

Independent Directors

A HandBook

The Companies Act, 2013 Series



**THE INSTITUTE OF
Company Secretaries of India**

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Preface

Board of Directors are central to the governance of companies. The boards play a key role in providing direction to the management in terms of strategy and also ensuring that the companies operate in the best interests of the shareholders and other stakeholders. Board independence is seen as a cornerstone of accountability and the presence of independent directors in the boardroom has been hailed as an effective deterrent to fraud, mismanagement, inefficient use of resources, inequality and unaccountability of decisions. Indeed, it has been widely acknowledged in recent times that their increased presence in board rooms has been hailed as harbingers, to strike right chord between, individual, economic, social and other stakeholders of a company.

The dramatic changes in the recent past in the regulatory environment in India on corporate governance with the enactment of the Companies Act, 2013 and the impending implementation of the revised clause 49 of the Listing Agreement has enhanced the role of independent directors in corporate governance a few notches higher.

Historical evolution of the concept of Independent Directors, their role, responsibilities, rights, duties and liabilities as well as related provisions in the Companies Act, 2013 and Clause 49 of the listing agreement have been covered in a lucid and comprehensive manner in this handbook. International perspective with regard to independent directors also finds a place in this publication.

I place on record my sincere thanks to Mr. K. Sethuraman, Group Company Secretary and Chief Compliance Officer, Reliance Industries and Mr.V.K Agarwal, Former Principal Director, ICSI for their valuable inputs in finalizing the hand book.

I commend the dedicated efforts put in by team ICSI led by Ms. Alka Kapoor, Joint Secretary and comprising Ms.Banu Dandona, Deputy Director, Ms.Deepa Khatri, Assistant Director, Ms.Disha Kant, Assistant Education Officer and Mr.Naveen Kumar, Senior Assistant in the Directorate of Professional Development –II in preparing this publication under the overall guidance of Mr. Sutanu Sinha, Chief Executive, ICSI and the guidance and leadership of Mr. Sanjay Grover, Central Council Member and Chairman, Corporate Laws and Governance Committee.

I am sure the publication will prove to be of immense benefit to companies as well as company directors in benchmarking the governance practices in the company.

In any publication of this kind, there is always scope for further refinement. I would be personally grateful to the users and readers of this handbook for their feedback.

CS R. Sridharan

President

Contents

	<i>Page</i>
1. Introduction	1
2. Independent Directors – International Practices	3
3. Who can be an Independent Director	8
4. Number of Independent Directors on Board	10
5. Limit on Number of Directorships	11
6. Limit on Membership in Board Committees	12
7. Appointment of Independent Directors	12
8. Re-appointment	15
9. Alternate Director	15
10. Director Identification Number (DIN)	15
11. Data Bank of Independent Directors	16
12. Tenure of Independent Directors	18
13. Retirement by Rotation	19
14. Remuneration of Independent Directors	20
15. Disclosures by/or relating to Independent Directors	20
16. Participation in Board Meetings	22
17. Independent Directors and Board Committees	23
CSR Committee	23
Nomination and Remuneration Committee	23
Audit Committee	24
18. Attendance of Independent Directors in General Meeting and Board Meetings	24
19. Duties of Directors	25
20. Key functions of the Board as per Listing Agreement:	28

21.	Duties of Non-Official Directors in CPSEs	31
22.	Responsibility of Independent Directors for the Prevention and Detection of Fraud	32
23.	Immunity under the Companies Act, 2013	33
24.	Training of Independent Directors	33
25.	Performance Evaluation of Independent Directors	34
26.	Separate Meetings of Independent Directors	34
27.	E-forms required to be filled in relation to Independent Directors	35
28.	Conclusion	35
29.	FAQs in relation to Independent Directors	36

INTRODUCTION

The emergence of the concept of “independent directors” can be seen in the light of evolution of the term “corporate governance” over time. A corporate form of entity has stakeholders viz. shareholders, creditors, banks and financial institutions, employees, community and environment. The working of the corporate system depends on how well the interests of these stakeholders are served. In the year, 1999, the Securities and Exchange Board of India (SEBI) set up a Committee under the chairmanship of Kumar Mangalam Birla to promote and raise standards of corporate governance in India. The recommendations put forward by the KM Birla Committee led to the addition of “Clause 49-Corporate Governance” in the Listing Agreement in the year 2000. In the Report, the Committee defines independent directors as:

“Independent Directors are directors who apart from receiving director’s remuneration do not have any other material pecuniary relationship or transaction with the company, its promoters, its management, or its subsidiary, which in the judgment of the Board may affect their independence of judgment”.

The scams such as Enron, WorldCom, Qwest, Global Crossing and the milestone legislation SOX triggered corporate governance reforms in the international arena. Accordingly, in the year 2002, the Government of India appointed Naresh Chandra Committee which among other recommendations in line with international best practices, recommended that the extant definition of independent director should be made more precise.

Another major development took place in the year 2002, when a Committee was formed by SEBI under the chairmanship of N R Narayanamurthy for reviewing the implementation of corporate governance code by listed companies. Accordingly, the Committee revised clause 49 to include the revised definition of Independent Director as under [(Para I. (A) of Clause 49 of Listing Agreement)]:

“iii. For the purpose of the sub-clause (ii), the expression ‘independent director’ shall mean a non-executive director of the company who:

- (a) 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;

- (b) is not related to promoters or persons occupying management positions at the board level or at one level below the board;
- (c) has not been an executive of the company in the immediately preceding three financial years;
- (d) is not a partner or an executive or was not partner or an executive during the preceding three years, of any of the following:
 - 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.
- (e) is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect independence of the director;
- (f) is not a substantial shareholder of the company i.e. owning two percent or more of the block of voting shares.”

SEBI vide circular SEBI/CFD/DIL/CG/1/2004/12/10 dated October 29, 2004, amended the listing agreement whereby the minimum age for independent directors was prescribed as 21 years.

The nominee directors were deemed to be independent directors.

In January 2013, SEBI came out with ‘Consultative paper on Review of Corporate Governance Norms in India’ proposing various new provisions for better governance practices. The approved provisions are to be effective from October 1, 2014.

The concept of independent directors was proposed in the legislation by means of the Companies Bill, 2009 which was finally enacted in the form of the Companies Act, 2013. The Act and the relevant Rules made thereunder contain extensive provisions dealing with independent directors. In fact, a whole schedule, namely Schedule IV has been prescribed under the Act which contains the “Code for Independent Directors”.

The comparative table highlighting the provisions with regard to independent director in terms of the Companies Act, 2013, previous clause 49 of the listing agreement and revised clause 49 is placed as **Annexure I**.

Pivotal role of Independent Directors

Independent Directors play a pivotal role in maintaining a transparent

working environment in the corporate regime. Independent Directors constitute such category of Directors who are expected to have impartial and objective judgment for the proper functioning of the company. The appointment of Independent Directors ensures an effective and balanced composition of the Boards.

Independent Directors play a pivotal role in building a strong foothold of Corporate Governance in an organization. They bring accountability and credibility to the Board process and also strengthen sound practices. While they need not take part in the company's day-to-day affairs or decision making, they should ask the right questions at the right time regarding the board's decisions. Raising the appropriate red flags at the right time would help them in avoiding the occurrence of unwanted situations and their consequences to a great extent.

However, an Independent Director may not be able to play an effective role in isolation despite his commitment to ethical practices. He may not be able to stop a decision that is detrimental to the members individually, but if the Independent Directors act collectively, then they can together make a difference. Independent Directors may not be in a position to stop fraud at the highest level, but with a high level of commitment and due-diligence, they may be well placed to identify signals that indicate that everything is not as it should be.

INDEPENDENT DIRECTORS – INTERNATIONAL PRACTICES

Definition of independence in the UK Corporate Governance Code

B.1.1. The board should identify in the annual report each non-executive director it considers to be independent. The board should determine whether the director is independent in character and judgment and whether there are relationships or circumstances which are likely to affect, or could appear to affect, the director's judgment. The board should state its reasons if it determines that a director is independent notwithstanding the existence of relationships or circumstances which may appear relevant to its de-termination, including if the director :

- has been an employee of the company or group within the last five years;
- has, or has had within the last three years, a material business relationship with the company either directly, or as a partner, shareholder, director or senior employee of a body that has such a relationship with the company;

- has received or receives additional remuneration from the company apart from a director's fee, participates in the company's share option or a performance-related pay scheme, or is a member of the company's pension scheme;
- has close family ties with any of the company's advisers, directors or senior employees;
- holds cross-directorships or has significant links with other directors through involvement in other companies or bodies;
- represents a significant shareholder; or
- has served on the board for more than nine years from the date of his first election.

Independence tests according to NYSE

In order to tighten the definition of "independent director" for purposes of these standards:

- (a) (i) No director qualifies as "independent*" unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company).
- (ii) In addition, in affirmatively determining the independence of any director who will serve on the compensation committee of the listed company's board of directors, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to:
 - (A) the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the listed company to such director; and
 - (B) whether such director is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company.
- (b) In addition, a director is not independent if:
 - (i) The director is, or has been within the last three years, an employee of the listed company, or an immediate family

member is, or has been within the last three years, an executive officer, of the listed company.

- (ii) The director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than \$ 120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service).
- (iii) (A) The director is a current partner- or employee of a firm that is the listed company's internal or external auditor; (B) the director has an immediate family member who is a current partner of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and personally works on the listed company's audit; or (D) the director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the listed company's audit within that time.
- (iv) The director or an immediate family member is, or has been within the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serve or served on that company's compensation committee.
- (v) The director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of \$1 million, or 2% of such other company's consolidated gross revenues.

Code of Corporate Governance – Singapore

An "independent" director is one who has no relationship with the company, its related corporations, its 10% shareholders or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgement with a view to the best interests of the company. The Board should identify in the company's Annual Report each director it considers to be independent. The Board should determine, taking into account the views of the

Nominating Committee, whether the director is independent in character and judgement and whether there are relationships or circumstances which are likely to affect, or could appear to affect, the director's judgement. Directors should disclose to the Board any such relationship as and when it arises. The Board should state its reasons if it determines that a director is independent notwithstanding the existence of relationships or circumstances which may appear relevant to its determination, including the following:

- (a) a director being employed by the company or any of its related corporations for the current or any of the past three financial years;
- (b) a director who has an immediate family member who is, or has been in any of the past three financial years, employed by the company or any of its related corporations and whose remuneration is determined by the remuneration committee;
- (c) a director, or an immediate family member, accepting any significant compensation from the company or any of its related corporations for the provision of services, for the current or immediate past financial year, other than compensation for board service;
- (d) a director:
 - (i) who, in the current or immediate past financial year, is or was; or
 - (ii) whose immediate family member, in the current or immediate past financial year, is or was, a 10% shareholder of, or a partner in (with 10% or more stake), or an executive officer of, or a director of, any organisation to which the company or any of its subsidiaries made, or from which the company or any of its subsidiaries received, significant payments or material services (which may include auditing, banking, consulting and legal services), in the current or immediate past financial year. As a guide, payments aggregated over any financial year in excess of \$200,000 should generally be deemed significant;
- (e) a director who is a 10% shareholder or an immediate family member of a 10% shareholder of the company; or
- (f) a director who is or has been directly associated with a 10% shareholder of the company, in the current or immediate past financial year.

It is further provided that the relationships set out above are not intended to be exhaustive, and are examples of situations which would deem a director to be not independent. If the Board wishes, in spite of the existence of one or more of these relationships, to consider the director as independent, it should disclose in full the nature of the director's relationship and bear responsibility for explaining why he should be considered independent.

Further, the independence of any director who has served on the Board beyond nine years from the date of his first appointment should be subject to particularly rigorous review. In doing so, the Board should also take into account the need for progressive refreshing of the Board. The Board should also explain why any such director should be considered independent.

ASX Corporate Governance Principles and Recommendations, the factors are considered relevant to assessing the independence of a director include if the director:

- is, or has been, employed in an executive capacity by the entity or any of its child entities and there has not been a period of at least three years between ceasing such employment and serving on the board;
- is, or has within the last three years been, a partner, director or senior employee of a provider of material professional services to the entity or any of its child entities;
- is, or has been within the last three years, in a material business relationship (eg as a supplier or customer) with the entity or any of its child entities, or an officer of, or otherwise associated with, someone with such a relationship;
- is a substantial security holder of the entity or an officer of, or otherwise associated with, a substantial security holder of the entity;
- has a material contractual relationship with the entity or its child entities other than as a director;
- has close family ties with any person who falls within any of the categories described above; or
- has been a director of the entity for such a period that his or her independence may have been compromised.

In each case, the materiality of the interest, position, association or relationship needs to be assessed to determine whether it might

interfere, or might reasonably be seen to interfere, with the director's capacity to bring an independent judgement to bear on issues before the board and to act in the best interests of the entity and its security holders generally.

It is further provided that the mere fact that a director has served on a board for a substantial period does not mean that he or she has become too close to management to be considered independent. However, the board should regularly assess whether that might be the case for any director who has served in that position for more than 10 years.

WHO CAN BE AN INDEPENDENT DIRECTOR

Section 149(6) of the Companies Act, 2013 provides that:

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

- (a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;
- (b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;
(ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;
- (c) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;
- (d) none of whose relatives 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 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;
- (e) who, neither himself nor any of his relatives –
 - (i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;

- (ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of –
 - (A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or
 - (B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm;
 - (iii) holds together with his relatives two per cent. or more of the total voting power of the company; or
 - (iv) is a Chief Executive or director, by whatever name called, of any non-profit organisation that receives twenty-five per cent. or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or
- (f) who possesses such other qualifications as may be prescribed”.

As per Rule 5 of the Companies (Appointment of Directors) Rules, 2014 an Independent Director shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company’s business.

MCA vide General Circular No. 1/22/2013-CL-V dated 09.06.2014 has issued the following clarifications with respect to ‘**Pecuniary Relationship**’ of Independent Director:

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

Nominee Director as Independent Director

As per section 149(6) of the Companies Act, 2013 and the revised clause

49 of the listing agreement, the nominee director is not considered as independent director.

This criteria has been introduced mainly to ensure transparency in corporate governance and to safeguard the autonomy of independent directors.

NUMBER OF INDEPENDENT DIRECTORS ON BOARD

The Companies Act, 2013 mandates the appointment of Independent Directors for certain companies.

According to sub-section (4) of section 149 :

- (i) every listed public company should have at least 1/3rd of the total number of directors as independent directors and,
- (ii) the Central Government may prescribe minimum number of independent directors for other class or classes of public companies.

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

- (i) Public Companies having paid up share capital of Rs.10 crore or more; or
- (ii) Public Companies having turnover of Rs.100 crore or more; or
- (iii) Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding Rs.50 crore.

Where a company ceases to fulfill any of three conditions laid down above for three consecutive years, it shall not be required to comply with the appointment of independent directors until such time as it meets any of such conditions.

In case a company is required to appoints higher number of independent directors due to composition of its Audit Committee, the company must appoint such higher number of independent directors.

Rule 4 above, also provides that a company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law.

Para II. A of **revised clause 49 of the listing agreement**, mandates a higher number of independent directors, for listed companies as below:

- i. The Board of directors of the company shall have an optimum combination of executive and non-executive directors with at least one woman director and not less than fifty percent of the Board of directors comprising non-executive directors.
- ii. Where the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case the company does not have a regular non-executive chairman, at least half of the Board should comprise of independent directors.

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

The explanation to the clause explains the term *“Related to any Promoter”* to mean

- a. If the promoter is a listed entity, its directors other than the independent directors, its employees or its nominees shall be deemed to be related to it;
- b. If the promoter is an unlisted entity, its directors, its employees or its nominees shall be deemed to be related to it.”

Subsidiary Company

As per clause 49VA of the listing agreement, at least one independent director on the Board of Directors of the holding company shall be a director on the Board of Directors of a material non listed Indian subsidiary company.

LIMIT ON NUMBER OF DIRECTORSHIPS

The Companies Act, 2013 does not provide any specific limit on the number of independent directorships. As per the provisions of section 165 of the Companies Act, 2013, the maximum number of directorships:

- (a) Maximum directorships in aggregate (including alternate directorships) is Twenty companies;
- (b) Maximum directorship in public companies is 10 companies. This includes directorship in private companies that are either holding or subsidiary company of a public company.

The members of a company may, however by passing a special resolution

specify any lesser number of companies in which a director of the company may act as director.

The restriction on number of directorships is however, laid down in revised clause 49 of the Listing Agreement which provides:

- (a) A person may serve as an Independent Director in maximum seven (7) listed companies.
- (b) Any person serving as a Whole-time Director in any listed company shall serve as an Independent Director in maximum three (3) listed companies.

As per the eligibility criteria for directorships in CPSEs, a person cannot be a non-official director on the boards of more than 3 CPSEs at the same time. Further, he should not hold directorships in more than 10 private companies.

LIMIT ON MEMBERSHIP IN BOARD COMMITTEES

A Director shall not be a member in more than ten Committees or act as Chairman of more than five Committees across all Companies in which he is a director. For the purpose of reckoning this limit, Chairmanship/ Membership of Audit Committee and stakeholders' Relationship Committee alone will be considered.

APPOINTMENT OF INDEPENDENT DIRECTORS

The appointment process of the independent directors should be independent of the company management. Section 178(3) of the Companies Act, 2013, provides that the Nomination and Remuneration Committee shall formulate the criteria for determining qualifications, positive attributes and independence of director. The step by step process for appointment of independent director is provided hereunder:

Selection by the Board

The Board of directors shall appoint Independent Directors and while selecting such independent directors, shall ensure that there is appropriate balance of skills, experience and knowledge in the Board so as to enable the Board to discharge its functions and duties effectively. [Para IV(1) of Schedule IV to Companies Act, 2013].

The Board of directors of the company, depending on the requirements of the company and profile of independent directors, select the independent director of the company. The Board of directors may select independent director from the data bank maintained by any Body, institute or association as notified by the Central Government or other

independent sources as may be available to the Board. The responsibility of exercising due diligence before selecting a person from the data bank will be with the company making such appointment.

Approval by the Shareholders

The appointment of independent director requires approval of the shareholders in General Meeting after being nominated by the Board. Such approval may be given either in annual general meeting or extra ordinary general meeting.

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

Letter of Appointment

The appointment of Independent Directors should be formalized through a letter of appointment which shall set out:

- i. the term of appointment, i.e. the tenure for which the independent director has been appointed;
- ii. the expectation of the Board from the appointed director and the Board level Committees in which the director is expected to serve and its tasks;
- iii. the fiduciary duties and liabilities that come with such an appointment;
- iv. the Code of Business Ethics that the company expects its Directors and employees to follow,
- v. the list of actions that a director should not do while functioning as such in the company
- vi. the remuneration, periodic fees, reimbursements of expenses for participating in the Board and other meetings and profit related commission, if any;
- vii. provision for Directors & Officers insurance, if any.

The terms and conditions of appointment of IDs are to be open for inspection at the registered office of the company by any member

during business hours and are also required to be posted on the company's website. [Para IV(5)(6) of Schedule IV].

The Letter of Appointment of Independent Director along with their detailed profiles should be disclosed on the website of the company and the stock Exchanges not late than one working day from the date of such appointment. [Clause 49.II.B.4.b. of the Listing Agreement]

Consent to act as Director

As per sub-section (5) of section 152 of Companies Act, 2013, a person appointed as a director shall not act as a director unless he gives his consent to hold the office as director. The consent should be in writing in Form DIR-2 and such consent should be filed with the Registrar in Form DIR-12 within thirty days of his appointment.

Entry in the register of Directors and KMP

Rule 17 of the Companies (Appointment and Qualification of Directors) Rules, 2014 requires that every company shall keep at its registered office a register of its directors and key managerial personnel containing the specified particulars of the directors/KMP alongwith details of securities held by them in the company, its holding company, subsidiaries, subsidiaries of the company's holding company and associate companies.

Filing of Return with the Registrar

Details of appointment of directors/KMPs or any change should be filed by the company with the Registrar in Form DIR-12 within 30 days of the appointment/change.

Self declaration as to independence

Section 149(7) requires individuals to submit a self-declaration confirming that they meet the criteria prescribed for the position. Every Independent Director is required to give a declaration that he meets the criteria of independence as required under section 149(6) of the Companies Act, 2013 at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an Independent Director.

Intermittent vacancy

Any intermittent vacancy of an Independent Director should be filled-up by the Board at the next Board meeting or within 3 months from the

date of such vacancy, whichever later. [*Second Proviso to Rule 4 of the Companies (Appointment and Qualifications of Directors) Rules, 2014*]

RE-APPOINTMENT

The re-appointment of Independent Director shall be on the basis of report of performance evaluation.

ALTERNATE DIRECTOR

No person should be appointed as an alternate director for an Independent Director unless he is qualified to be appointed as an Independent Director [*first proviso to Section 161(2)*].

DIRECTOR IDENTIFICATION NUMBER (DIN)

Section 152 of the Companies Act, 2013 mandates obtaining a DIN to become and remain a director in a company. DIN is a unique identification number allotted to an individual who is an existing director of a company or intends to be appointed as director of a company. DIN was first introduced *vide* the Companies (Amendment) Act, 2006.

DIN is needed so as to ascertain the identity of the person proposed to act as director/acting as director of the company. DIN also helps correlating a director's participation in multiple companies. Simultaneously, DIN helps the Government in creating a database.

Rule 9 of Companies (Appointment and Qualifications of Directors) Rules, 2014 provide the detailed procedure for obtaining DIN.

Fee for making an application for obtaining DIN has to be paid in accordance with the Companies (Registration Offices and Fees) Rules, 2014.

One cannot have two DINs. Multiple numbers of directorships does not mean multiple DINs. DIN is person-specific and not company specific. The DIN remains valid for the life-time of the director and such DIN will not be allotted to any other person.

Once a DIN is allotted, its intimation is required to be sent to the Company and the Company is required to inform the details of DIN to the Registrar of Companies.

An individual who has been allotted DIN is required to intimate any changes in his particulars, to the Central Government, within a period of thirty days of such change(s).

The concerned individual is also required to intimate the change(s) in his particulars to the company or companies in which he is a director within fifteen days of such change.

DATA BANK OF INDEPENDENT DIRECTORS

To ease the process of selection, the Central Government and organizations authorized by the Central Government (hereinafter to be referred as “the agency”) will maintain a data bank of persons willing and eligible to be appointed as independent directors, from which the companies can choose suitable persons for the position. Any body, institute or association which has been authorized in this behalf by the Central Government shall create and maintain a data bank of persons willing and eligible to be appointed as independent director and such data bank shall be placed on the website of the Ministry of Corporate Affairs or on any other website as may be approved or notified by the Central Government.

For the purposes of this compliance, such data bank shall contain at the minimum, the following details in respect of each person included in the data bank to be eligible and willing to be appointed as independent director:

- (a) DIN (Director Identification Number);
- (b) Name and surname in full;
- (c) Income-tax PAN;
- (d) Father’s/ Spouse’s name (if married) ;
- (e) Date of Birth;
- (f) Gender;
- (g) Nationality;
- (h) Occupation;
- (i) Full Address with PIN Code (present and permanent)
- (j) Phone number and Mobile No;
- (k) E-mail id;
- (l) Educational and professional qualifications;
- (m) Details of experience / expertise;
- (n) Details of any legal proceedings initiated or pending against such person;

- (o) List of companies in which he is or was director along with the following details :
 - (i) Name of the company;
 - (ii) Nature of industry;
 - (iii) Nature of directorship- Executive/Non-executive/ Independent/Nominee Director; and
 - (iv) Duration – with dates.
- (p) List of limited liability partnerships in which he is or was a designated partner along with the following details:
 - (i) Name of the LLP;
 - (ii) Nature of Industry; and
 - (iii) Duration- with dates.

A disclaimer shall conspicuously be displayed on the website along with the databank that a company must carry out its own due diligence before appointment of any person as an independent director and the body, institute or association as notified by the Central Government for creating and maintaining the databank or the Central Government shall not be responsible for the accuracy of information or lack of suitability of the person whose particulars from part of the data bank. Further, the Central Government or such body, institute or association shall neither be responsible for any contravention of any law committed by any company or its directors by the reason of the fact that the person appointed by the company as an independent director was selected from the databank nor will it be a defence in any court of law.

Any person who desires to get his name included in the data bank of independent directors has to make an application to the body, institute or association notified by the Central Government in Form DIR-1.

Provided that the body, institute or association may also evolve a suitable mechanism, using public information available about appointment of independent directors by various companies, through which the names of such eligible persons are included in the data bank who are willing to act as independent directors.

The body, institute or association may, at its sole discretion charge a reasonable fee from the applicant for inclusion of his name in the data bank of independent directors.

Any person who has applied for inclusion of his name in the data bank

of independent directors or any person whose name is appearing in the data bank of independent director, shall intimate to the body, institute or association, any changes in his particulars within fifteen days of the occurrence of such change.

Such databank posted on the website shall:

- (a) be publicly accessible at the specified website;
- (b) be substantially identical to the physical version of the panel or data bank;
- (c) be searchable on various parameters;
- (d) be presented in a format or formats convenient for both printing and viewing online; and
- (e) contain a link to obtain the software required to view / print the particulars free of charge.

The Act requires creation of Databank for independent Directors. In this Context, The Independent Directors Repository a joint initiative of three professional Statutory bodies, namely, The Institute of Chartered Accountants of India, The Institute of Company Secretaries of India and The Institute of Cost Accountants of India, under the active encouragement of the Ministry of Corporate Affairs, Government of India, has been developed to facilitate the individuals who are eligible and willing to act as Independent Directors and also to facilitate Companies to select the persons who are eligible and willing to act as Independent Directors under Section 150 of the Companies Act, 2013 and Rules made there under.

TENURE OF INDEPENDENT DIRECTORS

As per sub-section (10) of section 149 of the Act, an Independent director can hold office for a term upto five consecutive years. He is eligible for re-appointment on passing of special resolution by the company and disclosure of such appointment in the Board's Report. Section 149 (11) restricts the number of terms upto two consecutive terms each term not exceeding five consecutive years.

Such Independent director shall be eligible for appointment after two consecutive terms, after a break of three years from cessation of such two consecutive terms. During the said period, the independent director should not be appointed in or associated with the company in any other capacity, either directly or indirectly.

Ministry of Corporate Affairs vide its General Circular 14/ 2014 dated

June 09, 2014, has clarified that the appointment of an Independent Director for a term less than five years would be permissible. Appointment for any term (whether for five year or less) is to be treated as one term under section 149(10) of the Companies Act, 2013.

However for the purpose of sub-section (10) and (11) of section 149 of the Companies Act, 2013 any tenure of an independent director on the date of commencement of the Companies Act, 2013 shall not be counted as a term under those sub-sections. This means any tenure of independent director as on April 1, 2014 would not be counted as a term. However, as per the revised listing agreement, 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.

MCA vide General Circular dated 09.06.2014 has issued the following clarifications with respect to Appointment and Tenure of Independent Director:

- Appointment of existing Independent Directors under the 2013 Act should be made within one (1) year from 01.04.2014, subject to compliance with eligibility and other prescribed conditions.
- The appointment of an Independent Director for any term (whether 5 years or less) would be treated as a one term. Further, such a person should have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years. The person completing 'consecutive terms of less than 10 years' shall be eligible for appointment only after the expiry of the requisite cooling-off period of 3 years.

RETIREMENT BY ROTATION

As per section 149(13) of the Companies Act, 2013 the Independent Directors would not be liable to retire by rotation.

MCA vide General Circular dated 09.06.2014 has issued the following clarifications with respect to Appointment and Tenure of Independent Director:

- Appointment of existing Independent Directors under the Companies Act 2013 should be made within one year from 01.04.2014, subject to compliance with eligibility and other prescribed conditions.
- The appointment of an Independent Director for any term

(whether 5 years or less) would be treated as a one term. Further, such a person should have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years. The person completing consecutive terms of less than 10 years' shall be eligible for appointment only after the expiry of the requisite cooling-off period of 3 years.

REMUNERATION OF INDEPENDENT DIRECTORS

The Act expressly disallows independent directors from obtaining stock options and remuneration other than sitting fees for participation in the Board and other meetings.

Profit related commission may be paid to them, but subject to the approval of the shareholders.

Further, the remuneration of directors is required to be as per the policy formulated by the Nomination and Remuneration Committee. Such policy is required to be disclosed in the Board's report.

The revised clause 49 II.C of **the Listing Agreement** on remuneration provides that all remuneration paid to non-executive directors, including independent directors, shall be fixed by the Board of Directors and shall be agreed to by shareholders in general meeting.

DISCLOSURES BY/OR RELATING TO INDEPENDENT DIRECTORS

(i) Disclosures by Independent Directors

An independent director should make the following disclosures:

- (a) Any change in the circumstances that may/have led to change in his independence status, whenever there is such change [Section 149(7)].
- (b) Concern or interest which shall include the shareholding in any company or companies or bodies corporate, firms, or other association of individuals at first meeting of the Board in which he participates and then at first Board meeting in each financial year. If there is any change in such concern/interest, such change should be intimated to the Board in the immediate next Board meeting held after such change [Section 184(1)].
- (c) Concern or interest in contracts/arrangements entered/proposed to be entered into –
 - (a) with a body corporate in which such director or such director

- in association with any other director, holds more than 2% shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or
- (b) with a firm or other entity in which, such director is a partner, owner or member, as the case may be.
 - (c) at the Board meeting at which such contract/arrangement is discussed. The director is also prohibited to participate in such meeting. If the concern or interest originates after the contract is entered, such concern/interest should be disclosed forthwith or at the immediate next meeting of the Board held after the director become interested [Section 184(2)].
 - (d) It is mandatory for every director to inform the company about the committee positions he occupies in other companies annually, and notify changes as and when they take place [Clause 49 of the listing agreement].

(ii) Disclosures relating to Independent Directors

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

- (a) Disclosure in Board's Report:
 - a statement from the Board on declaration of independence given by independent directors under Section 149 [Section 134(3)].
 - the composition of CSR Committee, in which at least one director should be an independent director [Section 135(2)].
 - the composition of the Audit Committee with details of independent directors. [Section 177(8)].
 - Policy relating to the remuneration for the directors including independent directors, key managerial personnel and other employees recommended by the Nomination and Remuneration [Section 178(3)].
- (b) The terms and conditions of the appointment of an independent director should be open for inspection at the registered office of the company by any member during normal business hours. Simultaneously, the terms and conditions should also be posted on the company's website [Schedule IV].
- (c) The letter of appointment of the independent director along with the detailed profile shall be disclosed on the websites of

the company and the stock exchanges at least 1 working day from the date of such appointment [Clause 49].

- (d) The details of the training imparted to the independent directors shall be disclosed in the Annual Report [Clause 49].
- (e) Report on Corporate Governance, which is a part of the Annual Report, should contain various details as to the Board - composition identifying the category of directors (promoter, executive, non-executive, independent non-executive, nominee director), attendance of each director at the Board meetings and at last annual general meeting, number of other Board or committees thereof in which the director is a member or chairperson, number of Board meetings held and dates thereof [Clause 49].

PARTICIPATION IN BOARD MEETINGS

Section 173 (2) of the Act provides that a director may participate in Board meetings by personal attendance or by video conferencing or by other audio visual means and such participation by video conferencing or by other audio-visual means is a valid mode of participation.

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

Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides the matters which cannot be dealt with in the meeting through video conferencing or other audio visual means. Such matters are as under –

- (i) approval of the annual financial statements;
- (ii) approval of the Board's report;
- (iii) approval of the prospectus;
- (iv) Audit Committee Meetings for consideration of accounts; and
- (v) approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

It is considered a good practice that independent directors attend at least 75% of the Board Meetings held in a year. The attendance of independent directors at Board Meetings is seen as an important factor when they are considered for re-appointment.

INDEPENDENT DIRECTORS AND BOARD COMMITTEES

The Companies Act, 2013 has mandated presence of independent directors on certain committees, which are described below:

Corporate Social Responsibility (“CSR”) Committee

Section 135 of the Companies Act requires that every company with a net worth of Rs. 500 crore or more, or turnover of Rs. 1000 crore or more, or net profit of Rs. 5 crore or more during any financial year must constitute a CSR committee with 3 or more directors out of **which at least one director must be an independent director**. However, Rule 5 provides that –

- A private company or unlisted public company covered under sub section (1) of the section 135 of the Act, which is not required to appoint Independent director in pursuant to sub section 4 of the section 149 of the Act, may constitute CSR Committee without Independent Director;
- Where a private company has only two directors on its board, it shall constitute CSR Committee with two such directors.
- A foreign company covered under these rules shall constitute the CSR Committee with at least two persons of which One shall be specified under clause (d) of sub-section(1) of section 380 of the Act and another person shall be nominated by the foreign company.

A person specified under 380(1)(d) means one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company.

Nomination and Remuneration Committee

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

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

As per Rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014, the Board of directors of every listed companies and the

following classes of company shall constitute a Nomination and Remuneration Committee of the Board –

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

The paid up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited Financial Statements shall be taken into account for the purposes of this rule.

Audit Committee

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

As per Rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014, the Board of directors of every listed companies and the following classes of companies shall constitute an Audit Committee of the Board-

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

ATTENDANCE OF INDEPENDENT DIRECTORS IN GENERAL MEETING AND BOARD MEETINGS

General Meeting: The chairman of the Audit Committee, Nomination and Remuneration Committee and the stakeholders' Relationship Committee should be present at the General Meeting to answer shareholders' queries.

Board Meeting: Independent Directors are expected to attend all

meetings of the Board of Directors. The proxy advisors do not recommend re-appointment of Independent Directors unless they attend at least 75% of the meetings of the Board of Directors of the Company.

DUTIES OF DIRECTORS

The primary task of independent directors is to adopt an oversight role and to ensure that the corporate assets are used in the best interest of the company while balancing the interests of all stakeholders.

The independent director must ask for information about the company's operations and finances. If he does not get it, he must take steps to pursue the matter.

General Duties of Directors

The conduct of directors should be in accordance with the articles of association of the company; but in no case should contravene the duties specified by the law.

Directors, being trustees of shareholders, have fiduciary relationship with them. As such, the directors have fiduciary duties towards the company. The Companies Act, 2013 has codified these fiduciary duties which though were not explicitly stated under the previous law, were implied in view of the fact that directors are in a fiduciary relationship with the company and its members. The following are the duties of a director as specified under section 166 of the Companies Act, 2013:

- (1) Subject to the provisions of this Act, a director of a company shall act in accordance with the articles of the company.
- (2) A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- (3) A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- (4) A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
- (5) A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of

making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

- (6) A director of a company shall not assign his office and any assignment so made shall be void.

Specific Duties of Independent Directors

Code for Independent directors in Schedule IV of the Companies Act, 2013 specifically lays down the Guidelines for professional conduct, role, functions and duties of independent directors.

Guidelines for professional conduct:

An independent director shall –

- 1) uphold ethical standards of integrity and probity;
- 2) act objectively and constructively while exercising his duties;
- 3) exercise his responsibilities in a bonafide manner in the interest of the company;
- 4) devote sufficient time to his professional obligations for informed and balanced decision making;
- 5) Not allow any extraneous considerations that will vitiate his exercise of objective independent judgement in the paramount interest of the company as a whole, while concurring in or dissenting from the collective judgement of the Board in its decision making;
- 6) avoid abusing his position to the detriment of the company or its shareholders or for the purpose of gaining direct or indirect personal advantage or advantage for any associated person;
- 7) refrain from any action that would lead to the loss of his independence;
- 8) inform the Board immediately whose circumstances arise which make an independent director lose his independence;
- 9) assist the company in ensuring best corporate governance practices.

Role and Functions of Independent Directors:

- 1) To bring an independent judgment on issues of strategy, performance, risk management, resources, key appointments and standards of conduct;

- 2) To bring objectivity in the evaluation of the performance of Board and management;
- 3) To scrutinize the performance of management in meeting agreed goals and objectives;
- 4) To satisfy themselves on the integrity of financial information and that financial controls and the systems of risk management are robust and defensible;
- 5) To safeguard the interests of all stakeholders, especially minority shareholders;
- 6) To balance the conflicting interests of all stakeholders;
- 7) To determine appropriate levels of remuneration of executive directors, key managerial personnel and senior management and have a prime role in appointing and where necessary recommending removal of executive directors, KMP and senior management;
- 8) To moderate and arbitrate in the interest of the company as a whole.

Duties of Independent Directors:

- 1) To undertake appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the company;
- 2) To strive to attend all meetings of the Board of Directors and of the Board Committees of which he is a member;
- 3) To keep themselves well informed about the company and the external environment under which it operates;
- 4) To ensure adequate deliberations are held before approving related party transactions and assure that the same are in the interest of the company;
- 5) To report concerns about unethical behavior, actual or suspected fraud of the company's code of conduct or ethics policy;
- 6) Not to disclose confidential information including commercial secrets, technologies, advertising and sales promotion plans etc. unless such disclosure is approved by Board or by law.
- 7) seek appropriate clarification or amplification of information and, where necessary, take and allow appropriate professional advice and opinion of outside experts at the expense of the company;

- 8) participate constructively and actively in the committees of the Board in which they are chairpersons or members;
- 9) where they have concerns about the running of the company or a proposed action, ensure that these are addressed by the Board and, to the extent that they are not resolved, insist that their concerns are recorded in the minutes of the Board meeting;
- 10) not to unfairly obstruct the functioning of an otherwise proper Board or committee of the Board;
- 11) ascertain and ensure that the company has an adequate and functional vigil mechanism and to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use;
- 12) acting within his authority, assist in protecting the legitimate interests of the company, shareholders and its employees;

Key functions of the Board as per Listing Agreement:

The following are the key functions of the Board as per Clause 49 I.D.2 of Listing Agreement:

- a.* Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestments.
- b.* Monitoring the effectiveness of the company's governance practices and making changes as needed.
- c.* Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession plan-ning.
- d.* Aligning key executive and board remuneration with the longer term interests of the company and its shareholders.
- e.* Ensuring a transparent board nomination process with diversity of thought, experience, knowledge, perspective and gender in the Board.
- f.* Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.
- g.* Ensuring the integrity of the company's accounting and financial reporting systems, including the independent audit, and that

appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.

- h.* Overseeing the process of disclosure and communications.
- i.* Monitoring and reviewing Board Evaluation framework.

Clause 49 I.D.3 of the revised Listing Agreement sets out the “other responsibilities” of the board, which is a mixed list of duties as well as powers. This list has the following items:

- a.* The Board should provide the strategic guidance to the company, ensure effective monitoring of the management and should be accountable to the company and the shareholders.
- b.* The Board should set a corporate culture and the values by which executives throughout a group will behave.
- c.* Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.
- d.* The Board should encourage continuing directors training to ensure that the Board members are kept up to date.
- e.* Where Board decisions may affect different shareholder groups differently, the Board should treat all shareholders fairly.
- f.* The Board should apply high ethical standards. It should take into account the interests of stakeholders.
- g.* The Board should be able to exercise objective independent judgement on corporate affairs.
- h.* Boards should consider assigning a sufficient number of non-executive Board members capable of exercising independent judgement to tasks where there is a potential for conflict of interest.
- i.* The Board should ensure that, while rightly encouraging positive thinking, these do not result in over-optimism that either leads to significant risks not being recognised or exposes the company to excessive risk.
- j.* The Board should have ability to ‘step back’ to assist executive management by challenging the assumptions underlying: strategy, strategic initiatives (such as acquisitions), risk appetite, exposures and the key areas of the company’s focus.

- k. When committees of the board are established, their mandate, composition and working procedures should be well defined and disclosed by the board.
- l. Board members should be able to commit themselves effectively to their responsibilities.
- m. In order to fulfil their responsibilities, board members should have access to accurate, relevant and timely information.
- n. The Board and senior management should facilitate the Independent Directors to perform their role effectively as a Board member and also a member of a committee.

Revised clause 49 II D(3) of Listing Agreement provides that the Board of directors shall periodically review legal compliance reports of all laws applicable to the company prepared by the company as well as steps taken by the company to cure instances of non-compliances.

Duties implicit from provisions of Section 134

Section 134 sets out the contents of the report of Board of directors. As the Board is required to report these matters to the stakeholders, it implies these are also the duties of the directors including independent directors.

One of the important contents of the Board's Report under section 134(5) is the Directors' Responsibility Statement (DRS). The DRS covers the following items:

(i) Adherence to accounting standards:

Affirmation by the Board that in preparation of annual accounts, the applicable accounting standards had been followed, and where there were departures, proper explanation had been given.

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

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

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

Section 134(5)(c) speaks of maintenance of proper accounting

records, so as to safeguard the assets of the company and to prevent fraud and error.

(iv) Going concern accounting

(v) Adequacy of internal financial controls

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

- (a) that board had laid internal financial controls to be followed by the company;
- (b) that such internal financial controls are adequate; and
- (c) that such internal financial controls were operating effectively.

Internationally, there has been lot of discussion to guide directors about laying of internal controls and risk management. One of the commonly cited reports is the Turnbull Guidance. The Turnbull Guidance was framed for UK listing requirements, but has also been regarded as suitable by US SEC in complying with section 404 of the Sarbanes Oxley Act. It may be very useful for a director to refer to the Turnbull Guidance.

(vi) Compliance with applicable laws

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

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

Duties of Non-Official Directors in CPSEs

The Ministry of Heavy Industries and Public Enterprises came up with draft Model Role and Responsibilities for Non-Official Directors on the Board of CPSEs on 28th December, 2012 later modified on 20th June, 2013. The model enlists duties of non-official directors. These duties are in consonance with the duties cast under the Companies Act, 2013, however with some additions as specifically stated hereunder:

- (a) not to use confidential information acquired in the course of their service as non-official director for their personal advantage or for the advantage of any other entity;

- (b) keep the Board informed in an appropriate and timely manner any information in the knowledge of the member which is related to the decision making or is otherwise critical for the company;
- (c) furnish a report to the Board about his role and contribution during the year.
- (d) be acquainted with the applicable laws and understand that the liability that may arise, where a company violates any law and for the purpose should get a list of applicable laws to the company and understand the penal provisions for contraventions under those laws.
- (e) not be a member on more than 10 committees/sub committees of the Boards and shall not act as Chairman of more than 5 committees/sub-committees of the Boards across Boards of CPSEs companies in which he/she is a director. Furthermore, each non-official director should inform the company about the committee/sub-committee positions he/she occupies in other companies and notify change(s) as and when they take place.

Responsibility of Independent Directors for the Prevention and Detection of Fraud

Globally, with the evolving regulatory landscape, which makes the board responsible for the prevention and detection of fraud, directors have begun exercising adequate oversight on the management of the risk of fraud. Non-compliance of regulations / guidelines can have serious repercussions for directors, including their reputational loss and personal liabilities.

For directors of organizations with operations spread across multiple countries, the risk of non-compliance increases significantly as such organizations need to also comply with global legislations.

Every director including independent director is therefore advised to ask following questions to ensure compliance with good governance:

- Are the systems so well set that the right “tone at the top” is communicated at all levels?
- What effective mechanism do we have to assess risk?
- Are the systems/procedures /policies and process to address risk adequate?
- What steps are taken to promote compliance and penalize non-compliance in the organization?

- How adequately is company's compliance cell resourced?
- What monitoring tools do we have to detect fraud and misconduct?
- When the red flags are raised, how are they dealt with?
- Are we effectively trained in various policies and processes?

IMMUNITY UNDER THE COMPANIES ACT, 2013

Sub-section (5) of Section 149 of Companies Act, 2013 provides that an independent director, can be held liable only in respect of such acts of omission or commission by a company:

- (a) which had occurred with his knowledge attributable through Board processes, and
- (b) with his consent or connivance; or
- (c) where he had not acted diligently.

'Act of omission' implies failure to act where the law requires him to act. 'Act of commission' implies an act conducted so as to cause harm. "Connivance" means indirect consent to the commission of offence. Here, the knowledge should arise through Board processes i.e. from any proceedings of the Board or through participation in Board meetings or meetings of any committee of the Board and any information which the director is authorized to receive as director of the Board as per the decision of the Board. Knowledge coming from external sources has not been referred here. 'Acted diligently' means that the director should have taken steps to avoid the act of contravention, as much as possible.

TRAINING OF INDEPENDENT DIRECTORS

One of duties laid down in the Code for Independent Directors is that independent directors shall undertake appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the Company.

The company should provide suitable training to Independent Directors to familiarize them with the company, their roles, rights, responsibilities in the company, nature of the industry in which the company operates, business model of the company, etc. The details of such training imparted shall be disclosed in the Annual Report. [Clause 49.II.B.7 of the Listing Agreement]

PERFORMANCE EVALUATION OF INDEPENDENT DIRECTORS

The Companies Act, 2013 mandates performance evaluation of the Board, Committees and Individual directors.

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

Para VIII of the Code for Independent Directors provides that the performance evaluation of the independent directors shall be done by the entire Board of directors, excluding the director being evaluated. The code further provides that the re-appointment of Independent Director shall be on the basis of report of performance evaluation.

The revised Clause 49 of listing agreement also makes it mandatory to conduct the performance evaluation of the independent directors. The evaluation shall be done by the whole board except the directors being evaluated. The decision to extend/ continue the terms of the independent directors is made on the basis of such performance evaluation.

The requirement for such performance evaluation is annual under the Companies Act, 2013 which is in line with international practices – the Higgs Committee recommended at least annual review, i.e. once a year; the UK Corporate Governance Code also stipulates annual performance evaluation; the NYSE Corporate Governance Rules too mandate at least annual performance evaluation of the Board.

SEPARATE MEETINGS OF INDEPENDENT DIRECTORS

Para VII of the Code for Independent Directors deals with separate meeting of independent directors. It requires for conducting of at least one separate meeting of independent directors in a year without the presence of non-independent directors and members of the management.

The purpose of such meetings is to review the performance of the non-independent directors, the Board and the chairperson of the company. Such meetings would also assess the quality, quantity and timelines of flow of information between the company management and the Board.

E-FORMS REQUIRED TO BE FILLED IN RELATION TO INDEPENDENT DIRECTORS

- DIR-1 Application for inclusion of name in the databank of Independent Directors
- DIR-2 Consent to act as a director of a company
- DIR-3 Application for allotment of Director Identification Number
- DIR-6 Intimation of changes in particulars of Director to be given to the Central Government
- DIR-12 Particulars of appointment of directors and the key managerial personnel and the changes among them

CONCLUSION

The Companies Act, 2013 has bestowed greater empowerment upon the Independent Directors to ensure that the management and affairs of a company are run fairly and smoothly. At the same time, greater accountability has also been placed upon them. The new Act empowers the Independent Directors to actually have a definite 'say' in the management of a company, which would thereby immensely strengthen corporate governance.

FAQs IN RELATION TO INDEPENDENT DIRECTORS

Ques 1 What is the time limit within which the Board has to appoint an Independent Director and at which meeting whether Board Meeting or General Meeting?

Ans: Section 149(5) of the Companies Act, 2013 inter alia provides that company existing on or before the commencement of this Act, which are falling within the ambit of section 149(4), shall have to appoint Independent Directors within one year from the commencement of Companies Act, 2013 or rules made in this behalf, as may be applicable. Further, as per Section 152(2) read with Schedule IV to the Companies Act, 2013, provides that the appointment of the Independent Director shall be approved by the Company in its meeting of shareholders.

Ques 2 As per provision of section 149(5) appointment of independent directors is being given one year transition period but there is no such transition time for remuneration or nomination committee. Under Section 178 Nomination & Remuneration committee is to have minimum of two independent directors. If a company does not have Independent directors as of now, how can the committee be constituted as one year transition time has been given for appointment of Independent Directors? Can remuneration and nomination committee constitution be also assumed to be formed in one year transition time?

Ans: Ministry of Corporate Affairs, vide its Notification dated June 12, 2014, has clarified that the public companies required to constitute Nomination and Remuneration committee can constitute the same within one year from the commencement of the relevant rule or appointment of Independent Directors by them, whichever is earlier.

Ques 3 Can existing independent directors continue up to their original tenure as if the Companies Act, 1956 had been in force and be reappointed for a period of 5 years under the Companies Act 2013 on the completion of original tenure?

Ans. In terms of the explanation to sub-sections (10) & (11) of section 149, any tenure of an independent director on the date of commencement of this Act shall not be counted as a term under sub sections (10) and (11) of section 149. Further section 149(5) provides a transitional period of one year to comply with the requirement of independent directors, referring to General

Circular No. 14/2014 dated 9th June, 2014 it has been clarified by the Ministry that if it is intended to appoint existing independent directors under the new Act, such appointment shall be made in accordance with Section 149(10) and (11) read with Schedule IV of the Act within one year from April 1, 2014 i.e. by March 31, 2015.

But, if we talk about applicability of listing agreement over the listed companies, as per revised clause 49 of listing agreement 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.

Further the appointment of existing directors also needs to be formalized through a letter of appointment.

Ques 4 Can an Independent Director of a Company be appointed as Independent Director of its holding, subsidiary or associate company?

Ans. Yes, an Independent Director of a Company can be appointed as Independent Director of its Associate/sister concern. Also, as per revised clause 49 V A of the listing agreement, at least one independent director on the Board of Directors of the holding company shall be a director on the Board of Directors of a material non listed Indian subsidiary company.

Ques 5 As per Section 149(10) Independent Director shall hold office for a term up to five consecutive Years and as per Section 149(11) no independent Director shall hold office for more than two consecutive terms.

Independent Director is appointed in the AGM of 2014 for less than Five Years (Say Three Years). – FIRST TERM

He is again appointed in the AGM of 2017 for Five Years. – SECOND TERM.

In 2022 he will complete two consecutive terms but he will not complete total term of ten years.

Whether he can be appointed in the AGM of 2022 for another 2 years to complete his total term of 10 years?

Ans: Ministry has, vide its General Circular 14/ 2014 dated June 09, 2014, clarified that the appointment of an Independent Director (the ID) for a term less than five years would be permissible,

appointment for any term (whether for five year or less) is to be treated as a one term under section 149(10) of the Companies Act, 2013.

Further, section 149(11) provides that 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.

Thus, in view of the above, in the above query ID cannot be appointed in the AGM of 2022 for another 2 years to complete his total term of 10 years.

Ques 6 Whether independent directors shall be included in the total number of directors for the purpose of sub-section (6) and (7) of section 152 of the Companies Act, 2013

Ans. Section 152(6) of the Companies Act, 2013 provides that unless the Articles of Association provide for retirement by rotation of all directors at every annual general meeting, at least two-thirds of the total number of directors of a public company shall be persons whose office is liable to retirement by rotation and sub-section (7) provides that one-third of such directors shall retire by rotation at each annual general meeting of the company after the first annual general meeting. Independent directors shall not be included in the total number of directors for the purpose of sub sections (6) and (7).

Pursuant to section 149 (13), the requirement of retirement by rotation pursuant to sub-sections (6) and (7) of Section 152 is also not applicable to independent directors.

Ques 7 In case a public company has three directors. Out of three directors 1 director is an independent director whose office is not liable to retire by rotation, 1 director is a managing director appointed for a fixed term and 1 is the promoter director/ director appointed pursuant to share purchase agreement/ nominee director etc. whose office also is not liable to retirement by rotation. How can such a company ensure the compliance of section 152 (6) and (7)?

Ans. In such situations it is advised that companies appoint such number of non executive directors whose office is liable to retire by rotation and thereby ensure compliance of Section 152(6) and (7).

Ques 8 If a Company has granted stock options prior to the promulgation of the Companies Act, 2013, then whether such stock options can be exercisable by the Independent Directors?

Ans: As section 197(7), section 62(1)(b) and Rule 12 of the Companies (Share Capital and Debentures) Rule, 2014, an Independent Director has been disentitled to any stock option but the Independent Directors has not been prohibited to exercise the stock options granted to them which has been granted to them before Companies Act, 2013. Therefore, they can exercise the stock options granted to them prior to the commencement of the Companies Act, 2013; however, they shall not be entitled to have any stock option after the commencement of Companies Act, 2013.

*Annexure I***PREVIOUS CLAUSE 49, THE COMPANIES ACT, 2013, AND THE REVISED CLAUSE 49 – A COMPARATIVE STUDY**

Aspect covered	Previous Clause 49 (effective till 30.9.2014)	The Companies Act, 2013	Revised Clause 49 (effective from 1.10.2014)
Proportion of independent directors on the Board	1/3 rd in case of non-executive chairman; ½ in other cases [Clause 49(I A)(i) &(ii)]	1/3 rd in every listed company and at least two director on board in companies as prescribed in rules [Section 149(4) read with rule 4 of Companies (Appointment and Remuneration of Directors) Rules, 2014	1/3 rd in case of non-executive chairman; ½ in other cases [Clause 49(II A)]
Definition and scope	Less stringent than that under the Act[Clause 49 (I A)(iii)]	Very stringent (Section 149(6))	Same as that under the Act. [Clause 49 (II B)]
Age limit	Atleast 21 years [Clause 49 (I A)(3)(f)]	Not specified	Atleast 21 years [Clause (II B) (f)]
Appointment of Independent Directors by minority shareholders	No provision	Voluntary appointment of director by small shareholder. Such director is deemed to be independent director.[Section 151]	No provision

Formal letter of appointment	No such stipulation	Required [Schedule IV-(IV)(4)]	Required [Clause 49 (II B)(4)]
Formal training of independent director	Non-mandatory requirement of training of all the board members; no specific stipulation for independent directors.[Annexure ID – (5)]	Required [Schedule IV – (III A) It is the duty of Independent Directors to undertake appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the company.	Required [Clause 49 (II B)(7)]
Performance evaluation	Non-mandatory requirement of performance evaluation of non-executive directors. [Annexure-ID- (6)]	Evaluation by entire directors excluding director being evaluated [Schedule IV – (VIII)]	Required [Clause 49 (II B)(5)]
Treatment of nominee director as Non-Independent Director	Nominee directors appointed by public financial institutions are deemed independent directors. [Clause 49 (I A) (iv)]	Any nominee director excluded from the definition of independent director.[Section 149 (6)]	Alignment with the Companies Act, 2013 [Clause 49 (II B) (1)]
Maximum tenure	Not specified. Non-mandatory requirement-9 years [Annexure ID- (1)]	2 consecutive terms of 5 years each, a cooling off period of three years has been	2 consecutive terms of 5 years each; where already served for 5 years or

		provided for; term already served till commencement date to be ignored.(Section 149(10) & (11))	more as on October 1, 2014, the person is eligible for a single term of 5 years only. [Clause 49 (II B) (3)]
Disclosure of reasons of resignation	No provision	Reasons to be disclosed in the initiation to Registrar.[Schedule IV- (VI) read with section 168]	Reasons to be disclosed by the company in its intimation to the stock exchanges. [Clause 49 (VIII F)]
Remuneration	Stock options may be granted – shareholders’ resolution should specify the limits for the maximum number of stock option that can be granted to non-executive directors, including independent directors, in any financial year and in aggregate.[Clause 49 (I B)]	Sitting fees, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members. Stock options cannot be granted.[Section 197(5) & (7)]	Stock options shall not be granted.[Clause 49 (II C)]
Separate meetings of Independent Directors	No provision	At least once a year [Schedule IV of companies act 2013 – (VII)]	At least once a year [Clause 49 (II B)(6)]
Restriction on the number of independent directorships	Not specifically for Independent Directorships.	Not specifically for Independent Directorships.	7 listed companies; in case a whole-

			time director in any listed company, 3 listed companies.[Clause 49 (II B)(2)]
Committee memberships	Committee membership in 10 companies; Committee chairmanship in 5 companies [Clause 49 (I C)(ii)]	Not specified	Committee membership in 10 companies; Committee chairmanship in 5 companies [Clause 49 (II D)(2)]
Replacement on removal/resignation	Not specified	Within 180 days from the date of resignation/ removal. [Schedule IV of companies act 2013 - (VI)(2)]	At the earliest but not later than the immediate next Board meeting or three months from the date of such vacancy, whichever is later [Clause 49(II D)(4)]
Liability	Not specified	An Independent Director shall be held liable for acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. [Section 149(12)]	An Independent Director shall be held liable for acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. [Clause 49(II E)(4)]

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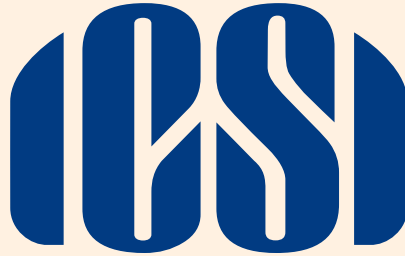
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