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**Corporate Laws**

***Appointment of Independent  
Directors under the Companies  
Act, 2013***

*If you have questions or would like additional information on the material covered in this Newsletter, please contact the authors:*

By: Seema Jhingan, Partner  
([sjhingan@lexcounsel.in](mailto:sjhingan@lexcounsel.in))

Himanshu Chahar, Senior Associate  
([hchahar@lexcounsel.in](mailto:hchahar@lexcounsel.in))

Shagun Badhwar, Associate  
([sbadhwar@lexcounsel.in](mailto:sbadhwar@lexcounsel.in))

**Appointment of Independent Directors under the Companies Act, 2013**

In terms of the recently enforced Companies Act, 2013 ("CA13"), read with the Companies (Appointment and Qualification of Directors) Rules, 2014, listed public companies and certain unlisted public companies are required to appoint independent directors in accordance with CA13 (please refer to our newsletter of May 19, 2014).

An 'independent director' in relation to a company, means a director other than a (i) managing director, or a (ii) whole-time director, or a (iii) 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 or its holding, subsidiary or associate company;
- (c) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;
- (d) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the 2 (two) immediately preceding financial years or during the current financial year;
- (e) 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% (two per cent) or more of its gross turnover or total income or Rs. 50 Lacs or such higher amount as may be prescribed, whichever is lower, during the 2 (two) immediately preceding financial years or during the current financial year;

LexCounsel, Law Offices C-10,  
Gulmohar Park New Delhi 110 049,  
INDIA. Tel.:+91.11.4166.2861  
Fax:+91.11.4166.2862

Recommended by:



(f) who, neither himself nor any of his relatives:

- 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 3 (three) financial years immediately preceding the financial year in which he is proposed to be appointed;
- is or has been an employee or proprietor or a partner, in any of the 3 (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% (ten per cent) or more of the gross turnover of such firm;
- holds together with his relatives 2% or more of the total voting power of the company; or
- is a chief executive officer or director, by whatever name called, of any non-profit organization 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 2% or more of the total voting power of the company; or

(g) who possesses the prescribed qualifications, including, appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business.

- CA13 also prescribes a model code of conduct for independent directors, including guidelines of professional conduct, role and functions, duties, manner of (re)appointment, resignations/removals, etc.
- Independent directors are not entitled to any stock options, but may receive remuneration by way of fee, reimbursement of expenses for participation in board or other meetings, and profit related commissions approved by the members.
- Independent directors can hold office for upto 5 (five) consecutive years, and will be eligible for re-appointment for another term of upto 5 (five) consecutive years by way of a special resolution and disclosure of such appointment in the directors' report.
- Therefore, no independent director can hold office for a more than 2 (two) consecutive terms of 5 (five) years. After ceasing to become an independent director, there will be a cooling-off period of 3 (three) years before such person can be re-appointed, provided that such person has not been directly or indirectly appointed in or associated with the company in any other capacity.

- Independent directors are not subject to retirement by rotation.
- Independent directors may be selected from a data bank of qualified persons that may be maintained by anybody, institution or association, as may be notified by the Central Government. Such data bank shall be placed on the website of the Ministry of Corporate Affairs or on any other website as may be approved or notified by the Central Government.
- For calculation of the total number of directors of a company for purposes of determining the directors liable to retire by rotation, independent directors shall not be taken into consideration.
- The period for complying with the appointment of independent directors is 1 (one) year from the commencement of CA13.

Considering the exclusions included within the definition of an independent director, public companies are finding it challenging to comply with the aforesaid requirements and appoint an independent director. Interestingly, an independent director is also required to be a member of the CSR committee to be set up by certain public companies in accordance with the CA13. However, the inability to appoint a suitable independent director is impacting the ability of these companies to even comply with the requirements of the CSR policy. Various representations have been made to the Central Government to seek adequate clarity and leeway for companies to comply with the norms with regard to appointment of independent directors. Whether the Government will blink and introduce the necessary clarity and relaxation with regard to the appointment process is a question that awaits a response.

**Feedback**

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