

# An Analysis of Appointment of Directors under the Companies Act, 2013

*Dr. G. Velmurugan<sup>1</sup> and Prof. R. Subashini<sup>2</sup>*

<sup>1</sup> Professor, VIT University, Vellore, [gvelmurugan@vit.ac.in](mailto:gvelmurugan@vit.ac.in)

<sup>2</sup> Assistant Professor (SG), VIT University, Vellore, [subashinir@vit.ac.in](mailto:subashinir@vit.ac.in)

## ABSTRACT

The supreme authority controlling the management and affairs of a company vests in the team of directors of the company, collectively known as its Board of Directors. A director is a person appointed to perform the duties and functions of director of a company in accordance with the provisions of the Companies Act, 2013. Only an individual can be director of company. (The Board shall consist of individual not of other persons like firms, LLP, companies, or other legal persons.). Section 149 of the Companies Act, 2013 brings out the following changes regarding Board of Directors of a company. In this article the author discussed about the procedure and conditions to appoint women director, independent director, additional director, nominee director and alternative director etc.,

**Key Words:** Listed Company, Women Director, Paid up capital, One third Independent Director, Companies Act, 2013

## INTRODUCTION

Every public company shall have a minimum of three directors whereas two directors in the case of private company. The minimum number of directors in the case of one person company is one. The maximum number of directors on the Board has been raised from twelve to fifteen. In case a company desired to have more number of directors beyond the fifteen directors it can do so after passing special resolution at the general meeting of the company and subject to the approval of the Central Government. Only an individual can be director of company. (The Board shall consist of individual not of other persons like firms, LLP, companies, gods or other legal persons.). Section 149 of the Companies Act, 2013 brings out the following changes regarding Board of Directors of a company.

## WOMEN DIRECTORS

Every listed company and every public company having a paid up share capital of Rs.100 crores or more OR turnover of Rs.300 crores or more shall mandatorily appoint one Woman Director. Rule 3 of Companies (Appointment & Qualification of Directors) Rules, 2014 states as follows:

Provided that a company, which has been incorporated under the Act and is covered under provisions of second proviso to sub-section (1) of section 149 shall comply with such provisions within a period of six months from the date of its incorporation:

Any intermittent vacancy in the Woman Directors should be filled up immediately but not later than three months from the date of such vacancy or the next Board meeting whichever is later. All listed companies are required to mandatorily appoint woman directors on their Board. Whether the woman directors have to be carved out of the independent directors' quota is not clear as also whether the woman director can be part of the promoters. If the latter is true then we will see a lot of wives, daughters, etc. entering into Board positions.

## RESIDENT DIRECTOR

Section 149(3) of the Companies Act, 2013 (Act) requires every company to have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year. The date of commencement of section 149 of the Act, ie, 1<sup>st</sup> April 2014. The first previous calendar year, for compliance with these provisions would, therefore, be calendar year 2014. The period to be taken into account for compliance with these provisions will be remaining period of calendar year 2014 ie 1<sup>st</sup> April to 31<sup>st</sup> December

. During Calendar year 2014, shall exceed 136 days. Regarding newly incorporated companies incorporated between 1.4.2014 to 30-09.2014 should have a resident director either at the incorporation stage itself or within six months of their incorporation. Companies incorporated after 30.9.2014 need to have the resident director from resident director from the date of incorporation itself.

<sup>1</sup> Professor, VIT University, Vellore, [gvelmurugan@vit.ac.in](mailto:gvelmurugan@vit.ac.in)

<sup>2</sup> Assistant Professor (SG), VIT University, Vellore, [subashinir@vit.ac.in](mailto:subashinir@vit.ac.in)

## INDEPENDENT DIRECTOR (ID)

The Act, 2013 has adopted many of the provisions of clause 49 of the listing agreement and has defined the term 'Independent Director' u/s 2(47) which says that 'Independent Director' means an Independent Director as referred to in sub-section (5) of section 149. The new Act along with the definition of ID's also provides the criteria for appointing, qualifications, tenure, remuneration and liability of ID's.

As per sub-section 6 of Section 149 of the Act, ID means a director other than a managing director or 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. Who is or was not a promoter of the company,
- c. Who is not related to promoters or directors in the company
- c. Who has or had no pecuniary relationship with the company
- d. None of whose relative has or had pecuniary relationship or transaction with the company.
- e. Who, neither himself nor any of his relative---
  - i. Holds or has held the position of a key managerial personnel
  - ii. Is or has been an employee or proprietor or a partner, in any of the three financial years preceding.
  - iii. Holds together with his relative two per cent or more of the total voting power of the company; or
  - iv. Is a Chief Executive or director, of any non-profit organization, or who possesses such other qualifications as may be prescribed.

Every listed company shall have at least one third of the total number of directors as independent directors. This is at variance with the listing agreement which specifies different levels of independent directors (i.e. either one third or half) depending upon whether the Chairman is an Executive Director or Non-Executive Director and whether the Non-executive Chairman is a promoter or not. Would it not have been better to have specified that "every listed company shall have independent directors as are specified in listing agreement"

Every public company having paid up share capital of Rs.10 crores or more OR turnover of Rs.100 crores or more or aggregate outstanding loans, debentures and deposits exceeding Rs.50 crores are required to appoint two independent directors on their Board. Existing companies hit by the aforesaid provision have a one year period within which they should comply with the requirement to appoint independent directors on their Board.

The intermittent vacancy of independent directors should be filled up within a period of three months from the date of such vacancy or immediate next Board meeting, whichever is latter. The third proviso to Rule 4(iii) of Companies (Appointment & Qualification of Directors) Rules, 2014

states that where the company ceases to fulfill any of the three conditions i.e. paid up share capital, turnover or outstanding debts, For three consecutive years, then it shall not be required to appoint the independent directors. This provision and Rule regarding appointment of independent directors in public companies above certain limits is Huge. The detailed criteria for being an independent director is given in sub-section (6), Every independent director shall at the first Board meeting after his appointment and in the first meeting of every financial year or any change in his status as an independent director give a declaration that he meets the criteria of independence as per the sub-section.

The format of this declaration is unfortunately not given in the Rules. The company and the independent directors are required to comply with and abide with the Code of Conduct as enumerated in Schedule IV. An independent director cannot be remunerated by way of stock option, but can receive sitting fees and profit related commission, which is required to be approved by the members. An independent director can be appointed for a term of 5 consecutive years but can be re-appointed for another term of 5 consecutive years upon approval by members by way of special resolution. After two terms of 5 years each, he has to vacate office but can be considered for appointment as an independent director after a three year hiatus during which period, he should not be associated with the company in any manner.

The Act, 2013, requires all the ID's to meet at-least once in a year. The meeting must be convened without the presence of the non-independent directors and members of the management. An ID would also evaluate the performance of the chairperson of the company. Also, the Act, 2013 requires an ID to review the performance of the non-independent directors and the Board as a whole of the company. These measures would immensely aid in ensuring the smooth and proper functioning of the Board of Directors of a company.

The Act, 2013 has also emphasized on the appointment of an ID as a member or as a chairperson in various committees. For instance in the Audit committee which shall comprise of minimum three directors, ID's should form a majority. In the same way, the Nomination and Remuneration Committees which shall consist of three or more non-executive directors, ID's should not be less than half of the total number of members. For the Stakeholders Committee, the Board of Directors of the Company which consist of more than one thousand shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year shall constitute a Stakeholders-relationship Committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the board.

The liability of an independent director and also a Non Executive Director not being a promoter or key managerial personnel shall be restricted only to acts which had occurred with his knowledge, attributable to Board processes and with his consent or connivance or where he has not acted diligently. Independent directors are not liable to retire by rotation.

## ADDITIONAL DIRECTORS

The articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time. An additional director shall hold office up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier.

Additional director appointed by a private company shall be regularized at the ensuing AGM under section 160 of the Companies Act, 2013. In the erstwhile Companies Act, 1956, corresponding section for regularisation of Additional Director section 257 which was not applicable to the private company. Section 160 of the Companies Act, 2013 is available to private company for the purpose of regularisation of additional director.

## NOMINEE DIRECTOR

As per Section 161(3). Subject to AOA of company, the Board May appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company. (According to term: Subject to AOA of company mean there should be provisions in Articles of Association of Company for appointment of Nominee Director, if there is no provision in Articles of company then alter the provision in AOA).

## ALTERNATE DIRECTOR

As per Section 161(2) A company May appoint, if the articles confer such power on company or a resolution is passed (if an Director is absent from India for atleast three months).

- An alternate Director cannot hold the office longer than the term of the Director in whose place he has been appointed.
- Additionally, he will have to vacate the office, if and when the original Director returns to India.
- Any alteration in the term of office made during the absence of the original Director will apply to the original Director and not to the Alternate Director.

## APPOINTMENT OF DIRECTORS

Section 152 of the New Act governs the appointment of directors. Certain specific requirements for appointment of director as laid down in the New Act are-

- If there is no provision for appointment of Director in the Articles (AoA), the subscribers to the

memorandum, i.e. the shareholders, who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed;

- Director to be appointed in a general meeting. If it is so done, an explanatory statement for such appointment, annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfills the conditions specified in this Act for such an appointment;
- The proposed Director has to furnish his DIN (Director Identification Number) mandatorily. DIN is allotted by the Central Government on application by a person intending to be the Director of a company. DIN can be obtained in pursuance of section 153 and 154;
- The proposed Director has to also furnish a declaration stating that he is not disqualified to be a director.
- Furthermore, such appointment should be with his consent. Earlier such consent was not mandatory for private companies. Consent implies that being appointed a director and taking the charge of the office are two different things;
- Consent has to be filed with the Registrar of Companies within 30 days of appointment

The provisions for optional proportionate representation which was earlier mandated only for public companies and the private companies which are subsidiaries of a public company, has now been extended to all private companies also (section 163 of the Companies Act, 2013). Also, the disqualifications for appointment and reappointment of directors have been made applicable to the private companies. Therefore, prior to appointing a director, a company must tick off the various disqualifications for appointment as director under Section 164 of the New Act.

## CONCLUSION

The new concept of having ID is a welcome step for corporate governance in India. The Act, 2013 has conferred greater empowerment upon ID's to ensure that the management & affairs of a company is being run fairly and smoothly. But, at the same time, greater accountability has also been placed upon them. The Act, 2013 empowers the ID's to have a definite 'say' in the management of a company, which would thereby immensely strengthen the corporate governance.

However it is also important to keep in mind that good corporate governance is not just the outcome of appropriate selection and effective functioning of ID's. Every director, whether independent/non independent, executive/non-

executive has a distinct role in the functioning of the company. It is only when the entire board functions effectively which results to good corporate governance and benefit minority as well as majority shareholder in its long term which maintains a good corporate image in the market.

New concept of having women director is a welcome step from the point of view of gender equity. However, it should not be misused by appointing the name shake women directors for the purpose of compliance. The government should ensure that the women director appointed are imparted training in corporate governance which will improve the quality of the women director. This will increase the demand for women director not as a statutory obligation but as a improvement of corporate governance.

**Reference:**

1. Schedule IV, Code for Independent Directors, Companies Act, 2013.
2. [http://www.mca.gov.in/Ministry/pdf/General\\_Circular\\_14\\_2014.pdf](http://www.mca.gov.in/Ministry/pdf/General_Circular_14_2014.pdf)
3. Taxmann's Companies Act 2013 with Rules
4. Companies Act , 2013 and Rules & Forms with Concise Commentary by Corporate Professionals.
5. Company Directors: Duties, Liabilities, and Remedies by Simon Mortimore
6. Women on Corporate Boards of Directors: International Research and Practice by Susan Vinnicombe (Editor), Val Singh (Editor), Ronald J. Burke (Editor)