

INDEPENDENT DIRECTOR

INDEPENDENT DIRECTOR IS A NEW PROFESSIONAL IN CORPORATE HORIZON WITH AN EYE ON GOOD GOVERNANCE.

Applicability:

Every **listed public company** to have at least one-third of the total number of directors as independent directors (ID)

As per Rule 4 of The Companies (Appointment and Qualification of Directors) Rules, 2014.

The following class or classes of Companies shall have at least 2 Director as independent directors-

- a) the public companies having paid up share capital of ten crore rupees or more or;
- b) the public companies having turnover of one hundred crore rupees or more; or
- c) the public companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding fifty crore rupees:

Any intermittent vacancy of an independent director shall be filled up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later:

As per Section 152 (6) (e) at the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto, However in this case the total number of Directors shall not include independent directors.

(SECTION 149(6))

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 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 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.

Remuneration (Sub – section 9 of Section 149):

An independent Director shall not receive any stock option and may receive remuneration complying section 197 and 198, reimbursement of expenses and profit related to commission. A director may receive remuneration by way of fee for attending meetings of the Board or Committee thereof or for any other purpose as may be decided by the Board.

As per Rule 4 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.

A company may pay a sitting fee to a director for attending meetings of the Board or committees thereof, such sum as may be decided by the Board of directors thereof which shall not exceed one lakh rupees per meeting of the Board or committee thereof. Provided that for Independent Directors, the sitting fee shall not be less than the sitting fee payable to other directors.

Term of office (Sub – section 10, 11 of Section 149):

An independent director shall hold office for a term up to five consecutive years on the Board of a company and shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report. No independent director shall hold office for more than two consecutive terms, but such independent director shall be eligible for appointment after the expiration of three years of ceasing to become an independent director. The provisions of section 152 in respect of retirement of directors by rotation shall not be applicable to appointment of independent directors.

Liability of Independent Directors (Sub –section 12 of Section 149):

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.

Selection of independent Director (Section 150):

An independent director may be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors. The responsibility of exercising due diligence before selecting a person as an independent director shall lie with the company making such appointment. 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.

Declaration of Independence (Sub – section 7 of Section 149):

Every Independent Director in his first board meeting participated after appointment and first board meeting in every financial year or whenever there is any change give declaration that he meets the criteria of independence as provided in sub-section (6).

CODE FOR INDEPENDENT DIRECTORS (SUB – SECTION 8 OF SECTION 149):

The company and independent director both shall follow Code for Independent Directors given under Schedule IV of the Act.

I. Guidelines of 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 bona fide manner in the interest of the company;
- (4) devote sufficient time and attention to his *professional obligations* for informed and balanced decision making;
- (5) not allow any extraneous considerations that will vitiate his exercise of objective independent judgment in the paramount interest of the company as a whole, while concurring in or dissenting from the collective judgment of the Board in its decision making;
- (6) not abuse 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 loss of his independence;
- (8) where circumstances arise which make an independent director lose his independence, the independent director must immediately inform the Board accordingly;
- (9) assist the company in implementing the *best corporate governance practices*.

II. Role and functions:

The independent directors shall:

- (1) help in bringing an *independent judgment* to bear on the Board's deliberations especially on issues of strategy, performance, risk management, resources, key appointments and standards of conduct;
- (2) bring an objective view in the evaluation of the *performance of board and management*;
- (3) scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance;

(4) satisfy themselves on the *integrity of financial information*; financial controls and the systems of risk management are robust and defensible;

(5) safeguard the interests of *all stakeholders*, particularly the *minority shareholders*;

(6) balance the conflicting interest of the stakeholders;

(7) determine appropriate levels of *remuneration of executive directors*, key managerial personnel and senior management and have a prime role in *appointing and where necessary recommend removal* of executive directors, key managerial personnel and senior management;

(8) moderate and arbitrate in the interest of the company as a whole, in situations of conflict between management and shareholder's interest.

III. Duties:

The independent directors shall—

(1) undertake appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the company;

(2) seek appropriate clarification or amplification of information and, where necessary, take and follow appropriate professional advice and opinion of outside experts at the expense of the company;

(3) strive to attend all meetings of the Board of Directors and of the Board committees of which he is a member;

(4) participate constructively and actively in the committees of the Board in which they are chairpersons or members;

(5) strive to attend the general meetings of the company;

(6) 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;

(7) keep themselves well informed about the company and the external environment in which it operates;

(8) not to unfairly obstruct the functioning of an otherwise proper Board or committee of the Board;

(9) pay sufficient attention and ensure that adequate deliberations are held before approving related party transactions and assure themselves that the same are in the interest of the company;

(10) 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;

(11) report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy;

(12) acting within his authority, assist in protecting the legitimate interests of the company, shareholders and its employees;

(13) not disclose confidential information, including commercial secrets, technologies, advertising and sales promotion plans, unpublished price sensitive information, unless such disclosure is expressly approved by the Board or required by law.

IV. Manner of appointment:

(1) Appointment process of independent directors shall be independent of the company management; while selecting independent directors the Board 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.

(2) The appointment of independent director(s) of the company shall be approved at the meeting of the shareholders.

(3) The explanatory statement attached to the notice of the meeting for approving the appointment of independent director shall include a statement that in the opinion of the Board, the independent director proposed to be appointed fulfils the conditions specified in the Act and the rules made thereunder and that the proposed director is independent of the management.

(4) The appointment of independent directors shall be formalised through a letter of appointment, which shall set out :

(a) the term of appointment;

(b) the expectation of the Board from the appointed director; the Board-level committee(s) in which the director is expected to serve and its tasks;

(c) the fiduciary duties that come with such an appointment along with accompanying liabilities;

(d) provision for Directors and Officers (D and O) insurance, if any;

(e) the **Code of Business Ethics** that the company expects its directors and employees to follow;

(f) the list of actions that a director should not do while functioning as such in the company; and

(g) the ***remuneration***, mentioning periodic fees, reimbursement of expenses for participation in the Boards and other meetings and profit related commission, if any.

(5) The terms and conditions of appointment of independent directors shall be open for inspection at the registered office of the company by any member during normal business hours.

(6) The terms and conditions of appointment of independent directors shall also be posted on the company's website.

V. Re-appointment:

The re-appointment of independent director shall be on the basis of report of performance evaluation.

VI. Resignation or removal:

(1) The resignation or removal of an independent director shall be in the same manner as is provided in sections 168 and 169 of the Act.

(2) An independent director who resigns or is removed from the Board of the company shall be replaced by a new independent director within a period of not more than one hundred and eighty days from the date of such resignation or removal, as the case may be.

(3) Where the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation or removal, as the case may be, the requirement of replacement by a new independent director shall not apply.

VII. Separate meetings:

(1) The independent directors of the company shall hold ***at least one meeting in a year***, without the attendance of non-independent directors and members of management;

(2) All the independent directors of the company shall strive to be present at such meeting;

(3) The meeting shall:

(a) review the performance of non-independent directors and the Board as a whole;

(b) review the performance of the Chairperson of the company, taking into account the views of executive directors and non-executive directors;

(c) assess the quality, quantity and timeliness of flow of information between the company management and the Board that is necessary for the Board to effectively and reasonably perform their duties.

VIII. Evaluation mechanism:

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