

Companies Bill 2012 and Independent Directors-Enhanced Role & Responsibilities



After a very long wait and sustained efforts of the Government of India, the new Companies Bill, 2012 has been passed in the Lok Sabha. The Bill provisions seem to be more progressive and futuristic. The Bill emphasises on each and every section of India -- be it investor, company, director or the general public and above all, the weaker sections of the Indian population. It is a very optimistic and progressive step to include mandatory provisions of Corporate Social Responsibility (CSR). Besides, there are many provisions giving due emphasis on more transparency and Corporate Governance. It has tried to fill up the loopholes of The Companies Act, 1956. In this regard, the provisions with respect to Independent Directors are worth taking note of. This article deals with the aspect of Independent Directors in Companies Bill 2012.



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A notable provision of the Companies Bill 2012 is the detailed procedure relating to appointment of "Independent Director", wherein a complete definition with procedure has been mentioned. The structure and process of appointment and cessation of Independent Directors will help to improve more transparency in the performance of the Company. It can be concluded that Independent Directors have been given a social duty to maintain transparency.

Another significant provision in the Bill is to include a woman director in certain class of companies. This provision will surely help to improve woman empowerment and to remove gender bias.



With a view to adopt 'Total Corporate Governance,' it has been stated that Subject to the provisions of section 152, an Independent Director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report. Moreover, notwithstanding anything contained, 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, provided that an independent director shall not, during the said period of three years, be appointed in or be associated with the company in any other capacity, either directly or indirectly. It implies that Independent Director shall not be financially or in any way interested with the Company. The provision relating to retirement by rotation shall not be applicable to Independent Director. The Bill casts an onerous responsibility on Independent Directors who now require to hold an important position in CSR Committee. The listed companies would be required to have at least one-third of the total number of directors as Independent Directors and the Central Government may prescribe the minimum number of Independent Directors in case of any class or classes of public companies.

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It has been clearly defined that 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 and

- (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 2% 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 10% 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 25% 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.
- (6) Every independent director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an independent director, give a declaration that he meets the criteria of independence as provided in sub-section (5).

Subject to the provisions contained in the bill, 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, maintained by any body, institute or association, as may be notified by the Central Government, having expertise in creation and maintenance of such data bank and put on their website for the use by the company making the appointment of such directors, provided that the responsibility of exercising due diligence before selecting a person from the data bank referred to above, as an Independent Director shall lie with the company making such appointment. The appointment of Independent Director shall be approved by the company in the general meeting as provided in sub-clause (2) of Clause 152 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. As a strict provision, it has been mentioned that no person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an Independent Director under the provisions of this Act. The role of an Independent Director can be analysed with this statement that has mentioned, that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one Independent Director, if any, shall be present at the meeting: Provided further that in case of absence of Independent Directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one Independent Director, if any.

Some of the important codes for Independent Directors are as follows:

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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.

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 and that 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.
- (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.

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;

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.

Conclusion

To conclude, it can be stated that the concept of Independent Director has been placed in order to provide more & more transparency and corporate governance. Overall, it seems that the Bill, after becoming an Act, will lead to overall development of India and also provide investor friendly environment. ■