Meeting?

View: Summary of the outcome of the meeting of the independent directors or the minutes of such meeting may be maintained. It is not necessary to place the minutes of such meeting before the Board. The chairman should be briefed on the gist of the discussions. However, wherever the independent directors so decide, the relevant key points/ outcome/recommendations may be placed before the Board at its next meeting.

6.6 Performance Evaluation of independent directors

For a high performing Board, there is a need to align the organisational strategy and build relevant capabilities to become a truly effective Board. Understanding stakeholder pulse to guide and driving transformation and recognising the changing nature of risks and managing them effectively is imperative.

Two fundamental roles are of prime importance at the Board level. The supervisory role of the Board includes appointments, strategy, plans, overseeing risk, compliance, succession planning and other relevant areas. The stewardship role of the Board involves steering the issues revolving around ESG principles, talent management, culture of the organisation and other related matters.

Additionally, while decision making would be by majority, there has to be space in the board room for dissenting views. These roles would have to be balanced, if required, through constitution of duly empowered committees to focus on any specific areas (that is, committees other than those mandated by law).

Board effectiveness should be measured against key result areas that the Board sets for itself and the way to achieve those can be by way of an annual or other periodic calendar of activities whose relationship with periodic objectives (and the ultimate key result area) is clearly defined.

In recent years, various new skill sets have emerged such as digital technology and innovation as critical capabilities to complement the traditional requirements of finance, legal and industry experience.

While globally such disclosures are still gathering momentum, and listed Indian companies are mandated to make certain disclosures on skill/expertise/ competencies required by (and available with) the Board, it will also be important for the Boards to articulate on how this skill matrix will be used to further improve the performance of the company in terms of key result areas targeted by the company.

The Act mandates performance evaluation of the Board, Committees and Individual directors for prescribed classes of companies. The NRC shall lay down the evaluation criteria for performance evaluation of independent directors.

As per the provisions of section 134(3)(p) of the Act read with Rule 8(4) of the Companies (Accounts) Rules, 2014 the Board's Report of (a) every listed company and (b) every other public company having a paid up share capital of twenty five crore rupees or more calculated at the end of the preceding financial year, should include a statement indicating the manner in which formal annual evaluation of the performance of the Board, its committees and of individual directors has been made.

Paragraph VIII of the code for independent directors (schedule IV to the Act) provides that the performance evaluation of the independent directors shall be done by the entire Board of Directors, excluding the director being evaluated. The code further provides that the re-appointment of independent director shall be on the basis of report of performance evaluation.

The Listing Regulations also make it mandatory to conduct the performance evaluation of the independent directors. The evaluation of independent directors shall be done by the entire Board of Directors which shall include -

(a) performance of the directors; and

(b) fulfilment of the independence criteria as specified in these regulations and their independence from the management:

Provided that in the above evaluation, the directors who are subject to evaluation shall not participate.

The decision to extend/ continue the tenure of independent directors is made on the basis of such performance evaluation.

The requirement for such performance evaluation is annual under the Act, which is in line with international practices – the Higgs Committee recommended at least annual review; the UK Corporate Governance Code also stipulates annual performance

evaluation; the NYSE Corporate Governance Rules too mandate at least annual performance evaluation of the Board.

In addition, it is also necessary that an independent director participates in the performance evaluation of the functioning of the Board as a whole, committee, other directors and review the performance of the Board taking into account the views of the executive and non-executive directors. They are expected to play an active role in identifying the gaps, recommend to the chairperson actions to be taken on such gaps, as well as assess the results of such actions. Besides, playing an active role, they must also assess whether the performance evaluation is not a mere tick box exercise and ensure that a conducive environment exists where they can share their views freely and in an objective manner.

However, due care must be taken that any such evaluation mechanism does not become a platform for Board or Committees to become acrimonious, and the objective of the evaluation is not achieved.

6.7 Tenure of Independent Directors

An independent director can hold office for a term up to five consecutive years and thereafter he is eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's Report [section 149 (10) of the Act].

The expression "up to" suggests that a term is expected to be for five consecutive years, the Board may consider even a shorter term of say three consecutive years in which case this will constitute one term.

Further, section 149(11) of the Act restricts the appointment of independent director for up to two consecutive terms with each term not exceeding five consecutive years.

Ministry of Corporate Affairs vide its General Circular 14/ 2014 dated 9th June, 2014, has clarified that the appointment of an independent director for a term less than five years would be permissible. Appointment for any term (whether for five year or less) is to be treated as one term under section 149(10) of the Act. Further, such a person should have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years.

Such independent director shall be eligible for appointment after the expiration of three years of ceasing to become an independent director. During the said period of three years, he shall not be appointed in or be associated with the company in any other capacity, either directly or indirectly.

However for the purpose of section 149(10) & (11) of the Act, any tenure of an

independent director on the date of commencement of the Act shall not be counted as a term under those sub-sections. This means any tenure of independent director as on April 1, 2014 would not be counted as a term.

As per Regulation 25(2) of the Listing Regulations, the maximum tenure of independent directors shall be in accordance with the Companies Act, 2013 and rules made thereunder, in this regard, from time to time.

Further as per Regulation 25(2A) of the Listing Regulations, w.e.f. 1st January, 2022, the appointment, re-appointment or removal of an independent director of a listed company, shall be subject to the approval of shareholders by way of a special resolution.

Further, the provisions of section 149 (10) & (11) are not applicable to section 8 companies and an unlisted public company which is licensed to operate by the respective authorities from the International Financial Services Centre located in an approved multi services SEZ set-up under the SEZ Act, 2005. (MCA exemption notification dated 5th June, 2015 and 4th January, 2017)

6.8 Retirement by Rotation

As per section 149(13) of the Act, the independent directors would not be liable to retire by rotation.

Issue: Whether independent directors shall be included in the total number of directors for the purpose of sub-section (6) and (7) of section 152 of the Act?

View: Section 152(6) of the Act provides that unless the articles of association provides for retirement by rotation of all directors at every annual general meeting, at least two-thirds of the total number of directors of a public company shall be persons whose office is liable to retirement by rotation and sub-section (7) provides that one-third of such directors shall retire by rotation at each annual general meeting of the company after the first annual general meeting.

Pursuant to section 149 (13) of the Act, the provisions of sub-section (6) and (7) of Section 152 of the Act in respect of retirement of directors by rotation shall not be applicable to appointment of independent directors. Hence for the purpose of sub-sections (6) and (7) of Section 152 of the Act, independent directors shall not be included in the total number of directors liable to retire by rotation.

Issue: If the Board is comprised of only executive directors and independent directors where both of them are appointed for a fixed term and not liable to retire by rotation, then how can one comply with the requirements of section 152 of the Act pertaining to liable to retire by rotation.

View: Board composition has to be structured in a manner that it complies with section 152 of the Act and both executive and non-executive directors, excluding independent directors, may be made liable to retire by rotation.

6.9 Re-Appointment

The re-appointment of independent director after first term shall be made through a special resolution of the company, based on the performance evaluation report.

Section 164(2) of the Act provides no person who is or has been a director of a company which –

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Where a person is appointed as a director of a company which is in default as above, he shall not incur the disqualification for a period of six months from the date of his appointment.

Issue: If special resolution under section 149(10) is not passed before end of first term of Independent Director, whether he becomes ineligible for re-appointment?

View: On completion of tenure of first term, he will cease to act as an independent director, but remain eligible for re-appointment for second term subject to passing of special resolution as required under section 149 (10) of the Act.

Issue: Is it necessary to file e-form DIR-12 for re-appointment of an independent director for the second term immediately after the end of his first term, if shareholders have already approved his appointment for second term by passing special resolution before the end of his first term?

View: In case of re-appointment of independent director for second term, if it has been already approved by the shareholders before the expiry of the first term of five years by passing a special resolution under section 149(10), immediately at the end of first term, his second term as independent director will start. Hence, there is no gap after the end of the first term and before the commencement of the second term. The e-form DIR-12 is to be filed under section 170 of the Act to intimate the change in directorships in a company.

Hence in this case, it is not necessary to file e-Form DIR-12 as there is no change in designation as such at any time. Further technically, MCA system will not allow filing of e-form DIR-12 in this regard as the designation of the individual as an independent director of this company would have already been registered with MCA, and hence it will give an error mentioning the same. However, if there is a break for some time between his first term and second term and the independent director has vacated his position, then it will be necessary to file e-Form DIR-12.

6.10 Resignation or Removal of independent directors

The resignation or removal of an independent director shall be in the same manner as is provided in sections 168 and 169 of the Act. A director may resign from his office by giving notice in writing. The notice shall become effective from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later. The director who has resigned shall be liable even after his resignation for the offences/defaults, if any, occurred during his tenure.

A director may also withdraw the resignation before the effective date of resignation, i.e., either before the receipt of notice of resignation by the company or the date specified in the notice of resignation, whichever is later.

In case of resignation of an independent director of the listed company, the following disclosures shall be made to the stock exchanges within seven days from the date of resignation:

i. [The letter of resignation along with][1] detailed reasons for the resignation as given by the said director

ia. [2][Names of listed companies in which the resigning director holds

1. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022

2. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022

directorships, indicating the category of directorship and membership of board committees, if any.]

ii. The independent director shall, along with the detailed reasons, also provide a confirmation that there are no other material reasons for his resignation other than those provided.

iii. The confirmation as provided by the independent director above shall also be disclosed by the listed companies to the stock exchanges along with the [disclosures][1] as specified in sub-clause (i) [and (ii)][2] above.

In addition, the corporate governance report of a listed company shall disclose detailed reasons for the resignation of an independent director who resigns before the expiry of his/her tenure along with a confirmation by such director that there are no other material reasons other than those provided.

Also as per section 168(1) of the Act, the fact about the resignation of director also needs to be mentioned in the Board's report which shall be laid at the immediately following general meeting of the company.

A company may, by ordinary resolution, remove an independent director, before the expiry of the period of his office and after giving him a reasonable opportunity of being heard. However, an independent director re-appointed for a second term shall be removed by the company only by passing a special resolution and after giving him a reasonable opportunity of being heard. [section 169(1) of the Act]

Further as per Regulation 25(2A) of the Listing Regulations, with effect from 1st January, 2022 the appointment, re-appointment or removal of an independent director of a listed company, shall be subject to the approval of shareholders by way of a special resolution.

6.11 Vacation of Office of Director

(1) According to section 167 (1) of the Act, the office of a director shall become vacant in case–

(a) he incurs any of the disqualifications specified in section 164 of the Act;

Provided that where he incurs disqualification under sub-section (2)

1. Substituted for the word "detailed reasons" by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022

2. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021, w.e.f. 1.1.2022.

of section 164 of the Act, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.

(b) he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board;

(c) he acts in contravention of the provisions of section 184 of the Act relating to entering into contracts or arrangements in which he is directly or indirectly interested;

(d) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184 of the Act;

(e) he becomes disqualified by an order of a court or the Tribunal;

(f) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months:

Provided that the office shall not be vacated by the director in case of orders referred to in clauses (e) and (f)-

(i) for thirty days from the date of conviction or order of disqualification;

(ii) where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or

(iii) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of.

(g) he is removed in pursuance of the provisions of the Act;

(h) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

(2) If a person, functions as a director even when he knows that the office

of director held by him has become vacant on account of any of the disqualifications specified in sub-section (1), he shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

(3) Where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.

(4) A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified in sub-section (1).

Issue: If anytime during the year, independent director loses his independence, does he vacate to be a director of the company?

View: Independence is the basic condition/ premise based on which independent director has been appointed by the company. Hence, if he loses his independence on any of the grounds, and if he continues to be a director on the Board of the company, then it may be treated as a breach of trust of the approval given by the shareholders.

Therefore unless shareholders approve his continuation as a non-independent director, it is recommended that he should not continue to hold the office of director.

Issue: If an independent director does not register his name and take the membership of databank or if he is not able to pass the exam after registration on the databank, whether he requires to vacate as independent director?

View: Registration on the databank and passing of online proficiency self-assessment test within a period of two years of registration, unless exempted, is an eligibility criteria for director to continue as independent director. If the independent director does not comply with the provisions, then he will lose his independence.

Therefore, unless shareholders approve his continuation as a non-independent director, he should not continue to hold the office of director.

7. ROLE, DUTIES AND LIABILITIES OF INDEPENDENT DIRECTORS

An independent Board is essential for sound corporate governance and to ensure that there are no actual or perceived conflicts of interest in decisions taken by the Board.

7.1 Pivotal Role of Independent Directors

Independent directors play a pivotal role in maintaining a transparent working environment in the corporate regime. Independent directors bring a valuable outside perspective to the deliberations. They bring accountability and credibility to the board processes. While they need not take part in the company's day-to-day affairs or decision making, they should raise appropriate red flags at the right time to avoid the occurrence of any unwanted situations and their consequences.

Independent directors can bring an objective view to performance evaluation of Board and management. In addition, they can play an important role in areas where the interest of management, the company and shareholders may converge such as executive remuneration, succession planning, changes in corporate control, audit function etc.

To make institution of independent directors effective each one of the independent director must be committed to ethical practices and conduct himself as independent both in letter and spirit.

7.2 Calling of Board Meeting

Any director, including an independent director, of the company may, at any time, summon a Meeting of the Board unless otherwise provided in the Articles. The model articles under the Act states that a director may, and the manager or secretary on the requisition of a director shall, at any time, summon a meeting of the Board [Regulation 67(ii) of Table F of Schedule I to the Act]. Similar requirements are provided in Paragraph 1.1.1 of the Secretarial Standard on Meetings of the Board of Directors.

7.3 Participation in Board Meetings

Section 173(2) of the Act provides that a director may participate in Board meetings either in person or through video conferencing or other audio-visual means, as may be prescribed.

Such audio visual means should be capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

According to Regulation 17(2A) of the Listing Regulations, the quorum for every meeting of the Board of Directors of the top 1000 listed companies with effect from 1st April, 2019 and of the top 2000 listed companies with effect from 1st April, 2020 shall be one-third of its total strength or three directors, whichever is higher, including at least one independent director. The participation of the directors by video conferencing or

by other audio-visual means shall also be counted for the purposes of such quorum.

It is desirable that independent directors attend all the Board/committee meetings held in a year. The attendance of independent directors at Board/committee meetings is seen as an important factor when they are considered for re-appointment. Proxy advisors have their own benchmark for Board and committee meeting attendance while recommending appointment of independent directors.

Extracts from SEBI WTM order dated 20th October, 2020 in the matter of Kirloskar Brothers Ltd.

SEBI Whole time Member has held that "the directors (which included independent directors) had the duty to act in good faith and with due diligence in the performance of their duties in the interest of company, keeping in mind the interest of its shareholders, including the minority shareholders. These directors had the non-public information of capital loss (in the group company which was bought by the company). The promoter directors, by merely recusing themselves from the said proposal, on the ground that they are interested parties, have failed in their duty of good faith and due diligence towards the company when dealing in securities. I note that "dealing in securities" includes "otherwise dealing in securities" in terms of the decision to deal with securities. Dealing in securities while on possession of non-public information is prevented under PFUTP Regulations. When a fraudulent act in terms of the law is to be prevented, by virtue of abstaining from taking steps to prevent the fraudulent act, it results in conscious abdication of the responsibility of taking due diligent steps to prevent the commission of fraud. There is no evidence of the promoter directors taking any such due diligent steps. Added to this, one of the promoter directors, by virtue of his act of commission of floating the proposal in the first place to buy the shares taking part in the deliberations, have conducted themselves in a manner that facilitated the commission of fraud / unfair trade practice on the company, especially on the minority shareholders. Therefore, I find that being in possession of the non-public information of capital loss, promoter directors omitted to take due diligent steps to prevent the commission of fraud / unfair trade practice and one of the promoter directors also did the positive act of floating the proposal towards the commission of unfair trade practice.

One of the independent directors chaired the meeting and another independent director also participated in deliberations. Therefore, by virtue of the above omissions and commissions, all the directors (promoter directors as well as independent directors) have undermined the ethical standards and good faith dealings between parties engaged in business transactions and thus had caused unfair treatment to the minority shareholders of the company in a fraudulent manner. It is noted that though two of the directors were non-executive independent directors, the same does not have any bearing to the present allegations, as it has already been determined that they had access to UPSI and they had direct role of participating in company's board meeting while in possession of such non-public information leading to the inducement of the company to buy shares of loss-making group company.

7.4 Disclosure of Conflict of Interest

Where an independent director is interested in any item of business, he should disclose the same. He should not be present during discussion on an item wherein he is a related party.

7.5 Role of Independent Director as Chairman

As a chairman of the Board, independent director is expected to chair the Board and general meetings. He has to determine the order of the agenda, ensure that directors receive adequate and timely information, encourage participation of directors for effective decision making and perform such other functions assigned to the chairman including exercise of casting vote, if any.

7.6 Minutes of Board Meetings to include views of Independent Directors

Views of independent directors are very important for the Board to take an appropriate decision. The independent directors must express their views on each issue at the meeting. The Board should encourage free and frank discussions on all agenda items, including objective criticism to arrive at best possible decision. Further, independent directors should ensure to include their dissent or qualifications, if any, on any decision of the Board in the minutes of the meeting. Independent directors should avoid expressing their grievances in public forums.

7.7 Independent Directors and Board Committees

The Board constitutes various committees, as a means of improving board effectiveness and efficiency where more focused, specialized and technically oriented discussions are required. Committees prepare the ground work for decision

making and report at the subsequent Board meetings. Further, committees enable better management of the Board's time and allow in-depth scrutiny and focused attention.

Committees allow the Board to handle larger number of issues with greater efficiency by having experts focusing on specific matters. Committees review information in greater detail and provide the Board with an objective and independent insight into Board's functioning and judgment.

The independent directors are required to play a significant role during deliberations in the meetings of Board and different committees in which they are members. The independent director should report any unethical practices, fraud and violation of law and ensure to safeguard the interests of the company and its stakeholders.

The Act and the Listing Regulations have mandated presence of independent directors on certain committees which are described below:

(i) Corporate Social Responsibility Committee

Section 135 of the Act requires that every company with a net worth of Rs. 500 crore or more, or turnover of Rs. 1000 crore or more, or net profit of Rs. 5 crore or more during the immediately preceding financial year must constitute a Corporate Social Responsibility (CSR) committee with 3 or more directors out of which at least one director must be an independent director. However where a company is not required to appoint an independent director under section 149(4) it shall have in its CSR Committee two or more directors.

(ii) Audit Committee

Section 177 of the Act specifically stipulates that every listed public company and other class of companies must constitute an audit committee of at least three directors with a majority of independent directors.

As per Rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014, the Board of Directors of every listed public company and the following classes of companies shall constitute an audit committee of the Board-

(a) all public companies with a paid up capital of ten crore rupees or more;

(b) all public companies having turnover of one hundred crore rupees or more;

(c) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

Regulation 18 of the Listing Regulations deals with audit committee, which provides

that every listed company shall constitute a qualified and independent audit committee as under:

(a) The audit committee shall have minimum three directors as members.

(b) [1][At least] two-thirds of the members of audit committee shall be independent directors and in case of a listed company having outstanding SR equity shares, the audit committee shall only comprise of independent directors.

(c) All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise.

(d) The chairman of the audit committee shall be an independent director and he shall be present at the annual general meeting of the company to answer shareholders queries.

The quorum for audit committee meeting of a listed company shall either be two members or one third of the members of the audit committee, whichever is greater, with at least two independent directors.

(iii) Nomination and Remuneration Committee (NRC)

Section 178 of the Act mandates every listed public company and prescribed class of companies to constitute a Nomination and Remuneration Committee with three or more non-executive directors out of which one-half must be independent directors.

The chairman of the company whether executive or non-executive cannot chair the Nomination and Remuneration Committee but can become a member of the said committee. Chairman of the NRC shall be an independent director.

As per rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014, the Board of Directors of every listed public company and the following classes of company 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 paid up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited Financial Statements shall be taken into account for the purposes of this rule.

1. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations 2021, w.e.f. 1.1.2022.

Regulation 19 of the Listing Regulations deals with Nomination and Remuneration Committee, and provides that the Board of Directors shall constitute the Nomination and Remuneration Committee as under:

(i) the committee shall comprise at least three directors;

(ii) all directors of the committee shall be non-executive directors; and

(iii) at least [two-thirds][1] of the directors shall be independent directors.

The chairman of the Nomination and Remuneration Committee shall be an independent director. Provided that the chairman of the listed company, whether executive or non-executive, may be appointed as a member of the Nomination and Remuneration Committee and shall not chair such committee.

The quorum for a meeting of the Nomination and Remuneration Committee shall be either two members or one third of the members of the committee, whichever is greater, including at least one independent director in attendance.

Issue: Whether a debt listed wholly owned subsidiary (WOS) of an equity listed company required to appoint Independent directors and constitute the audit committee and the Nomination and Remuneration Committee?

View: Section 149(4) of the Act read with rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, prescribes the class or classes of unlisted companies which are required to appoint independent directors.

Further, as per section 177(1) and section 178(1) of the Act read with rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014, every listed public company and a company covered under rule 4 of these Rules shall constitute an 'Audit Committee' and a 'Nomination and Remuneration Committee of the Board'.

Now, as per rule 4(2) of the Companies (Meetings of Board and its Powers) Rules, 2014, the following classes of unlisted public companies shall not be covered under sub-rule (1) of rule 4, (and hence will neither be required to appoint independent directors nor be required to constitute audit committee and Nomination and Remuneration Committee):

(a) a joint venture;

(b) a wholly owned subsidiary; and

1. Substituted for the word "fifty percent" by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021, w.e.f. 1.1.2022.

(c) a dormant company as defined under section 455 of the Act.

It is important to note that the above exemption is available only to such unlisted public companies which are a joint venture or a wholly owned subsidiary or a dormant company.

An equity listed company must definitely be a public company as only then it can list its equity shares. Therefore, a wholly owned subsidiary of an equity listed company will be deemed to be a public company, irrespective of whether it is a private company or public company as per its memorandum and articles of association, as it is a subsidiary of an equity listed company.

As per section 2(52) of the Act, a 'listed company' means a company which has any of its securities listed on any recognized stock exchange. As per proviso to section 2(52) of the Act read with rule 2A of the Companies (Specification of Definitions Details) Rules 2014, public companies which have not listed their equity shares on a recognized stock exchange but have listed their non-convertible debt securities on private placement basis in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008 shall not be considered as listed companies.

Hence, if the above mentioned wholly owned subsidiary of an equity listed company has not listed its equity shares on a recognized stock exchange, then it will be an 'unlisted public company' as referred to in rule 4(2) of the Companies (Meetings of Board and its Powers) Rules, 2014, as mentioned above. Hence, such wholly owned subsidiary be exempted from the requirement of appointment of independent directors as well as from the requirement to constitute audit committee and Nomination and Remuneration Committee.

Even after such unlisted wholly owned subsidiary of an equity listed company lists its debt securities on a recognized stock exchange, then as per the above-mentioned definition of 'listed company' in section 2(52) of the Act read with the proviso therein, it will continue to be an unlisted public company and it can continue to avail the exemption provided under rule 4(2) of the Companies (Meetings of Board and its Powers) Rules, 2014 if it continues to be a wholly owned subsidiary.

However, it must be noted that if the value of outstanding listed debt securities as on 31st March 2021 or anytime thereafter cross the threshold prescribed for high value debt listed company, then as per Listing Regulations, the requirement of constitution of audit committee and Nomination and Remuneration Committee shall apply. However, as per Explanation to Regulation 16(1)(b) of Listing Regulations, the non-executive directors on the Board of such high value debt listed wholly owned subsidiary shall be treated as independent directors.

If any other law applicable to such wholly owned subsidiary (for e.g., RBI Regulations, etc.) require the appointment of independent directors or the constitution of audit committee and Nomination and Remuneration Committee, then that will prevail even it is not a high value debt listed wholly owned subsidiary.

(iv) Stakeholders Relationship Committee

Regulation 20 of the Listing Regulations provides that the listed company shall constitute a Stakeholders Relationship Committee to specifically look into various aspects of interest of shareholders, debenture holders and other security holders. The chairman of this committee shall be a non-executive director. At least three directors, with at least one being an independent director, shall be members of the committee.

(v) Risk Management Committee

Regulation 21 of the Listing regulations mentions that the top 1000 listed companies determined on the basis of market capitalization as at the end of the immediate previous financial year and a 'high value debt listed company' shall constitute the Risk Management Committee, such committee shall have minimum three members with majority of them being members of the Board of Directors, including at least one independent director and in case of a listed company having outstanding SR equity shares, at least two thirds members of the Risk Management Committee shall be independent directors.

7.8 Attendance at Board and General Meetings

General meeting: The chairman of the audit committee, nomination and remuneration committee and the stakeholders' relationship committee should be present at the general meeting to answer shareholders' queries.

Board meeting: Independent directors are expected to attend all meetings of the Board of Directors. It is mandatory for all directors to attend at least one Board meeting in a period of 12 months.

Manoj Agarwal vs SEBI, SAT order dated 14th July, 2017

An argument made by independent director that he had not attended any Board meeting and hence he is deemed to have vacated the office under section 283(g) of the Companies Act, 1956 and consequently no action could be taken against him is without any merit. Section 283(g) of the Companies Act, 1956 applies only to a director who in spite of notice absents himself from three consecutive meetings of the Board of Directors or absents himself from all the meetings of the Board for a continuous period of three months. In the present case, no notice of Board meeting was issued to him. In such a case, question of the appellant remaining absent from the Board meetings does not arise and consequently question of applying section 283(g) of the Companies Act, 1956 does not arise.

Taneja Aerospace and Aviation Ltd. (SEBI Adjudication order dated 21st February, 2019)

If an independent director is absent at all meetings where a particular matter was discussed, it would be difficult to attribute to him the non-disclosure of relevant and material information to shareholders and to stock exchange. Taking cue from section 149(12), SEBI Adjudication Officer gave benefit of doubt to the independent director who did not attend any of the Board meetings.

Extract from the order given by the Whole Time Member of SEBI dated 20th June, 2017 in the matter of Zylog Systems Ltd.

After noticing the violation of non-payment of dividend by the company within prescribed time, Mr. S Rajagopal and Mr. V K Ramani, two independent directors on the Board have taken strong stands to convince the company's Board about the necessity of ensuring that the statutory dues and the dividends are paid without any delay, in a Board meeting. One of these two independent directors was also the chairman of the company, and he ensured that this point raised at the meeting was recorded in the minutes. As the company failed to comply, the two independent directors resigned from the company's Board. Considering these facts and circumstances, the Whole Time member of SEBI opined that since both the independent directors did not have any role in the day-to-day management of the company and have discharged their responsibility as independent directors putting in their best efforts, there should be no action taken in respect of them.

Extract from the order given by Hon'ble Supreme Court dated 16th October, 2018 in the matter of Amrapali group of companies

In this case, it was alleged that home buyers were cheated by making false promises / claims for example selling of flats which were not even part of the master plan of projects or unapproved in the master plan, double booking of the same flat by different customers. These funds along with loan funds were alleged to be diverted to directors, KMP, group companies and other third parties.

Supreme Court ordered selling unencumbered properties of Amrapali and also attached personal properties of company's directors, without making any distinction between working directors and non-executive directors.

From the forensic audit carried out in this case, it was observed that none of the directors ever attended Board meetings and it was informed that directors signed papers under the instructions and directions of a particular director. Even the bank signatories of group companies were not directors, and were some relatives of main company's directors who used to sign the cheques. Some of the directors of group companies were even junior employees from statutory auditors' office. It was also found that professional fees were paid to directors and their relatives without any contract, and that executives colluded with senior management and changed software of accounting entries. Company did not file annual returns since 2015 and it did not have statutory records.

It was held that non-executive directors have not acted in good faith and hence could not take the shield provided under section 149(12) of the Act.

7.9 General Duties of Directors

(i) Background

The erstwhile Companies Act, 1956 (the 1956 Act) did not explicitly stipulate directors' duties, which made it necessary to fall back on common law principles which was articulated by courts while delivering specific decisions.

However, directors' duties and liabilities are incorporated in the Companies Act, 2013 (the 2013 Act), which now has a clear mandate about directors' duties (somewhat similar to the codification of directors' duties under the UK Companies Act of 2006 (section 172). The provisions of the 2013 Act not only provide greater certainty to directors regarding their conduct, but also enable the beneficiaries as well as courts and regulators to judge the discharge of directors' duties more objectively.

The duties of directors are set forth in section 166 of the 2013 Act, and are principally as follows:

(a) To act in accordance with the articles of association of the company;

(b) To act in good faith to promote the objects of the company;

(c) To act in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment;

(d) To exercise duties with due and reasonable care, skill and diligence and to exercise independent judgment;

(e) To not be involved in a situation of direct or indirect conflict with the interests of the company; and

(f) To not achieve any undue gain or advantage.

(g) To not assign his office and any assignment so made shall be void.

These duties can broadly be classified into two:

(a) duty of care, skill and diligence; and

(b) fiduciary duties.

The duty of care, skill and diligence requires directors to devote the requisite time and attention to the affairs of the company and take decisions that do not expose the company to unnecessary risks.

Fiduciary duties, on the other hand, require the directors to put the interests of the company ahead of their own personal interests. Rules that prevent conflict of interest and self-dealing on the part of directors are integral to this set of duties.

Extracts from the order of Delhi High Court dated 27th January, 2016 in the matter of Rajeev Sumitra v/s Neetu Singh & Ors.

By virtue of section 166 of the Act, which came into effect from 1st April 2014, a hitherto prohibition in common law was translated into a statutory prohibition providing, *inter-alia*, that a director could not and cannot enter into a competing business with the company of which he is a director or gain any advantage either to himself or to his relatives and further that if he is found guilty of violating the said provision, he shall be liable to pay an amount equal to that gain to the company. Additionally, section 88 of the Indian Trusts Act also provides that a director/partner who in violation of his fiduciary character gains for himself any pecuniary advantage or enters into any dealing in which his own interest is adverse to the interest of the company and thereby gains a pecuniary advantage to himself, he will hold such advantage gained for the benefit of the company.

Extracts from SAT order dated 28th July, 2021 in the matter of Yashovardhan Birla vs SEBI

In the given case appeal was preferred to SAT, wherein, the defense of the appellant Mohandas was that he was independent director and appellant Yashovardhan Birla was Non-Executive Director. They were party only to the resolution carried by the Board of Director for issuing the GDR.

Adverse inference was drawn by the Whole Time Member-SEBI that though the GDR proceeds did not receive to the company for a long period, none of them had raised any grievance about the same. Thus non-receipt of GDR proceeds for a long period cannot simply remain forgotten by appellant Yashovardhan Birla who was the co-chairman of the company and appellant Mohandas Adige who was the member of the audit committee of the company during the relevant period.

On appeal, SAT in its order observed that we are dealing with a case of fraud purported to have committed by the concerned entities with a common intention. So far as Mr. Mohandas (Independent Director) is concerned, he was the member of the audit committee. The snapshot of list detailing the various directorships held by him shows that he was the director of numbers of companies and thus cannot be called as innocent independent director.

Above all, this seasoned director was the member of the audit committee which handled/reviewed the financial matters of the company during the period GDR proceeds vanished from the accounts of the company. Taking into consideration all these facts, in our view it would be naïve to conclude that the appellant Mohandas was only an independent director and had innocently consented to the Board decision authorising Mr. P.V.R. Murthy to deal with the GDR including loan if any.

Extracts from SEBI order dated 14th October, 2021 in the matter of GDR Issue of Nakoda Limited

It must be emphasized that the role of independent directors is to work as a watchdog, help in managing risk and safeguard the interests of minority shareholders. Though S.K. Bhoan (Independent Director) has denied being in charge of day to day affairs of the company, it is clear from the Annual Reports that apart from D.B. Jain and B.G. Jain, it was only S.K. Bhoan who was part of the Management Committee, which was constituted to carry out the day to day activities of the company. Hence, S.K. Bhoan cannot contend that he was not in-charge of the day to day affairs of the company. In such a scenario, SEBI find that the submissions of S.K. Bhoan are not acceptable and he cannot plead ignorance.

Extracts from SEBI order dated 14th October, 2021 in the matter of GDR issue of Edserv Softsystems Limited

It was concluded that Edserv in connivance with Vintage devised a fraudulent scheme whereby Vintage received GDRs without paying full consideration for the GDRs, at the cost of the shareholders / investors of Edserv. Further, the directors, G. Giridharan and G. Gita, were held liable for the above mentioned fraudulent scheme as they were fully involved in the day-to-day activities of the company, and had complete knowledge of the activities of the company during the process of issuance of GDRs.

SEBI observed that independent directors had actively sought information and details from the Chairman and Chief Executive Officer of the company regarding the utilisation of the GDR proceeds and thereafter resigned. Upon a holistic view of the facts, SEBI WTM granted the benefit of doubt to independent directors, especially in view of the diligence exhibited by them with respect to the utilisation of the GDR proceeds followed by their decision to step down from the Board of Edserv, soon thereafter. In view of the findings, the proceedings initiated against them was disposed of without any directions.

Extracts from NCLT order dated 1st September, 2021 in the matter of Videocon Industries Ltd.

On comparison of Balance Sheets of Videocon Industries Ltd. as at 2014 and as at 2019, it is observed that there is steep downfall in reserves and surplus of company, whereas there is steep rise in loan component of company. Most of the investments were dead investments. The operating income of the company has also fallen down drastically. Promoters holding is at 40.59% but 98.16% of their equity is pledged with various financial institutions and banks. Thus it is evident that the promoters have hardly any financial interest left in the company.

In the course of transaction audit, it was found that during the years 2016 to 2018, almost half of the receivables was settled against the payables. Most of the entities whose receivables and payables were settled were group entities of the company. On enquiring whether any approval of Joint Lenders Forum and Board of Directors of company was taken for this settlement, it was stated by company that only Mr. Venugopal Dhoot (Chairman and Managing Director of the company) has approved the same. Many of these related parties were not properly disclosed in the financial statements of the company. Hence it was held that the affairs of the company are being conducted in a manner prejudicial to public interest. Hence all movable and immovable properties of respondents (except companies) [which includes all the directors, CFO and CS also] including bank accounts, lockers, demat accounts including jointly held properties be attached during the pendency of the company petition.

Extracts from SEBI Whole Time Member order dated 15th June, 2021 in the matter of Inter Globe Finance Ltd.

Section 27 of SEBI Act, 1992 earlier provided for vicarious liability of certain persons who were in charge of and was responsible to the company where an offence is committed by a company, i.e., it did not provide for the vicarious liability in respect of civil liability of company arising out of the violations committed by such company. However, after amendments made to Section 27 with effect from March 08, 2019, by the Finance Act, 2018, vicarious liability for civil liability of the company has been introduced by replacing the word "offence" with the word "contravention" in Section 27 of the SEBI Act, 1992.

Under LODR Regulations, various responsibilities of Board of Directors in the form of principles are mentioned under Regulation 4(2)(f) which create specific and direct liability of the Board of Directors. Regulation 4(2)(f) refers to Board of Directors of company, it does not make any distinction between independent director or other directors. Independent directors are part of audit committee and would have reviewed the financial statements of company, and approved the financials of company as part of the Board of Directors of company. Failure to raise any concern regarding the financials of company, as member of the audit committee as well as the Board of Directors of company, shows that these directors did not act diligently with respect to the provisions contained in the LODR Regulations. Therefore, the contention raised that they are independent directors and not involved in day to day affairs of company is not tenable.

Extracts from National Green Tribunal Bench order dated 1st June, 2020 in the matter of L.G. Polymers India Pvt. Ltd.

In this regard, the Andhra Pradesh High Court, vide an Order dated 26th May, 2020 has also got the passports of all the directors surrendered and not allowed to go outsider India without Court's leave.

The National Green Tribunal Bench mentioned that "The root cause of the incident appeared to the Court as lack of experience of the company and its parent company in monitoring and maintaining the equipment. The lack of awareness of the operators and industrial persons about control measures was the main cause of the incident. This scenario definitely points towards the accountability for lapses on part of the Industry, which rests with the Managing Director of the Unit, including other officials of the Government department."

After the High Power Committee Report submitted to the State Government, which indicated multiple inadequacies on the part of company and slackness of management over poor safety protocols and total breakdown of the emergency response procedures in the plant that resulted in the tragedy, the CEO / MD and the remaining 2 directors were arrested on 7th July, 2020.

Section 166(5) of the 2013 Act speaks about a director not achieving undue gain or advantage to himself or to his relatives, partners, or associates. Section 166(4) of the 2013 Act also states that the director shall not involve himself in a situation in which director may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company. In the aforesaid judgement, the concept of conflict of interest or achieving of undue gain or advantage has been broadened to cover even interest in competing business. Hence, such scenarios where a director may be involved in any competing business, it is recommended that such situation also be considered as a situation of conflict of interest and be dealt with appropriately. Further even though the other company may or may not be benefitted in a particular transaction, he can be considered to be duty bound to compensate to the first company, which he has betrayed by disloyalty.

(ii) Comparative Position of India and UK

The effort to codify directors' duties is not altogether new, as it has been undertaken in other common law jurisdiction such as the UK.

However, in one significant respect, the Indian codification exercise is different from the UK. Under the 2013 Act in India, there is no provision that reserves the application of common law following codification. The applicability of common law has been preserved to the extent that it can be utilized to interpret the statutory provisions relating to directors' duties.

The following provisions in the UK Companies Act of 2006 are relevant:

- The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director. (Section 170(3) of UK Companies Act, 2006)
- The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties. (Section 170(4) of UK Companies Act, 2006)

Whilst section 166 of the 2013 Act does contain codification of directors' duties, the

statutory provisions lay down only the broad and basic principles, and do not provide the details as to how the duties must be discharged by the directors.

It is not possible for the statute to envisage all possible situations in which directors must discharge their duties and also the manner in which they are to do so. Those details will be determined by the courts based on the facts and circumstances of each case which is where common law comes into the picture.

The 2013 Act does not have a section corresponding to section 170 (3) of the UK Companies Act, 2006 (extracted above) which specifically states that the duties enshrined in section 166 of the 2013 Act are based on common law rules and equitable principles and shall have effect in place of such rules and principles. In other words, there is no express provision to state that the statutory duties replace the common law duties.

(iii) Due and Reasonable care – section 166

Every director must exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment. These requirements are ordinarily expected from any person occupying a position of responsibility. Directorship is certainly an altogether different position, from that of a shareholder or any other officer.

House of Lords in Derry v Peek [1889]

"a director is bound in all particulars to be careful and circumspect, and not, either in his statements to the public or in the performance of the duties he has undertaken, to be careless or negligent, or rash. Want of care or circumspection, as well as recklessness, may in such a case as the present be taken into consideration in determining at every stage the question of *bona fides*".

Extracts from the SEBI Whole Time Member order dated 3rd January, 2020 in the matter of Sumangal Industries Ltd.

"the law casts a duty on a director to attend the Board meetings and maintain a sufficient knowledge and understanding of the company's business; and as such, a director must act honestly and without negligence, with such amount of care as an ordinary man would be expected to take, as if the business were his own. Further, directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors."

(iv) Duty to avoid conflict of interest

This provision expects a director of a company to steer clear of controversies arising from his involvement in positions or situations of conflict. If he puts himself in a situation where he suffers from a conflict of interest, he is running the risk of contravening this provision. This provision expects every director not to get involved in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

Duty to avoid conflicts of interest is essentially a duty introduced by the statute in order to lay emphasis on the need to make it mandatory for a director to distance himself from the meeting of the Board when any contract or arrangement in which he is interested comes up for discussion and approval. Principles of corporate governance revolve around this duty forming an essential aspect of corporate management much before introducing the same as a statutory duty under the 2013 Act.

It is only a reflection of the fiduciary duty enjoined upon a director. This concept presupposes the need for the presence of a disinterested quorum of a minimum of two disinterested directors so as to take a valid decision.

Therefore, it is necessary to understand the concept of "Interested Directors" in contradiction with "Disinterested Directors". The Act provides a mandatory stipulation to achieve the purpose by stipulating that an "Interested Director" abstain from participating in meetings. In other words, the Act itself provides the lock and the key and ensures that the directors do not violate the fiduciary duties they owe.

'Fiduciary' means a character analogous to that of a trustee, one who holds the property of others in confidence. Fiduciary duty means a loyalty that requires confidentiality and prohibits conflict of interest. Fiduciary duties cannot be made the subject of delegation. This general rule applies irrespective of whether the person under fiduciary is a trustee or his position is merely representative one.

As per section 88 of the Indian Trusts Act 1882, where a trustee, executor, partner, director, legal advisor, or other person bound in a fiduciary character to protect the interests of another person (company), gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold the advantage so gained for the benefit of such other person.

Peirce Leslie and Co. Ltd. v Miss. Violet Ouchterlony Wapshare [1969] 3 SCR 203

"It is a settled rule of equity that any person bound in a fiduciary character to protect the interests of another person should not put himself in a position where his interest and duty conflict. If by availing himself of this fiduciary character or by entering into any dealings under circumstances in which his interests are or may be adverse to those of such other person he gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained".

(v) Duty not to make undue gain or advantage

This duty has been introduced to ensure that directors do not leverage their position as directors and their contacts for diverting potential business opportunities and make undue gain. This is another manifestation of the duty to avoid conflict of interest. A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company. This duty is just a derivative of the duty to act in good faith.

7.10 Specific Duties of independent directors

Section 149(8) of the Act prescribes that the company and independent directors shall abide by the provisions specified in schedule IV regarding code for independent directors. It is a guide to professional conduct for independent directors. Adherence to these standards by independent directors and fulfilment of their responsibilities in a professional and faithful manner will promote confidence of the investment community, particularly minority shareholders, regulators and companies in the institution of independent directors.

Code for independent directors provided in schedule IV to the Act specifically lays down the guidelines for professional conduct, role, functions and duties of independent directors.

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 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.

Role and functions of independent directors

(1) To 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) To bring an objective view in the evaluation of the performance of board and management;

(3) To scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance;

(4) To satisfy themselves on the integrity of financial information and that financial controls and the systems of risk management are robust and defensible;

(5) To safeguard the interests of all stakeholders, particularly the minority shareholders;

(6) To balance the conflicting interest of the stakeholders;

(7) To 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) To 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

(1) To undertake appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the company;

(2) To 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) To participate constructively and actively in the committees of the Board in which they are chairman's 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) To 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) To 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;

Note: It may be noted that in case of listed companies, with effect from 1st January, 2022 only those members of the audit committee, who are independent directors shall approve related party transactions.

(10) To 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) To report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy;

(12) To act within their 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.

Extracts from the order of Bombay High Court dated 22nd September, 1952 in the matter of Walchandnagar Industries Ltd. vs. Ratanchand Khimchand Moti Shaw

Section 86F of Companies Act, 1913 imposed a personal disability upon a director of the company and the disability is that a director of the company, or the firm of which he is a partner or any partner of such firm, or the private company of which he is a member or director is precluded from entering into any contracts for the sale, purchase or supply of goods and materials with the company. A director entered into a contract with the company for the supply of one tin of ghee, and the question arose that whether by reason of the respondent entering into this contract he has ceased to be a director of the company. The disqualification is not absolute, because the section provides that with the consent of the directors, a director can enter into contracts which are prohibited under this section.

Winkworth vs. Edward baron Development Co. Ltd. (1987) 1 WLR 1512, [Judge - Lord Templeman]

Directors owe a fiduciary duty to the company and its creditors, present and future, to ensure that its affairs are properly administered and to keep the company's property inviolate and available for the repayment of its debts.

Lagunas Nitrate Syndicate (1899) 2 Ch. 432

In discharging the duties, a director must act honestly and must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take in the circumstances on his own behalf. The directors are not liable for mistakes or errors of judgment which may cause loss to the company, provided they act bonafide and for the benefit of the company and with such care as may be expected from them.

Kavanangh vs. Common Wealth Trust Co. (1918) 233 NY 103 USA

Where the president of an investment company improvidently invested in companies in which he was interested and caused loss, his fellow directors were held liable because they had left the investment of the company's funds to the president's unfettered discretion and exercised no supervision over him.

Land Credit Co. of Ireland vs. Lord Fermoy (1869) LR 3 EQ 7

If a company suffers loss on ultra vires acts of directors, the company can claim such loss from the directors. If they pay dividends out of capital, or buy the shares of the company or return capital in unlawful way, the directors would be liable to replace the funds improperly applied by them.

7.11 Duties under PIT Regulations

(i) Compliance with Code of Conduct under PIT Regulations

Since the independent director's role and function in the organization would provide him access to unpublished price sensitive information (UPSI), he would have to be specified as a designated person under the PIT Regulations. Hence, he should adhere to the code of conduct provided under PIT Regulations and should refrain from trading in securities of the company while having any UPSI and whenever trading window is closed for all designated persons, irrespective of whether the independent director has UPSI or not, i.e., from the last date at the end of quarter till 48 hours from the declaration of results, or such timeline as may be specified in the company's code of conduct for closure of trading window for the purpose of declaration of quarterly financial results.

Even otherwise, when the trading window is open, he will also be required to refrain from entering into contra trade within 6 months and should seek pre-clearance from the compliance officer as per the thresholds mentioned in the company's code of conduct.

The above trading restrictions shall be applicable even to immediate relatives of the independent director.

(ii) Disclosure requirements under PIT Regulations

As per Regulation 7(1)(b) of PIT Regulations, every person on appointment as a director (including independent director) of the company shall disclose his holding of securities of the company as on the date of appointment, to the company within seven days of such appointment.

Also, every director (including independent director) of every company shall disclose to the company (in Form C) the number of such securities acquired or disposed of within two trading days of such transaction if the value of the securities traded, whether in one transaction or a series of transactions over any calendar quarter, aggregates to a traded value in excess of ten lakh rupees or such other value as may be specified in the company's code of conduct. As per SEBI circular dated August 13, 2021, filing of Form C is no longer mandatory for listed companies who have complied with SEBI circular dated 9th September, 2020 with regard to System driven disclosure as a step towards automating Form C disclosures by the company.

As per the requirement of SEBI circular dated 9th September, 2020, the details of demat accounts, PAN and holding of securities of all persons covered under Regulation 7(2) of PIT Regulations (including independent directors) were required to be submitted to designated depository (to be chosen by each listed company among the 2 depositories) by September 30, 2020. If there is any change / addition in the disclosures already submitted, then the same must be intimated by the listed company to the designated depository on the same day of change. Hence, in case of any changes in demat A/c, PAN of any director OR appointment of any new director will be required to be intimated by the listed company to the designated depository on the same day of change.

Further since the independent director's role and function in the organization would provide him access to UPSI, he would have to be specified as a designated person under Regulation 9(4) of the PIT Regulations. Hence, upon being specified as a designated person, he shall need to disclose the following details to the compliance officer, on an annual basis:-

- Names and Permanent Account Number or any other identifier authorized by law of the following persons to the company on an annual basis and as and when the information changes:

    a) immediate relatives

    b) persons with whom such designated person(s) shares a material financial relationship

    c) Phone, mobile numbers which are used by them

- In addition, the names of educational institutions from which designated persons have graduated and names of their past employers shall also be disclosed on a one time basis.

Explanation – The term "material financial relationship" shall mean a relationship

in which one person is a recipient of any kind of payment such as by way of a loan or gift from a designated person during the immediately preceding twelve months, equivalent to at least 25% of the annual income of such designated person but shall exclude relationships in which the payment is based on arm's length transactions.

Extracts from SEBI's interpretive letter dated 19th July, 2018 issued under the SEBI (Informal Guidance) Scheme, 2003 in the matter of Hawkins Cookers Ltd. (HCL) regarding sale of shares by an independent director.

Facts of the case:

a) One of the company's independent directors wants to sell his equity shares of the company.

b) The sale shall be done as per a trading plan in accordance with regulation 4(iii) of the PIT Regulations.

c) As per para 8 of Schedule B to the PIT Regulations, while applying for preclearance, the said director will have to submit an undertaking to the company to the effect that he is not in possession of any Unpublished Price Sensitive Information (UPSI).

d) By virtue of participation in the Board meetings and access to the information that is shared at such meetings, the said director is deemed to be perpetually in possession of UPSI. Therefore, the said undertaking is not possible.

Queries:

a) Whether the said director may submit a trading plan as required for a plan to trade shares above INR 20 lakh in value and proceed with executing the same without giving the said undertaking.

b) What procedure should be followed by the company and/ or the said director such that the said director may lawfully execute the trade?

Guidance from SEBI:

a) Regulation 5 of the PIT Regulations provides exception to the general rule that prohibits trading by insiders when in possession of UPSI. Further, regulation 5, *inter alia*, states that the trading plan shall be approved by the compliance officer and shall not entail trading in securities for market abuse. In this regard, regulation 5 (3) especially states that the compliance officer shall review the trading plan to assess whether the plan would

have any potential for violation of PIT Regulations and shall be entitled to seek such express undertakings as may be necessary to enable such assessment and to approve and monitor the implementation of the plan.

b) In the absence of an approved trading plan, designated persons are subject to the requirements of code of conduct formulated by the company in terms of regulation 9 read with schedule B to the PIT Regulations.

KR Sasiprabhu in the matter of SpiceJet Ltd. - SEBI AO order 31st January, 2020

In this case, SEBI noted that section 149(12) of Companies Act, 2013 specifically stipulates that an independent director and a non-executive director shall be liable for any action or omission only if the occurrence of the same involve the knowledge through the Board process and with his consent or connivance or where he had not acted diligently. Reading from the same, SEBI said that there is a specific requirement of evidence to show the communication of UPSI to an independent director who has been charged with the allegation trading based on UPSI. As in the instant case, where independent director is charged, merely on the basis of the fact that Noticee is an insider and had traded prior to declaration of financial results is not sufficient for concluding the guilt of him. The material evidence needs to be looked into if the same establishes the communication of UPSI to the independent director before the trades are carried out by him.

For detailed guidance on the subject, readers may refer to ICSI Guidance Note on Prevention of Insider Trading available at *www.icsi.edu/ssb/home/*

7.12 Key functions of the Board as per Listing Regulations

(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) Monitoring the effectiveness of the listed company's governance practices and making changes as needed.

(3) Selecting, compensating, monitoring and, when necessary, replacing key managerial personnel and overseeing succession planning.

(4) Aligning key managerial personnel and remuneration of Board of Directors with the longer term interests of the listed company and its shareholders.

(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) 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) Ensuring the integrity of the listed company'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) Overseeing the process of disclosure and communications.

(9) Monitoring and reviewing Board of Director's evaluation framework.

The Listing Regulations set out the "other responsibilities" of the Board, which is a combined list of duties as well as powers. This list has the following items:

(1) The Board of Directors shall provide strategic guidance to the listed company, ensure effective monitoring of the management and shall be accountable to the listed company 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 company 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 company 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 company'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.

According to Regulation 17(3) of the Listing Regulations, the Board of Directors shall periodically review compliance reports pertaining to all laws applicable to the listed company, prepared by the listed company as well as steps taken by the listed company to rectify instances of non-compliances.

7.13 Duties implied from provisions of Section 134 of the Act

Section 134 of the Act sets out the contents of the report of Board of Directors. One of the important contents of the Board's Report under section 134(5) of the Act is the Directors' Responsibility Statement. The Board needs to ensure that the company has adequate internal financial systems and processes to enable the Board to confirm the items mentioned in the Directors' Responsibility Statement.

A. The Directors' Responsibility Statement covers the following:

(i) Adherence to accounting standards:

Affirmation by the Board that in preparation of annual accounts, the applicable

accounting standards had been followed, and where there were departures, proper explanation had been given.

(ii) Accounting policies and reliance on Judgments and estimates:

Section 134(5)(b) of the Act requires the Board to state whether the directors had selected the accounting policies, and applied them consistently, and have made judgements and estimates, and the same are reasonable and prudent. The end result of the above is that the statements give a true and fair view of the state of affairs, and the profit or loss for the period.

(iii) Maintenance of adequate accounting records for safeguarding of the company's assets and prevention of fraud and error:

Section 134(5)(c) of the Act speaks of maintenance of proper accounting records, so as to safeguard the assets of the company and to prevent fraud and error.

(iv) Going concern accounting

(v) Adequacy of internal financial controls

Section 134(5)(e) of the Act is applicable only in case of listed companies. This requires the Board to certify –

(a) that board had laid internal financial controls to be followed by the company;

(b) that such internal financial controls are adequate; and

(c) that such internal financial controls were operating effectively.

(vi) Compliance with applicable laws

Section 134(5)(f) of the Act requires the Board to report whether the Board had devised proper systems to ensure compliance with all applicable laws, and that such systems were adequate and operating effectively.

This section may be read in conjunction with section 205(1)(a) of the Act whereby the company secretary intimates to the Board about compliance with applicable laws.

B. Other Compliances

(i) Statement on compliances of Secretarial Standards

The Secretarial Standard on Meetings of the Board of Directors (SS-1) provides that the Report of the Board of Directors shall include a statement on compliances of applicable Secretarial Standards.

(ii) Risk Management

As per section 134(2)(n) of the Act, the Board's Report should include a statement indicating development and implementation of a Risk Management Policy for the company including identification therein of elements of risk, if any, which in the opinion of the Board may threaten the existence of the company.

Independent directors should, through their risk oversight role, satisfy themselves that the risk management policies and procedures designed and implemented by the company's senior executives and risk managers are consistent with the company's strategy and risk appetite and that these policies and procedures are functioning as directed. They must also ensure that risk-taking beyond the company's determined risk appetite is recognized and addressed timely.

Regulation 21 (4) of the Listing Regulations provides that the Board of Directors shall define the role and responsibility of the Risk Management Committee and may delegate monitoring and reviewing of the risk management plan to the committee and such other functions as it may deem fit. Such function shall specifically cover cyber security.

The role and responsibilities of the Risk Management Committee shall mandatorily include the performance of functions specified in Part D of Schedule II of Listing Regulations.

The role of the independent directors in fraud risk prevention and detection has come under scrutiny of regulators and other stakeholders, due to the recent discovery of high profile instances of fraud. The Act and the Listing Regulations have recognized fraud as a key risk and have made the Board, audit committee and senior management accountable for fraud risk management.

The Board, including the independent directors, should adopt a fraud risk management program that pro-actively addresses fraud risks. A structured approach to fraud risk management can help the Board, including independent directors, to ask the right questions, identify and strengthen Board's oversight, establish fraud control strategies and take steps to prevent, detect and investigate appropriately.

The Risk Management Committee shall have powers to seek information from any employee, obtain outside legal or other professional advice and secure attendance of outsiders with relevant expertise, if it considers necessary.

(iii) Corporate Governance Matters

The Board, including independent directors should ensure proper systems and processes to comply with other aspects of corporate governance, including code

of conduct, ethics, checks on company's strategies, HR policies, vigil mechanism, robust internal control systems including IT controls, data analytics and processes to periodically review grievance mechanism from stakeholders.

7.14 Group Governance Policies

Currently, it is not mandatory for an organisation to implement group governance policies. Group governance policies are desirable in entities with conglomerate structure involving several different businesses, and each group may adopt such governance policies as may be appropriate given size, nature and specific circumstances of such group. The monitoring at group level may be done by a Board's Committee of the ultimate holding entity. If there is such Policy, Independent Director should adhere to such policies.

7.15 Immunity under the Act

Independent directors are on the Board purely on account of their special skills and expertise in particular fields and they represent the conscience of the investing public and also take care of public interest. Independent directors bear a fiduciary responsibility towards shareholders and the creditors.

Section 149(12) of the Act provides that an independent director, can be held liable only in respect of such acts of omission or commission by a company:

(a) which had occurred with his knowledge attributable through Board processes, and

(b) with his consent or connivance; or

(c) where he had not acted diligently.

Regulation 25(5) of the Listing Regulations states, "An independent director shall be held liable, only in respect of such acts of omission or commission by the listed company which had occurred with his/her knowledge, attributable through processes of Board of Directors, and with his/her consent or connivance or where he/she had not acted diligently with respect to the provisions contained in these regulations."

'Act of omission' implies failure to act where the law requires him to act. 'Act of commission' implies an act conducted so as to cause harm. "Connivance' means indirect consent to the commission of offence. Here, the knowledge should arise through Board processes i.e., from any proceedings of the Board or through participation in Board meetings or meetings of any committee of the Board and any information which the director is authorized to receive as director of the Board as per

the decision of the Board. Knowledge coming from external sources has not been referred here. 'Acted diligently' means that the director should have taken steps to avoid the act of contravention, as much as possible.

Ministry of Corporate Affairs vide general circular dated 2nd March, 2020 has issued certain clarifications and directives on prosecution initiated against independent directors (IDs) and other non-executive directors (NEDs), which *inter alia* provides that in cases where lapses are attributable to the decisions taken by the Board or its committees, all care must be taken to ensure that civil or criminal proceedings are not unnecessarily initiated against the IDs or the NEDs, unless sufficient evidence exists to the contrary.

Atul B. Munim v. Registrar of Companies & Ors, 2000 [102(2)] Bom LR 288

The liability of an independent director can be ascertained through the roles and responsibilities undertaken by such director during the course of his/ her appointment. The liability of a director depends upon the circumstances in which the director undertakes any action. In a case wherein the court interpreted the meaning of an 'officer in default', the court held that the process of determining the liability cannot be done mechanically without applying mind to the facts of the case and the provision of the law.

National Small Industries v Harmeet Singh Paintal Criminal Appeal No. 320-336 of 2010 (arising out of Special Leave Petition (CRL) Nos. 445-461 of 2008)

The Supreme Court has stated that for making a director of a company liable for offences committed by the company, there must be specific averments against the director showing as to how and in what manner the director was responsible for the conduct of the business of the company.

Saroj Kumar Poddar v. State (NCT of Delhi) and Anr., JT (2007) 2 SC 233

It was, *inter-alia*, held as follows:

> "Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted."

Adi Cooper vs. SEBI, SAT order dated 5th November, 2019

If an independent director in question is a chairman of audit committee, and if he claims that he was not present at a particular meeting where the final resolution for a transaction (GDR issue in this particular case) was passed, but was present at other meetings where it was discussed, then his contention that he was not involved in the day to day running of the company cannot be accepted, if the matter has been discussed in other meetings also where he was present. It is the duty of chairman of audit committee to ensure that the proceeds of the issue reached the company and how the proceeds were utilized.

In this case, since he had not taken care of these aspects, SAT held that the conduct of the chairman of audit committee was inimical to the interest of the company, to the investors, as well as to the shareholders and, the action of this independent director was in violation of section 12A of the SEBI Act read with Regulations 3 and 4 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003.

7.16 Duties under Takeover Regulations

Regulation 26 of Takeovers Regulations deals with obligations of the target company which *inter alia* provides that the Board of Directors of the target company shall constitute a committee of independent directors to provide reasoned recommendations on open offer. Such Committee shall be entitled to seek external professional advice at the expense of the target company.

While providing reasoned recommendations on the open offer proposal, the committee of independent directors shall disclose the voting pattern of the meeting in which the open offer proposal was discussed.

The committee of independent directors shall provide its written reasoned recommendations on the open offer to the shareholders of the target company and such recommendations shall be published, at least two working days before the commencement of the tendering period, in the same newspapers where the public announcement of the open offer was published.

It is one of the primary duties of any independent director to safeguard the interests of all stakeholders especially the minority stakeholders, and to balance the interests of the stakeholders. It is his duty to see that any transfer of shares takes place in conformity with the articles of association and that the interests of all parties are represented adequately and taken into consideration. In its recommendations, the committee of independent directors may question the basis of such an offer and challenge the presumptions underlying such a strategic initiative.

8. IMPORTANT PROVISIONS OF SECRETARIAL STANDARDS ON MEETINGS OF THE BOARD OF DIRECTORS (SS-1) AND GENERAL MEETINGS (SS-2)

Participation in meetings is crucial for directors to ensure effective decision making. Extracts of important provisions from SS-1 and SS-2 pertaining to Board and General Meetings, are placed at *Annexure-X*.

For detailed text of SS-1, SS-2 and Guidance Notes thereon the readers may visit the ICSI website link: *www.icsi.edu/ssb/home/*

9. BUSINESS JUDGMENT RULE AND PROTECTION FOR ACTIONS TAKEN BY DIRECTORS IN GOOD FAITH

9.1 Background

In India, the duties of directors are embodied in various statutes and particularly in section 166 of the Act. However, section 456 and section 463 of the Act provide protection to directors who have acted in good faith.

Similarly, in most common law countries like United States, Canada, England and Wales, and Australia, there is a doctrine of Business Judgement Rule ("BJR"). It is a doctrine derived from various case laws under Corporation Law that courts defer to the business judgment of corporate executives.

The BJR helps to guard a corporation's Board of Directors from frivolous legal allegations about the way it conducts business. Under this rule Boards are presumed to act in "good faith" that is, within the fiduciary standards of loyalty, prudence, and care directors owe to shareholders. Without evidence that the Board has blatantly violated some rule of conduct, the courts will generally not review or question its decisions. These fiduciary standards include the "duty of care" and the "duty of loyalty." The first is an obligation to act on an informed basis. The second requires directors to put the interests of the corporation and its shareholders over the interests of others.

The BJR protects companies from frivolous lawsuits by assuming that, unless proved otherwise, the Board is acting in the interests of shareholders. The rule assumes that the Board cannot and will not be able to make optimal decisions all the time.

This is a doctrine which is case law driven and has evolved over a period of time. It is rooted in the principle that directors of companies are clothed with the presumption which law accords to them of being motivated in their conduct by a *bona fide* regard for the interests of the company and its stakeholders.

The Rule is therefore a presumption in the law that directors invariably act in good faith and always in the interests of the shareholders and the company. The doctrine flows from the unique role that directors' discharge as trustees and agents of the company.

The above presumption is rebuttable if evidence can be brought by the plaintiff to challenge the presumption.

Unless it is clear that directors have violated the law or acted against the interests of shareholders, courts will neither question their decisions nor substitute its own notions of what is or is not sound business judgment if the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.

The BJR acknowledges that the daily operation of a business, as well as its long-term strategy, requires making controversial decisions or taking actions that put the company at risk. All business decisions are to some extent risky, whether they involve starting a new line of business or buying another company. Generally speaking, higher profits require taking greater risks.

The principle underlying the BJR is that the Board of Directors should be allowed to make such decisions without fear of prosecution by shareholders who might object.

Based on a decision in Grobon v Perot (339A 2A 180)(Del.)(1988), the rule is based on the application of the following traits in the directors' action:

- Action is in good faith;
- Action is in the best interests of the company;
- Action has been taken on an informed basis;
- Action was not wasteful;
- Action did not involve any self-interest and that loyalty to the company had prevailed.

There is a celebrated case of Dodge v. Ford Motor Co. (2004 Mich.459,170 N.W668) (1919) which sets out the principles for the application of the above Rule as under:

> "Courts of equity will not interfere in the management of directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds or refuse to declare a dividend when the company has a surplus of net profits which can be without detriment to its business divided among the

shareholders and when a refusal to do so would amount to an abuse of discretion as would constitute a fraud or breach of that good faith which they are bound to exercise towards their shareholders."

In the following few examples of reported cases, courts have absolved directors of any wrongdoing and have not directed any derivative action against them given that they have acted in good faith:

(i) Accounts

Where directors have exercised their power in drawing up the company's accounts in accordance with their best judgement exercised in good faith. (Devlin v Slough Estates Ltd. (1983) BCLC 497) Also refer to CIT v Eastern Bengal Jute trading Co. Ltd (1978) (48 Com Cases 262) (Cal.)

(ii) Declaration of dividend

Where directors have considered it desirable to distribute profits as dividend while the company's debts remain unpaid. (Re. Mercantile Trading Co. stringer's case (1869-4 Ch. A.475)

(iii) Making of calls

No restraint order was issued to prevent directors from making or enforcing calls as per their decision taken in good faith. (Anglo-Universal Bank v Baragnon (1881) (45 LT 362)(CA).

9.2 Burden of Proof

When the corporation pleads the BJR, the court generally goes with the contention that the presumption applies, and the burden is on the plaintiff to prove that the BJR does not apply. Only if the plaintiff can prove that the director acted in gross negligence or bad faith, will the court not uphold the business judgment presumption. Similarly, if the plaintiff can prove that the director had a conflict of interest, then the court will not uphold the business judgment presumption.

If directors fulfil their fiduciary duty, they would get an explicit safe harbour for any breach of their duty of care and diligence, and the merits of their business judgments would not be the subject of review by the courts.

The BJR would therefore act as a rebuttable presumption in favour of directors which, if rebutted, would still require the courts to establish that the directors breached their duty of care and diligence.

9.3 Business Judgement Rule in various countries:-

The BJR in different jurisdictions are as under:-

(i) United States (Delaware) –

American courts have developed a BJR which provides special protection to directors making informed business decisions. The American Law Institute has devised a relatively precise formulation which is consistent with the rule developed by the courts which avoids much of the confusion that has arisen from the various ways in which the courts have started to rule. The main feature of the rule is that a 'safe harbour' is created for a director or officer who makes a business judgment in good faith if:

a. he or she has no personal interest in the subject of the business judgment rule;

b. he or she is informed to an appropriate extent about the subject of the business judgment; and

c. he or she rationally believes that the business judgment is in the best interests of the company.

(ii) Canada –

Canadian corporate law contains an organizing principle of fair treatment within the Supreme Court's notion that directors are to act in the business interests of the corporation, "viewed as a good corporate citizen".

The directors owe a fiduciary duty to the corporation, and only to the corporation. People sometime speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation.

However, cases may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

Where conflicting interests arise, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty. This is defined as a "tripartite fiduciary duty", composed of:

- an overarching duty to the corporation, which contains
- a duty to protect shareholder interests from harm, and
- a procedural duty of "fair treatment" for relevant stakeholder interests.

(iii) United Kingdom (England & Wales) –

Under Section 172 of the Companies Act, 2006 in United Kingdom, is one of the duties of the directors which is inclined towards the BJR:

Section 172 - to promote the success of the company - directors must continue to act in a way that benefits the shareholders as a whole, but there is an additional list of non-exhaustive factors to which the directors must have regard. These factors are:

- the long term consequences of decisions
- the interests of employees
- the need to foster the company's business relationships with suppliers, customers and others
- the impact on the community and the environment
- the desire to maintain a reputation for high standards of business conduct
- the need to act fairly as between members

(iv) Australia –

It has been held in various Australian case laws that the BJR is capable of providing a defense for directors whose conduct breaches section 180(1) of the Corporation Act in Australia. An extract of Section 180 of Corporation Law in Australia is given below:-

Section 180 - Care and diligence

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

   (a) were a director or officer of a corporation in the corporation's circumstances; and

   (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of sub-section (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

   (a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the proper subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

9.4 Provisions under the Act

Section 463 of the Act *inter alia* provides protection to the directors. Section 463 says that:

(1) if in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the court may relieve him, either wholly or partly, from his liability on such term, as it may think fit.

However, in a criminal proceeding under this sub-section, the court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

(2) Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a court before which a proceedings against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section (1).

(3) No court shall grant any relief to any officer under sub-section (1) or sub-section (2) unless it has, by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted.

9.5 Summary

The BJR in the United States (Delaware) & Australia are clearly mentioned in their

Statutes. But it is not so directly and clearly mentioned in the statutes in United Kingdom and India.

In all the above Jurisdictions, the principle followed is that directors of a corporation are fully clad with the presumption, which the law accords to them, of being motivated in their conduct by a *bona fide* regard for the interests of the corporation whose affairs the stockholders have committed to their charge.

Under the BJR courts will uphold the decisions of a director as long as they are made:

- In good faith,
- With the care that a reasonably prudent person would use, and
- With the reasonable belief and diligence that the director is acting in the best interests of the corporation.

9.6 Guidance for Independent Directors arising out of BJR

It can be seen above that in any event of contingency, in order to ensure that the courts defer the matter to the BJR, it is necessary to demonstrate that the directors have acted in good faith and have fulfilled all the duties expected of them.

(i) Good Faith

- **Indian Penal Code**

  Under Section 52 of Indian Penal Code anything which is done with due care and attention qualifies for good faith.

- **The Limitation Act, 1963**

  Under the Limitation Act nothing shall be deemed to be done in good faith which is not done with due care and attention.

  If one carefully sees the expression used in the above statutes is "due care". The term due care is not ordinary care but a care which is expected in discharging that particular act.

  Similarly, in case of a director it would be expected that he exercises due care while discharging his duties, the level of care expected to be exercised by a director on the Board of a company.

- **General Clauses Act, 1897**

  Under the General Clauses Act a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not.

Whilst it can be said that under the General Clauses Act even if a person acts negligently that *per se* does not tantamount to not acting in good faith, acting in good faith comes within its ambit acting diligently and to that extent there is a very thin line differentiating being negligent and acting in connivance as the latter includes knowing about a contravention and still remaining silent or winking at it.

The Australian Company Law allows directors the freedom to exercise their business judgment without being afraid of erring on the wrong side if they act in good faith for best interests of the company, without having any material personal interest. Though this requirement has been covered under section 166 of the Act in a way, it has not been stated so clearly as spelt out under the Australian company law. Directors must take action in good faith for a proper purpose to protect the interests of the company. This requirement is squarely covered by section 166 of the Act.

A director must act in good faith and his objective must be to promote the objects of the company and it must be for the benefit of all members of the company as a whole, and in the best interests of the company, its employees, shareholders, the community and for protection of the environment. While it is not only necessary but is also a statutory duty to act in good faith to promote the objects of the company, any such action cannot prejudicially affect any person or thing connected with or dealing with the company.

(ii) Duty of Care

Under the Delaware Law (United States), duty of care is a fiduciary duty owed to a corporation by its directors.

There is no statutory codification of the duty of care in the Delaware General Corporation Law, but it is explained as a director owes a duty to exercise good business judgment and to use ordinary care and prudence in the operation of the business. They must discharge their actions in good faith and in the best interest of the corporation, exercising the care an ordinary person would use under similar circumstances.

(iii) Fiduciary Duty

Fiduciary duties in a financial sense exist to ensure that those who manage other people's money act in their beneficiaries' interests, rather than serving their own interests.

A fiduciary duty is the highest standard of care in equity or law. A fiduciary is expected to be extremely loyal to the person to whom he owes the duty (the "principal") such that there must be no conflict of duty between fiduciary and principal, and

the fiduciary must not profit from their position as a fiduciary (unless the principal consents).

(iv) Prudent person rule

The prudent person rule has its roots in trust law. The "prudent person rule" is the standard in accordance with which the persons managing the trust – the trustees or fiduciaries – must operate. The prudent person rule can generally be stated in terms of the following broad principle:

A fiduciary must discharge his or her duties with the care, skill, prudence and diligence that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and aims.

10. STRATEGIES FOR ENGAGEMENT WITH THE MANAGEMENT

10.1 Setting the Priorities Right - Getting Familiarised with the Company's Business, culture, ethics etc.

It is very important for an independent director to know about the company in which he is about to be inducted as a director or he has already been inducted as a director. Having adequate knowledge about the company enables independent director to play his role effectively. Besides, a director can provide his guidance effectively if he understands the business of the company and the area in which the company needs his guidance.

For an independent director to familiarise swiftly with a company's business and culture and to start contributing and fulfil his roles, duties and functions as has been statutorily defined, the Guidance Note has listed certain key metrics which the director has to consider.

While the law requires the independent directors to familiarise themselves and the companies to conduct induction and other continuous programs, it is in the interest of the independent director that he stays abreast of the developments concerning the industry, the business and international practices apart from local laws.

Key metrics, which a director should focus while on boarding a company

S. No.	Key Metrics	Relevant business document	Objective of review
	Familiarization on culture and values of the company	Vision, Mission, Objectives & Values, Code of Conduct and other policies of the company. Board processes, charters of committees, their role and responsibilities	To familiarize himself about the company and its culture, its Vision, Mission, Objectives & Values
1	Familiarisation about the company	Annual Report for the last 3 years including the Boards' Report, Management Discussion and Analysis, Corporate presentations, Business Plans, Corporate Governance policy, Code of Conduct and other policies. Also it is necessary that he engages with the Key Managerial personnel of the company to understand the business environment of the company in line with the familiarization programme provided by the company.	To familiarise himself about the company and its operations and the governance culture of the company.
2	Financial integrity	Statutory Auditors' Report for the last 3 years, credit rating documents.	To understand if there had been any concern areas on financial matters expressed by the Statutory Auditors.
3	Governance and Compliance integrity	Secretarial Auditors' Report for the last 3 years.	To understand if there had been any issues of concern on governance and compliance matters expressed by the Secretarial Auditors.

4	Risk Management Framework	Risk Management Policy.	To understand the key risks, domestic and international including geo-political risks affecting the company, risks of sanctions on countries, oil prices, regulatory risks, adverse terms of trade, capacity under-utilization, technology disruptions, business risks, currency risks, financial risks, etc. and risk mitigation measures.
5	Strength of the senior management personnel	Details of directors, key managerial personnel and senior management personnel and the changes therein during the last 3 years.	To understand how the directors, key managerial / senior management personnel have viewed the company and how long they have stayed in the company and if frequent changes, is there any governance issue with the company.
6	Legal risks	Major or material litigations and the details thereof in the last 3 years.	To understand the legal risks faced by the company. Identify important legal cases and their financial impact. Also whether there are any environmental concerns and how has the company addressed them.
7	Key Regulatory governance and compliance	Corporate law issues and securities law issues, if any.	To have a broader understanding on the matters relating to corporate and securities laws.
8	Corporate Governance	Inspections, prosecutions, strictures and penalties by any Statutory authorities during the last 3 years and the details of the issues involved therein, proxy advisory reports if available.	Whether the company's governance practices, financial practices and general management practices have undergone review by statutory authorities and the outcome of such reviews, if any.

9	Sectoral risks	Sector specific risks and requirements which the company is exposed to and the management's plans and measures to mitigate such risks.	To have a broader understanding of the risks in which the company conducts its business operations.
10	Financial Performance	The performance of the company *vis-à-vis* its peers and competitors.	To have a benchmark overview of the company *vis-à-vis* its peers and competitors.
11	Internal Control Systems	The company's Annual Report – Financial Statements, Management Discussion & Analysis, Statutory Auditors' Report, CEO/CFO certification, Internal Audit Report.	The objective of review will be matters mentioned in section 134(5) of the Act will be covered broadly.
12	Code of Conduct, Ethic Policies, Code on Insider Trading Regulations	The relevant business document will be the company's relevant policies.	The objective of review will be to understand Code of Conduct/ Insider Trading Code so that director will promptly comply with the same.

In addition, an independent director should also be familiar with the Memorandum and Articles of Association of the company. Important agreements such as JV, collaboration agreements, loan agreements etc. as well as important corporate policies may also be looked into in detail to understand the position of the company and the resulting factors which may have impact on the functioning of the company.

10.2 Engaging with the Managing Director / CEO and Senior Management

The independent directors in their conversation with the Managing Director / CEO and top management should find out what contribution the management expects from the independent directors. This, coupled with personal assessment of their skills and capabilities, will help independent directors to contribute meaningfully and the Board will work as a good team. This is where an impartial Board evaluation can play a part. Apart from the Board members, the independent directors should also interact with the key management officials to get better insight of processes/ functioning of the company and to ascertain the problem areas, if any.

11. STRATEGIC APPROACH TO MEETING'S AGENDA

11.1 Exercising Diligence – Pre-Meetings, at the Meetings and Post-Meetings

Diligence means the degree of attention or care expected of a person in a given situation. Prior to dealing with the question of how to exercise diligence at the pre-meetings, at the meetings and post the meetings, it is imperative to understand the expectations of the regulators from the directors and in particular from the independent directors. To understand such expectations, it becomes necessary to analyse the duties, functions and responsibilities of directors specified in the regulatory framework. Independent director should insist on regular updates on important regulatory as well as other developments having impact on the company.

The legal obligations of directors in this regard have been expressly and specifically spelt out in the Act and also the Listing Regulations.

11.2 Legal Obligations under the Company Law Provisions

Section 166 of the Act stipulates the duties of directors. Such stipulation is with reference to the manner in which a director is expected to act and the manner in which he shall exercise his duties as a director. It also stipulates how to conduct himself in a situation of conflict of interest.

Manner in which a director is expected to act	He shall act in good faith to promote the objects of the company for the benefit of its members as a whole; and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
Manner of exercising the duties	He shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
Conduct during conflict of interest situations	He shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company. He shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates.

11.3 Consequences of failure to conform to the legal obligations

A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company. [section 166 (5) of the Act]

Failure to conform to the statutory duties will make the director liable to be punished with a minimum fine of Rs 1 lakh and to a maximum fine of Rs 5 lakh. [section 166 (7) of the Act]

11.4 Legal Obligations under the Listing Regulations

The legal obligations of Board of Directors have been specifically classified under Chapter II of the Listing Regulations.

The key functions of the Board have been specified to include the following:

Key Business metrics	Review and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans, setting performance objectives.
Key Operational metrics	Monitoring implementation and corporate performance, overseeing major capital expenditures.
M&A	Reviewing Acquisitions and disinvestments. The Board should discuss the company's philosophy on acquisition versus organic growth and its strategy on deployment of free cash.
	On specific M&A cases, the Board should ensure that enough rigor has gone into management's analysis, spot weaknesses, if any, in the management's presentation / process, evaluate the potential risks, consider interest of all constituents and independent director should be involved also during post transaction integration phase.

Governance metrics	Monitoring the effectives of the governance practices and making changes as and when required. Monitoring and managing potential conflict of interests of management, members of the Board of Directors and shareholders, including misuse of corporate assets and abuse in related party transactions. Overseeing the process of disclosure and communications. Monitoring and reviewing Board of Directors' evaluation framework.
Succession Planning	Selecting, compensating, monitoring and replacing key managerial personnel, when required and overseeing succession planning. Establishment of a transparent nomination process to the Board of Directors with the diversity of thought, experience, knowledge, perspective and gender in the Board of Directors.
Guidance on remuneration	Aligning remuneration of key managerial personnel and remuneration of Board of Directors with the longer-term interests of the listed company and its shareholders.
Financial Reporting	Ensuring the integrity of the accounting and financial reporting systems, including 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.

11.5 Exercising diligence

Having regard to the duties, functions and responsibilities of the directors, a director should be alert in ensuring that he receives all the relevant information, disclosure, data and other relevant materials from the company so that he can fulfil his role as envisaged in the regulatory framework.

To further elaborate, a director should be careful enough to analyse and review whether the information presented to him by the management enables him to exercise proper diligence to review the information, analyse the same and exercise an objective independent judgment and then firm up his thoughts or view on the subject presented to him.

Pre-meeting-

- A director has to engage with the management and ascertain the likely agenda for the meetings or suggest any item of agenda that director wishes to introduce with the permission of the chairman. The director may ask for appropriate information and disclosure either in advance or on receipt of the agenda notes if he feels that such information or disclosure is necessary to take informed decision.

- A director, may as a good practice have a meeting with the management, internal auditors, statutory auditors, secretarial auditors and other key personnel before the meeting to understand any matter which is tabled for discussion as part of the agenda. A director shall thoroughly read the agenda and notes thereon and prepare for the meeting so that effective contribution can be made during the meeting.

- Adequate planning and time commitment is essential for a good and effective participation and contribution. It's also important to ensure that the independent directors do not assume many directorships and should avoid over boarding. Proxy advisory firms have stricter norms with regard to the number of directorships in view of the time and quality commitment and recommend negative voting recommendations.

At the meeting-

- At the meeting, a director should not hesitate to ask probing questions to understand the basis of assumptions and strategy of the management to get full picture before taking a decision. During the meeting, it is possible that a lot of new information or disclosure emanate out of the deliberations.

- An independent director should bring outside perspective on a given topic and should deal with all the transactions objectively, without any bias. This will provide an independent view of the management and add value to the Board. This will also safeguard the interest of all stakeholders and enhance good corporate governance.

- A director should ensure that such information or disclosure has an adequate or underlying evidence rather than a hollow statement made at the spur of the moment. If a director is not satisfied with such statement, information or disclosure, he should provide adequate time to the management to revert with the adequate data or evidence so that an informed decision can be taken.

- A director can insist to record his point of view on any deliberation in the meeting of the minutes.
- As a good practice a director can maintain the notes of the meeting for future reference.
- An independent director should strive to attend and contribute to all Board meetings, committee meetings, general meetings and court convened meetings. Proxy advisory firms have certain guidelines with regard to the attendance. If the attendance is poor then they provide negative voting recommendation.

Post meeting-

- After the meeting it is important for a director to review the minutes of the meeting to ensure that the minutes reflect accurate discussions at the meeting. If there are any suggestions, the director may provide within the stipulated timelines.
- A director may also keep a track of action points that are emanating from the meeting so that the progress can be assessed against the said actions.

11.6 Diligence Matrix with cases for review of information placed before the Board

The regulatory requirements under the Act and Listing Regulations mandates providing various information to the Board for their review and decision making and thus ensuring good governance of the company. Such information pertains to business matters, operational metrics, financial information and governance disclosures. It is necessary for a director to exercise proper and adequate diligences while examining and reviewing such information. A director has to exercise a careful judgment on the adequacy of the information presented to him. If there is a void in the information or inadequacy in the disclosure, a director should not hesitate to seek further details or clarifications, wherever required.

An illustrative guide is presented on the adequacy of the contents for each of the prescribed information to be presented to the Board as has been stipulated under the Act and Listing Regulations.

[Schedule II – Part A of Listing Regulations]

S. No.	Minimum information pursuant to Regulation 17(7) – Schedule II: Corporate Governance (Part A) of the SEBI (Listing Regulations and Disclosure Requirements) Regulations, 2015 / Secretarial Standard on Meetings of the Board of Directors (SS-1)	Details
1	Annual operating plans and budgets and any updates.	
2	Capital budgets and any updates.	
3	Quarterly results for the company and its operating divisions or business segments.	
4	Minutes of meetings of audit committee and other committees of the Board.	
5	The information on recruitment and remuneration of senior officers just below the Board level, including appointment or removal of Chief Financial Officer and the company Secretary.	
6	Status Report on Show Cause Notices (SCN), Demand Notices (DN) and Penalty Notices (PN) under various laws received by the company.	
7	Details of Fatal or serious accidents, dangerous occurrences, and any material effluent or pollution problems in the manufacturing units of the company, if any.	
8	Details of default in financial obligations by the company, if any.	
9	Information on public or product liability claim of any nature, judgment or order which have passed strictures on the conduct of the company, if any or taken an adverse view regarding another enterprises that may have negative implications on the company.	
10	Details of any joint venture or collaboration agreement.	
11	Payment towards goodwill, brand equity or intellectual property.	

12	Significant development in Human Resources/ Industrial Relations including labour problems and their proposed solutions. Relationships with labour unions in all units of the company.	
13	Sale of material nature of investments, subsidiaries, assets, which is not in normal course of business.	
14	Quarterly details of foreign exchange exposures and the steps taken by management to limit the risks of adverse exchange rate movement, if material.	
15	Non-Compliance of any regulatory, statutory or listing requirements. Service to the shareholders *viz.,* non-payment of dividend, delay in share transfers etc.	

Details of loans / guarantee / security / acquisition to subsidiary companies and other companies

Diligence Matrix with Cases for Disclosure of Material and Non-Material Events or Information

[Schedule III – Part A & B of Listing Regulations]

Part A: Disclosures of Events or Information: Specified Securities		
The following shall be events/information, upon occurrence of which listed company shall make disclosure to stock exchange(s):		
S. No.	**A. Events which shall be disclosed without any application of the guidelines for materiality as specified in sub-regulation (4) of regulation (30):**	**Details**
1.	Acquisition(s) (including agreement to acquire), Scheme of Arrangement (amalgamation/ merger/ demerger/ restructuring), or sale or disposal of any unit(s), division(s) or subsidiary of the listed company or any other restructuring. Explanation.- For the purpose of this sub-para, the word 'acquisition' shall mean-	

	(i) acquiring control, whether directly or indirectly; or, (ii) acquiring or agreeing to acquire shares or voting rights in, a company, whether directly or indirectly, such that - (a) the listed company holds shares or voting rights aggregating to five per cent or more of the shares or voting rights in the said company, or; (b) there has been a change in holding from the last disclosure made under sub-clause (a) of clause (ii) of the Explanation to this sub-para and such change exceeds two per cent of the total shareholding or voting rights in the said company.	
2.	Issuance or forfeiture of securities, split or consolidation of shares, buyback of securities, any restriction on transferability of securities or alteration in terms or structure of existing securities including forfeiture, reissue of forfeited securities, alteration of calls, redemption of securities etc.	
3.	Revision in Rating(s).	
4.	Outcome of meetings of the Board of Directors: The listed company shall disclose to the Exchange(s), within 30 minutes of the closure of the meeting, held to consider the following: a) dividends and/ or cash bonuses recommended or declared or the decision to pass any dividend and the date on which dividend shall be paid/dispatched; b) any cancellation of dividend with reasons thereof; c) the decision on buyback of securities; d) the decision with respect to fund raising proposed to be undertaken; e) increase in capital by issue of bonus shares through capitalization including the date on which such bonus shares shall be credited/dispatched;	

	f) reissue of forfeited shares or securities, or the issue of shares or securities held in reserve for future issue or the creation in any form or manner of new shares or securities or any other rights, privileges or benefits to subscribe to; g) short particulars of any other alterations of capital, including calls; h) financial results; i) decision on voluntary delisting by the listed company from stock exchange(s). Provided that in case of board meetings being held for more than one day, the financial results shall be disclosed within thirty minutes of end of the meeting for the day on which it has been considered.	
5.	Agreements (*viz.* shareholder agreement(s), joint venture agreement(s), family settlement agreement(s) (to the extent that it impacts management and control of the listed company), agreement(s)/ treaty(ies)/ contract(s) with media companies) which are binding and not in normal course of business, revision(s) or amendment(s) and termination(s) thereof.	
6.	Fraud/ defaults by promoter or key managerial personnel or by listed company or arrest of key managerial personnel or promoter.	
7.	Change in directors, key managerial personnel (Managing Director, Chief Executive Officer, Chief Financial Officer, Company Secretary etc.), Auditor and Compliance Officer.	
7A.	In case of resignation of the auditor of the listed company, detailed reasons for resignation of auditor, as given by the said auditor, shall be disclosed by the listed companies to the stock exchanges as soon as possible but not later than twenty four hours of receipt of such reasons from the auditor.	

7B.	Resignation of independent director including reasons for resignation: In case of resignation of an independent director of the listed company, within seven days from the date of resignation, the following disclosures shall be made to the stock exchanges by the listed companies: (i) [1][The letter of resignation along with] detailed reasons for the resignation as given by the said director. [2][(ia) Names of listed companies in which the resigning director holds directorships, indicating the category of directorship and membership of board committees, if any.] ii. The independent director shall, along with the detailed reasons, also provide a confirmation that there are no other material reasons other than those provided. iii. The confirmation as provided by the independent director above shall also be disclosed by the listed companies to the stock exchanges along with the [3][disclosure] as specified in sub-clause (i) [4][and (ii)] above.	
8.	Appointment or discontinuation of share transfer agent.	
9.	Resolution plan/ Restructuring in relation to loans/borrowings from banks/financial institutions including the following details: (i) Decision to initiate resolution of loans/borrowings; (ii) Signing of Inter-Creditors Agreement (ICA) by lenders; (iii) Finalization of Resolution Plan; (iv) Implementation of Resolution Plan; (v) Salient features, not involving commercial secrets, of the resolution/ restructuring plan as decided by lenders.	

1. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022

2. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022

3. Substituted for the word "detailed reasons" by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021, w.e.f. 1.1.2022.

4. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022.

10.	One time settlement with a bank.	
11.	Reference to BIFR and winding-up petition filed by any party / creditors.	
12.	Issuance of Notices, call letters, resolutions and circulars sent to shareholders, debenture holders or creditors or any class of them or advertised in the media by the listed company.	
13.	Proceedings of annual and extraordinary general meetings of the listed company.	
14.	Amendments to memorandum and articles of association of listed company, in brief.	
15.	(a) Schedule of analysts or institutional investors meet and presentations made by the listed entity to analysts or institutional investors. Explanation: For the purpose of this clause 'meet' shall mean group meetings or group conference calls conducted physically or through digital means. (b) Audio or video recordings and transcripts of post earnings/ quarterly calls, by whatever name called, conducted physically or through digital means, simultaneously with submission to the recognized stock exchange(s), in the following manner: (i) the presentation and the audio/video recordings shall be promptly made available on the website and in any case, before the next trading day or within twenty-four hours from the conclusion of such calls, whichever is earlier; (ii) the transcripts of such calls shall be made available on the website within five working days of the conclusion of such calls: The requirement for disclosure(s) of audio/video recordings and transcript shall be voluntary with effect from April 01, 2021 and mandatory with effect from April 01, 2022.	

16	The following events in relation to the corporate insolvency resolution process (CIRP) of a listed corporate debtor under the Insolvency Code: a) Filing of application by the corporate applicant for initiation of CIRP, also specifying the amount of default; b) Filing of application by financial creditors for initiation of CIRP against the corporate debtor, also specifying the amount of default; c) Admission of application by the Tribunal, along with amount of default or rejection or withdrawal, as applicable; d) Public announcement made pursuant to order passed by the Tribunal under section 13 of Insolvency Code; e) List of creditors as required to be displayed by the corporate debtor under regulation 13(2)(c) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; f) Appointment/ Replacement of the Resolution Professional; g) Prior or post-facto intimation of the meetings of Committee of Creditors; h) Brief particulars of invitation of resolution plans under section 25(2)(h) of Insolvency Code in the Form specified under regulation 36A(5) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; i) Number of resolution plans received by Resolution Professional; j) Filing of resolution plan with the Tribunal; k) Approval of resolution plan by the Tribunal or rejection, if applicable;	

	l) Specific features and details of the resolution plan as approved by the Adjudicating Authority under the Insolvency Code, not involving commercial secrets, including details such as: (i) Pre and Post net-worth of the company; (ii) Details of assets of the company post CIRP; (iii) Details of securities continuing to be imposed on the companies' assets; (iv) Other material liabilities imposed on the company; (v) Detailed pre and post shareholding pattern assuming 100% conversion of convertible securities; (vi) Details of funds infused in the company, creditors paid-off; (vii) Additional liability on the incoming investors due to the transaction, source of such funding etc.; (viii) Impact on the investor – revised P/E, RONW ratios etc.; (ix) Names of the new promoters, key managerial person(s), if any and their past experience in the business or employment. In case where promoters are companies, history of such company and names of natural persons in control; (x) Brief description of business strategy. m) Any other material information not involving commercial secrets. n) Proposed steps to be taken by the incoming investor/ acquirer for achieving the minimum public shareholding; o) Quarterly disclosure of the status of achieving the minimum public shareholding;	

	p) The details as to the delisting plans, if any approved in the resolution plan.	
17	Initiation of forensic audit: In case of initiation of forensic audit, (by whatever name called), the following disclosures shall be made to the stock exchanges by listed companies: a) The fact of initiation of forensic audit along-with name of entity initiating the audit and reasons for the same, if available; b) Final forensic audit report (other than for forensic audit initiated by regulatory / enforcement agencies) on receipt by the listed company along with comments of the management, if any.	
S. No.	**B. Events which shall be disclosed upon application of the guidelines for materiality referred in sub-regulation (4) of regulation (30):**	**Details**
1.	Commencement or any postponement in the date of commencement of commercial production or commercial operations of any unit/division.	
2.	Change in the general character or nature of business brought about by arrangements for strategic, technical, manufacturing, or marketing tie-up, adoption of new lines of business or closure of operations of any unit/division (entirety or piecemeal).	
3.	Capacity addition or product launch.	
4.	Awarding, bagging/ receiving, amendment or termination of awarded/bagged orders/ contracts not in the normal course of business.	
5.	Agreements (*viz.,* loan agreement(s) (as a borrower) or any other agreement(s) which are binding and not in normal course of business) and revision(s) or amendment(s) or termination(s) thereof.	
6.	Disruption of operations of any one or more units or division of the listed company due to natural calamity (earthquake, flood, fire etc.), force majeure or events such as strikes, lockouts etc.	
7.	Effect(s) arising out of change in the regulatory framework applicable to the listed company.	

8.	Litigation(s) / dispute(s) / regulatory action(s) with impact.	
9.	Fraud/defaults etc. by directors (other than key managerial personnel) or employees of listed company.	
10.	Options to purchase securities including any ESOP/ESPS Scheme.	
11.	Giving of guarantees or indemnity or becoming a surety for any third party.	
12.	Granting, withdrawal, surrender, cancellation or suspension of key licenses or regulatory approvals.	
	C. Any other information/event *viz.*, major development that is likely to affect business, e.g., emergence of new technologies, expiry of patents, any change of accounting policy that may have a significant impact on the accounts, etc. and brief details thereof and any other information which is exclusively known to the listed company which may be necessary to enable the holders of securities of the listed company to appraise its position and to avoid the establishment of a false market in such securities.	
	D. Without prejudice to the generality of para (A), (B) and (C) above, the listed company may make disclosures of event/information as specified by the Board from time to time.	
PART B: DISCLOSURE OF INFORMATION HAVING BEARING ON PERFORMANCE/OPERATION OF LISTED COMPANY AND/OR PRICE SENSITIVE INFORMATION: NON-CONVERTIBLE SECURITIES		
S. No.	**A. The listed company shall promptly inform the stock exchange(s) of all information which shall have bearing on performance/ operation of the listed company or is price sensitive or shall affect payment of interest or dividend or redemption payment of non-convertible securities including:**	**Details**
1.	expected default in the timely payment of interest, dividend or redemption payment or both in respect of the non-convertible securities and also default in the creation of security for non-convertible debt securities as soon as the same becomes apparent;	

2.	any attachment or prohibitory orders restraining the listed company from transferring non-convertible securities from the account of the registered holders along-with the particulars of the numbers of securities so affected, the names of the registered holders and their demat account details;	
3.	any action which shall result in the redemption, reduction, cancellation, retirement in whole or in part of any non-convertible securities;	
4.	any action that shall adversely affect payment of interest on non-convertible debt securities or payment of dividend on non-convertible redeemable preference shares including default by issuer to pay interest on non-convertible debt securities or redemption amount and failure to create a charge on the assets;	
5.	any change in the form or nature of any of its non-convertible securities that are listed on the stock exchange(s) or in the rights or privileges of the holders thereof and make an application for listing of the securities as changed, if the stock exchange(s) so require;	
6.	any changes in the general character or nature of business/ activities, disruption of operation due to natural calamity, and commencement of commercial production / commercial operations;	
7.	any events such as strikes and lock outs. which have a bearing on the interest payment/ dividend payment / principal repayment capacity;	
8.	details of any letter or comments made by debenture trustees regarding payment/non-payment of interest on due dates, payment/non-payment of principal on the due dates or any other matter concerning the security, listed company and /or the assets along with its comments thereon, if any;	
9.	delay/default in payment of interest or dividend/ principal amount/redemption for a period of more than three months from the due date;	
10.	failure to create charge on the assets within the stipulated time period;	

11.	any instance(s) of default/delay in timely repayment of interests or principal obligations or both in respect of the debt securities including, any proposal for re-scheduling or postponement of the repayment programmes of the dues/ debts of the listed company with any investor(s)/ lender(s).	
12.	any major change in composition of its Board of Directors, which may amount to change in control as defined in Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;	
13.	any revision in the rating;	
14.	the following approvals by Board of Directors in their meeting:- (a) the decision to pass any interest payment; (b) short particulars of any increase of capital whether by issue of bonus securities through capitalization, or by way of right securities to be offered to the debt security holders, or in any other way;	
15.	all information, report, notices, call letters, circulars, proceedings, etc. concerning non-convertible debt securities;	
16	The listed company shall disclose the outcome of meetings of the Board of Directors to the Exchange(s), within thirty minutes of the closure of the meeting, held to consider the following: (a) the decision with respect to fund raising proposed to be undertaken by way of non-convertible securities; (b) financial results. Provided that in case of Board meetings being held for more than one day, the financial results shall be disclosed within thirty minutes of end of the meeting for the day on which it has been considered.	
17	fraud/defaults by promoter or key managerial personnel or director or employees of listed company or by listed company or arrest of key managerial personnel or promoter;	
18	change in directors, key managerial personnel (Managing Director, Chief Executive Officer, Chief Financial Officer, Company Secretary etc.), Auditor and Compliance Officer;	

19	in case of resignation of the auditor of the listed company, detailed reasons for resignation of auditor, as given by the said auditor, shall be disclosed by the listed companies to the stock exchanges as soon as possible but not later than twenty-four hours of receipt of such reasons from the auditor;	
20	Resolution plan/ restructuring in relation to loans/borrowings from banks/financial institutions including the following details: (i) Decision to initiate resolution of loans/borrowings; (ii) Signing of Inter-Creditors Agreement (ICA) by lenders; (iii) Finalization of Resolution Plan; (iv) Implementation of Resolution Plan; (v) Salient features, not involving commercial secrets, of the resolution/ restructuring plan as decided by lenders.	
21	One-time settlement with a bank;	
22	Winding-up petition filed by any party / creditors;	
23	Proceedings of Annual and extraordinary general meetings of the listed company;	
24	the following events in relation to the Corporate Insolvency Resolution Process (CIRP) of a listed corporate debtor under the Insolvency Code: a) Filing of application by the corporate applicant for initiation of CIRP, also specifying the amount of default; b) Filing of application by the financial creditors for initiation of CIRP against the corporate debtor, also specifying the amount of default; c) Admission of application by the Tribunal, along with the amount of default or rejection or withdrawal, as applicable; d) Public announcement made pursuant to the order passed by the Tribunal under section 13 of Insolvency Code;	

	e) List of creditors as required to be displayed by the corporate debtor under regulation 13(2)(c) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; f) Appointment/ Replacement of the Resolution Professional; g) Prior or post-facto intimation of the meetings of Committee of Creditors; h) Brief particulars of invitation of resolution plans under section 25(2)(h) of Insolvency Code in the Form specified under regulation 36A (5) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; i) Number of resolution plans received by Resolution Professional; j) Filing of resolution plan with the Tribunal; k) Approval of resolution plan by the Tribunal or rejection, if applicable; l) Specific features and details of the resolution plan as approved by the Adjudicating Authority under the Insolvency Code, not involving commercial secrets, including details such as: (i) Pre and Post net-worth of the company; (ii) Details of assets of the company post CIRP; (iii) Details of securities continuing to be imposed on the companies' assets; (iv) Other material liabilities imposed on the company; (v) Detailed pre and post shareholding pattern assuming 100% conversion of convertible securities;	

	(vi) Details of funds infused in the company, creditors paid-off; (vii) Additional liability on the incoming investors due to the transaction, source of such funding etc.; (viii) Impact on the investor – revised P/E, RONW ratios etc.; (ix) Names of the new promoters, key managerial persons(s), if any and their past experience in the business or employment. In case where promoters are companies, history of such company and names of natural persons in control; (x) Brief description of business strategy.	
25	intimation related to any change in terms of issue or redemption or exercising of call/ put options;	
26	intimation related to any change in covenants or breach of covenants under the terms of non-convertible debentures and/ or non-convertible redeemable preference shares;	
27	intimation related to forfeiture of unclaimed interest or dividend or principal amount;	
28	intimation related to any change in the debenture trustee or Credit Rating Agency or Registrar and Share Transfer Agent;	
29	intimation of comfort/guarantee or any credit enhancement provided by the listed company to a third party;	
30	any other information/change that: (a) affect the rights and obligations of the holders of the non-convertible securities; and (b) is not in the public domain but necessary to enable the holders of the non-convertible securities to comprehend the true position and to avoid the creation of a false market in such listed securities.	

Diligence Matrix with Cases – Financial Disclosures

[Schedule IV – Part A of Listing Regulations]

S. No.	Disclosures in Financial Results	Details
(1)	Changes in accounting policies, if any, shall be disclosed in accordance with Accounting Standard 5 or Indian Accounting Standard 8, as applicable, specified in section 133 of the Act read with relevant rules framed thereunder or by the Institute of Chartered Accountants of India, whichever is applicable.	
(2)	If the auditor has expressed any modified opinion(s) in respect of audited financial results submitted or published under this para, the listed company shall disclose such modified opinion(s) and cumulative impact of the same on profit or loss, net worth, total assets, turnover/total income, earning per share, total expenditure, total liabilities or any other financial item(s) which may be impacted due to modified opinion(s), while publishing or submitting such results.	
(3)	If the auditor has expressed any modified opinion(s), the management of the listed company has the option to explain its views on the audit qualifications and the same shall be included in the Statement on Impact of Audit Qualifications (for audit report with modified opinion).	
(4)	With respect to audit qualifications where the impact of the qualification is not quantifiable: i. The management shall mandatorily make an estimate which the auditor shall review and report accordingly. ii. Notwithstanding the above, the management may be permitted to not provide estimate on matters like going concerns or sub-judice matters; in which case, the management shall provide the reasons and the auditor shall review the same and report accordingly.	

(5)	If the auditor has expressed any modified opinion(s) or other reservation(s) in his/her audit report or limited review report in respect of the financial results of any previous financial year or quarter which has an impact on the profit or loss of the reportable period, the listed company shall include as a note to the financial results – (i) how the modified opinion(s) or other reservation(s) has been resolved; or (ii) if the same has not been resolved, the reason thereof and the steps which the listed company intends to take in the matter.	
(6)	If the listed company has changed its name suggesting any new line of business, it shall disclose the net sales or income, expenditure and net profit or loss after tax figures pertaining to the said new line of business separately in the financial results and shall continue to make such disclosures for the three years succeeding the date of change in name: Provided that the tax expense shall be allocated between the said new line of business and other business of the listed company in the ratio of the respective figures of net profit before tax, subject to any exemption, deduction or concession available under the tax laws.	
(7)	If the listed company had not commenced commercial production or commercial operations during the reportable period, the listed company shall, instead of submitting financial results, disclose the following details: (i) details of amount raised i.e., proceeds of any issue of shares or debentures made by the listed company; (ii) the portions thereof which is utilized and that remaining unutilized; (iii) the details of investment made pending utilisation; (iv) brief description of the project which is pending completion; (v) status of the project and	

	(vi) expected date of commencement of commercial production or commercial operations: Provided that the details mentioned above shall be approved by the Board of Directors based on certification by the chief executive officer and chief financial officer.	
(8)	All items of income and expenditure arising out of transactions of exceptional nature shall be disclosed.	
(9)	Extraordinary items, if applicable, shall be disclosed in accordance with Accounting Standard 5 (AS 5 – Net Profit or Loss for the Period, Prior Period Items and Changes in Accounting Policies) or Companies (Accounting Standards) Rules, 2006, whichever is applicable.	
(10)	The listed company, whose revenues are subject to material seasonal variations, shall disclose the seasonal nature of their activities and the listed company may supplement their financial results with information for the twelve month period ending on the last day of the quarter for the current and preceding years on a rolling basis.	
(11)	The listed company shall disclose any event or transaction which occurred during or before the quarter that is material to an understanding of the results for the quarter including but not limited to completion of expansion and diversification programmes, strikes and lock-outs, change in management, change in capital structure and the listed company shall also disclose similar material events or transactions that take place subsequent to the end of the quarter.	
(12)	The listed company shall disclose the following in respect of dividends paid or recommended for the year, including interim dividends : (i) amount of dividend distributed or proposed for distribution per share; the amounts in respect of different classes of shares shall be distinguished and the nominal values of shares shall also be indicated; (ii) where dividend is paid or proposed to be paid pro-rata for shares allotted during the year, the date of allotment and number of shares allotted, pro-rata amount of dividend per share and the aggregate amount of dividend paid or proposed to be paid on pro-rata basis.	

(13)	The listed company shall disclose the effect on the financial results of material changes in the composition of the listed company, if any, including but not limited to business combinations, acquisitions or disposal of subsidiaries and long term investments, any other form of restructuring and discontinuance of operations.	
(14)	The listed company shall ensure that segment reporting is done in accordance with AS-17 or Indian Accounting Standard 108 as applicable, specified in section 133 of the Act read with relevant rules framed thereunder or by the Institute of Chartered Accountants of India, whichever is applicable.	

11.7 External Professional Advice

Independent directors hold multifarious qualifications and experience, but an external professional advice may be important for them to give inputs during discussion at the meeting. Such professional advice sometimes may have some cost, for this the company may either maintain some panel of experts or it may allow the director to obtain such advice at their own manner. Keeping in mind the liabilities, independent directors should be extra vigilant and also take external professional advices on issues as per need basis.

11.8 Understanding the Risk Matrix of a Company and Influencing Non-Financial Factors in Governance

Every Board should formally undertake an annual review of the company's risk management system, either by engaging outside experts or through internal resources along with independent directors. The objective is to assist the Board in both the review of the company's risk management systems and also assist them in understanding and analyzing business-specific risks. Where a major or new risk comes to fruition, the independent directors should thoroughly investigate and report back to the full board or the relevant Committees as appropriate.

Independent directors should, through their risk oversight role, satisfy themselves that the risk management policies and procedures designed and implemented by the company's senior executives and risk managers are consistent with the company's strategy and risk appetite and that these policies and procedures are functioning as directed. They must also ensure that risk-taking beyond the company's determined risk appetite is recognized and addressed timely.

Non-financial factors play a very important in the life of a company. Keeping a watch

on risk and non-financial factors, the independent directors can drive the company to enhanced governance standards.

11.9 Engagement Strategies with Investors, Proxy Advisory Firms, Analysts and Regulators

The stakeholders have varied expectations from independent directors on governance culture of the company. The independent directors should ensure that the company has adopted a fair disclosure policy and designated specific person to engage with investors, proxy advisory firms, analysts and regulators etc.

12. Proxy Advisory Firms' Perspective

In recent times proxy advisory firms have begun to play an important role in India in guiding the institutional investors on the manner in which they should exercise their votes in respect of resolutions proposed at general meetings of large listed companies. Their recommendations in this regard do not carry any legal force but nonetheless, given that the advisory is based on acceptance of recognized practices in capital markets and based on an extensive analysis carried out by a team of professionals, they do exert some influence on the voting decision of the institutional investors in particular.

Where it comes to recommending the appointment or re-appointment of Independent directors they use certain benchmarks which travel beyond the contours of legal provisions in India .To provide a holistic perspective, it has been considered appropriate to bring to the attention of professionals and the readers alike, the additional parameters that are factored in by the proxy advisory firms while advising the institutional investors on voting for the incumbent candidate seeking election or re-appointment as an independent director in the concerned entity.

Briefly the benchmarks used are as under:

1) Wilful defaulter

If the candidate has been recognized as a willful defaulter as per the definition provided by RBI, they recommend invariably a vote AGAINST the candidate notwithstanding the existence of other merits in the candidature.

2) Regularity in attending meetings

Considerable weightage is provided by the proxy advisory firms in regard to the attendance of the candidate at meetings of the company. The thumb rule that is applied is that the candidate ought to have been present at least in 75% of the

meetings of the Board or committees of which he is a member. Attendance in general meetings is also considered as an important attribute.

3) Association with company as independent director for more than two terms of five years each

Under the Act, the tenure of directorship of the independent director with the company prior to the coming into force of the Companies Act, 2013 is to be ignored and the disqualification for appointment as independent director sets in only after the incumbent has completed two terms of five years each.

Proxy advisories however apply a different approach and they take into consideration the tenure of association of the independent director with the company prior to 1.4.2014, i.e., the date on which the provision of the Act became effective in determining whether the candidate can be considered as an independent director. If the length of association of the independent director on the above basis exceeds two terms of five years each, the candidate is not considered by them to be an independent director and they also state in the recommendation that the Board structure in the company is distorted by virtue of the fact that the incumbent is not to be considered as an independent director. In such a case, the recommendation is an "Against" vote.

4) Over boarding

As per SEBI Listing Regulations, a director shall not be a member in more than ten committees or act as a chairman of more than five committees across all listed companies in which he/she is a director and as per the Companies Act, no person, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time: Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

Proxy advisories however apply a different approach they do not view favorably if the proposed candidate;

- is a member of more than 3 audit committees, especially if the director is the chairman of one or more of the committees
- has 6 or more committee memberships, including a maximum of 3 committee chairmanships
- is sitting on the Board of more than six public listed companies

5) Diversity

As per part D of the SCH II of the SEBI Listing Regulations, the Nomination and

Remuneration Committee (NRC) of the company has to devise a policy on Board Diversity. The proxy advisory firms consider extant diversity of the Board in terms of education, expertise and gender as per the chart / matrix provided under the SEBI Listing Regulations while considering voting for an independent director.

Generally, vote AGAINST is recommended for the chair of the NRC up for reelection if the Board does not comply with Board gender diversity regulations.

7) Extraordinary circumstances

Under the below circumstances few proxy advisors recommend vote AGAINST directors, members of a committee, or the entire Board, due to:

- Material failures of governance, stewardship, risk oversight (including, but not limited to, environmental, social, and climate change issues), or fiduciary responsibilities at the company;
- Failure to replace management as appropriate; or
- Appalling actions related to a director's or supervisor's service on other boards that raise substantial doubt about his or her ability to effectively oversee management and serve the best interests of shareholders at any company.

8) Miscellaneous provisions

- Proxy advisory firms expect the appointment of Lead Independent Director where the company has non-independent chairman and base their recommendation on this consideration.
- An individual who has been employed by the company within the past five years is not considered to be independent.

Also, the proxy firms generally recommend vote AGAINST all members of the audit committee up for re-election if:

- The non-audit fees paid to the auditor are excessive; or
- The company did not disclose the audit fees and/or non-audit fees in the latest fiscal year.

Disclaimer:

As the benchmarks referred to above do not carry any legal basis, ICSI does not in any way endorse the views of the proxy advisories on the above. The above note is intended to serve only for the information of the readers.

13. Evolving Areas: Environment, Social and Governance Dimension & Independent Directors

Of late, Investors increasingly comprehend that a corporation's performance is germane to environmental, social, and governance (ESG) factors. The companies now-a-days are increasingly inclined towards sustainable corporate strategy and investors are towards sustainable returns.

'G' in ESG plays the role of brain in the human body for every action of the corporates. ESG represents more a stakeholder-centric approach to doing business. The ESG phenomena is gaining more prominence in global nuances. Effective independent board leadership is a key component of good corporate governance and long-term value creation.

Independent directors play a vital role in company's endeavor to deliver maximum value to the stakeholders. Governance assumes about 50% of the weightage in corporate ESG assessments apart from Environment and Social.

There are many frameworks which standardize the disclosure of ESG performance which are mainly connected with compliance with local laws, when it comes to governance. The main frameworks followed by corporates are provided below:

- ❖ Global Reporting Initiative (GRI)
- ❖ UN Principles for Responsible Investment (PRI)
- ❖ Carbon Disclosure Project (CDP)
- ❖ Climate Disclosure Standards Board (CDSB)
- ❖ National Guidelines on Responsible Business Conduct
- ❖ Business Responsibility and Sustainability Reporting (BRSR)

14. CONCLUSION

The institution of independent directors is a necessary step for elevation of corporate governance in India.

The Act and the Listing Regulations have bestowed greater empowerment upon the independent directors to ensure that the management and affairs of a company are run fairly and smoothly. At the same time, greater accountability and responsibility has also been placed upon them. The independent directors have been empowered to actually have a definite 'say' in the management of a company, which would thereby immensely strengthen corporate governance.

Independent directors provide fresh objective input to strategic thinking and decision making. They are expected to bring in an independent judgement and to give dispassionate advice drawing on a range of experience and knowledge not available to the executive management, on issues like strategy, performance, resources, governance, etc.

Rather than accepting the inputs as presented by management, wherever necessary, they should exercise courage and value systems to question the management. They also carry out the control and monitoring function focusing on interests of stakeholders. They act as the bridge between management and stakeholders.

Management should provide promptly adequate information of high quality to the Board members on all issues requiring a decision.

Independent directors should devote enough quality time to the Board and other relevant matters including strategy and business development, apart from governance issues. They should understand that executive management is primarily responsible for successfully running the company and should be given enough freedom to function.

In such a scenario, independent directors can contribute immensely to the success of the company by providing necessary guidance, enable profitable growth and expedite enhancement of stakeholder value.

Annexure I

Comparative table highlighting the provisions with regard to independent directors in terms of the Act and Listing Regulations

Aspect Covered	The Companies Act, 2013	SEBI (LODR) Regulations, 2015
Proportion of independent directors on the Board	1/3rd in every listed company and at least two directors on board in companies as prescribed in rules. [section 149(4) read with rule 4 of Companies (Appointment and Remuneration of Directors) Rules, 2014	1/3rd in case of non-executive chairman; 1/2 in other cases; 1/2 in case the regular non-executive chairman is a promoter of the company or is related to any promoter or person occupying management positions at the level of Board of Directors or at one level below the Board of Directors or where the listed company has outstanding SR equity shares. Top 500 listed companies shall have at least one independent woman director by April 1, 2019 and top 1000 by April 1, 2020. [Regulation 17(1)]
Definition and scope	[section 149(6)]	[Regulation 16(1)(b)]
Age limit	Not specified	Not less than 21 years of age. [Regulation 16(1)(b)(vii)] Max 75 years of age. Special resolution required. (Regulation 17(1A)
Qualification	*Rule 5 of Companies (Appointment and Qualification of Directors) Rules, 2014* An independent director shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business.	Not specified; Though in case of audit committee, at least 2/3rd of members should be independent and all members should be financially literate, i.e., having the ability to read and understand basic financial statements, i.e., balance sheet, profit and loss account, and statement of cash flows (Explanation 1 to regulation 18(c). At least one member of audit committee should have accounting or related financial management expertise. Further, there is an obligation on the listed company to familiarise the independent director about the company (regulation 25(7)).

	Section 178(3) of the Act provides that 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 is required to formulate the criteria for determining qualifications of independent directors. (Part D of Schedule II read with regulation 19(4) of the Listing Regulations)
Appointment of independent directors by minority shareholders	Voluntary appointment of director by small shareholder. Such director is deemed to be independent director. *[Section 151]*	No provision.
Formal letter of appointment	Required *[Schedule IV-(IV)(4)]*	
Formal training of independent director	Required [Schedule IV – (III A)] It is the duty of independent directors to undertake appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the company.	The company shall familiarise the independent directors with the company, their roles, rights, responsibilities in the company, nature of the industry in which the company operates, business model of the company, etc. The details of such familiarisation programme shall be disclosed on company website and a web link thereto shall also be given in the Annual Report. [Regulations 25(7) and 46(2)(i))]

Performance Evaluation	Evaluation by entire directors excluding director being evaluated *[Schedule IV – (VIII)]*	The Nomination Committee shall lay down the evaluation criteria for performance evaluation of independent directors. (Part D of Schedule II read with regulation 19(4) of the Listing Regulations) The performance evaluation of independent directors shall be done by the entire Board of Directors. [Regulation 17(10)]
Treatment of nominee director as non-independent director	Any nominee director excluded from the definition of independent director. *[Section 149(6)]*	Aligned with the Act [Regulation 16(1)(b)]
Filing of casual vacancy of independent director	Second proviso to Rule 4 of Companies (Appointment of Directors) Rules, 2014 states that any intermittent vacancy of an independent director shall be filled up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later. An independent director who resigns or is removed from the Board of the company shall be replaced by a new independent director within a period of three months from the date of such resignation or removal, as the case may be.	With effect from 1st January 2022[1], an independent director who resigns or is removed from the Board of Directors shall be replaced by a new independent director at the earliest but not later than three months from the date of such vacancy.

1. Provision applicable till 31.12.2021 as under:

"An independent director who resigns or is removed from the board of directors of the listed company shall be replaced by a new independent director at the earliest but not later than the immediate next meeting of the board of directors or three months from the date of such vacancy, whichever is later:"

	Where the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation or removal, as the case may be, the requirement of replacement by a new independent director shall not apply. *[Schedule IV to the Act (Section VI)]*	Where the listed company fulfils the requirement of independent directors in its Board of Directors without filling the vacancy created by such resignation or removal, the requirement of replacement by a new independent director shall not apply. [Regulation 25(6)]
Restriction on the appointment as independent director in different companies.	Not specifically for independent directorships.	A person shall not serve as an independent director in more than seven listed companies. Any person who is serving as a whole time director / managing director in any listed company shall serve as an independent director in not more than three listed companies. [Regulation 17A] Explanation: For the purpose of this regulation, the count for the number of listed companies on which a person is a director / independent director shall be only those whose equity shares are listed on a stock exchange.
Committee memberships	Not specified	A director shall not be a member in more than ten Committees or act as chairman of more than five Committees across all listed companies in which he is a director. [Regulation 26(1)]
Maximum tenure	2 consecutive terms of 5 years each, a cooling off period of three years has been provided for; term already served till commencement date to be ignored. *[(Section 149(10) & (11)]*	It shall be in accordance with the Companies Act, 2013 and rules made there under, in this regard, from time to time. [Regulation 25(2)]

Disclosure of reasons of resignation	Reasons to be disclosed in the intimation to Registrar. *[Schedule IV-(VI) read with Section 168]*	In case of resignation of an independent director of the listed company, within seven days from the date of resignation, the following disclosures shall be made to the stock exchanges by the listed companies: i. [The letter of resignation along with][1] detailed reasons for the resignation as given by the said director [2][(ia) Names of listed companies in which the resigning director holds directorships, indicating the category of directorship and membership of board committees, if any.] ii. The independent director shall, along with the detailed reasons, also provide a confirmation that there is no other material reasons other than those provided. The confirmation as provided by the independent director above shall also be disclosed by the listed companies to the stock exchanges along with the [3][disclosures] as specified in sub-clause (i) [4][and (ii)] above. This has to be disclosed as a material event under regulation 30 as well as in the corporate governance section of the Annual report under Schedule V.

1. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022.

2. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022.

3. Substituted for the word "detailed reasons" by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022

4. Inserted by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022

Remuneration	Sitting fees, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members. Stock options cannot be granted. In case of non-executive directors, the Companies Act, 2013 requires the approval of shareholders for any remuneration payable to such directors exceeding 1% of the net profits in case there is a managing director or whole time director or manager and 3% in other cases *[Section 197(5) & (7)]*	The Board of Directors shall recommend all fees or compensation, if any, paid to non-executive directors, including independent directors and shall require approval of shareholders in general meeting [Regulation 17(6)(a)] The approval of shareholders by special resolution shall be obtained every year, in which the annual remuneration payable to a single non-executive director exceeds fifty per cent of the total annual remuneration payable to all non-executive directors, giving details of the remuneration thereof. (Regulation 17(6)(ca)
Separate meetings of independent directors	At least once a financial year *[Schedule IV of Companies Act, 2013 – (VII)]*	The independent directors of shall hold at least one meeting in a financial year, without the attendance of non-independent directors and members of management. All the independent directors of the company shall strive to be present at such meeting. [Regulation 25(3)]
Removal	An independent director re-appointed for second term under sub-section (10) of section 149 shall be removed by the company only by passing a special resolution and after giving him a reasonable opportunity of being heard.	With effect from 1st January, 2022 the appointment, re-appointment or removal of an independent director of a listed company, shall be subject to the approval of shareholders by way of a special resolution. [Regulation 25(2A)]

Replacement on removal/ resignation	Within three months from the date of resignation/ removal. *[Schedule IV of Companies Act 2013 - (VI) (2)]*	With effect from 1st January, 2022[1], an independent director who resigns or is removed from the Board of Directors shall be replaced by a new independent director at the earliest but not later than three months from the date of such vacancy. [Regulation 25(6)]
Prohibited Stock options for independent directors	Independent directors shall not be entitled to any stock option. [Section 149(9)]	Independent directors shall not be entitled to any stock options. [Regulation 17(6)(d)]
Liability	An independent director shall be held liable for 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. *[Section 149(12)]*	An independent director shall be held liable, only in respect of such acts of omission or commission by a listed company which had occurred with his/her knowledge, attributable through Board processes, and with his/her consent or connivance or where he/she had not acted diligently with respect of the provisions contained in the Listing Regulations. [Regulation 25(5)] The Code of Conduct shall suitably incorporate the duties of independent directors as laid down in the Act. [Regulation 17(5)(b)]

1. Provision applicable till 31.12.2021 as under:

"An independent director who resigns or is removed from the board of directors of the listed company shall be replaced by a new independent director at the earliest but not later than the immediate next meeting of the board of directors or three months from the date of such vacancy, whichever is later:"

Annexure-II

Form DIR-2
Consent to act as a director of a company

[Pursuant to section 152(5) and rule 8 of Companies (Appointment and Qualification of Directors) Rules, 2014]

To

……..(Name of the company)

……..(Address of Company)

Subject: Consent to act as a director

I……., hereby give my consent to act as director of……., pursuant to sub-section (5) of section 152 of the Companies Act, 2013 and certify that I am not disqualified to become a director under the Companies Act, 2013.

1. Director Identification Number (DIN): ……
2. Name (in full): ……..
3. Father's Name (in full): ……
4. Address: ……
5. E-mail id: ……..
6. Mobile no.: ……...
7. Income-tax PAN. : ……...
8. Occupation: ……
9. Date of birth: ……
10. Nationality: ……
11. No. of companies in which I am already a Director and out of such companies the names of the companies in which I am a Managing Director, Chief Executive Officer, Whole time Director, Secretary, Chief Financial Officer, and Manager. - …….
12. Particulars of membership No. and Certificate of practice No. if the applicant is a member of any professional Institute. Specifically state NIL if none.

DECLARATION

I declare that I have not been convicted of any offence in connection with the promotion, formation or management of any company or LLP and have not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law in the last five years. I further declare that if appointed my total Directorship in all the companies shall not exceed the prescribed number of companies in which a person can be appointed as a Director.

Signature:.....

Designation: Director

Date:

Place:

Attachments:

1. Proof of identity.
2. Proof of residence.

Annexure-III

FORM MBP - 1

Notice of interest by director

[*Pursuant to section 184 (1) and rule 9(1)*]

To

The Board of Directors,

Dear Sir(s)

I, ... S/O ..... resident of ... ., Director of the company hereby give notice of my interest or concern in the following companies, bodies corporate, firms or other association of individuals:

Sl. No.	Names of the Companies / bodies corporate / firms / association of individuals	Nature of interest or concern / Change in interest or concern	Shareholding	Date on which interest or concern arose / changed

Signature of MD / Director / Secretary / Whole Time Director

Place:

Date:

Annexure-IV

FORM 'DIR-8'

Intimation by Director

[Pursuant to Section 164(2) and rule 14(1) of Companies (Appointment and Qualification of Directors) Rules, 2014]

Registration No. of Company .....

Nominal Capital Rs. .....

Paid-up Capital Rs. .....

Name of Company .....

Address of its Registered Office .....

To
The Board of Directors of .....

I ..... son/daughter/wife of ..... resident of director/managing director/manager in the company hereby give notice that I am/ was a director in the following companies during the last three years:-

Name of the Company	Date of Appointment	Date of Cessation
1.... 2....		

I further confirm that I have not incurred disqualification under section 164(2) of the Companies Act, 2013 in any of the above companies, in the previous financial year, and that I, at present, stand free from any disqualification from being a director.

or

I further confirm that I have incurred disqualifications under section 164(2) of the Companies Act, 2013 in the following company(s) in the previous financial year, and that I, at present stand disqualified from being a director.

Name of the Company	Date of Appointment	Date of Cessation
1.... 2....		

Signature

Dated this ..... day of ..... (Full Name)

Annexure-V

Declaration of Independence

[*Pursuant to sub-section (7) of Section 149 of the Companies Act, 2013*]

To

The Board of Directors

..... Limited

Dear Sirs,

Pursuant to sub-section (7) of Section 149 of Companies Act, 2013 ('Act'), I, ……... hereby declare that I meet the criteria of independence in accordance with sub-section (6) of Section 149, as stated below:

a. I am / was not a promoter of the company or its holding, subsidiary or associate company;

b. I am not related to promoters or directors in the company, its holding, subsidiary or associate company;

c. I did not have any 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;

d. None of my relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to 2% or more of its gross turnover or total income or fifty Lakhs whichever is lower during the two immediately preceding financial years or during the current financial year.

e. I, neither by myself nor any of my relatives–

   (i) holds or has held the position of a key managerial personnel or is or has been an employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding (Mention relevant F.Y.);

   (ii) am or have been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year (Mention relevant F.Y.); of–

(A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

(B) 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;

(iii) holds together with my relatives two per cent or more of the total voting power of the company; or

(iv) is a Chief Executive or director, by whatever name called, of any non-profit organisation that receives twenty-five per cent or more of the receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that hold two per cent or more of the total voting power of the company.

(v) is a material supplier, service provider or customer or a lessor or lessee of the company;

f. I am not less than 21 years of age[1].

Terms and Conditions of appointment of Independent directors

I am giving this declaration to enable the Board for determining its composition as per Section 149 of the Act read with the Rules made there under.

I hereby confirm adherence to the standards of Code of Conduct for Independent Directors prescribed in Schedule-IV of the Act.

I undertake to keep the Board informed immediately about any change in the circumstances which may affect my status of independence as per Section 149 (6) of the Act.

Name: .....

Designation: Independent Director

1. In case of listed companies, additional parameters as per Listing Regulations may be included.

Annexure-VI

SPECIMEN

Appointment Letter for Independent Director

Shri .....

Director DIN:

<Address>

Dear Sir / Madam,

....., 2020

Re: Your appointment as the independent director of the company

We are pleased to inform you that the shareholders through postal ballot / e-voting, the results of which have been declared on ..... 2019, have approved your appointment as an independent director of the company as envisaged under section 149 read with Schedule IV and other applicable provisions of the Companies Act, 2013.

A. Preliminary

Your appointment is subject to the following:

1. You will submit a declaration in the beginning of every financial year under section 149 (7) of the Companies Act, 2013 ("the Act") during your tenure confirming whether you meet the criteria of independence.
2. You will promptly inform the Board of any change in the status of your independence.
3. So long as you are independent director of the company, the number of companies in which you hold office as a director or a chairman or committee member will not exceed the upper limit stipulated under the Act and the listing agreement.
4. So long as you are independent director of the company, you will ensure that you do not get disqualified to act as a director pursuant to the provisions of section 164 of the Act.
5. You will ensure compliance with other provisions of the Act and the listing agreement as applicable to you as an independent director.

B. Term

Your appointment as an independent director is for a term of five (5) consecutive years commencing from ..... 2020 to ..... 2025 during which period you will not be subject to retirement by rotation. Your tenure will also be subject to your continuing to meet the criteria of independence throughout.

C. Committees

You may be nominated on one or more committees of the Board and in such event you will be provided with the relevant committee's term of reference and any specific responsibilities.

D. Code of Conduct and Duties and Responsibilities

1. You will abide by the Code of Business Conduct and Ethics to the extent applicable to an independent director of the company.
2. You will abide by the Guidelines of professional conduct, Role, Function and Duties as an independent director as provided in Schedule IV of the Companies Act, 2013.
3. You will not hold office as a director or any other office in a competing company/ firm/ entity.
4. You are expected to stay updated on how best to discharge your roles, responsibilities, and duties and liabilities, as an independent director of the company under applicable law, including keeping abreast of current changes and trends in economic, political, social, financial, legal and corporate governance practices.
5. You are expected to:

(i) take decisions objectively and solely in the interests of the company;

(ii) facilitate Company's adherence to high standards of ethics and corporate behavior;

(iii) guide the Board in monitoring the effectiveness of the company's governance practices and to recommend changes, required if any;

(iv) guide the Board in monitoring and managing potential conflicts of interest of management, Board members and stakeholders, including misuse of corporate assets and abuse in related party transactions;

(v) guide the Board in ensuring the integrity of the company'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.

E. Performance Evaluation

Your re-appointment or extension of term and your remuneration will be recommended by the Nomination and Remuneration Committee to the Board, pursuant to a performance evaluation carried out by the Board.

F. Remuneration

1. Your annual remuneration will be as under:

    a) You will be paid such remuneration by way of sitting fees for meetings of the Board and its committees as may be decided by the Board from time to time within the limits prescribed under the Act.

    b) The sitting fees presently payable to the non-executive independent director is ...../- per meeting of the Board and Rs. ..... per meeting of the committee thereof.

2. You will be entitled to reimbursement of expenses incurred by you in connection with attending the Board/committee meetings, general meetings and in relation to the business of the company towards hotel accommodation, travelling and other out-of-pocket expenses.

3. Pursuant to applicable law, you will not be entitled to any stock options.

G. Insurance

The directors would be covered /indemnified as per the policy of the company.

H. Prohibition on Insider Trading

You will follow the company's "Code for Prevention of Insider Trading" on insider information and the requirement under the Companies Act, 2013 and SEBI Regulations, which *inter-alia* requires that price-sensitive information is not used or transmitted and maintained securely. You should not make any statements that might risk a breach of these requirements without prior clearance.

I. Miscellaneous

1. All the terms as mentioned above, including your appointment, remuneration, professional conduct, roll and functions, duties and evaluation shall be

governed by the Companies Act, 2013 and rules made thereunder and corporate governance requirement under the Listing Regulations as amended from time to time.

2. This letter and any non-contractual obligations arising out of or in connection with this letter are governed by, and shall be construed in accordance with the laws of India and subject to the exclusive jurisdiction of the Courts of India.

3. You will have access to confidential information, whether or not the information is marked or designated as "confidential" or "proprietary", relating to the company and its business including legal, financial, technical, commercial, marketing and business related records, data, documents, reports, etc., client information, intellectual property rights (including trade secrets), ("Confidential Information").

You shall use reasonable efforts to keep confidential and to not disclose to any third party, such Confidential Information.

If any confidential information is required to be disclosed by you in response to any summons or in connection with any litigation, or in order to comply with any applicable law, order, regulation or ruling, then any such disclosure should be, to the extent possible, with the prior consent of the Board.

Please confirm your acceptance by signing, dating, and returning a copy of this letter to the company.

Yours sincerely,

(Chairperson/Managing Director/Company Secretary)

AGREED AND ACCEPTED

I have read and understood the terms of my appointment as an independent director of ..... Limited, set out in this letter and I hereby affirm acceptance to the same.

Signed .....

Name:

DIN :

Place:

Date:

Annexure-VII

Directors and Officers insurance (Checklist)

Regulation 25(10) of Listing Regulations mandates top [1][1000] listed companies by market capitalization calculated as on March 31 of the preceding financial year and high value debt listed companies, to undertake Directors and Officers insurance ('D & O insurance') for all their independent directors of such quantum and for such risks as may be determined by its Board of Directors.

Need for D&O policy:

Directors and Officers liability insurance is a personal insurance which gives a liability cover for key personnel of the organisation.

Corporate directors and officers are likely to get sued personally for the variety of reasons on the grounds of vital decisions they take in their managerial capacity.

Complex environment of business operation often puts managers on a battlefield. Claims may arise from investors, competitors, customers, vendors and also from employees.

Having a 'right' directors' and officers' insurance policy can provide them with a certain degree of financial security against these costly litigations.

Some of the specific exposures that make D&O insurance necessary for the Directors and Officers are:

- Vulnerability to shareholder/stakeholder claims
- Sexual harassment, discrimination allegations and other employment practice violations
- Regulatory investigations
- Accounting irregularities
- Exposures relating to mergers and acquisitions
- Corporate Governance requirements
- Compliance with various legal statutes

Directors and officers liability covers a wide range of litigation that could arise from

1. Substituted for the number "500" by the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 w.e.f. 1.1.2022.

customers, vendors, shareholders, employees and general public.

This insurance also covers litigation arising due to acts of another company, where the insured is serving as a nominee director.

Directors and officers can be prosecuted for failures and civil action can also be taken against them. Their liability is unlimited in amount.

Legislation allows companies to assist their directors financially while litigation or other proceedings are going on and to indemnify their directors against certain liabilities to third parties, even if the directors are at fault. However, they may not reimburse the legal costs of the unsuccessful defence of criminal proceedings or criminal fines and penalties.

A D&O insurance can provide worldwide coverage. If the company has operations abroad, it can provide worldwide coverage for both territory and jurisdiction. This could cover claims arising from shareholders based abroad, or suppliers and clients being headquartered abroad.

The Director liability insurance policy would pay for lawyers' fees to defend a case in court. In addition, via add-on covers it can reimburse expenses to respond to a regulatory notice, investigation by authorities, and cost of hiring a PR consultant to minimize losses.

Directors and officers insurance carry an extension called Employment Practices Liability Insurance (EPLI) and Entity EPLI. Employees may sue for acts such as sexual harassment, and biased termination. Entity EPLI extension extends this coverage to the company as well.

Coverage:

Directors and officers insurance is a multi-layered product.

Side A cover: It covers the directors and officers for the cost of litigations in the event of company's insolvency or bankruptcy. It safeguards key employees when a company is financially unable to repay them.

Side B cover: Under this, D&O policy reimburses the company for the third party claims already paid on behalf its directors and officers.

There is one more side for the parent organization for claims relating to the securities of the corporation, also termed "entity securities coverage."

Insured can decide whether to limit the coverage to only directors and officers or to include an entity as well.

Policy Limit

Need to be decided depending on the degree of risk exposure involved.

It can also be decided based on a settlement values of various claim experience from consulting firms.

Can also be considered what limit of insurance its directors and officers want if they insist on value.

Factoring the cost of defending a lawsuit in the policy limit is also vital.

Overall exposure and affordability are all that matters to arrive at the ultimate figure for policy limit.

Compare policy features and quotes

When it comes to buying insurance, compare the policy benefits instead of only the premium.

Pay attention to exclusions

It's important to know what is covered and what is not covered. Some of the policies may exclude bankruptcy claims, majority investors' claims and many such claims.

Hence, read the fine prints thoroughly to ensure you are getting coverage against the wide range of claims.

Annexure-VIII

Annual Report on Capacity Building of Independent Director

(*To be submitted by the institute*)

Director's Name:

DIN Number:

IDDB Registration Number:

Subscription (1 yr/5 yr/Lifetime):

Membership Validity:

Online Self-Assessment Proficiency Test Status (N.A if exempted):

A. Participation during the Financial Year _____

E-Learning Modules		Other Training Programs/ Courses		Colloquium / Workshops /Events of IDDB	
No. of modules released by the institute during the FY	No. of modules completed by the reportee	No. of courses organized by the institute during the FY	No. of courses attended by the reportee	No. of events organized by the institute during the FY	No. of events attended by the reportee

B. Total Participation

E-Learning Modules		Other Training Programs/ Courses		Colloquium / Workshops /Events of IDDB	
No. of modules released by the institute till date	No. of modules completed by the reportee	No. of courses organized by the institute till date	No. of courses attended by the reportee	No. of events organized by the institute till date	No. of events attended by the reportee

Annexure-IX

Model Policy on familiarisation programme for Independent Directors

1. PREAMBLE

In order to familiarise the independent directors inducted on the Board of XYZ Ltd. ("the Company") and to facilitate the good corporate governance at board level, the company has adopted a policy on conducting familiarisation programmes for independent directors at regular intervals.

Being a listed company, the company abides by the provisions of the Companies Act, 2013 ("the Act") as well as SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("Listing Regulations"), which stipulates familiarisation of independent directors through various programmes about the company, including nature of the industry in which the company operates, business model of the company, their roles, rights, responsibilities as independent directors of the company, and any other relevant information.

2. OBJECTIVE

This familiarisation programme aims to increase the Board's effectiveness by enhancing the requisite skills of independent directors, creating awareness about the business model of the company and their roles, rights, responsibilities as directors of the company.

The familiarisation programmes for independent directors shall be a mandatory requirement to fulfil the objective of this policy.

3. CONDUCTING OF FAMILIARISATION PROGRAMMES:

(A) At the time of Appointment

(i) A formal letter of appointment, which *inter alia* explains the role, function, duties and responsibilities as an independent director of the company shall be provided to all newly appointed independent directors of the company, accompanied with a "welcome kit" comprising of the following documents:

- Memorandum and Articles of Association of the company
- Annual Reports of the company for previous three financial years
- Code of Conduct for Directors
- Risk Management Policy of the company

- Presentation on the Business Model of the company
- Any other important document.

(ii) The Chairman /Managing Director shall conduct interactive session with newly inducted independent directors on the organisational set up, the functioning of different division/ departments, market share of the company, corporate governance and other important aspects, to give them an overview about functioning of the company.

(iii) In addition, the company shall conducts an introductory familiarisation program for new Independent Director, preferably, before he attends the first Board/ Committee meeting. Such programme shall provide an overview of:

- Criteria of independence, disclosure requirements and code of conduct applicable to independent directors under the Act and Listing Regulations;
- Roles, functions, Duties, Responsibilities and liabilities of independent directors;
- Secretarial Standards on Meetings of the Board of Directors (SS-1) and General Meetings (SS-2) issued under Section 118(10) of the Act;
- Latest Annual Report of the company and Directors Responsibility Statement forming part of Boards' Report;
- Important policies such as Vigil Mechanism/Whistle Blower Policy, Risk Management framework, Public Disclosure Policy, Policy for Approval of Related Party Transactions (RPTs), Policy on Corporate Social Responsibility (CSR), Code of Conduct for Directors and Senior Management etc.;
- Expectation from independent directors highlighting the key areas which requires their active consideration such as overseeing systems of risk management, financial control and management, related party transactions, CSR, strategic direction to improve board effectiveness and eliminating conflicts of interest, separate meeting of independent director, etc.;
- Board evaluation process.

(B) Continual familiarisation programmes:

The company shall conduct continual familiarisation programme for independent

directors at regular intervals, at least twice in a year to provide updated knowledge on the business and operations of the company.

These familiarisation programmes shall include updates on:

- business strategy and financial model of the company,
- risk management,
- important developments in legal and auditing matters,
- change in government policies having impact on the business of the company,
- developments in statutory compliances,
- development in businesses undertaken by subsidiary company, if any.

The familiarisation programmes shall provide an opportunity to the independent directors to interact with the senior management of the company responsible for implementation of decisions taken by the Board and its Committees.

Apart from meeting with the management, independent directors shall have access to the Auditors and external advisors of the company appointed from time to time and may invite them at the separate meetings of independent directors to discuss matters pertaining to the company's affairs.

To enable view of practicalities involved in the business operations, visits to plants/ factories/site offices of the company may be organised for the directors.

4. AMENDMENT TO THE POLICY

The Board of Directors may amend this Policy, wherever required.

If due to any amendment in applicable law governing this policy, any part of this policy becomes irrelevant or inconsistent with such amended law, then such amendment shall prevail over this policy.

5. DISCLOSURE

As per Listing Regulations the details of the familiarisation programme imparted to independent directors shall be disseminated under a separate section on the website of the company.

Accordingly, the details of familiarisation programmes undertaken under this policy shall be uploaded on the corporate governance section of the company's website.

Annexure-X

IMPORTANT PROVISIONS OF BOARD MEETINGS COVERED UNDER THE SECRETARIAL STANDARD ON MEETINGS OF THE BOARD OF DIRECTORS (SS-1)

- Notice convening a Meeting shall be given at least seven days before the date of the Meeting, unless the Articles prescribe a longer period. Notice in writing of every Meeting shall be given to every Director by hand or by speed post or by registered post or by facsimile or by e-mail or by any other electronic means.
- The Agenda, setting out the business to be transacted at the Meeting, and Notes on Agenda shall be given to the Directors at least seven days before the date of the Meeting, unless the Articles prescribe a longer period. Agenda and Notes on Agenda shall be sent to all Directors by hand or by speed post or by registered post or by e-mail or by any other electronic means.
- Notes on items of business which are in the nature of Unpublished Price Sensitive Information may be given at a shorter period of time than stated above, with the consent of a majority of the Directors, which shall include at least one independent director, if any.
- Supplementary Notes on any of the Agenda Items may be circulated at or prior to the Meeting but shall be taken up with the permission of the Chairman and with the consent of a majority of the Directors present in the Meeting, which shall include at least one independent director, if any.
- To transact urgent business, the Notice, Agenda and Notes on Agenda may be given at shorter period of time than stated above, if at least one independent director, if any, shall be present at such meeting. If no independent director is present, decisions taken at such a Meeting shall be circulated to all the Directors and shall be final only on ratification thereof by at least one independent director, if any. In case the company does not have an independent director, the decisions shall be final only on ratification thereof by a majority of the directors of the company, unless such decisions were approved at the meeting itself by a majority of directors of the company. The fact that the meeting is being held at a shorter notice shall be stated in the notice.
- Any item not included in the Agenda may be taken up for consideration with the permission of the Chairman and with the consent of a majority of the

Directors present in the Meeting. The decision taken in respect of any other item shall be final only on its ratification by a majority of the Directors of the company, unless such item was approved at the Meeting itself by a majority of Directors of the company.

- Each item of business requiring approval at the Meeting shall be supported by a note setting out the details of the proposal, relevant material facts that enable the Directors to understand the meaning, scope and implications of the proposal and the nature of concern or interest, if any, of any Director in the proposal, which the Director had earlier disclosed.
- The company shall hold at least four Meetings of its Board in each Calendar Year with a maximum interval of one hundred and twenty days between any two consecutive Meetings.
- Any Director may participate through Electronic Mode in a Meeting unless the Act or any other law specifically prohibits such participation through Electronic Mode in respect of any item of business. The Notice of the Meeting shall inform the Directors about the option available to them to participate through Electronic Mode and provide them all the necessary information.
- The attendance register shall be deemed to have been signed by the Directors participating through Electronic Mode, if their attendance is recorded in the attendance register and authenticated by the Company Secretary or where there is no Company Secretary, by the Chairman or by any other Director present at the Meeting, if so authorised by the Chairman and the fact of such participation is also recorded in the Minutes.
- The Quorum for a Meeting of the Board shall be one-third of the total strength of the Board, or two Directors, whichever is higher. Quorum shall be present not only at the time of commencement of the Meeting but also while transacting business. Directors participating through Electronic Mode in a Meeting shall be counted for the purpose of Quorum, unless they are to be excluded for any items of business under the provisions of the Act or any other law.
- A Director shall neither be reckoned for Quorum nor shall be entitled to participate in respect of an item of business in which he is interested. However, in case of a private company, a Director shall be entitled to participate in respect of such item after disclosure of his interest.
- Unless otherwise stipulated in the Act or the Articles or under any other law, the Quorum for Meetings of any Committee constituted by the Board shall

be as specified by the Board. If no such Quorum is specified, the presence of all the members of any such committee is necessary to form the Quorum.

- Where a company is required to appoint independent directors under the Act, such independent directors shall meet at least once in a Calendar Year. The Company Secretary, wherever appointed, shall facilitate convening and holding of such Meeting, if so desired by the independent directors.
- Leave of absence shall be granted to a Director only when a request for such leave has been communicated to the Company Secretary or to the Chairman or to any other person authorised by the Board to issue Notice of the Meeting.
- The Chairman of the Board shall conduct the Meetings of the Board. If no such Chairman is elected or if the Chairman is unable to attend the Meeting, the Directors present at the Meeting shall elect one of themselves to chair and conduct the Meeting, unless otherwise provided in the Articles.
- A member of the committee appointed by the Board or elected by the committee as Chairman of the committee, in accordance with the Act or any other law or the Articles, shall conduct the Meetings of the committee. If no Chairman has been so elected or if the elected Chairman is unable to attend the Meeting, the committee shall elect one of its members present to chair and conduct the Meeting of the committee, unless otherwise provided in the Articles.
- Business that requires urgent decisions can be approved by means of Resolutions passed by circulation. Resolutions passed by circulation are deemed to be passed at a duly convened Meeting of the Board and have equal authority. Where not less than one-third of the total number of Directors for the time being require the Resolution under circulation to be decided at a Meeting, the Chairman shall put the Resolution for consideration at a Meeting of the Board.
- Each business proposed to be passed by way of Resolution by circulation shall be explained by a note setting out the details of the proposal, relevant material facts that enable the Directors to understand the meaning, scope and implications of the proposal, the nature of concern or interest, if any, of any Director in the proposal, which the Director had earlier disclosed and the draft of the Resolution proposed. The note shall also indicate how a Director shall signify assent or dissent to the Resolution proposed and the date by which the Director shall respond.

- The Resolution is passed when it is approved by a majority of the Directors entitled to vote on the Resolution, unless not less than one-third of the total number of Directors for the time being require the Resolution under circulation to be decided at a Meeting. Resolutions passed by circulation shall be noted at a subsequent Meeting of the Board and the text thereof with dissent or abstention, if any, shall be recorded in the Minutes of such Meeting.

- Every company shall keep Minutes of all Board and Committee Meetings in a Minutes Book. Minutes help in understanding the deliberations and decisions taken at the Meeting. Apart from the Resolution or the decision, Minutes shall mention the brief background of all proposals and summarise the deliberations thereof. In case of major decisions, the rationale thereof shall also be mentioned. Minutes kept in accordance with the provisions of the Act evidence the proceedings recorded therein.

- Within fifteen days from the date of the conclusion of the Meeting of the Board or the committee, the draft Minutes thereof shall be circulated by hand or by speed post or by registered post or by courier or by e-mail or by any other recognised electronic means to all the members of the Board or the committee, as on the date of the Meeting, for their comments. The Directors, whether present at the Meeting or not, shall communicate their comments, if any, in writing on the draft Minutes within seven days from the date of circulation thereof, so that the Minutes are finalised and entered in the Minutes Book within the specified time limit of thirty days. In the event a Director does not comment on the draft Minutes, the draft Minutes shall be deemed to have been approved by such Director.

- Minutes shall *inter-alia* contain the views of the Directors particularly the independent director, if specifically insisted upon by such Directors, provided these, in the opinion of the Chairman, are not defamatory of any person, not irrelevant or immaterial to the proceedings or not detrimental to the interests of the company.

- Minutes, once entered in the Minutes Book, shall not be altered. Any alteration in the Minutes as entered shall be made only by way of express approval of the Board at its subsequent Meeting at which the Minutes are noted by the Board and the fact of such alteration shall be recorded in the Minutes of such subsequent Meeting.

- Minutes of the preceding Meeting shall be noted at a Meeting of the Board held immediately following the date of entry of such Minutes in the Minutes

Book. Minutes of the Meetings of any Committee shall be noted at a Meeting of the Board held immediately following the date of entry of such Minutes in the Minutes Book.

- Minutes of the previous Meeting may be signed either by the Chairman of such Meeting at any time before the next Meeting is held or by the Chairman of the next Meeting at the next Meeting.
- Within fifteen days of signing of the Minutes, a copy of the said signed Minutes, certified by the Company Secretary or where there is no Company Secretary by any Director authorised by the Board, shall be circulated to all the Directors, as on the date of the Meeting and appointed thereafter, except to those Directors who have waived their right to receive the same either in writing or such waiver is recorded in the Minutes.
- The Minutes of Meetings of the Board and any Committee thereof can be inspected by the Directors.

IMPORTANT PROVISIONS OF GENERAL MEETINGS COVERED UNDER SECRETARIAL STANDARD ON GENERAL MEETINGS (SS-2)

- The Board shall, every year, convene or authorise convening of a Meeting of its Members called the Annual General Meeting (AGM) to transact items of Ordinary Business specifically required to be transacted at an AGM as well as Special Business, if any. The Board may also, whenever it deems fit, call an Extra-Ordinary General Meeting of the company to transact items of Special Business, if any.
- Annual General Meetings shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated, whereas other General Meetings may be held at any place within India.
- Notice in writing of every Meeting shall be given to every Member of the company. Such Notice shall also be given to the Directors and Auditors of the company, to the Secretarial Auditor, to Debenture Trustees, if any, and, wherever applicable or so required, to other specified persons.
- Notice shall clearly specify the nature of the Meeting and the business to be transacted thereat. In respect of items of Special Business, each such item shall be in the form of a Resolution and shall be accompanied by an explanatory statement which shall set out all such facts as would enable a Member to understand the meaning, scope and implications of the item

of business and to take a decision thereon. In respect of items of Ordinary Business, Resolutions are not required to be stated in the Notice.

- In case of appointment of independent directors, the justification for choosing the appointees for appointment as independent directors shall be disclosed and in case of re-appointment of independent directors, performance evaluation report of such director or summary thereof shall be included in the explanatory statement.

- Notice and accompanying documents shall be given at least twenty-one clear days in advance of the Meeting. For the purpose of reckoning twenty-one days clear Notice, the day of sending the Notice and the day of Meeting shall not be counted. Further in case the company sends the Notice by post or courier, an additional two days shall be provided for the service of Notice.

- Notice and accompanying documents may be given at a shorter period of time if consent in writing is given thereto, by physical or electronic means, by not less than ninety-five percent of the Members entitled to vote at such Meeting. The company shall ensure compliance of provisions relating to appointment of Proxy unless all the Members entitled to vote at such Meeting, consent to holding of the General Meeting at shorter Notice.

- No items of business other than those specified in the Notice and those specifically permitted under the Act shall be taken up at the Meeting.

- A Meeting convened upon due Notice shall not be postponed or cancelled. If, for reasons beyond the control of the Board, a Meeting cannot be held on the date originally fixed, the Board may reconvene the Meeting, to transact the same business as specified in the original Notice, after giving not less than three days intimation to the Members. The intimation shall be either sent individually in the manner stated in this Standard or published in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and in an English newspaper in English language, both having a wide circulation in that district.

- A duly convened Meeting shall not be adjourned unless circumstances so warrant. The Chairman may adjourn a Meeting with the consent of the Members, at which a Quorum is present, and shall adjourn a Meeting if so directed by the Members. The Chairman may also adjourn a Meeting in the event of disorder or other like causes, when it becomes impossible to

conduct the Meeting and complete its business. At an adjourned Meeting, only the unfinished business of the original Meeting shall be considered.

- If any Director is unable to attend the Meeting, the Chairman shall explain such absence at the Meeting. The Chairman of the audit committee, Nomination and Remuneration Committee and the Stakeholders Relationship Committee, or any other Member of any such committee authorised by the Chairman of the respective Committee to attend on his behalf, shall attend the General Meeting.
- Directors who attend General Meetings of the company and the Company Secretary shall be seated with the Chairman.
- The Chairman of the Board shall take the Chair and conduct the Meeting. If the Chairman is not present within fifteen minutes after the time appointed for holding the Meeting, or if he is unwilling to act as Chairman of the Meeting, or if no Director has been so designated, the Directors present at the Meeting shall elect one of themselves to be the Chairman of the Meeting. If no Director is present within fifteen Minutes after the time appointed for holding the Meeting, or if no Director is willing to take the Chair, the Members present shall elect, on a show of hands, one of themselves to be the Chairman of the Meeting, unless otherwise provided in the Articles.
- The Chairman shall explain the objective and implications of the Resolutions before they are put to vote at the Meeting. The Chairman shall provide a fair opportunity to Members who are entitled to vote to seek clarifications and/or offer comments related to any item of business and address the same, as warranted.
- Every company shall, at the Meeting, put every Resolution, except a Resolution which has been put to Remote e-voting, to vote on a show of hands at the first instance, unless a poll is validly demanded.
- The Chairman shall order a poll upon receipt of a valid demand for poll either before or on the declaration of the result of the voting on any Resolution on show of hands.
- Unless otherwise provided in the Articles, in the event of equality of votes, whether on show of hands or electronically or on a poll, the Chairman of the Meeting shall have a second or casting vote. Where the Chairman has entrusted the conduct of proceedings in respect of an item in which he is interested to any Non-Interested Director or to a Member, a person who so takes the Chair shall have a second or casting vote.

- Resolutions for items of business which are likely to affect the market price of the securities of the company shall not be withdrawn. Further, any resolution proposed for consideration through e-voting shall not be withdrawn.
- Modifications to any Resolution which do not change the purpose of the Resolution materially may be proposed, seconded and adopted by the requisite majority at the Meeting and, thereafter, the modified Resolution shall be duly proposed, seconded and put to vote. No modification shall be made to any Resolution which has already been put to vote by Remote e-voting before the Meeting.
- The qualifications, observations or comments or other remarks, if any, mentioned in the Auditor's Report on the financial transactions, which have any adverse effect on the functioning of the company shall be read at the Annual General Meeting and attention of the Members present shall be drawn to the explanations / comments given by the Board of Directors in their report.
- The qualifications, observations or comments or other remarks if any, mentioned in the Secretarial Audit Report issued by the Company Secretary in Practice, which have any material adverse effect on the functioning of the company, shall be read at the Annual General Meeting and attention of Members present shall be drawn to the explanations / comments given by the Board of Directors in their report.
- Every company shall keep Minutes of all Meetings. A distinct Minutes Book shall be maintained for Meetings of the Members of the company, creditors and others as may be required under the Act. A company may maintain its Minutes in physical or in electronic form.
- In respect of Resolutions passed by e-voting or postal ballot, a brief report on the e-voting or postal ballot conducted including the Resolution proposed, the result of the voting thereon and the summary of the scrutiniser's report shall be recorded in the Minutes Book and signed by the Chairman or in the event of death or inability of the Chairman, by any Director duly authorised by the Board for the purpose, within thirty days from the date of passing of Resolution by e-voting or postal ballot.
- In case a Meeting is adjourned, the Minutes in respect of the original Meeting as well as the adjourned Meeting shall be entered in the Minutes Book within thirty days from the date of the respective Meetings.

- Minutes of a General Meeting shall be signed and dated by the Chairman of the Meeting or in the event of death or inability of that Chairman, by any Director who was present in the Meeting and duly authorised by the Board for the purpose, within thirty days of the General Meeting.
- Directors and Members are entitled to inspect the Minutes of all General Meetings including Resolutions passed by postal ballot.

NOTES