

INDEPENDENT DIRECTORS UNDER COMPANIES ACT, 2013

Independent directors as the name suggests are directors on Board of a company who are independent individuals, not having any other relationship or transaction with the company. The concept of Independent directors gained momentum in the late 1980s and early 1990s due to the uncovering of various corporate frauds and misfeasance.

In India, Clause 49 of the listing agreement mandates appointment of independent directors on Board of a listed company. With the passage of the new Companies Act of 2013, the concept of independent directors has found place in the Companies Act itself. The requirements prescribed under the Companies Act 2013 seem to be much more stringent than that of the listing agreement.

In the present write up, we have focused on the various provisions relating to independent directors as contained in the Companies Act, 2013.

Meaning/Definition of Independent Director

As per Section 2(47), "independent director" means an independent director referred to in sub-section (5) of section 149;

Section 149 (6) contains 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,—

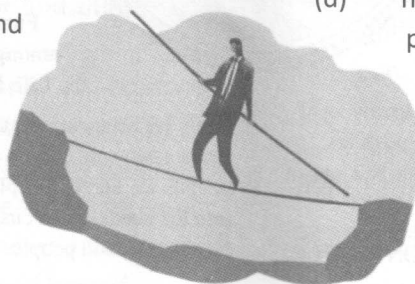
- (a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;
- (b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;

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



Mr. S. Dhanapal, CS
Member of HCC

- (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 two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;
- (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 nonprofit organisation that receives twenty-five per cent. or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or

(f) who possesses such other qualifications as prescribed below:

An independent director shall possess appropriate balance of 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.

Applicability to Companies

Following class of companies are required to appoint at least 1/3 of total number of directors on their Board of Directors as independent directors:

- Listed Companies,
- Public Companies having paid up share capital of one hundred crore rupees or more; or
- Public Companies having turnover of three hundred crore rupees or more;
- Public Companies which have, in aggregate, outstanding loans or borrowings or debentures or deposits, exceeding two hundred crore rupees.

Explanation:

- Any fraction contained in the 1/3rd number shall be rounded off as one.

- The criteria specified for unlisted public companies shall be applicable for the first year and shall continue to apply to that company in subsequent years during the tenure of the Independent Director even if the paid up share capital or turnover, or borrowings/deposits, as the case may be, fall below the limits specified therein.
- A company belonging to any class of companies for which a higher number of independent directors has been prescribed in or under the law/regulations governing such class of companies, shall comply with the requirements specified in such law/regulation.
- Every company existing on or before the date of commencement of this Act shall, within one year from such commencement or from the date of notification of the rules in this regard as may be applicable, comply with these requirements.

Term of Office of Independent Director

- An independent director shall hold office for a term up to 5 consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.
- No independent director shall hold office for more than 2 consecutive terms, but such independent director shall be eligible for appointment after the expiration of 3 years of ceasing to become an independent director provided that he shall not, during the said period of 3 years, be appointed in or be associated with the company in any other capacity, either directly or indirectly.
- Any tenure of an independent director on the date of commencement of this Act shall not be counted as a term under the above provisions.

Other Provisions relating to Independent Directors

- The appointment of independent director shall be approved by the company in general meeting and the explanatory statement annexed to the notice of the general meeting called to consider the said appointment shall indicate the justification for choosing the appointee for appointment as independent director.
- Every independent director shall 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, give a declaration that he meets the criteria of independence.
- The company and independent directors are required to abide by the provisions specified in Schedule IV of the Act.
- An independent director shall not be entitled to any stock option and may receive remuneration by way of fee, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.
- An independent director shall be held liable, only in respect of such acts of omission or commission by a company which had

occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

- The provisions relating to retirement of directors by rotation shall not be applicable to appointment of independent directors.

Manner of selection of independent directors and maintenance of databank of independent directors

To ease the process of selection of independent directors, the Act provides that 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. The Central Government will authorise anybody, institute or association for this purpose having expertise in creation and maintenance of such data bank. The data bank will contain all the basic details about the proposed appointee. However, responsibility of exercising due diligence before selecting a person from the data bank referred to above, as an independent director shall lie with the company making such appointment. 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 it will be a defense in any court of law.

