

DUTIES AND ROLE OF INDEPENDENT DIRECTORS

*Shreya Srivastava**

The role of independent non-executive directors features prominently in corporate governance codes. The presence of independent representatives on the board, capable of challenging the decisions of the management, is widely considered as a means of protecting the interests of shareholders and, where appropriate, other stakeholders.

Independent Directors under SEBI Regulations

Under the SEBI Regulations, only a listed Company is required to have Independent Directors as provided in clause 49 of the Listing Agreement. This clause provides that a listed company shall have 50% of its Board of Directors as non-executive Directors. When the Chairman of the Board is a non-executive Director, at least one-third of the Board should have Independent Directors. If the Chairman is a promoter of the Company, or is related to any promoter or a person occupying management position at the Board Level or one level below the Board, at least 50% of the Board should consist of Independent Directors.

Independent Directors under Companies Act, 2013

Section 149 of The Companies Act, 2013 recognises the concept of an “Independent Director”. This term is defined to mean a person —

- (i) Who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience.
- (ii) Who possesses such other qualifications as may be prescribed. (Refer Para 3.5 below).
- (iii) Who is or was not a promoter of the company, or its holding, subsidiary or associate company (hereinafter referred to as associate companies).
- (iv) Who is not related to promoters or directors of the company or any of its associate companies.

*Teaching and Research Associate, Gujarat National Law University

(v) Who has or had no pecuniary relationship with any of the above persons/companies during the current or two immediately preceding financial years.

(vi) None of his relatives has or had pecuniary relationship or transaction with the above persons amounting to 2% or more of its gross turnover or total income or Rs. 50 lakhs (or such higher amount which is prescribed) – whichever is lower during the current or two preceding financial years.

(vii) Who or any of his relatives –

(a) Holds or held the position of a key managerial personnel or as employee of the company or any of its associate companies in any of the 3 financial years immediately preceding the year of his appointment.

(b) Is or has been an employee, proprietor or partner of the following during any of the 3 preceding financial years.

- A firm of Auditors, Company Secretaries or Cost Auditors of the company or any of its associate companies.

- Any legal or consulting firm which has or had transaction with the company in or any of its associate companies amounting to 10% or more of the gross turnover of the firm.

(c) Holds, together with his relatives, 2% or more of the voting power of the company, or

(d) Is a Chief Executive or Director of any non-profit organisation that receives 25% or more of its receipts from the company, any of its promoters, directors or its associate companies or that holds 2% or more of the total voting power of the company.

(viii) Who is not a Managing/Whole Time/Nominee Director

Every listed Company will be required to have atleast 1/3rd of the total number of directors as Independent Directors. The Government may prescribe the minimum number of Independent Directors in any class or classes of public Companies. Every such company will have to comply with this requirement within a period of one year from the commencement of the new Act. It will be the duty of every Independent Director to give a declaration u/s.149(7) at the first Board Meeting in which he participates and thereafter at the first Board meeting of every financial year in which he participates that he meets with

the above criteria of independent Director. He has to intimate status of his Independence from time-to-time. A Managing Director, whole-time Director or a Nominee Director will not be considered as an Independent Director.

Duties and Responsibilities of Independent Directors

Section 149(8) provides that the company and the Independent Directors shall comply with the provisions specified in Schedule IV. This Schedule lays down a “Code of Conduct” for Independent Directors. It is stated that the adherence with this code of conduct by Independent Directors and fulfilment of their responsibilities in a professional and faithful manner will promote confidence of the investment community, minority shareholders, regulators and companies in the institution of Independent Directors.

The schedule provides for:

- (i) Guidelines for professional conduct;
- (ii) Role and Functions;
- (iii) Duties;
- (iv) Manner of appointment, Reappointment, Resignation and Removal;
- (v) Separate Meetings of Independent Directors and
- (vi) Evaluation of Performance of Independent Directors by the Board of Directors. The Code of Conduct to be followed by the Company and the Independent Directors as given in Schedule IV.

Role and functions

The Independent Directors shall:

- (i) 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;
- (ii) Bring an objective view in the evaluation of the performance of board and management;

- (iii) Scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance;
- (iv) Satisfy themselves on the integrity of financial information and that financial controls and the systems of risk management are robust and defensible;
- (v) Safeguard the interest of all stakeholders, particularly the minority shareholders;
- (vi) Balance the conflicting interest of the stakeholders;
- (vii) 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; and
- (viii) Moderate and arbitrate in the interest of the company as a whole, in situations of conflict between management and shareholder's interest.