

# LEGALFOXES LAW TIMES

## INDEPENDENT DIRECTORS- APPLICABILITY, ROLES AND DUTIES

By Dr G V P Radha Kumari

The Companies Act, 1956 does not give us a clear and concise definition of what exactly constitutes an Independent Director. However, per the 2013 Act, independent directors have been thrust into the spotlight. For each of the companies, the presence of an Independent Director must fulfil the requirements of a separate criterion.

### **An Independent Director**

An independent director is a non-executive director of a company who provides assistance to the company in the process of enhancing its corporate credibility and adhering to appropriate governance standards.

It is not possible for him or her to be influenced in any way by the company because he or she does not have any kind of connection with the organisation. The term "Independent Director" has been defined in the Act, and several new requirements relating to their appointment as well as their duties, role, and responsibilities have also been outlined.

Rule 4 and Rule 5 of the Companies (Appointment and Qualification of Directors) Rules, 2014 should be read in conjunction with the provisions relating to their appointment that are contained in S. 149 of the Companies Act, 2013. These provisions should be read in conjunction with one another.

### **How the appointment will be handled**

When selecting independent directors, the Board should check that there are proper skills, experience, and knowledge within the Board in order for the Board to be able to effectively

discharge its functions and duties. Independent directors must be appointed without management input. At the annual meeting of shareholders, there will be a vote to confirm the appointment of one or more independent directors for the company. Independent directors must be appointed by letter, which must detail the terms of the appointment in addition to any other particular information that may be required.<sup>1</sup>

### **Re-appointment**

The report of a performance review will be used to determine whether or not an individual is reappointed.

### **Resignation**

In the event that an independent director resigns from their position on the Board of the company or is expelled from their position for any reason, then he must be replaced within one hundred eighty days of the date of their resignation or removal, depending on the circumstances. When a company satisfies the requirement of having independent directors on Board, even without filling the vacancy created by resignation or removal, the former director must be replaced by a new independent director, this condition shall not apply to the company.<sup>2</sup>

### **Regarding the Appointment of an Independent Director**

#### **Listed Public Company**

There must be one-third of a company's directors that are independent for it to be considered a listed public company. Any fractions that are contained within that one-third are to be rounded up to the nearest whole number.

#### **Unlisted Company**

For any class of public enterprises, the Central Government has the authority to prescribe the minimum number of independent directors that must be present. According to Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following categories

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<sup>1</sup> COMPANY LAW Paperback – 1 January 2016 by [Dr. Avtar Singh](#) (Author)

<sup>2</sup> <https://www.indiafilings.com/learn/independent-director/>

of businesses mandatorily shall have a minimum of two directors who are qualified to serve as independent directors.

- Public companies with paid-up share capital of at least Rs. 10 crore.
- Public companies with a gross revenue of at least Rs. 100 crore.
- Public companies with an aggregate outstanding loan balance, including debentures and deposits, that is greater than Rs. 50 crore.

### **Important points**

1. When calculating paid-up share capital or turnover or loans, debentures, and deposits, the amount that was present as of the last date of the most recent audited financial statements must be taken into account.
2. In the event that the audit committee needs a greater number of independent directors, the company will be required to increase the number of directors it has on its board.
3. Even if the requirements are met, JV, entirely owned subsidiary, or a dormant company are not required to appoint an independent director.

At the first board meeting he attends as a director, then at the first meeting of each fiscal year or when it is necessary that could affect his status as an independent director, every independent director is required to disclose any potential conflicts of interest. Moreover, terms and conditions for independent directors must be published on the website of the company.

### **Role of an Independent Director**

The Company can benefit from the Independent Director's role as a guide, coach, and mentor. As part of this role, you will be responsible for helping to manage risk and contributing to the enhancement of the corporate credibility and governance standards. By participating actively in the numerous committees that have been established by the company, independent directors are

tasked with the responsibility of ensuring better governance. It is necessary to appoint independent directors because they fulfil several important roles, including the following:<sup>3</sup>

- Make it easier to withstand and respond to the pressures that come from owners.
- Play an important part in the process of succession planning.
- In regards to topics such as strategy, performance, risk management, resources, key appointments, and standards of conduct, he or she is required to support the acquisition of independent judgement in order to contribute to the deliberations of the board.
- In order to evaluate the effectiveness of the company's board and management, he or she needs to maintain an objective viewpoint.
- Examining, keeping track of, and reporting on the performance of management in relation to the goals and objectives that were agreed upon during board meetings
- It is imperative that the interests of all stakeholders, and especially those of the minority shareholders, be protected.
- Strive to find a middle ground between the competing interests of the various stakeholders.
- Conduct an investigation into the veracity of the reported financial data and make certain that adequate financial controls and risk mitigation strategies are in place.
- When there is a conflict between the interests of the management and those of the shareholders, you should work toward finding solutions that are best for the company.
- Determining what appropriate levels of compensation should be offered to executive directors, other key managerial personnel, and senior management

#### **Duties of an Independent Director<sup>4</sup>**

- They must go through the necessary training and continually update and improve their skills, as well as their familiarity with the company.

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<sup>3</sup> <https://www.mca.gov.in/Ministry/reportonexpertcommitte/chapter4.html>

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- Make every effort to be present at the company's general meetings.
- If you are a member of the board of directors or any board committees, you should make every effort to attend their meetings.
- Demonstrate an adequate level of knowledge concerning the organisation as well as the external environment in which it functions.
- You are obligated to report any issues that pertain to unethical behaviour, actual or suspected fraud, or violations of the conduct code of Co. or ethics policy.
- While acting within the scope of his or her authority, contribute to the effort of protecting the lawful interests of the company, its shareholders, and its employees.
- To avoid impeding in an unreasonable manner the operations of the company or any committee of the Board.
- Be a part of the committee that the Board creates, either as a member or as a chairperson of that committee.
- To not disclose confidential information, including commercial secrets, technologies, advertising and sales promotion plans and price-sensitive information, except such disclosure is expressly approved by the Board or required by law. This includes situations in which such disclosure may be necessary.
- Determine and guarantee that the organisation possesses a vigil mechanism that is adequate and operational, and also guarantee that the interests of a person who uses such a mechanism will not be negatively impacted as a result of that person's use of the mechanism.

**Additional Provisions Regarding Independent Directors Include the Following in the Companies Act of 2013:<sup>5</sup>**

- Businesses that meet the requirements for the Corporate Social Responsibility Committee of the Board, which is responsible for developing and overseeing a corporation's CSR policy. The

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<sup>5</sup> Sanjiv Agarwal (Author), Ankita Agarwal's Guide for Independent Directors: Company Law, SEBI Guidelines, Corporate Governance (paperback, 5 August 2020) (Author)

Companies Act of 2013 mandates that the CSR Committee must have a three directors, including one who is independent of the company.

- If a company is not required to have an independent director on its board, then two directors required to serve on its Corporate Social Responsibility Committee.
- The appointment process for independent directors must be conducted in a manner that is separate and apart from that of the management of the company. It is possible to appoint an independent director using the Databank.
- Every independent director is required to make a declaration that they meet the independence criteria when either:
  - They attend their very first board meeting as a director.
  - At the very beginning of each new fiscal year, when the board of directors meets for the very first time.
- If a circumstance arises that has the potential to compromise his or her status as an independent director.

It is required that the independent director be appointed for term-limited to 5 years. The term shall not exceed a total of two terms served consecutively. Special resolution by the company - the individual can be reappointed to their position.

- If there is a vacancy in the office of an independent director, the position must be filled either at the very or within three months, the following board meeting, whichever comes first.
- An individual can serve as an independent director for a maximum of seven different listed companies at any given time.
- An independent director is not eligible to retire as a result of rotation and is not to be counted as part of the "total number of directors" for the purpose of calculating the number of rotational directors.
- An individual may be selected for the role of alternate director. However, in order to be appointed as an independent director, he or she needs to meet the requirements.

- A small shareholder is considered to be independent if both of the following conditions are met:
- He or she meets the requirements for appointment as an independent director under section 149(6).
- The individual must affirm in a declaration that they are independent according to the standards outlined in section 149(7).
- The presence of at least one independent director is required for the meeting of the Board of Directors to be considered valid if it is called with less notice than usual in order to conduct some urgent business. In the event that there is not a single independent director, the decision must first be communicated to each and every director, after which it must be ratified by at least one independent director.

### **THE DATA BANK**

According to the Act, an Independent Director may be chosen from a data bank that is kept by the Indian Institute of Corporate Affairs, which has expertise in creating and maintaining such data banks, and posted on their website for use by the company appointing an Independent Director. The data bank contains names, addresses, and qualifications of people who are eligible and willing to act as Independent Directors. The Companies (Appointment and Qualification of Directors) Rules, 2014 ("Rules") contains a number of provisions related to Independent Directors, including the number of IDs to be appointed, the IDs' qualifications, and for a candidate who is competent and ready to be chosen as an Independent Director, the compliances that must be met.<sup>6</sup>

### **RECENT AMENDMENTS**

On June 10, 2022<sup>7</sup>, the Ministry of Corporate Affairs (MCA) published the Companies (Appointment and Qualification of Directors) Second Amendment, Rules, 2022 (also known as the "Second Amendment Rules"), which amended the Rules pertaining to identification documents. Therefore, anyone has had their name erased from the database in accordance with

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<sup>6</sup> <https://www.independentdirectorsdatabank.in/>

<sup>7</sup> Notification No.G.S.R. 439(E) dated 10<sup>th</sup> June 2022

the provisions of paragraph (4) of Rule 6 of the Rules may apply for the regaining of his name by paying a fee of one thousand rupees, and the Indian Institute of corporate Affairs shall allow such restoration subject to the conditions that are outlined in the following paragraphs:<sup>8</sup>

1. For a year following the date of restoration, the name must be shown in a separate category.;
2. The individual in question shall have one year from the date of restoration to complete the online proficiency self-assessment test.;
3. The name shall only be inserted in the databank if the individual in question passes the aforementioned online proficiency self-assessment test; and
4. Upon passing the test, the fees paid by the individual at the time of initial registration

## CONCLUSION

They are very different from the other directors on the Board of the company because the provisions of the Companies Act of 2013 require an Independent Directors that is not connected to the business in any way. Independent Directors are not permitted to have a material interest in the company for which they are responsible, and they are obligated to represent the interests of all investors and minority shareholders. As a result of these factors, Independent Directors play an important part in the efficient operation of a company.

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<sup>8</sup> <https://taxguru.in/company-law/companies-appointment-qualification-directors-second-amendment-rules-2022.html>