



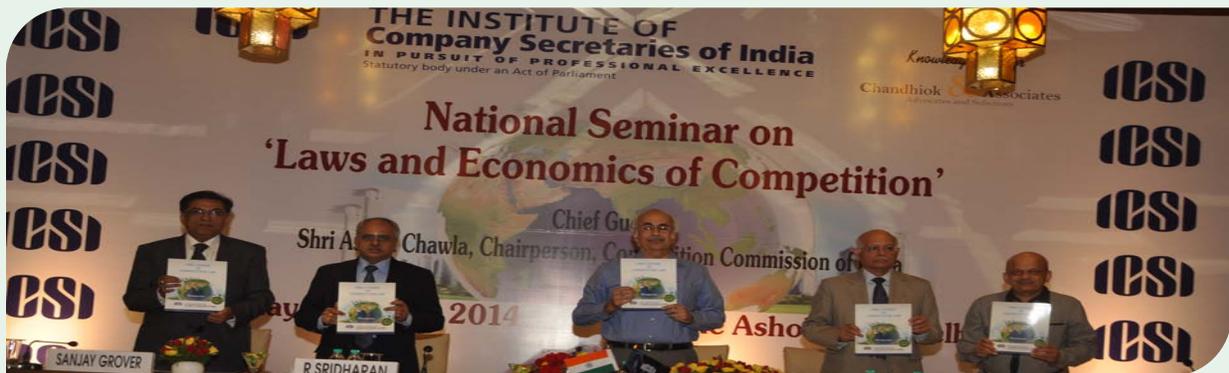
**THE INSTITUTE OF
Company Secretaries of India**

IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

e-CS Nitor



Addressing the Audience : Shri Sanjay Grover (Programme Director & Chairman, Corporate Laws and Governance Committee), Sitting from Left (clockwise): Shri R Sridharan (President, ICSI), Shri Ashok Chawla (Chairperson, Competition Commission of India), Shri Vinod Dhall (Former Chairman, CCI & Executive Chairman, DHALL-TTA) and Shri Vikas Y Khare (Vice-President, ICSI)



Launch of ICSI PMQ Course on Competition Law : From L to R : Shri Sanjay Grover (Programme Director & Chairman, Corporate Laws and Governance Committee), Shri R Sridharan (President, ICSI), Shri Ashok Chawla (Chairperson, Competition Commission of India), Shri Vinod Dhall (Former Chairman, CCI & Executive Chairman, DHALL-TTA) and Shri Vikas Y Khare (Vice-President, ICSI)

- MCA Circulars
- Independent Directors – A Comparative Study of Indian and International Regulatory Framework
- Appointment of KMP under Section 203
- Independent Directors
Requirement under the Companies Act, 2013
- FAQs on Independent Directors

ICSI Events

1. PMQ Course in Competition Law
2. 42nd National Convention of Company Secretaries, 21-23 August, 2014, Science City, Dhapa, Kolkata



Message from President



Dear Member,

Though many parts of India is under scorching summer, yet we are experiencing cool breeze and winds of change brought in by the MCA notification with respect to KMP. The moment is exhilarating, indeed it is our finest hour. We have reclaimed our aspiration and hope and we are beholden to MCA for having considered our representations and also reposed trust in us. On the other hand, this moment is also signalling us to exhibit the highest professional standards and ethics, which are quintessential to us, being moral beacon light.

With Knowledge base is ever expanding, legislative framework becoming complex, stake holders expectations are growing, economic scenario undergoing tectonic changes, business models defying the conventional mode, self-regulation being the order of the day, services sector across the globe undergoing paradigm shift and to cap it all the Companies Act 2013 focussing substantially on governance and compliances and in this situation, as professionals, we are required to deliver services, which should be fully compliant with the laws and best practices. Under this circumstances, the priority of the Institute is to bridge the knowledge gap and to add value to the working knowledge of the members and we have already initiated a number of steps to reach out to the members and floating of e-CS Nitor is one such attempt. I had received a number of e-mails appreciating our efforts. It is my sincere wish that over period of time this e-journal to establish its own brand of excellence and occupy a pride place in every one's desk top.

Through CS Nitor, let's discuss contemporary issues and carve out solutions and bring in new ideas. I end this communication with a quote from Socrates – ***“Strong minds discuss ideas, average minds discuss events, weak minds discuss people.”***

Regards

R Sridharan
President
president@icsi.edu

June 16 , 2014



The Council

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भारत का राजपत्र
The Gazette of India

असाधारण

EXTRAORDINARY

भाग II—खण्ड 3—उप-खण्ड (i)

PART II—Section 3—Sub-section (i)

प्राधिकार से प्रकाशित

PUBLISHED BY AUTHORITY

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नई दिल्ली, सोमवार, जून 9, 2014/ज्येष्ठ 19, 1936

No. 306]

NEW DELHI, MONDAY, JUNE 9, 2014/JYAISTHA 19, 1936

**MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION**

New Delhi, the 9th June, 2014

G.S.R. 390(E).—In exercise of the powers conferred by sub-section (1) of Section 203 of the Companies Act, 2013 (18 of 2013) read with clause (51) of Section 2 and Section 469 of the said Act, the Central Government hereby makes the following rules to amend the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, namely:—

1. (1) These rules may be called the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2014.
(2) They shall come into force on the date of their publication in the Official Gazette.
2. In the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 after rule 8, the following rule shall be inserted, namely:—

“8A. Appointment of Company Secretaries in companies not covered under rule 8.—A company other than a company covered under rule 8 which has a paid up share capital of five crore rupees or more shall have a whole-time company secretary.”

[F. No. 1/11/2013-CL-V]

AMARDEEP SINGH BHATIA, Jt. Secy.

Note : The principal rules were published in the Gazette of India *vide* notification number G.S.R. 249(E), dated the 31st March, 2014.



General Circular No. 14/2014

**No. 1/22/2013-CL-V
Government of India
Ministry of Corporate Affairs**

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

Dated: 9th June, 2014

To

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

Subject: Clarifications on Rules prescribed under the Companies Act, 2013 -Matters relating to appointment and qualifications of directors and Independent Directors - reg.

Sir,

Government has received representations from Industry Chambers, Professional Institutes and other stakeholders seeking clarifications *inter alia* about appointment of Independent Directors (IDs) under the relevant provisions of the Companies Act, 2013 (Act) read with relevant rules with effect from 1st April, 2014. The representations have been examined and clarifications on the following points are hereby given:-

(i) Section 149(6)(c): "pecuniary interest in certain transactions" :- (a) This provision *inter alia* requires that an 'ID' should have no 'pecuniary relationship' with the company concerned or its holding/ subsidiary/ associate company and certain other categories specified therein during the current and last two preceding financial years. Clarifications have been sought whether a transaction entered into by an 'ID' with the company concerned at par with any member of the general public and at the same price as is payable/paid by such member of public would attract the bar of 'pecuniary relationship' under section 149(6)(c). The matter has been examined and it is hereby clarified that in view of the provisions of section 188 which take away transactions in the ordinary course of business at arm's length price from the purview of related party transactions, an 'ID' will not be said to have 'pecuniary relationship', under section 149(6)(c) in such cases.

(b) Stakeholders have also sought clarification whether receipt of remuneration, (in accordance with the provisions of the Act) by an 'ID' from a company would be considered as



having pecuniary interest while considering his appointment in the holding company, subsidiary company or associate company of such company.

The matter has been examined in consultation with SEBI and it is clarified that 'pecuniary relationship' provided in section 149(6)(c) of the Act does not include receipt of remuneration, from one or more companies, by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission approved by the members, in accordance with the provisions of the Act.

(ii) Section 149: Appointment of 'IDs' : Clarification has been sought if 'IDs' appointed prior to April 1, 2014 may continue and complete their remaining tenure, under the provisions of the Companies Act, 1956 or they should demit office and be re-appointed (should the company so decide) in accordance with the provisions of the new Act.

The matter has been examined in the light of the relevant provisions of the Act, particularly section 149(5) and 149(10) & (11). Explanation to section 149(11) clearly provides that any tenure of an 'ID' on the date of commencement of the Act shall not be counted for his appointment/ holding office of director under the Act. In view of the transitional period of one year provided under section 149(5), it is hereby clarified that it would be necessary that if it is intended to appoint existing 'IDs' under the new Act, such appointment shall be made expressly under section 149(10)/(11) read with Schedule IV of the Act within one year from 1st April, 2014, subject to compliance with eligibility and other prescribed conditions.

(iii) Section 149(10)/(11) - Appointment of 'IDs' for less than 5 years:- Clarification has been sought as to whether it would be possible to appoint an individual as an ID for a period less than five years.

It is clarified that section 149(10) of the Act provides a term of "upto five consecutive years" for an 'ID'. As such while appointment of an 'ID' for a term of less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as a one term under section 149(10) of the Act. Further, under section 149(11) of the Act, no person can hold office of 'ID' for more than 'two consecutive terms'. Such a person shall 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. In such a case the person completing 'consecutive terms of less than ten years' shall be eligible for appointment only after the expiry of the requisite cooling-off period of three years.

(iv) Appointment of 'IDs' through letter of appointment:- With reference to Para IV(4) of Schedule IV of the Act (Code for IDs) which requires appointment of 'IDs' to be formalized



through a letter of appointment, clarification has been sought if such requirement would also be applicable for appointment of existing IDs?

The matter has been examined. In view of the specific provisions of Schedule IV, appointment of IDs' under the new Act would need to be formalized through a letter of appointment.

This issues with the approval of the competent authority.

Yours faithfully

(Kamna Sharma)

Assistant Director

Copy to:-

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



[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRA-ORDINARY
PART II, SECTION 3, SUB-SECTION (i)]

GOVERNMENT OF INDIA
MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

NEW DELHI, the 12th June, 2014

G.S.R (E).— In exercise of the powers conferred under sub-section (1) of section 123 read with section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules to amend the Companies (Declaration and Payment of Dividend) Rules, 2014, namely: -

1. (1) These rules may be called the Companies (Declaration and Payment of Dividend) Amendment Rules, 2014.

(2) They shall come into force on the date of their publication in the Official Gazette.
2. In the Companies (Declaration and Payment of Dividend) Rules, 2014, in rule 3, for sub-rule (5), the following sub-rule shall be substituted, namely:-

"(5) No company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company of the current year."

[File No.1/31/2013-CL.V]

(Amardeep Singh Bhatia)

Joint Secretary to the Government of India.



[TO BE PUBLISHED IN THE GAZETTE OF INDIA
EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (I)]

GOVERNMENT OF INDIA
MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the 12th June. 2014

G.S.R - In exercise of the powers conferred under sections 173, 175, 177, 178, 179, 184, 185, 186, 187, 188, 189 and section 191 read with section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules to amend the Companies (Meetings and Powers of Board) Rules, 2014, namely:-

1. (1) These rules may be called the Companies (Meetings and Powers of Board) Amendment Rules, 2014
(2) They shall come into force on the date of their publication in the Official Gazette.
2. In the Companies (Meetings and Powers of Board) Rules, 2014, in rule 6, after the explanation, the following shall be inserted, namely:-

"Provided that public companies covered under this rule which were not required to constitute Audit Committee under section 292A of the Companies Act, 1956 (1 of 1956) shall constitute their Audit Committee within one year from the commencement of these rules or appointment of independent directors by them, whichever is earlier:

Provided further that public companies covered under this rule shall constitute their Nomination and Remuneration Committee within one year from the commencement of these rules or appointment of independent directors by them, whichever is earlier."

[F.No.1/32/2013-CL-V Pt.]

(Amardeep Singh Bhatia)

Joint Secretary to the Govt. of India

Note :- The principal notification was published in the Gazette of India vide No. G.S.R. 265(E) dated 31.03.2014.



General Circular No. 15/2014

**File NO.5/6/2014-CL-I
Government of India
Ministry of Corporate Affairs**

'A' Wing, 5th floor, Shastri Bhawan
Dr. Rajendra Prasad Road, New Delhi-110001
Dated: 9th June, 2014

To

All Regional Directors
All Registrars of Companies
All Stakeholders

**Subject: Clarification regarding maintaining register in new format
[sub-section (9) of Section 186] - reg.**

Sir,

This Ministry has received various communications seeking clarification regarding sub-section (9) of section 186 read with sub-rule (1) of Rule 12 of the Companies (Meeting of Board and its Powers) Rule, 2014 with regard to maintenance of register of loans/guarantee/security/making acquisition in new format

2. In this connection, it is hereby clarified that registers maintained by companies pursuant to sub-section (5) of Section 372A of Companies Act, 1956 may continue as per requirements under these provisions and the new format prescribed vide Form MBP2 shall be used for particulars entered in such registers on and from 1.4.2014.

3. This issues with the approval of the Competent Authority.

Yours faithfully,

(Kamna Sharma)
Assistant Director

Copy to:

PSO to Secretary/PPS to AS

PSs to JS (M)/JS (B)/JS (SP)/DII (UCN)/DII (RCM)

DIR (AK)/DIR (AB)/DIR (NC)/DIR [PS], CLV Section



General Circular No. 16/2014

**F. No. : 01/12/2013 CL-V
Ministry of Corporate Affairs
Government of India**

'A' Wing, 5th floor, Shastri Bhawan
Dr. Rajendra Prasad Road, New Delhi-01

Dated : 10.06.2014

To

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

Sub: Applicability of PAN requirement for Foreign Nationals

Sir,

In continuation of the General Circular No. 12/2014 dated 22.05.2014 regards the above subject, it is clarified that the provisions of the said Circular are applicable to a Foreign National who is a subscriber/promoter at the time of incorporation of the Company.

2. In case the said subscriber/promoter, does not possess Permanent Account Number (PAN), he/she shall furnish a declaration in the prescribed proforma, as an attachment to the Incorporation Form (INC-7).
3. Further, it is clarified that, in case of a Resident Director of the proposed company he/she shall be required to submit PAN details at the time of incorporation.
4. This issue with the approval of the Competent Authority.

Encl. - Undertaking

Yours faithfully

(Sanjay Kumar Gupta)

Deputy Director

23384657

PPS to Secretary
PPS to Additional Secretary
PPS to JS (B)/JS (M)/DII (UCN)/ DII (BNH)/DII (RCM)
PS to DIR (AB)



Undertaking

I _____ (name) _____, son of _____ (father's name) _____, citizen of _____ (nationality) R/o(Address) _____ having passport No. _____ (passport Number) _____ hereby declare as under:

- (i) That I am not required to obtain Income Tax Permanent Account Number (PAN) under the provisions of Income Tax Act, 1961;
- (ii) That in view of the above I have not been issued any PAN; and
- (iii) That I undertake to furnish to the Registrar of Companies (mention jurisdiction) details of my PAN as soon as a Permanent Account Number is allotted to me,

Date:

Place:

(Signature)

Name of the Person



General Circular No. 17

**No. MCA21/72/2014 -e.Gov.
Government of India
Ministry of Corporate Affairs**

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

Dated: 11 June, 2014

To

All Regional Directors
All Registrars of Companies
All Stakeholders

Subject:- Filling of MGT-10- clarification-regarding .

Sir,

In continuation of General Circular No. 06/2014 dated 29.03.2014 and 09/2014 dated 25.04.2014 , I am directed to inform you that stakeholders are required to fill Form MGT-10 physically, get it duly signed/certified by a professional and file it alongwith other required enclosures as attachments with the prescribed General E-Form No. GNL-2. This temporary arrangement will continue till an E-Form for MGT-10 is made available. Fee applicable for MGT-10 will be as per the Table of Fees prescribed in Companies (Registration Offices and Fees) Rules, 2014.

2. This issues with the approval of the Competent Authority.

(Sanjay Kumar Gupta)
Deputy Director
Ph:23384657

Copy to:

1. PSO to Secretary
2. PPS to Addl. Secretary
3. PS to JS(M)/ PS to JS(B)/ PPS to JS(SP)
4. DIR(AK)/DIR(AB)/DIR(NC)/DIR(PS)
5. AD(MKS)



General Circular No.- 18

**File No. MCA21/72/2014 - e.Gov.
Government of India
Ministry of Corporate Affairs**

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

Dated: 11 June, 2014

To

All Regional Directors
All Registrars of Companies
All Stakeholders

Subject:- Clarification for filing of form No. INC-27 for conversion of company from public to private under the provisions of Companies Act, 2013-reg.

Sir,

Attention of the Ministry has been drawn to difficulties being faced by stakeholders while filing form INC-27 for conversion of a public company into a private company. The relevant provisions of Companies Act, 2013 (second proviso to sub-section (1) and sub-section (2) of section 14) have not been notified. In view of this, the corresponding provisions of Companies Act, 1956 (Proviso to sub-section (1) and sub-section (2A) of Section 31) shall remain in force till corresponding provisions of Companies Act, 2013 are notified. The Central Government has delegated such powers under the Companies Act, 1956 to the Registrar of Companies (ROCs) vide item No. (c) of the notification number S.O. 1538(E) dated the 10th July, 2012 and this delegated power remains in force. Applications for such conversions, therefore, have to be filed and disposed as per the earlier provisions.

2. This issues with the approval of the Competent Authority.

(Sanjay Kumar Gupta)

Deputy Director

Ph: 23384657

Copy to:

1. PSO to Secretary
2. PPS to Addl. Secretary
3. PS to JS(M)/ PS to JS(B)/ PPS to JS(SP)
4. DIR(AK)/DIR(AB)/DIR(NC)/DIR(PS)



General Circular No. 19/2014

**No. 1/4/2013-CL-V
Government of India
Ministry of Corporate Affairs**

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

Dated 12th June, 2014

To

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

Subject: Clarifications on Rules prescribed under the Companies Act, 2013 -Matters relating to share capital and debentures-reg.

Sir,

Government has received representations from Industry Chambers, Professional Institutes and other stakeholders seeking clarifications on matters relating to 'share capital and debentures' under the relevant provisions of the Companies Act, 2013 (Act) read with relevant rules, which have come into force with effect from 1st April, 2014. The representations have been examined and clarifications on the following points are hereby given:-

- (i) Share Transfer Forms executed before 1st April, 2014:- In view of prescription of new Securities Transfer Form as per Form SH-4 with effect from 1st April, 2014, the companies and other stakeholders have sought clarity with regard to Share Transfer Forms executed before 1st April, 2014 as per earlier Form 7B but which are yet to be accepted/registered by companies.

The matter has been examined and it is clarified that since transaction relating to transfer of shares is a contract between two or more persons/shareholders, any share transfer form executed before 1st April, 2014 and submitted to the company concerned within the period prescribed under relevant section of the Companies Act, 1956 needs to be accepted by the companies for registration of transfers. In case any such share transfer form, executed prior to 1st April, 2014, is not submitted within the prescribed period under the Companies Act, 1956, the concerned company may get itself satisfied suitably with regard to justification of delay in submission etc. In case a



company decides not to accept the share transfer form, it shall convey the reasons for such non-acceptance within time provided under section 56(4)(c) of the Act.

- (ii) Delegation of powers by board under rule 6(2)(a): Clarification has been sought whether the powers of the Board provided under rule 6(2)(a) of Companies (Share Capital and Debentures) Rules, 2014 with regard to issue of duplicate share certificates can be exercised by a Committee of Directors.

The matter has been examined in light of the relevant provisions of the Act, particularly sections 179 & 180 and regulation 71 of Table "F" of Schedule I and it is clarified that a committee of directors may exercise such powers, subject to any regulations imposed by the Board in this regard.

This issues with the approval of the competent authority.

Yours faithfully

(Kamna Sharma)

Assistant Director (Policy)

Copy to:-

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



INDEPENDENT DIRECTORS – A COMPARATIVE STUDY OF INDIAN AND INTERNATIONAL REGULATORY FRAMEWORK*

Particulars	Indian Regulatory Framework		International Regulatory Framework
	Clause 49	Companies Act 2013	
Prescription as to Board Independence	50% of the Board is to be independent if the Chairman is a promoter, or related to promoter or executive, otherwise 1/3 rd of the board are to be independent.	Every listed company and prescribed class of companies to have at least 1/3 rd of total number of directors as independent directors.(Section 149)	<p><i>King III code of corporate governance</i> – The Board Should Comprise a balance of power, with a majority of non-executive directors. The majority of non-executive directors should be independent. (Principle 2.18)</p> <p><i>ASX Corporate Governance Principles</i> – A Majority of the Board should be independent directors. (Recommendation 2.1)</p> <p><i>UK Corporate Governance Code:</i> The Board should include an appropriate combination of executive and non-executive directors (and in particular, independent non-executive directors) such that no individual or small group of individuals can dominate the Board’s decision making.(Supporting principle to B.1)</p> <p><i>OECD Principles of Corporate Governance:</i> The Board should consider assigning a sufficient number of non-executive board members capable of exercising independent judgment to tasks where there is a potential for conflict of interest. Examples of such key responsibilities are ensuring the integrity of financial and non-financial reporting, the review of related party transactions, nomination of board members and key</p>
* Prepared by Dte. of Academics, ICSI.			



<p>Separation of role of Chairman and CEO</p>	<p>Office of Chairman and CEO can be held by a same individual.</p>	<p>Office of Chairman and CEO cannot be held by same individual subject to conditions(Section 203)</p>	<p><i>King III code of corporate governance (2.16)</i> The board should elect a chairman of the board who is an independent non-executive director. The CEO of the company should not also fulfil the role of chairman of the board.</p> <p><i>UK Corporate Governance Code: A.3.1.</i> The chairman should on appointment meet the independence criteria. A chief executive should not go on to be chairman of the same company. If exceptionally a board decides that a chief executive should become chairman, the board should consult major shareholders in advance and should set out its reasons to shareholders at the time of the appointment and in the next annual report.</p> <p><i>ASX Corporate Governance guidelines : Recommendation 2.2:</i> The chair should be an independent director.</p>
<p>Lead Independent Director</p>	<p>Not required to be appointed</p>	<p>Not required to be appointed</p>	<p><i>UK Corporate Governance Code</i> The board should appoint one of the independent non-executive directors to be the senior independent director to provide a sounding board for the chairman and to serve as an intermediary for the other directors when necessary.</p> <p><i>King III code of corporate governance</i> A lead independent director should be appointed in the case where an executive chairman is appointed or where the chairman is not independent or conflicted.</p> <p><i>ASX Corporate Governance guidelines</i> Where the chair is not an independent director, it may be</p>



			beneficial to consider the appointment of a lead independent director.
Nominee Director	Nominee Directors are not considered as Independent Directors	An independent director in relation to a company means a director other than a MD or a WTD or a nominee director. (Section 149(6))	--
Declaration as to independence	--	Section 149(7) mandates declaration from Independent Directors stating that they are meeting the criteria for independence.	<i>King III code of corporate governance(2.18.9)</i> The board should include a statement in the integrated report regarding the assessment of the independence of the independent non-executive directors.
Qualification of Independent Directors	Not specified.	Companies (Appointment and qualification of Directors) Rules, 2014 specifies certain criteria as to qualification.	<i>ASX Corporate Governance guidelines:</i> The board should be large enough to incorporate a variety of perspectives and skills, and to represent the best interests of the company as a whole rather than of individual shareholders or interest groups.
Stock Options	Stock options prohibited to independent directors	Independent Directors are not entitled to any stock option.(section 197(7))	--
Separate Meeting of Independent Directors	The Independent Directors of the company shall hold at least one meeting in a year, without the attendance of non-independent directors and members of management. (Clause49(II)(B)(6))	Independent Directors of the company shall hold at least one meeting in a year, without the attendance of non-independent directors and members of management. (Section 149 read with Schedule IV)	ASX CG Principles - Recommendation 2.1 :Non-executive directors should consider the benefits of conferring regularly without management present, including at scheduled sessions (At times it may be appropriate for the independent directors to meet without other directors present.). Their discussions can be facilitated by the chair or lead independent director, if any. UK CG Code : A.4.2. The chairman should hold meetings with the non-executive directors without the executives present. Led by the senior independent director, the



			non-executive directors should meet without the chairman present at least annually to appraise the chairman's performance and on such other occasions as are deemed appropriate.
Audit Committee	The audit committee shall have minimum three directors as members. Two-thirds of the members of audit committee shall be independent directors. The Chairman of the Audit Committee shall be an Independent Director.	Section 177. (1) The Board of Directors of every listed company and such other class or classes of companies, as may be prescribed, shall constitute an Audit Committee. (2) The Audit Committee shall consist of a minimum of three directors with independent directors forming a majority:	<i>King III code of corporate governance</i> All members of the audit committee should be independent non-executive directors. The audit committee should be chaired by an independent non-executive director ASX CG Principles Recommendation 4.2- The Audit Committee consists majority of independent directors and to be chaired by an independent director.
Nomination Committee	The company shall set up a nomination and remuneration committee which shall comprise at least 3 directors, all of whom shall be NEDs and at least ½ shall be independent. Chairman of the committee shall be an independent director.	The Nomination and Remuneration Committee is applicable to the following classes of Companies Every listed Company Every other Public company- <ul style="list-style-type: none"> • Having Paid up capital of Rs.10 crores or more; or • Having turnover of Rs.100 Crores • Which have, in aggregate, outstanding loans or borrowings or debentures or deposits exceeding Rs. 50 Crores. The paid up share capital or turnover or outstanding loans, or borrowings or	ASX CG Principles-Recommendation 8.2 :
Remuneration Committee			Remuneration committee to consists of majority of independent directors and to be chaired by an independent director()



		<p>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.</p> <p>The above mentioned classes of companies shall constitute the Nomination and Remuneration Committee consisting of 3 or more NEDs out of which not less than one half shall be IDs.</p>	
CSR Committee	--	<p>135. (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.</p>	--
Stakeholders Grievance Committee	<p>A committee under the Chairmanship of a non-executive director and such other members as may be decided by the Board of the company shall be formed to specifically look into the redressal of grievances of shareholders,</p>	<p>The Board of Directors of a company which consists of more than one thousand shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year shall constitute a Stakeholders Relationship Committee consisting of a chairperson who shall be a non-executive director and</p>	--



	<p>debenture holders and other security holders. This Committee shall be designated as 'Stakeholders Relationship Committee' and shall consider and resolve the grievances of the security holders of the company including complaints related to transfer of shares, non-receipt of balance sheet, non-receipt of declared dividends</p>	<p>such other members as may be decided by the Board. The SRC shall consider and resolve the grievances of security holders of the company(Section 178(5))</p>	
<p>Performance Evaluation of Independent Directors</p>	<p><u>Clause 49(II)(B)(5):</u></p> <p>a. The Nomination Committee shall lay down the evaluation criteria for performance evaluation of independent directors.</p> <p>b. The company shall disclose the criteria for performance evaluation, as laid down by the Nomination Committee, in its Annual Report.</p> <p>c. The performance evaluation of independent directors shall be done by the entire Board of Directors</p>	<p><u>Section 178(2) read with Schedule IV states that</u> the Nomination and Remuneration Committee shall identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall carry out evaluation of every director's performance. The performance evaluation of independent directors shall be done by the entire Board of Directors, excluding the director being evaluated. On the basis of the report of performance evaluation, it shall be determined whether to extend or continue the term of appointment of</p>	<p>UK CG Code : B.6.1 The board should state in the annual report how performance evaluation of the board, its committees and its individual directors has been conducted.</p> <p>UK CG Code: B.6.2 : Evaluation of the board of FTSE 350 companies should be externally facilitated at least every three years. A statement should be made available of whether an external facilitator has any other connection with the company.</p>



	(excluding the director being evaluated). d. On the basis of the report of performance evaluation, it shall be determined whether to extend or continue the term of appointment of the independent director.	the independent director	
Tenure of Independent Directors	To restrict the total tenure of an Independent Director to 2 terms of 5 years. However, if a person who has already served as an Independent Director for 5 years or more in a listed company as on the date on which the amendment to Listing Agreement becomes effective, he shall be eligible for appointment for one more term of 5 years only.	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 reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report. 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.	<i>King III code of corporate governance</i> Any independent non-executive directors serving more than 9 years should be subjected to a rigorous review of his independence and performance by the board.(2.18.8)
Training of Independent Directors	The company shall provide suitable training to independent directors to familiarize them with the company, their roles, rights, responsibilities in the company, nature of	No provision as to training.	<i>King III code of corporate governance</i> The induction of and ongoing training and development of directors should be conducted through formal processes (2.20)



	the industry in which the company operates, business model of the company, etc. The details of such training imparted shall be disclosed in the Annual Report.		
Liability of Directors	An independent director shall be held liable only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable to Board process and with his consent or connivance or where he had not acted diligently with respect to the provisions in the listing agreement.	An independent director a non executive director not being promoter or KMP, shall be held liable, only in respect of such acts or 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)]	--



Appointment of KMP under Section 203

*R.R. Shastri**

Section 203 of the Companies Act, 2013 (“the Act”) requires every company belonging to such class or classes of companies, as may be prescribed, to have the following whole-time key managerial personnel –

- i) Managing Director or Chief Executive Officer or Manager and, in their absence, a whole-time director;
- ii) Company Secretary; and
- iii) Chief Financial Officer.

Rule 8 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 requires every listed company and every other public company having a paid-up share capital of ten crore rupees or more to have whole-time key managerial personnel.

Private companies, which are significantly large in number in India, are not required any more to employ key managerial personnel (“KMP”). If this was an intended exclusion, the consequences would have to be seen as the days go by.

Appointment of KMP by the Board

Sub section (2) of Section 203 prescribes that every whole-time KMP shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including remuneration. The question that arises is what action is required to be taken by a company that already has functioning KMP such as a Managing Director or a Whole-time Director or Manager and Company Secretary who had been appointed pursuant to the provisions of the Companies Act, 1956. As most of these KMP had to be appointed by the Board even under the provisions of the Companies Act, 1956, it may be said that they do not have to be appointed again under the Companies Act, 2013. Any change of personnel occupying these positions would have to be approved by the Board in accordance with the provisions of Section 203.

**Legal Advisor, Tata Sons Limited*



The appointment of a Chief Financial Officer (“CFO”) was not mandated under the Companies Act, 1956 and hence the CFO would now have to be appointed by the Board under the provisions of Section 203 of the Companies Act, 2013. If the company already has a functioning CFO designated as CFO, the Board could note/record the appointment of the CFO and his remuneration “in pursuance of the provisions of Section 203 of the Companies Act, 2013”.

KMP not to hold office in more than one company:

Sub section (3) of Section 203 prohibits a KMP from holding office in more than one company except in its subsidiary company at the same time. A question that arises from a reading of this provision is whether a company secretary/chief financial officer/whole-time director can hold the position of a company secretary/chief financial officer/whole-time director simultaneously in two companies so long as one is the holding company and the other its subsidiary.

Ideally, sub section (3) could have incorporated the words “as KMP” after the words “whole-time KMP shall not hold office” which would have clearly meant that a KMP in one company can hold the office of a KMP in its subsidiary at the same time. Therefore, a company secretary of Company A could hold the position of company secretary of Company B which is the subsidiary of Company A, but not any other company.

It was common practice in the past to appoint an employee of the holding company holding the prescribed qualifications of a company secretary as Company Secretary of the subsidiary company. This was being done because of the understanding that a person can be appointed as company secretary of only one company.

Sub section (3) seems to have opened a window for appointing a person as company secretary in a holding company as well as its subsidiary at the same time. Similarly, the chief financial officer and a whole-time director of a holding company can hold the same positions in the subsidiary company at the same time. Whether this relaxation has been provided to help subsidiaries with small operations and/or low/no profits to fill the KMP positions at no cost is the moot question.

It is clear that a KMP in Company A, may at the same time, hold an office other than that of a KMP e.g. General Manager, Marketing Manager, Finance Manager, etc. in another company even if that other company is not a subsidiary.



The third proviso to Sub section (3) states that a company may appoint or employ a person as its managing director if he is the managing director or manager of one and of not more than one other company and such appointment or employment is made or approved by a resolution passed at a meeting of the Board So, there is a specific carve-out for appointing the same person as managing director of two companies at the same time. A “Manager” of a holding company cannot hold office of “Manager” in more than one company at the same time except in its subsidiary

The second proviso states that a whole-time KMP holding office in more than one company at the same time on the date of commencement of the Act shall within a period of six months from such commencement choose one company in which he wishes to continue to hold the office of KMP. This requirement would apply to a case where the second position of KMP is held in a company which is not a subsidiary of the first company.

Appointment of Chief Executive Officer

Section 203 of the Act requires the appointment of a CEO to be made by the Board. It also suggests that it would be sufficient for a company to which the provisions of Section 203 apply to appoint a CEO instead of a managing director, manager or whole-time director. It would be for the Board to decide whether the CEO should be a member of the Board or not. It appears that the positions of “Manager” and “CEO” are on par for the purposes of Section 203.



Independent Directors

Requirements under the Companies Act, 2013

R. Mahadevan*

Introduction

The purpose of this article is to have an interactive communication with the readers and also to share some thoughts on the subject of independent directors which is perhaps one of the most important provisions contained in the Companies Act, 2013.

Section 149 of the Companies Act, 2013 covers some important aspects concerning independent directors. Applicable rules on this subject have also been notified under the Companies (Appointment and Qualification of Directors) Rules, 2014.

We are all aware that a public company has to have a minimum of three directors on its board. But a listed public company may need to have a minimum of five directors on its board, so as to comply with the other provisions contained in the Companies Act, 2013.

On a reading of Section 149(1) of the Companies Act 2013, it is clear that every company shall have a board of directors consisting of individuals and every public company shall have a minimum of three directors on its Board. The second proviso to the Section 149(1) further states that such class or classes of companies as may be prescribed shall have at least one woman director.

Under Rule 3 of the Companies (Appointment and Qualification) Rules, 2014, the following classes of companies shall have at least one woman director:

- (i) Every listed company
- (ii) Every other public company having
 - (a) Paid up share capital of one hundred crore rupees or more; or
 - (b) Turnover of three hundred crore rupees or more.

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In accordance with Section 149(2) of the Companies Act, 2013 every existing company shall within one year (i.e. from the date of notification) comply with the requirements of the Section 149(1).

Listed Public Company: Independent Directors:

Under Section 149(4) of the Companies Act, 2013 every listed company has to ensure that at least one-third of its total number of directors are independent directors. The explanation to Section 149(4) provides that any fraction contained in such one-third numbers shall be rounded off as one.

In respect of the following classes of companies, Rule 4 of the aforesaid Rules prescribes that there shall be at least two independent directors:

- (i) Public companies having paid up share capital of ten crore rupees or more; or
- (ii) Public companies having turnover of one hundred crore rupees or more; or
- (iii) Public companies which have in aggregate outstanding loans, debentures and deposits exceeding fifty crore rupees.

If any vacancy in the position of independent director has arisen, such vacancy shall be filled up before the immediately next board meeting or before the expiry of three months from the date of the vacancy, whichever is later.

We now consider the case of a listed company whose board is comprised of three individuals as its directors. Of the three individuals, we consider one of them to be a non-independent / non-executive promoter director, the second individual (woman) as managing director, and the third as an independent director. In the above example, it is to be noted that there is full compliance of the relevant provisions of sections 149(1) and 149(2) of the Companies Act, 2013.

However, certain other provisions of the Companies Act, 2013 are also required to be complied with by a listed company and which could result in raising the minimum number of directors of a listed company to at least five. These provisions are given below:-

i) *Audit Committee*

Section 177(2) of the Companies Act, 2013 states; that every listed company shall constitute an audit committee comprising of at least three directors, with majority of them being independent directors. The proviso to this section also requires that majority of the



independent directors of the audit committee including its chairperson, shall be persons who can read and understand the financial statements.

Under section 177(3) the audit committees of listed companies existing at the commencement of this Act, shall have to be reconstituted in accordance with the provisions of this section within one year from the date of its notification.

In order to comply with the provisions of section 177(2) the listed company in our given example will have to ensure that majority of its audit committee members are independent directors and they along with the chairperson are able to read and understand the financial statements.

Accordingly, continuing with our above example, the said listed company will have to either induct one more independent director on its board or alternatively, the promoter director may have to vacate his directorship for facilitating induction of another independent director in his place. In the former situation, the total number of directors on the board of the listed company will go up to four and in the latter situation the number of directors of the listed company will remain unchanged.

For our study we would consider that the said listed company has inducted another independent director on its board and accordingly the listed company now has four directors on its board comprising of two independent directors and two non-independent directors (viz. promoter director and a managing director).

To ensure compliance of the provisions of section 177(2), the audit committee members of the said listed company, may be constituted with three of its directors, i.e. promoter director and the two independent directors (one of whom shall be the chairperson) forming the majority and who are also able to read and understand the financial statements. For our study we also consider that all the independent directors of the said listed company are professionally qualified and are members of one or more professional institutes (viz., ICSI, ICAI, ICMAI, etc.).

ii) *Nomination and Remuneration Committee*

Section 178(1) of the Companies Act, 2013 requires, that, every listed company shall constitute a nomination and remuneration committee comprising of three or more non-executive directors out of which not less than one half shall be independent directors.

In our above example, the listed company is now having four directors on its board. The nomination and remuneration committee may be constituted by the listed company with its



three non-executive directors i.e. promoter director and two independent directors, which will be in compliance with the provisions of section 178(1) of the Companies Act, 2013.

iii) *Stakeholders Relationship Committee*

Under section 178(5) of the Companies Act, 2013 every listed company having more than one thousand shareholders, debenture-holders, deposit-holders and any other security-holders at any time during a financial year shall constitute a stakeholders relationship committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the board of directors.

Although a 'stakeholder', has not be defined under the Act, we all know, that they may include nominee directors of banks and /or financial institutions or other stakeholders representing the shareholders or trustees for debenture holders or creditors etc. of the company. Further, it is to be noted that Section 178(5) does not specify the minimum number of members required to constitute such a committee. It is for the board of the company to decide about it.

For our study we may consider that such a committee is constituted by the listed company with at least three of its directors comprising of the promoter director (non-executive chairperson), and any two other directors of the said company.

iv) *Director elected by small shareholders*

Under section 151 of the Companies Act, 2013, a listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed. The appointment of a director elected by small shareholders may be triggered under Rule 7. Under proviso to the said rule, a listed company may itself opt to elect a director representing small shareholders suo moto. As and when such an appointment is made, it will result in an increase in the total number of directors on the board of the listed company. It may further be noted that a director elected by small shareholders is classified as an independent director under sub-rule(4) of Rule 7 of the aforesaid Rules.

Accordingly, in our above example the listed company (assuming it has decided to elect a director representing small shareholders) may be required to induct another director on its board, thus raising the total number of its directors to five. A director elected by such small shareholders may also be inducted as a member of the stakeholder's relationship committee. Of course, if the listed company opts not to have a director representing small shareholders on its board, it will continue to have four directors.



Listed Company: minimum number of directors

Thus after having arrived at the minimum number of directors that a listed company should have on its board in compliance of the various provisions of the Companies Act, 2013, we now proceed with our study of the other relevant provisions under the Act relating to independent directors.

Code for Independent Directors

The other provisions relating to independent directors are equally important both for the listed company as well as for its independent directors. The functioning of every listed company from now onwards would to a large extent depend on the contributions of the professional independent directors as well as its executive directors. The independent directors have now been entrusted with varied role, functions and duties under Schedule IV of the Code for Independent Directors.

Further the said code not only provides guidance to independent directors for their professional conduct but it also seeks to enforce their adherence to the standards set for them thereby ensuring fulfillment of their responsibilities in a professional manner and strengthening the confidence of the investment community particularly the minority shareholders, regulators and companies in the institution of independent directors. The code also deals with the appointment, reappointment, resignation, separate meetings and evaluation mechanism for the independent directors.

The requisites to be considered for being appointed as an independent director are laid down by the Act. These are summarized below:-

Requisites for an Independent Director

Section 149(6) of the Companies Act, 2013 lays down the requirements to be fulfilled by an individual before being inducted as an independent director of the Company.

These are:-

1. He should not be the managing, whole time or nominee director of the company.
2. He should be a person who in the opinion of the board is a person of integrity and possesses relevant expertise and experience.



3. He should not be nor was not a promoter of the company or its holding, subsidiary or associate company.
4. He should not be related to the promoters or directors in the company, its holding, subsidiary or associate company.
5. He should not have or has had no pecuniary relationship with the company, its holding, subsidiary or associate company or their promoters or directors during the two immediately preceding financial years or current financial year.
6. None of his relatives has or had any pecuniary relationship with the company, its holding, subsidiary or associate company or their promoters or directors amounting to 2% or more of the gross turnover or total income or Rs. 50 Lakh or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or current financial year. No higher criteria has been prescribed so far.
7. Neither himself nor any of his relatives-
 - i) holds or has held the position of a key managerial personnel or is or has been an employee of the company, its holding, subsidiary or associate company in any of three financial years immediately preceding the financial year in which he is proposed to be appointed.
 - ii) is or has been an employee or proprietor or a partner in any of 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, its holding, subsidiary or associate company, or
 - (B) any legal or consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to 10% or more of the gross turnover of such firm.
 - iii) holds together with his relatives two percent or more of the total voting power of the company, or
 - iv) is a Chief Executive or director or whatever name called, of any non-profit organization that receives 25% or more of its receipts from the company, any of



its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company; or

8. He possesses such other qualifications as may be prescribed. The qualifications are prescribed in rule 5 of the aforesaid Rules.

The definition of an associate company, holding company and subsidiary company have been provided by sections 2(6), 2(46) and 2(87) respectively of the Act.

The readers may refer to the same.

The other provisions pertaining to Independent directors are summarized below:

Declaration to be given by an independent director:

The independent director is now also required under section 149(7) of the Companies Act, 2013 to give a declaration at his first Board Meeting of the company and thereafter at the first meeting of the board in every financial year or whenever there is any change in the circumstances that may change his status as an independent director. This declaration should categorically state that the criteria of independence as provided in section 149(6) have been met by the independent director.

Profit related commission for independent directors:

Under sub-section 149(9) of the Companies Act, 2013, a listed company may remunerate an independent director with a profit related commission which is required to be approved by the members of the company and which shall be subject to the provisions of sections 197 and 198 of the Act. It is also to be noted that an independent director shall not be entitled to any stock option that may be issued by the listed company. However, an independent director will be entitled to sitting fees for attending the meetings of the board and /or committees and also for reimbursement of the expenses incurred for attending such meetings.

Term of office for independent directors:

Under section 149(10) an independent director shall hold office for a term of up to five consecutive years on the board of a listed company and may be reappointed for another consecutive term of five years by the members by passing a special resolution and by disclosure of such appointment in the board report.



An independent director cannot hold office for more than two consecutive terms in a listed company, but after expiration of three years after his ceasing office as an independent director, he shall be eligible for being appointed as an independent director by the listed company under section 149(11). The proviso to section 149(11) requires the independent director not to be associated with the listed company either directly or indirectly during the said period of three years for being eligible to be appointed again as an independent director of the listed company.

Retirement by rotation not applicable to independent directors:

The provisions of sub-section (6) and (7) of section 152 relating to retirement of directors by rotation shall not be applicable to independent directors. The explanation to section 152(6) states that total number of directors shall not include the independent directors for the purpose of calculating the number of directors who shall retire by rotation at every annual general meeting of a listed company.

Liabilities under the Act:

Under section 149(12) an independent director shall be held liable for all acts of omission or commission by a listed company which had occurred with his knowledge, consent or connivance. It would be prudent on the part of a listed company to take adequate insurance coverage for the company as well as for its directors including independent directors, for indemnifying themselves against any of the aforesaid liabilities or such other liability in respect of negligence, default, misfeasance, breach of duty or breach of trust for which they may be held guilty under the Act.

Meetings of independent directors:

The code for independent directors also requires that the independent directors shall hold at least one meeting in a year without any non-independent directors or members of management present and at such meeting they shall review the performance of all non-independent directors as well as the board of directors.

The meeting shall also review the performance of the chairperson after considering the views of the executive and non-executive directors and shall also assess the quality, quantity and timeliness of the flow of information between the company management and the board of directors.



Conclusion

In conclusion it may be said that with the notification of the Act and the rules, the aforesaid provisions will become effective and listed companies will be required to ensure its timely compliance. The study was mainly centered on independent directors because it is considered that a transformation has begun with the enactment of the Companies Act, 2013. It is to be noted that given the time constraints, a listed company may now have to first reconstitute their existing board and also at the same time decide on the ideal composition of its board including independent directors.

It may not be much of an issue to induct at least two independent directors, who are professionally qualified and having adequate experience and expertise, if the process could be started well in advance. It may be said that in future only professionals would be willing to offer themselves for the position of independent directorship of a listed company. Moreover, professionals will also be much sought after by listed companies. The listed companies should be able to attract experienced professionals by offering them suitable compensation in the form of profit related commission as provided under the Act.

The entire process of inducting independent directors may have to be streamlined by listed companies. It may involve screening suitable individuals for the position of independent directorship, interviewing, finalizing terms and conditions of their appointment including their remuneration, if any, that may be offered under the relevant provisions of the Act, issuing appointment letters with their role, duties, functions, responsibilities properly laid down therein, taking necessary approval from the shareholders of the company, providing training to independent directors as and when necessary etc and such other particulars as may be relevant for the listed company.



FAQs on Appointment of Independent Directors

Vinod Kothari*

The old mindset on appointment of directors – appointment as additional director first, then regularisation in a general meeting, followed by retirement by rotation etc – all of this will have to change completely in case of independent directors. The key point is Schedule IV, (1) (2) and (3). The language of the Schedule suggests that the appointment will have to be done by the general meeting.

Seemingly the provisions of the Act, 2013 and the rules issued thereunder relating to appointment and qualification of directors and independent directors are creating a lot of confusion. As a result Ministry of Corporate Affairs (MCA) on 9th June, 2014¹ has issued clarification on the same vide General Circular No. 14/2014 (**clarification circular**) after examining various representations received.

In the light of the above-mentioned, the FAQs below seek to answer some common questions:

Criteria for independence:

1. Is there a difference in the criteria of independence as per clause 49, revised Clause 49 and as per section 149 (6) of the Act, 2013?

Yes, the criteria of independence as per Clause 49 and that as per Section 149 (6) of the Companies Act, 2013 (Act) differs. In addition to those mentioned under section 149 (6) of the Act, Clause 49 lists out the following as well:

Criteria under Old Cl. 49	Criteria under S.149(6) of Act, 2013	Criteria under revised Cl. 49 (wef 1st Oct 2014)
apart from receiving director's remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates which may affect independence of the director	who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the 2 immediately preceding financial years or during the current financial year ;	apart from receiving director's remuneration, has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the 2 immediately preceding financial years or during the current financial year

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1 The circular may be viewed at http://www.mca.gov.in/Ministry/pdf/General_Circular_14_2014.pdf



-	none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent. or more of its gross turnover or total income or Rs. 50.00 lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year	none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to 2% or more of its gross turnover or total income or Rs. 50.00 lakh or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;
is not related to promoters or persons occupying management positions at the board level or at one level below the board	<ul style="list-style-type: none"> 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 	<ul style="list-style-type: none"> 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
has not been an executive of the company in the immediately preceding three financial years	-	-
is not a partner or an executive or was not partner or an executive during the preceding three years, of any of the following: <ul style="list-style-type: none"> i) the statutory audit firm or the internal audit firm that is associated with the company, and ii) the legal firm(s) and consulting firm(s) that have a material association with the company 	neither himself nor any of his relatives— <ul style="list-style-type: none"> i) holds or has held the position of a KMP 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; ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the 	who, neither himself nor any of his relatives — <ul style="list-style-type: none"> 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; ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the



	<p>financial year in which he is proposed to be appointed, of—</p> <p>a. a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or</p> <p>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;</p>	<p>financial year in which he is proposed to be appointed, of—</p> <p>a. a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or</p> <p>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;</p>
is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect independence of the director		who, neither himself nor any of his relatives is a material supplier, service provider or customer or a lessor or lessee of the company
is not a substantial shareholder of the company i.e. owning 2% or more of the block of voting shares	<p>who, neither himself nor any of his relatives;</p> <p>holds together with his relatives 2 per cent. or more of the total voting power of the company;</p>	<p>who, neither himself nor any of his relatives;</p> <p>holds together with his relatives 2 per cent. or more of the total voting power of the company;</p>
not less than 21 years of age		<p>Who is less than 21 years of age.</p> <p><i>This seems to be a drafting lacuna.</i></p>
	who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience	who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;
	<p>who, neither himself nor any of his relatives;</p> <p>is a Chief Executive or director, by whatever name called, of any non-profit organisation that</p>	<p>who, neither himself nor any of his relatives;</p> <p>is a Chief Executive or director, by whatever name called, of any non-profit organisation that</p>



	receives 25% or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company	receives 25% more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company
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It is to be noted that for the purpose of the Companies Act, 2013, “associate company”, means a company in which that other company has a control of at least 20% of the total share capital² or of business decisions under an agreement, but which is not a subsidiary company of the company having such influence and includes a joint venture company. However, for the purpose of Clause 49, the meaning of the word “associate” is derived from AS 23, and which means an enterprise in which the investor can participate in the financial and/ or operating policy decisions of the investee but cannot control those policies and which is neither a subsidiary nor a joint venture of the investor.

2. How does a director self certify and intimate his independence to the company? At what point of time does this need to be done?

An independent director shall self certify that he satisfies the criteria laid down under section 149 (6) of the Act, 2013 at the following points of time:

- 2.1. at the first board meeting in which he participates as a director
- 2.2. at the first board meeting in every financial year
- 2.3. whenever there is a change in the circumstances which may affect his status as an independent director

3. Is there any particular form for self certification of independence?

No, there is no particular format for self certification of independence. He may make a declaration in the format given in the [Annexure](#)

4. How should one determine the existence of a pecuniary relationship?

The language in section 149 (6) (c) uses the word “pecuniary relationship”, while in section 149 (6) (d), the words used are “pecuniary relationship or transaction”. The word *material* which featured in clause 49 of the listing agreement has not been included here. Further clause (d) specifies the monetary limit beyond which the value of the transaction will be seen as impacting the independence of the director.

2 means the aggregate of the - (a) paid-up equity share capital; and (b) convertible preference share capital;



The intent of the law is not to bring each transaction of the independent director under the scanner. So long as the transactions are executed on arms length basis, it should not be regarded as a disqualification.

MCA has also specified the same in its clarification circular that transactions entered into in the ordinary course of business at arm's length price will not fall under the purview of "pecuniary relationship" stated in section 149 (6) (c) while determining the independence of the director.

Further, the remuneration received from one or more companies, by way of a fee u/s 197 (5), reimbursement of expenses for participation in the Board and other meetings, profit related commission approved by the members in accordance with the provisions of the Act, 2013 will also fall outside the purview "pecuniary relationship" stated in section 149 (6) (c) while determining the independence of the director

Tenure of an Independent Director

5. What will be tenure of appointment of independent directors?

As per sub-sections (10) and (11) of section 149 of the Act, 2013 an independent director can be appointed for a term up to five consecutive years and thereafter can be re-appointed for another term of up to five consecutive years only after passing of a special resolution in general meeting. The re-appointment shall happen only after performance evaluation is done by the entire board. However, an independent director cannot hold office for more than two consecutive terms. The Act, 2013 also provides for a cooling off period of three years after which he can again be appointed as the independent director.

As per revised Clause 49, an independent already holding tenure for 5 or more years can be appointed for only one term of 5 years.

6. Will the existing tenure be counted?

The Act, by way of an explanation to sub-sections (10) and (11) of section 149, clearly states that any tenure of an independent director as on the date of commencement of the Act shall not be counted as term under the abovementioned sub-sections.

Clause 49 states that a person who has already served as an independent director in a company for five or more years as on 1st October, 2014 shall be eligible to be appointed for one more term of up to five years only.



Hence, if we summarise the above, the substance emerges is as follows:

- For listed companies:
 - If the independent director has already serve five or more years as on 1st October, 2014 – He can be appointed for only one more term of up to five years.
 - If the independent director has served a tenure which is less than five years as on 1st October, 2014 – He can be appointed for not more than two consecutive terms of up to five years each.
- For unlisted companies: The existing independent directors can be appointed for not more than two consecutive terms of up to five years each.

7. Can a Company appoint an independent director for a term of less than 5 years?

In view of the representations received by MCA asking whether an independent director can be appointed for a term of less than 5 years, the clarification circular specifies that the same is permissible. However, any appointment whether of 5 or less than 5 years will be regarded as ‘one term’. Section 149 (11) clearly stipulates that no person can hold office as an independent director for more than ‘two consecutive terms’. Thus, irrespective of the duration of each of the two terms (whether the same aggregates to 10 years or less) a person holding office for two consecutive terms shall be eligible for re-appointment only after the expiry of three years of ceasing to become an independent director.

8. Some companies are taking the view that the expression “term upto five consecutive years” used in sec. 149 (10) may mean a 5-year term starting from 1st April 2014, that is, the date of implementation of sec 149. Accordingly, these companies are appointing their independent directors upto 31st March 2019. Is this view correct or advisable?

The word “year” usually means a calendar year, and therefore, it is fair to say the term of 5 years, starting from 1st April 2014, ends on 31st March 2019. However, the word year is not used as a self-standing word here. It is used in conjunction, so to lead to the expression “term upto five consecutive years”. It is a *stare decisis* that a director’s appointment is done at an AGM. It continues, in case of rotational directors, upto the 3rd AGM after the present one, and in case of directors appointed for a fixed term, upto such fixed term. Therefore, the expression “term upto five consecutive years” must mean the time gap between the present AGM and the 5th AGM after the present one.



Any other interpretation will lead to a completely unworkable situation. For example, if the directors were to be appointed upto 31st March 2019, then what about the filling up of their places on 1st April 2019? Sure enough, the company cannot wait for the AGM of 2019. So, either the AGM of 2018 itself has to reappoint the director prospectively from 1st April 2019, or the director's office will remain vacant upto the date of the 2019 AGM.

Such an interpretation disturbs a settled rule that directors' term starts at an AGM and continues upto an AGM. The word "year" appearing here does not have to be read as a self-standing "calendar year". Sec 3 of the General Clauses Act starts with the exception – unless the context otherwise requires. Therefore, the general meanings of words given in the General Clauses Act do not have to be mechanically applied. This is particularly so in case of terms of offices, which are appointed in a particular manner.

9. Is there a conflict between the requirement of the Act and the Listing Agreement?

As per Companies Act 2013, a person may be appointed as an Independent Director for a term upto 5 years, and then he may be reappointed for one more term upto years, on the strength of a special resolution. However, the revised Clause 49 of the Listing Agreement seems to provide for only one more term. The relevant clause reads:

Provided that a person who has already served as an independent director for five years or more in a company as on October 1, 2014 shall be eligible for appointment, on completion of his present term, for one more term of up to five years only.

If one examines closely, there is no conflict between the requirements of the Act and the Listing Agreement, if the directors are appointed before 1st October 2014. Sure enough, the AGM of 2014 will be over before 1st October. So, if the appointment is done before 1st October 2014, it becomes a "present term" as on 1st October 2014, and therefore, the term of 5 years will start running only after the expiry of the "present term".

Limit on number of Directorships held

10. Is there any limit on the number of companies in which a person can act as an Independent Director?

As per Companies Act, 2013 there is a limit on number of directorships prescribed under section 165 (1) of 20 companies (including any alternate directorship). There is no separate limit specified for Independent directors.



However, revised Clause 49 prescribes a limit on the number of companies in which a person can act as Independent Director. A person cannot serve as an Independent Director in more than seven companies. Further, any person who is serving as a whole time director in any listed company shall serve as an independent director in maximum three listed companies.

Regular appointment of independent directors:

11. Who will do the regular appointment of independent directors?

The identification of prospective independent directors shall be done by the Nomination and Remuneration Committee and be recommended to the board. Thereafter, the appointment of independent director(s) of the company has to be approved in the meeting of the shareholder. It may be noted that the appointment of an independent director can be done only at a general meeting and not by way of postal ballot. This is deduced by way of para IV (2) of Schedule IV to Act, 2013.

The explanatory statement attached to the notice for the meeting approving the appointment of independent director shall contain a statement that in the opinion of the board, the person proposed to be appointed as the independent director fulfils the conditions set down in the Act and the Rules and is independent of the management.

12. Can an existing independent director be treated as a non-executive, rotational director?

The existing independent directors cannot be treated as rotational directors. They will continue to act as independent directors till one year from the enforcement of this section (i.e. up to 31st March, 2015) and since the Explanation to section 152 (6) says that for the purpose of calculating total number of rotational directors, independent directors shall not be included, hence, it is very clear that they cannot be treated as non-executive rotational directors.

Vacancies in the office of independent directors:

13. What are the various ways in which vacancy can arise in the post of an independent director?

Vacancy may arise in the following ways:

- 13.1 Death
- 13.2 Incapacity to act
- 13.3 Ineligibility of a director
- 13.4 Resignation



13.5 Removal by members, or by NCLT

14. If a vacancy arises, how does it have to be filled up?

This question has to be seen from two aspects:

14.1 Schedule IV, VI (2) of Act, 2013 says where an independent director resigns or is removed, then the vacancy has to be filled up by a replacement director within 180 days. However, the clause does not say who will fill the replacement.

However, sub-clause D(4) of clause 49 states any vacancy cause by way of resignation or removal from the board in the post of independent director shall be filled up not later than the immediate next Board meeting or three months from the date of such vacancy, whichever is later.

14.2 Further, we shall also refer to second proviso to the Rule 4 (iii) of the Companies (Appointment and Qualification of Directors) Rules, 2014 which refers to intermittent vacancy in the post of independent director. The meaning of the term “intermittent vacancy” in the Rules seems to be between the dates of two general meetings. “Intermittent” means something occurring in between, and therefore, since there is no general meeting currently in the offing, and the company does not have the required number of independent directors, the Rules permit the Board of directors to cause the appointment. Further, such intermittent vacancy has to be filled within not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

The revised Clause 49 remains silent on the procedure of filling up the vacancy.

Hence, the substance that emerges from the above is as follows:

	Listed company	Unlisted company
Vacancy caused by resignation or removal	Filled up by the board at the immediate next board meeting or within 90 days from the date of vacancy	Filled up by at the general meeting within 180 days
Vacancy caused by death, incapacity or ineligibility	-do-	Filled up by the board at the immediate next board meeting or within 90 days from the date of vacancy

15. How long will the replacement director hold office?

- a. In case of appointment by the board, the director should hold office till the coming General meeting.



- b. In case of appointment by a general meeting, he may anyway be appointed for a full term of 5 years.

Existing independent directors

- 16.** Will the existing independent directors have to be reappointed at the forthcoming AGM?

Quite likely the existing independent directors have been appointed as rotational directors. As per the new law, independent directors become non rotational. This change in terms of appointment can only be done by the general meeting. Accordingly, we are of the view that the existing independent directors may be reappointed for a term of 5 years at the coming AGM.

Section 149 (5) provides a transition time of 1 year to ensure compliance with provisions of sub-section (4) relating to appointment of independent directors by eligible companies. MCA in its clarification circular has specified that any tenure of the independent director on the commencement of the Act, 2013 shall not be counted for his appointment/holding office of director under the Act, 2013. The companies have to necessarily appoint existing independent directors, who fulfill the eligibility and other prescribed conditions, under the Act, 2013 under section 149 (10) & (11) read with Schedule IV of the Act. The time frame to comply with same is a period of 1 year from 1st April, 2014.

Thus, the existing independent directors will be appointed under the new Act, 2013 and compliances with respect to obtaining of consent to act as Director and requisite form filing and compliances will be required to be done.

Special notice for appointment of an independent director:

- 17.** Is a special notice required for appointment of an independent director?

Para IV of Schedule IV of Act, 2013 requires the appointment of the independent directors to be approved by at the meeting of the shareholders for which a notice has to be served with an explanatory statement containing the opinion of the Board that independent director proposed to be appointed fulfils all the conditions set down in the Act, 2013 and Rules and that the person is independent from the management. The requirement of special notice seems irrelevant to an independent director whose candidature is proposed by the board himself.



18. Is a pre-deposit of Rs 100000/- as provided in section 160 (1) applicable to the appointment of an independent director

Section 160 of Act, 2013 corresponds to section 257 of Act, 1956 and pertains to appoint a *competing* director in place of the director retiring by rotation and proposed to be re-appointed at the general meeting. Since, the appointment of a director is two-tiered i.e. identification by nomination and remuneration committee and thereafter consideration by the board and expression of opinion by the board, the author is of the opinion that the requirements u/s 160 and consequent deposit of Rs. 1,00,000/- shall not be applicable for the appointment of an independent director.

Letter of appointment:

19. Is the letter of appointment to be given to the independent director required to be placed at the general meeting where he is being appointed?

Clause IV (4) of Schedule IV requires furnishing of a formal letter of appointment to the appointed independent director setting out the matters stated therein. MCA has specified in its clarification circular that in view of the specific provisions of the Act, 2013 the requirement of furnishing formalized letter of appointment is applicable for appointment of independent director under Act, 2013. Thus, existing independent directors appointed under provisions of 149 (10) and (11) will also be furnished with a formalized letter of appointment.

However, neither the Act, 2013 nor Clause 49 says that the letter of appointment should be placed at the general meeting where he is being appointed. Clause IV (5) of Schedule IV simply requires the company to keep the terms and conditions of appointment open for inspection at the registered office of the company for the members during normal business hours and Clause IV (6) requires the company to post the terms and conditions of appointment of Independent Directors on its website.

Clause 49 (revised) requires the company to disclose the terms and conditions of appointment of the independent directors to the stock exchange and on the websites of the company within one working day from the date of such appointment. Thus, there is no need to make the contents of the appointment letter a part of the general meeting notice.



Annexure

Declaration by Independent Directors [Pursuant to section 149(7)]

To

----- (Name of the company)

----- (Address of the company)

Subject: Declaration of meeting the Independence criteria

I, allotted with Director Identification Number hereby declare the following with respect to each of the criteria as provided in clauses (b) to (f) of sub-section (6) of Section 149 of the Companies Act, 2013 read with Companies (Appointment and Qualification of Directors) Rules, 2014 and of sub-clause (1) of Clause 49 II B of the Equity Listing Agreement:

- (1) (i) I am/ was not a promoter of the company or its holding, subsidiary or associate company;
- (ii) I am not related to promoters or directors in the company, its holding, subsidiary or associate company;
- (2) I had no 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;
- (3) none of my relatives have or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;
- (4) Neither me 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 the financial year;



- (ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year, 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 nonprofit 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;
- (v) is a material supplier, service provider or customer or a lessor or lessee of the Company;

(5) I am above 21 years of age;

(6) I 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.

I further declare the following with respect to each of the criteria as provided in sub-clause (2) of Clause 49 II B of the Equity Listing Agreement:

- a. I do not serve as an independent director in more than seven listed companies.
- b. I am not serving as a whole time director in any listed company and therefore the requirement to serve as an independent director in not more than three listed companies is not applicable to me or

I am serving as a whole time director in ____ listed company viz. M/s..... and including current directorship I am serving as an independent director in not more than three listed companies.

Signature:

Date:

Place:

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POST MEMBERSHIP QUALIFICATION COURSE IN COMPETITION LAW

India has witnessed two phases of development process with different policy regimes and institutional frameworks. In the first phase, since independence, the development of the Indian economy took place within a rigidly regulated and relatively closed economic framework. In the second phase, since 1991, the country embarked upon economic reform process and embraced market oriented policies.

Since 1991, the Government of India introduced a series of economic reforms, including policies of liberalisation, deregulation, disinvestment and privatisation. The broad thrust of the new policies was a move away from the centralised allocation of resources in some key sectors by the government to allocation by market forces. After a decade of reforms, restraints to competition such as state monopolies and protective measures and controls were replaced by relatively more competitive and de-regulated open market policies.

The Competition Act, 2002, replacing the MRTP Act, 1969, was enacted to provide, keeping in view of the economic development of the country for the establishment of a Commission, to prevent practices having adverse effect on competition, to promote and sustain competition in markets and to protect the interests.

The basic purpose of the Competition Law, in any country, is to ensure that markets remain competitive, to the benefit of both business and consumers. The compliance by the market participants of competition law, rules and directions issued by competition authorities, is a precondition in achieving the purpose of law.

Competition authorities, the world over, encourage companies to seek advice from professional experts in compliance of competition law to assist them in designing, implementing and maintaining an effective compliance program. The Company Secretaries being compliance experts are most suitable professionals to play a wider role in enforcement and compliance of competition law. Company Secretaries are the professionals, who have expertise in providing total compliance solutions and imbibing good corporate governance practices in the veneer of company strategy, formulation, implementation and other aspects of company policies as a coherent whole.

In these underpinnings, the ICSI introduced Post Membership Qualification Course (PMQ) in Competition Law, for its members.



OBJECT

The PMQ Course in Competition Law aims at capacity building of Company Secretaries in the area of legal, procedural and practical aspects of Competition Law and matters related thereto.

OBJECTIVES

The objectives of the PMQ Course in Competition Law are that the members who complete the PMQ Course in Competition Law should –

- Appreciate various concepts of competition, economics of Competition including economic theories and policies that influence the aspects of Competition in the market and operation of Competition Law.
- Gain acumen, insight and thorough knowledge of law governing competition in India and major overseas jurisdictions.
- Understand and appreciate the interface between Competition Commission of India and Sectoral Regulators.
- Understand the Competition Law in practice and in particular procedures involved in various aspects of administration of competition law in India including dealing with Competition Commission of India and Competition Appellate Tribunal.
- Understand and appreciate the importance and structure of Competition Compliance Programme its effective implementation, monitoring and evaluation.
- Be able to apply the knowledge of Competition Law in commercial context.

Course Structure

PMQ Course in Competition Law comprises of following two parts, namely :

- (a) Part I of the course comprises of written examination, and
- (b) Part II of the Course comprises of 100 hours training.

PART I: Papers for Examination

The candidates for Part I examination shall be examined in the following four papers :

Paper I	Concepts and Economics of Competition Law (100 marks)
Paper II	Anti-competitive Agreements and Abuse of Dominance (100 marks)
Paper III	Regulation of Combinations (100 marks)
Paper IV	Competition Compliance Programme (50 marks) Case study (50 marks)



PART II: Training

A candidate after qualifying Part I of the course shall undergo training for 100 hours in the manner and areas specified by the Council under a Competition Law Practitioner, legal department of large companies particularly MNCs or PCS firms engaged in Competition Law Practice, as may be approved by the Council from time to time.

ELIGIBILITY CRITERIA

The members of the Institute shall be eligible for the admission to the course. Registration for the course will be valid for a period of five years during which period the candidate will be required to complete both the parts. Registration shall be open throughout the year. A candidate shall however, register at least six calendar months prior to the month in which the examination commences.

EXAMINATION

Part I of the Post Membership Qualification Course in Competition Law examination will be conducted at such intervals, in such manner and at such time and place as the Council may decide subject to availability of such minimum number of candidates enrolled for the examination. The dates and places of the examination shall be published in the Institute's Journal "Chartered Secretary".

PREPARATION FOR THE COURSE

Post Membership Qualification Course in Competition Law is a specialized course and the candidates pursuing this course will be required to have thorough knowledge of the subjects prescribed under each paper of the course. For this purpose, the candidates will be provided an illustrative list of suggested books and readings.

DIPLOMA CERTIFICATE

A candidate successfully completing both Part I and Part II of the Post Membership Qualification Course in Competition Law shall be awarded a Diploma Certificate to that effect in the appropriate form by the Institute and shall be entitled to use the descriptive letters and bracket "DCL (ICSI)" to indicate that he has been awarded "Post Membership Diploma in Competition Law" by the Institute of Company Secretaries of India.

Course Fee: Rs. 25,000/- per candidate at the time of Registration

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Broad topics for submission of Articles

- CSR
- Annual Return
- AGM
- E-Voting
- Bonus Shares
- Preferential issues
- Board Disclosures
- Incorporation
- Incorporation conversion
- Shareholders democracy
- Acceptance of Deposits
- Rules under Companies Act, 2013
- Resolutions to be filed under Companies Act, 2013



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Theme: CS – Change. Challenge. Opportunity

Kindly block these dates in your diary. Other details about the National Convention being hosted on ICSI website shortly.

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