

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 for 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

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