

Companies Act Fundamentals

Independent Director

2020 MHA Legal



Corporate Restructuring

Independent Directors

- Section 2(47) of the Act prescribed that “Independent director” to mean an independent director referred to in sub section (5) of section 149 of the Act.

- Every listed public company needs to appoint at least one-third of the total number of directors as independent directors

- Rule 4 provides that a public companies complying with the following limits as on the last date of latest audited financial statements also needs to appoint 2 independent directors:-
 - paid up share capital of Rs. 10 crore or more; or
 - turnover of Rs. 100 crore or more; or
 - in aggregate, outstanding loans/borrowings/ debentures/
 - deposits/ exceeding Rs. 50 crore or more.

Independent Directors

- Intermittent vacancy of an independent director needs to then it shall be filled up by the board of directors within 3 months from the date of such vacancy or not later than immediate next board meeting, whichever is later.
- Once the company comply with the requirements to appoint Independent Director and thereafter ceases to fulfil any of three conditions for three consecutive years then it will not be required to comply these provisions until such time as it meets any of the conditions.

Definition of an Independent Directors

- Section 149 (6) of the Act define an independent director means a director other than a managing director or a whole-time director or a nominee director who does not have any material or pecuniary relationship with the company/directors and prescribe the following criteria for appointment independent directors
 - (a) Who in the opinion of the Board, is a person of integrity and possesses relevant industrial expertise and experience;
 - (b) Such individual shall not be a promoter or related to promoter of the company or its holding, subsidiary or associate company;
 - (c) Such individuals must not have any material or pecuniary relationship during the two immediately preceding financial years or during the current financial year with the company or its promoters/directors/holding/subsidiary/ associate company;
 - (d) The relatives of such person should not have had any pecuniary relationship with the company or its subsidiaries, amounting to 2% or more of its gross turnover or total income or Rs. 50 lacs or such higher amount as may be prescribed, whichever is less, during the two immediately preceding financial years or in the current financial year;

Definition of an Independent Directors

- (e) He must not either directly or any of his relatives:
 - (i) hold 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

Declaration by an Independent Director-

- Section 149 (7) of the Act, prescribe that every independent director shall give a declaration that he meets the criteria of independence when:
 - (a) he attends the first meeting of the Board as a director;
 - (b) thereafter at the first meeting of the Board in every financial year and
 - (c) whenever there is any change in the circumstances which may affect his status as an independent director.

Further “nominee director” means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

Code of Conduct for an Independent Director and
Company-Section 149 (8)

Section 149 (8) of the Act prescribed that the company and
independent directors shall abide by the provisions specified in Schedule

Code of Conduct for an Independent Director

- Section 149 (8) of the Act prescribe that the company and independent directors shall abide by the provisions specified in Schedule IV regarding code for independent directors. It is a guide to professional conduct for independent directors.
- Adherence to these standards by independent directors and fulfilment of their responsibilities in a professional and faithful manner will promote confidence of the investment community, particularly minority shareholders, regulators and companies in the institution of independent directors.
- Code of Conduct includes guidelines of professional conduct, role and functions, duties, manner of appointment, re-appointment, resignation or removal, separate meetings, evaluation mechanism.

Remuneration of an Independent Director

- Section 149 (9) of the Act provides an independent director shall not be entitled to any stock option. He may receive remuneration by way of sitting fee, reimbursement of expenses incurred for participation in the Board and other committee meetings and profit related commission as may be approved by the members as provided under section 197 (5) of the Act.

Terms of appointment of Independent Director



- Subject to the provisions of Section 152, an independent director can be appointed for a term of up to five consecutive years on the Board. However, in case of his reappointment for further five year then special resolution passed in general meeting and disclosure of such appointment is made in the Board's report shall be required.
- As per section 149 (11) of the Act independent director can be considered for re-appointment after expiration of three years of ceasing to become an independent director but he must not be appointed/associated with the company directly or indirectly in any other capacity during the said period of three years.
- As per section 149 (13) the provisions of retirement of directors by rotation are not applicable on Independent director.
- Further proviso to section 152 (5) provide that in case of independent directors, the explanatory statement relating to their appointment should contain a declaration from the Board that in their opinion, the independent directors satisfy the conditions provided in the Act for such appointment.

Liability of an Independent Director

- 149 (12) provide that an independent director and a non-executive director except the 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, attributable through Board processes and with his consent or connivance or where he had not acted diligently.

Manner of selection of an Independent Director

- According to section 150 (1) of the Act, independent directors may be selected from a data bank of eligible and willing persons maintained by the agency (Any body, institute or association as may be authorized by Central Government). Such agency shall put data bank of independent directors on the website of Ministry of Corporate Affairs or any other notified website. Company must exercise due diligence before selecting a person from the data bank referred to above, as an independent director.
- This section further stipulates that the appointment of independent directors has to be approved by members in a General meeting and the explanatory statement annexed to the notice must indicate justification for such appointment.
- Rule prescribed the details that would be included in the data bank along with the names and qualification of persons who are eligible and willing to be appointed as independent director

Thank you



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Passion, Integrity, Excellence

Thank You

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