



INDEPENDENT DIRECTORS



ICSI

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INTRODUCTION:

Directors are the torch bearers thereby acting as a trustee and agent for the property of all the Stakeholders of the Corporate Entity. As Majority of Stakeholders are unable to take part in the management of day to day affairs of the company in which they had invested, utmost responsibility is being casted by the statute upon the Directors of the company. However, there might be certain scenarios where Uncertain events like Conflict of Interests, Biasness and Forgery be evidenced thereby prejudicing to the interest of the Stakeholders namely shareholders, creditors, debtors, regulators, government and not limited to prospective investors loosing confidence in the corporate structure and governance practices.

To curb all these mentioned problems, to ensure transparency, adherence of law and corporate governance norm and to report adequately, Concept of Independent Directors are being coined by JJ Irani Committee thus, the provisions wrt. Independent Directors are enshrined under section 149 of the Companies Act, 2013 and Regulation 16 of SEBO (LODR) Regulations, 2018.

The Significance of the role of ID can be understood hereunder as: they are known to bring an objective view in BoD deliberations; ID also ensure that there is no dominance of power in the entity; they act as Guardian of the interests of all shareholders and stakeholders, especially in the areas of potential conflict of interest; they contribute significantly to the decision making process of BoD; moreover, provides independent judgement and wider prospective.

Any person desirous to become an ID need to qualify all the conditions specified under section 149(6), pass an examination wrt ID and needs to register his name and details thereto on Database maintained under section 151 of Companies Act, 2013.

Section 149(4) provides that following types of companies are required to appoint IDs, namely:

- 1) Every Listed Public company: shall have at least 1/3rd of the total number of Directors as Independent directors, and
- 2) Following class or classes of Companies: shall have at least 2 directors as Independent Directors:
 - a. An Unlisted Public Companies having:
 - i. Paid up share capital of 10 crore Rs or more; or
 - ii. Turnover of at least 100 crore Rs or more; or
 - iii. Aggregate outstanding loans, debentures and deposits Exceeding 50 crore Rupees.

However, this requirement of appointing Independent Directors shall not apply to

- 1) Section 8 companies
- 2) Specified IFSC companies
- 3) Unlisted public companies which are joint ventures, WOS, or Dormant company

Liability of the Independent Directors can be understood by pursuing section 149(12) as:

- 1) An Independent director; and
- 2) A Non-executive director (not being promoter or Key managerial personnel)

Shall be held liable only in respect of such acts of omission or commission by a company which had occurred with his knowledge or attributable to Board process, with his consent or connivance or where he had not acted diligently.

However, in order to afford safeguards to IDs and NEDs, MCA vide Clarification dated 02nd march 2020 had clarified about their liabilities as: In the view of section 149(12), IDs and NEDs should not be arrayed in any Criminal or Civil liabilities under the Act unless the above mentioned criteria (in section 149(12) is met.

MANNER OF APPOINTMENT:

- 1) BOD Resolution in Board meeting shall be passed
- 2) Special Resolution shall be passed at the General Meeting of the Members;
- 3) Notice of General meeting shall be accompanied with an Explanatory Statement;
- 4) Appointment of IDs shall be in a formalised manner backed by Letter of Appointment which shall include:
 - a. Term of appointment
 - b. The expectation of the Board of directors
 - c. The fiduciary duties along with responsibilities and liabilities
 - d. D and O Insurance
 - e. Code of business ethics
 - f. List of actions that a director should not do or do
 - g. Remuneration, subject to section mentioning 197, the fees payable, profit related commission, reimbursement of expenses.
- 5) After appointment, some prescribed forms viz: DIR-2 , DIR-8 and DIR-12 is required to be filed on www.mca.gov.in

SAPERATE MEETINGS OF INDEPENDENT DIRECTORS:

- 1) The Independent Directors of the company shall hold at least 1 meeting in a Financial year, without the attendance of any non-independent directors and members of management;
- 2) All the IDs of the company shall strive to be present at such meeting;
- 3) The IDs in the meeting shall, inter-alia:
 - a. Review the performance of Non independent directors and the board as a whole;
 - b. Review the performance of chairperson of the company, taking into consideration the views of executive directors and Non-executive directors;
 - c. Assess the quality, quantity and timelines of flow of information between the company management and the board and that is necessary for the board to effectively and reasonably perform their duties.

EVALUATION OF INDEPENDENT DIRECTORS:

- (1) The performance evaluation of Indendent directors shall be done by the entire board of directors of the company, excluding the director being evaluated.
- (2) On the basis of thee report of performance evaluation, it shall be determined whether to extend or continue the term of appointment of the independent director.

QUALIFICATIONS FOR INDEPENDENT DIRECTORS:

Apart from Rule 5 of Companies (Appointment and Qualification of Directors) Rules, 2014, there are no express qualification prescribed to become an Independent Director.

Rule 5 of Companies (Appointment and Qualification of Directors) Rules, 2014 provides that:

- 1) An Independent Director shall possess appropriate skills, experience, and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to corporate.
- 2) None of the “Relatives” of an Independent Director, for the purpose of sub-clauses (ii) and (iii) of clause (d) of section 149(6):
 - a. Is indebted to the company, its holding, subsidiary or associate or its promoters, or directors; or
 - b. Has given a guarantee or provided any security in connection with indebtedness of any third person to the company, its holding, subsidiary or associate or its promoters, or directors,

Of Rs. 50 lakhs at any time during preceeding 2 financial years or the current financial year.

Q: CAN A COMPANY SECRETARY BE APPOINTED AS INDEPENDENT DIRECTOR?

A Company Secretary shall be eligible to be appointed as an Independent director in the company provided he shall satisfy the following conditions:

- A) Is Eligible to be appointed as an ID in pursuance of section 149(6);
- B) Is sufficiently equipped with the requisite skills and experience in terms of the provisions of Rule 5 of Companies (Appointment and Qualification of Directors) Rules, 2014;
- C) Has passed a prescribed examination to be an Independent Director duly conducted by an Institution duly recognised by law;
- D) Has enrolled itself as an independent director, in the Databank maintained by a duly recognised agency/body under section 151.

To conclude, Independent directors contribute significantly to the decision making process of BOD;

They are the back bone of the overall Governance Mechanism of the country as a whole.

Hence, the Independent directors are the dire need of the success of corporate governance.

Thank you.