CHAPTER XI
APPOINTMENT AND QUALIFICATIONS OF DIRECTORS

Company to have Board of Directors.

149. (1) Every company shall have a Board of Directors consisting of individuals as directors and shall have—

(a) a minimum number of three directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company; and

(b) a maximum of fifteen directors:

Provided that a company may appoint more than fifteen directors after passing a special resolution:

Provided further that such class or classes of companies as may be prescribed, shall have at least one woman director.

(2) Every company existing on or before the date of commencement of this Act shall within one year from such commencement comply with the requirements of the provisions of sub-section (1).

(3) Every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.

(4) Every listed public company shall 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.

Explanation.—For the purposes of this sub-section, any fraction contained in such one-third number shall be rounded off as one.

(5) Every company existing on or before the date of commencement of this Act shall, within one year from such commencement or from the date of notification of the rules in this regard as

1. Enforced with effect from 1-4-2014.
may be applicable, comply with the requirements of the provisions of sub-section (4).

(6) 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,—

(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 two per cent 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 preced-
ing 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 ten per cent 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 twenty-five per cent 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.

(7) 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 (6).

Explanation.—For the purposes of this section, “nominee director” means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.
(8) The company and independent directors shall abide by the provisions specified in Schedule IV.

(9) Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option and may receive remuneration by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.

(10) 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 re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board’s report.

(11) Notwithstanding anything contained in sub-section (10), 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.

Explanation.—For the purposes of sub-sections (10) and (11), any tenure of an independent director on the date of commencement of this Act shall not be counted as a term under those sub-sections.

(12) Notwithstanding anything contained in this Act,—

(i) an independent director;

(ii) a non-executive director not being promoter or key managerial personnel,
shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

(13) The provisions of sub-sections (6) and (7) of section 152 in respect of retirement of directors by rotation shall not be applicable to appointment of independent directors.

RELEVANT RULES: RULES 3, 4 & 5 OF THE COMPANIES (APPOINTMENT AND QUALIFICATION OF DIRECTORS) RULES, 2014

Woman director on the Board

Rule 3: The following class of companies shall appoint at least one woman director—

(i) every listed company;

(ii) every other public company having—

(a) paid-up share capital of one hundred crore rupees or more;

or

(b) turnover of three hundred crore rupees or more:

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:

Provided further that any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

Explanation.—For the purposes of this rule, it is hereby clarified that the paid up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.

Number of independent directors

Rule 4: The following class or classes of companies shall have at least two directors as independent directors—
(i) the Public Companies having paid up share capital of ten crore rupees or more; or
(ii) the Public Companies having turnover of one hundred crore rupees or more; or
(iii) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding fifty crore rupees:

**Provided** that in case a company covered under this rule is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it:

**Provided further** that any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later:

**Provided also** that where a company ceases to fulfil any of three conditions laid down in sub-rule (1) for three consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions;

Explanation.—For the purposes of this rule, it is hereby clarified that, the paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account:

**Provided** that a company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law.

**Qualifications of independent director**

**Rule 5**: An independent director shall possess 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.
149.1 Overview of Chapter XI

An overview of Chapter XI - Appointment and Qualification of Directors is given below:

- Section 149 : Company to have Board of Directors
- Section 150 : Manner of selection of independent directors and maintenance of databank of independent directors
- Section 151 : Appointment of director elected by small shareholders
- Section 152 : Appointment of directors
- Section 153 : Application for allotment of Director Identification Number
- Section 154 : Allotment of Director Identification Number
- Section 155 : Prohibition to obtain more than one Director Identification Number
- Section 156 : Director to intimate Director Identification Number
- Section 157 : Company to inform Director Identification Number to Registrar
- Section 158 : Obligation to indicate Director Identification Number
- Section 159 : Punishment for contravention
- Section 160 : Right of persons other than retiring directors to stand for directorship
- Section 161 : Appointment of additional director, alternate director and nominee director
- Section 162 : Appointment of directors to be voted individually
- Section 163 : Option to adopt principle of proportional representation for appointment of directors
- Section 164 : Disqualifications for appointment of director
- Section 165 : Number of directorships
- Section 166 : Duties of directors
- Section 167 : Vacation of office of director
- Section 168 : Resignation of director
- Section 169: Removal of directors
- Section 170: Register of directors and key managerial personnel and their shareholding
- Section 171: Members’ right to inspect
- Section 172: Punishment

### 149.1-1 Changes ushered in the 2013 Act

Major changes made by the 2013 Act vis-a-vis the 1956 Act are as under:

<table>
<thead>
<tr>
<th>Points of comparison</th>
<th>Companies Act, 2013</th>
<th>Companies Act, 1956</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
</tr>
</tbody>
</table>

**APPOINTMENT OF DIRECTORS**

- **Compulsory appointment of woman director**
  - Such class or classes of companies as may be prescribed shall have a woman director.
  - Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class of companies shall appoint at least one woman director—
    - (i) every listed company;
    - (ii) every other public company having—
      - (a) paid-up share capital of one hundred crore rupees or more; or
      - (b) turnover of three hundred crore rupees or more:
  - No provisions regarding this in the 1956 Act.
<table>
<thead>
<tr>
<th>Points of comparison</th>
<th>Companies Act, 2013</th>
<th>Companies Act, 1956</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(1)</strong></td>
<td>The paid up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.</td>
<td>No such requirement in the 1956 Act.</td>
</tr>
<tr>
<td></td>
<td>A company, which has been incorporated under the Act and is covered under the above provisions shall appoint at least one woman director within a period of six months from the date of its incorporation.</td>
<td>No such requirement in the 1956 Act.</td>
</tr>
<tr>
<td></td>
<td>Any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.</td>
<td>No such requirement in the 1956 Act.</td>
</tr>
<tr>
<td><strong>At least 1 director who stayed in India for 182 days or more</strong></td>
<td>Every company shall have at least one of the directors who has stayed in India for 182 days or more in the previous calendar year.</td>
<td>No such requirement in the 1956 Act.</td>
</tr>
<tr>
<td><strong>Independent director</strong></td>
<td>♦ Listed public company shall have at least one-third of the total number of directors as independent directors. The Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.</td>
<td>No such requirement in the 1956 Act.</td>
</tr>
<tr>
<td>Points of comparison</td>
<td>Companies Act, 2013</td>
<td>Companies Act, 1956</td>
</tr>
<tr>
<td>----------------------</td>
<td>---------------------</td>
<td>---------------------</td>
</tr>
</tbody>
</table>
| (1) | Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class or classes of companies shall have at least two directors as independent directors—  
   (i) the Public Companies having paid up share capital of ten crore rupees or more; or  
   (ii) the Public Companies having turnover of one hundred crore rupees or more; or  
   (iii) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding fifty crore rupees.  
   In case a company covered under this rule is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.  
   Any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later. | |
<table>
<thead>
<tr>
<th>Points of comparison</th>
<th>Companies Act, 2013</th>
<th>Companies Act, 1956</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>Where a company ceases to fulfil any of three above conditions for three consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions. The paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account. A company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law. ◆ An independent director shall not be entitled to stock options. He shall not be entitled to any remuneration other than sitting fee, reimbursement of expenses for participation in the Board and other meetings and profit-related commission as may be approved by the members.</td>
<td></td>
</tr>
<tr>
<td>Points of comparison</td>
<td>Companies Act, 2013</td>
<td>Companies Act, 1956</td>
</tr>
<tr>
<td>--------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>---------------------</td>
</tr>
</tbody>
</table>
| Limitation of liability of non-executive directors and independent director | Notwithstanding anything contained in this Act,—  
(i) an independent director,  
(ii) a non-executive director not being promoter or key managerial personnel,  
shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. | No such provisions in the 1956 Act. |
| Maximum number of directors                | Maximum number of directors in public company as well as private companies is 15. A company may appoint more than 15 directors after passing a special resolution. (No need for Central Govt. approval as under the 1956 Act to increase number of directors beyond permissible maximum.) | No such requirement for private company. Maximum number of directors: 12 for public company. Need for Central Govt. approval to increase number of directors beyond permissible maximum |
| Declaration by person proposed to be appointed as director | Every person proposed to be appointed as a director shall furnish:  
(i) his DIN and  
(ii) a declaration that he is not disqualified to become a director under this Act. | No such declaration required. |
<table>
<thead>
<tr>
<th>Points of comparison</th>
<th>Companies Act, 2013</th>
<th>Companies Act, 1956</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>[Rule 8 of the Companies (Appointment and Qualification of Directors) Rules, 2014; Form DIR-2]</td>
<td>No such provision</td>
</tr>
<tr>
<td>Board's opinion as to whether IDs fulfil the conditions specified for appointment as IDs</td>
<td>In the case of appointment of an independent director (ID), the explanatory statement attached to notice of meeting shall state that in the opinion of the Board he fulfils the conditions specified in this Act for such an appointment.</td>
<td>No such provision</td>
</tr>
<tr>
<td>Determining the 2/3rs of directors of public Co. liable to retire by rotation</td>
<td>For determining the “Not less than two-thirds of the total number of directors of a public company” liable to retire by rotation, “Total number of directors” shall not include independent directors, whether appointed under this Act or any other law for the time being in force.</td>
<td>No such provision</td>
</tr>
<tr>
<td>Time limit for furnishing DIN to ROC</td>
<td>15 days of receipt of intimation from the director of his DIN.</td>
<td>One week of receipt of intimation from the director of his DIN.</td>
</tr>
<tr>
<td>Right of persons other than retiring directors to stand for directorship</td>
<td>◆ Section 160 of the 2013 Act applies to all companies ◆ Section 160 provides for refund of deposit even if candidate gets more than 25% of total votes cast. ◆ Under section 160 deposit is `1,00,000 or such higher amount prescribed under the Rules.</td>
<td>◆ Section 257 of the 1956 Act was applicable only to public companies. ◆ Section 257 provided for refund of deposit only if candidate got elected as a director. ◆ The deposit under section 257 was `500.</td>
</tr>
<tr>
<td>Alternate Directors</td>
<td>◆ Section 161 of the 2013 Act provides that Board of</td>
<td>Section 313 of the 1956 Act empowered the Board of</td>
</tr>
<tr>
<td>Points of comparison</td>
<td>Companies Act, 2013</td>
<td>Companies Act, 1956</td>
</tr>
<tr>
<td>---------------------</td>
<td>--------------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>(1)</td>
<td>Directors may appoint a person, to act as an alternate director for a director during his absence from India for a period of not less than three months.</td>
<td>Directors to appoint a person, to act as an alternate director for a director ('the original director') during his absence for a period of not less than three months from the State in which meetings of the Board are ordinarily held.</td>
</tr>
<tr>
<td></td>
<td>Section 161 requires that person appointed as alternate director should not be a person holding any alternate directorship for any other director in the company. The 1956 Act contained no such requirement.</td>
<td>Section 161 further provides that a person who is proposed to be appointed as an alternate director for an independent director should be qualified to be appointed as an independent director under the provisions of this Act. There was no such requirement in the 1956 Act.</td>
</tr>
<tr>
<td></td>
<td>Section 161 further provides that a person who is proposed to be appointed as an alternate director for an independent director should be qualified to be appointed as an independent director under the provisions of this Act. There was no such requirement in the 1956 Act.</td>
<td>No such provision in the 1956 Act.</td>
</tr>
</tbody>
</table>

**Nominee Directors**

- Section 161 of the 2013 Act provides that subject to the articles, 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 State Government by virtue of its shareholding in a Government company.
<table>
<thead>
<tr>
<th>Points of comparison</th>
<th>Companies Act, 2013</th>
<th>Companies Act, 1956</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Section 161(1) of the 2013 Act provides that the Board of Directors shall not appoint a person who fails to get appointed as a director in a general meeting as an additional director.</td>
<td>No such provision.</td>
</tr>
<tr>
<td>Additional Directors</td>
<td>Section 162 of 2013 Act applies to all companies.</td>
<td>Section 263 of the 1956 Act applied only to public companies.</td>
</tr>
<tr>
<td></td>
<td>♦ Section 263 of the 1956 Act provided that where a resolution so moved is passed, no provision for the automatic re-appointment of the director retiring by rotation in default of another appointment shall apply. The 2013 Act omits this provision.</td>
<td></td>
</tr>
<tr>
<td>Appointment of directors to be voted individually</td>
<td>♦ The 2013 Act permanently debars from directorship of a company any person who is convicted of any offence and sentenced to imprisonment of 7 years or more. ♦ Section 164 of the 2013 Act contains the following two new grounds for disqualifying a person from directorships of companies which were not there in section 274 of the 1956 Act: ♦ he has been convicted of the offence</td>
<td>No such provisions in 1956 Act</td>
</tr>
</tbody>
</table>
### Points of comparison

<table>
<thead>
<tr>
<th>Disqualifications of director if company commits specified defaults</th>
<th>Companies Act, 2013</th>
<th>Companies Act, 1956</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Under section 164(2) of the 2013 Act, it does not matter whether the defaulting company is a public company or not.</strong></td>
<td>Under the 1956 Act, a person was disqualified from directorships if he was a director of a defaulting public company which had committed either of the specified defaults.</td>
<td></td>
</tr>
<tr>
<td><strong>Under the 1956 Act, a person was disqualified from directorships if he was a director of a defaulting public company which had committed either of the specified defaults.</strong></td>
<td><a href="#">See Rule 14 of the Companies (Appointment and Qualification of Directors) Rules, 2014</a></td>
<td></td>
</tr>
</tbody>
</table>

| Exclusion of certain directorships for computing limit on maximum directorships | The 2013 Act omits these exclusions. | Section 278 of the 1956 Act provided for exclusion of certain directorships for the purposes of computing the limit on number of directorships. |

<p>| Limit on maximum number of directorships | Maximum number of directorships that an individual can hold including alternate directorships is 20 of which not more than 10 can be of public companies. | 15 directorships |</p>
<table>
<thead>
<tr>
<th>Points of comparison</th>
<th>Companies Act, 2013</th>
<th>Companies Act, 1956</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
</tr>
<tr>
<td></td>
<td>General meeting by special resolution can specify lesser number than 20/10 companies. No such provision in 1956 Act.</td>
<td></td>
</tr>
<tr>
<td><strong>DUTIES OF DIRECTOR</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Duties of directors</td>
<td>Spelt out in section 166 of the 2013 Act based on case laws.</td>
<td>Not spelt out.</td>
</tr>
<tr>
<td><strong>VACATION OF OFFICE OF DIRECTOR</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vacation of office of director for failing/ceasing to hold share qualification</td>
<td>No longer a ground for vacation of office under the 2013 Act. [It may be noted that provisions related to share qualification in section 270 of the 1956 Act are omitted from the 2013 Act].</td>
<td>Failure to obtain within the time specified, or at any time thereafter ceasing to hold, the share qualification, if any, required of him by the articles of the company was a ground for vacation of office under the 1956 Act.</td>
</tr>
<tr>
<td>Vacation of office of director if he absents himself at Board meetings</td>
<td>Section 167 of the 2013 Act provides that if a director absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board, his office shall become vacant. Section 167 of the 2013 Act is much more liberal in the sense that it requires director to attend at least one board meeting during a period of 12 months. However, section 283 of the 1956 Act authorised the Board to sanction a director's absence for any period of time which is not</td>
<td>Section 283 of the 1956 Act provided that a director’s office shall become vacant if he absents himself from three consecutive meetings of the Board of directors, or from all meetings of the Board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the Board.</td>
</tr>
<tr>
<td>Points of comparison</td>
<td>Companies Act, 2013</td>
<td>Companies Act, 1956</td>
</tr>
<tr>
<td>----------------------</td>
<td>---------------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
</tr>
<tr>
<td>Where all directors of company vacate their offices</td>
<td>Section 167 of the 2013 Act provides that where all the directors of a company vacate their offices, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.</td>
<td>The 1956 Act never expressly provides for this situation.</td>
</tr>
</tbody>
</table>

### RESIGNATION OF DIRECTORS


### REGISTER, ETC., OF DIRECTORS

| Return containing such particulars and documents as may be prescribed, of the directors and the key managerial personnel | Section 170 of the 2013 Act requires that a return containing such particulars and documents as may be prescribed, of the directors and the key managerial personnel shall be filed with the Registrar within 30 days from the appointment of every director and key managerial personnel, as the case may be, and within 30 days of any change taking place. [See rules 17 & 18 of the Companies (Appointment and Qualification of Directors) Rules, 2014] | No requirement to file such return. |
149.1A Legislative history

149.1A-1 Corresponding provisions of the 1956 Act
Section 149 of the 2013 Act corresponds to sections 252 and 253 of the 1956 Act.

149.1A-2 Comparative study : 2013 Act vis-a-vis the 1956 Act
Section 149 of the 2013 Act contains the following new provisions which were not there in the 1956 Act:

◆ At least one of the directors shall be a person who has stayed in India for 182 days or more in the previous calendar year.

◆ Such class or classes of companies, as may be prescribed, shall have a woman director. Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class of companies shall appoint at least one woman director—
  (i) every listed company;
  (ii) every other public company having—
      (a) paid-up share capital of one hundred crore rupees or more; or
      (b) turnover of three hundred crore rupees or more:
          the paid up share capital or turnover, as the case may be, as on
          the last date of latest audited financial statements shall be taken
          into account.

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 of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

◆ Every listed public company shall have at least one-third of the total number of directors as independent directors. The Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies. Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class or classes of companies shall have at least two directors as independent directors—
  (i) the Public Companies having paid up share capital of ten crore rupees or more; or
  (ii) the Public Companies having turnover of one hundred crore rupees or more; or
(iii) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding fifty crore rupees. Where a company ceases to fulfil any of three conditions as above for three consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions. The paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

Any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

In case a company covered under this rule is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.

A company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law.

◆ An independent director shall not be entitled to stock options. He shall not be entitled to any remuneration other than sitting fee, reimbursement of expenses for participation in the Board and other meetings and profit-related commission as may be approved by the members.

◆ Maximum number of directors is 15. A company may appoint more than 15 directors after passing a special resolution. No need for Central Govt. approval as under the 1956 Act to increase number of directors beyond permissible maximum.

◆ Section 149(12) of the 2013 Act provides that notwithstanding anything contained in this Act, —

   (i) an independent director,

   (ii) a non-executive director not being promoter or key managerial personnel,

shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

There was no such limitation of liability of non-executive directors under the 1956 Act.
149.1A-3 Parliamentary Standing Committee Recommendations (2009-10)

Size of the Board

The Committee recommended as under:

"11.8 The Committee agree with the Ministry’s proposal for an alternate clause providing for a maximum of fifteen Directors, excluding the directors nominated by the lending institutions, with the proviso that a company may appoint more than fifteen directors after passing a special resolution. However, the proposed stipulation for prior Central Government approval to increase the number of directors beyond fifteen may not be warranted, as this is a matter which can be best decided by the shareholders."

Independent Directors

The Committee recommended as under:

"29. As the institution of Independent Directors is a critical instrument for ensuring good corporate governance, it is necessary that the functioning of this institution is critically analysed and proper safeguards are made to ensure its efficacy. The appointment of Independent Directors should not be a case of mere technical compliance reduced to the letter of the law. It is important that Independent Directors play their designated role to nurture the financial health of the Company and to protect the interests of various stakeholders, particularly the minority shareholders. The Committee, therefore, believe provisions pertaining to the Independent Directors should be distinguished from other Directors in the Bill. The Government should, therefore, prescribe precisely their mode of appointment, their qualifications, extent of independence from promoters/management, their role and responsibilities as well as their liabilities. In this context, it would be pertinent to mention that there is a need to circumscribe and limit the liabilities of Independent Directors, so that they are able to act freely and objectively and are able to share their expertise with the rest of the Board. A provision may also be made for their rotation by restricting their tenure in a company to say, five years. The Ministry of Corporate Affairs thus needs to revisit the Institution of Independent Directors and make amendments in the Bill accordingly. A code for independent directors may be considered for this purpose. The appointment process of Independent Directors may also be made independent of the company management by constituting a panel or a data bank to be maintained by the Ministry of Corporate Affairs, out of which companies may choose their requirement of Independent Directors. It is expected that the system of independent directors will evolve as a corporate governance institution over time............"

Further the Committee recommended as under:

11.45. ....... the Committee would like the Government to formulate a code of Independent Directors, which may, inter alia include their mode of appointment, role and responsibilities vis-à-vis other Directors, their remuneration and extent of their liability. It is the Committee’s considered view that Independent Directors should be distinguished from other Directors in
the Board. They should also not be related to the promoters or persons occupying management positions at the Board level and as already recommended, they should also not have any kind of pecuniary relationship with the company. The proposed code should be suitably incorporated in the Bill to enable the institution of independent directors to evolve with time.

As regard pecuniary relationships of IDs, the Committee recommended as under:

11.20 The Committee are of the view that in order to protect the independent character of the Independent Directors, it is necessary that they should not have any kind of pecuniary relationship at all with the company. The proposed clause prescribing the pecuniary relationship with the company may, therefore, be made applicable only to the relatives of the Independent Directors.

As regards whether nominee director can be considered an Independent Director, the Committee recommended as under:

11.28 While giving justification for distinguishing the nominee Director and independent Director, representative of the Ministry of Corporate Affairs during evidence stated as under:—

As far as independent Directors are concerned, we are not including nominee Directors as independent Directors whereas that is so in the SEBI Act. It is for the reason that nominee Directors would also mean PFI representatives and obviously they would be an interested party and therefore they cannot be counted as independent Directors. That is why, we have distinguished between nominee Directors and independent Directors in the Bill.

11.29 The Committee agree with the view expressed by the Ministry that the nominee Directors cannot be treated as Independent Directors....

149.1A-4 Irani Committee Report

Irani Committee in Chapter IV of its report had recommended as under:

‘5.4 Every Company should have at least one director resident in India to ensure availability in case any issue arises with regard to the accountability of the Board.’

149.2 Overview of section 149

Section 149 deals with:

♦ Obligation of company to have a Board of Directors [Section 149(1)] [Para 149.4]
♦ Board Size [Section 149(1)/(2)] [Para 149.5]
♦ Obligation of specified companies to have at least one woman director [Section 149(1), second proviso and 149(2)] [Para 149.6]
♦ Company to have at least one resident director [Section 149(3)] [Para 149.8]
◆ Obligation of listed companies and other specified companies to have independent directors [Section 149(4)/(5)] [Para 149.9]
◆ Definition of Independent Director [Section 149(6)/(7)] [Para 149.10]
◆ Tenure of Independent Directors [Section 149(10)/(11)] [Para 149.11]
◆ Code of Conduct of Independent Directors [Section 149(8)] [Para 149.12]
◆ Remuneration of Independent Directors [Section 149(9)] [Para 149.13]
◆ Liability of Independent Directors [Section 149(12)] [Para 149.14]
◆ Retirement by rotation in case of Independent Directors [Section 149(13)] [Para 149.15]

149.2A Corporate Governance

New clause 49 of the Listing Agreement, effective from 1-10-2014 is applicable to listed companies.

Circular No. CFD/Policy/Cell/2/2014, dated 17-4-2014, provides as under:

Applicability

◆ The revised Clause 49 would be applicable to all listed companies with effect from October 1, 2014. However, the provisions of Clause 49(VI)(C) as given in Part B shall be applicable to top 100 listed companies by market capitalisation as at the end of the immediate previous financial year.

◆ The provisions of Clause 49(VII) shall be applicable to all prospective transactions. All existing material related party contracts or arrangements as on the date of this circular which are likely to continue beyond March 31, 2015 shall be placed for approval of the shareholders in the first General Meeting subsequent to October 1, 2014. However, a company may choose to get such contracts approved by the shareholders even before October 1, 2014.

◆ For other listed entities which are not companies, but body corporate or are subject to regulations under other statutes (e.g. banks, financial institutions, insurance companies etc.), the Clause 49 will apply to the extent that it does not violate their respective statutes and guidelines or directives issued by the relevant regulatory authorities. The Clause 49 is not applicable to Mutual Funds.

Circular No. CIR/CFD/Policy/Cell/7/2014, dated 15-9-2014 provides as under:

1. Applicability of Clause 49

The Clause 49 of the Listing Agreement shall be applicable to all companies whose equity shares are listed on a recognized stock exchange. However,
compliance with the provisions of Clause 49 shall not be mandatory, for the
time being, in respect of the following class of companies:

(a) Companies having paid up equity share capital not exceeding `10 crore
and Net Worth not exceeding `25 crore, as on the last day of the previous
financial year:

Provided that where the provisions of Clause 49 becomes applicable to
a company at a later date, such company shall comply with the require-
ments of Clause 49 within six months from the date on which the
provisions became applicable to the company.

(b) Companies whose equity share capital is listed exclusively on the SME
and SME-ITP Platforms.

A detailed analysis of New Clause 49 is given in paras 149.16 to 149.25.
Relevant provisions of New Clause 49 are discussed under relevant
sections also.

149.3 Director [Section 2(34)]

"Director" means a director appointed to the Board of a company. [Sec-
tion 2(34)]. If appointment of directors is not in accordance with articles,
they are not directors - Rajan Nagindas Doshi v. British Burma Petroleum
Co. Ltd. [1972] 42 Comp. Cas. 197 (Bom.)

When question is whether a person is in law a director of company, minute
books and return sent to Registrar of Companies are more important evi-
dence rather than fact that person was de facto functioning as director.
When the whole question was whether the defendant was in law entitled
to function as a director, the trial Judge, was not justified in brushing
aside the share registers and other minute books produced by the plaintiff
to establish that the defendant was neither a shareholder nor had he been
appointed a director. When once from the records produced by the com-
pany it was evident prima facie that the defendant was not shown as a
shareholder and that he had not been appointed as a director as claimed
by him, and that S did not cease to be a director from 31-8-1964, the
Appellate Court was perfectly justified in granting the injunction restrain-
ing the defendant from functioning as a director. The Appellate Court was
also perfectly justified in drawing an adverse inference against the defen-
dant about his having become a shareholder, having due regard to the
fact that he had instituted a suit for rectification of the share register only
as late as 21-11-1966, though he claimed to have obtained a transfer of
shares as early as on 30-10-1963 - Ram Autar Jalan v. Coal Products (P.)
Ltd. [1970] 40 Comp. Cas. 715 (SC)

Where plaintiff had resigned from directorship of company by selling her
shares, she could not maintain suit claiming herself to be director of com-
pany. In view of the findings that while continuing as a director the plain-
tiff had resigned from the directorship of the company by selling her shares; and that she had never been re-appointed as a director thereafter, she could not maintain the suit against the defendant claiming herself to be a director of the company - Mrs. Reeta Mohanty v. Antaryami Pattnaik [2006] 66 SCL 49 (Ori.)

A suit for recovery of office of director is not a suit for recovery of possession of company's properties. In the instant case, the bank was an incorporated company which owned the properties. Its directors had merely the custody and management of the affairs of the bank, and it was only in such capacity and in such relationship, that they dealt with the property of which the company was the owner. In the instant case, what was sought for by the plaintiff was merely a declaration to the office and, though the holder of such office might enjoy certain powers under the Articles of Association, yet the subject-matter of the suit was unrelated to anything, which could be stated in definite money terms. Thus, the suit had been properly valued at ` 100 for the purpose of the Court fees and jurisdiction.- E.V. Srinivasachariar v. Srirangam Janopakara Bank Ltd. [1954] 24 Comp. Cas. 330 (Mad.)

149.3-1 Act does not provide for a nominal director

All directors of a company stand on the same footing and their duties, responsibilities and obligations are uniformly controlled by the provisions in the Act as well as the articles of association of the company concerned. - Kothari (Madras) Ltd. v. Myleaf Tobacco Development Co. (P.) Ltd. [1985] 57 Comp. Cas. 690 (Kar.)

149.3-2 Rights of a non-shareholder director

A non-proprietary director cannot:

(a) apply for the winding-up of the company;

(b) sue for oppression, mismanagement under sections 397 and 398 of the 1956 Act [corresponding to section 241 of the 2013 Act].

He has no right to receive notice of annual general meetings unless he is a member. He cannot form part of a quorum and has no right to vote. He has no right to apply to the Central Government for investigation of the affairs of the company. He has no right to the dividends declared. He acts as a delegate of the board and not in his own rights. He is not entitled to inspection of minutes book of a general meeting of the company. He is not an agent or a trustee of the shareholders.

A non-proprietary director has the following rights under the Act:

(a) to be heard prior to his removal;

(b) to receive notice of board meetings;
(c) to be given notice of the resolution proposed to be passed by
circulation; and

(d) to inspect books of account.

A non-proprietary director is entitled to sue the company only in certain
cases.

A non-shareholder director owes duties to the company but has no right
to exercise any of the powers which a shareholder who is a proprietor of
the company can exercise. A non-shareholder director cannot even main-
tain derivative action on behalf of the company. Even the Articles of Asso-
ciation of a company constitute contract between the company and its
members but do not confer any right on a person other than a member.
The Articles of Association do not confer any right on a non-proprietary
director of the company. - BSN (UK) Ltd. v. Janardan Mohandas Rajan
Pillai [1996] 86 Comp. Cas. 371 (Bom.)

In Paramjit Singh Alias Bittoo Duggal v. Raj Shree Steel Co. (P.) Ltd. [2008]
146 Comp. Cas. 354 (Delhi) it was held that the Court cannot interfere in the
management of the company and cannot direct a company to induct non-
shareholders as Directors merely on the basis of allegations that those non-
shareholders had invested money from undisclosed sources by undis-
closed modes.

149.3-3 Full time or part time director

In Jagjivan Hiralal Doshi v. Registrar of Companies [1989] 65 Comp. Cas. 553
(Bom.) it was held that Companies Act makes no distinction between a full
time and a part time director, in matter of liability.

The plain meaning of director is the person occupying the position of
director—call him a part-time director or a full time director. The rules of
construction do not call for any modification or qualification of this
meaning. ‘Any director’ is an officer of the company. The Legislature which
defined the word ‘Officer’ has made no distinction based on full-time and
part-time performance of duty. The powers of the company are exercised
by the board of directors. It shall not exercise any power or do any act
which is required to be exercised or done by the company in general
meetings. Here again no distinction founded on part-time participation as
member of the board is discernible. A meeting of the board of directors
shall be held at least once in three months. In such meeting, every member
participates in voting and takes decisions without distinction as to whether
he is a part-time or full-time director.

In the matter of proceedings for negligence, default, breach of duty,
isfeasance and breach of trust, the Act and the Rules admit of no
distinction between members of the board of directors based on their part-
time or full-time performance of duties. Their liability for any proceedings
for such acts is equal. Even if all the directors are, in law, liable for their acts, the question of relieving them is still one of discretion.

If the responsibility of all the directors, whether they are performing part-time duties or full-time duties, is equal, question may be raised should any of the directors be relieved from the liability in respect of negligence, breach of trust, misfeasance etc.; it is always a question of judicial discretion. What are the cases in which part-time directors should be relieved? The answer would depend upon the circumstances of each case and no rigid formula can be laid down. In some cases the directors who perform part time functions may be relieved from liability because no evidence of the fact that they had exercised any control in the particular matter has been brought forth. But, in a given case, evidence about their knowledge of the facts which constitute negligence, breach of trust, misfeasance, etc., may be brought forth. In such cases, they should not be relieved from liability for acts of negligence, misfeasance, etc. Part time directors, by reason of their part time status, are not invariably to be relieved from the liability for negligence, breach of duty, misfeasance, breach of trust, etc.

149.4 Company to have board of directors [Section 149(1)]

Every company shall have a Board of Directors consisting of only individuals as directors. [Section 149(1)]

The idea behind the section is that as the office of a director is to some extent an office of trust, there should be somebody readily available who can be held responsible for the failure to carry out the trust and it might be difficult to fix that responsibility if the director was a corporation or an association of persons. - Oriental Metal Pressing Works (P.) Ltd. v. Bhaskar Kashinath Thakoor [1961] 31 Comp. Cas. 143 (SC). The bar is, on the firm or a body corporate being appointed as director. There is, however, no bar in permitting their duly authorised representatives to stand for election to the executive committee - Motion Pictures Association, In re [1984] 55 Comp. Cas. 375 (Delhi).

The term “Board of Directors” or “Board” is defined in relation to a company. It means the collective body of the directors of the company [Section 2(10)].

The Kumar Mangalam Birla Committee Report on Corporate Governance discussed the Role of Board of Directors as under:

6.1 Board of Directors - The board of a company provides leadership and strategic guidance, objective judgment independent of management to the company and exercises control over the company, while remaining at all times accountable to the shareholders. The measure of the board is not simply whether it fulfils its legal requirements but more importantly, the board’s attitude and the manner in which it translates its awareness and understand-
ing of its responsibilities. An effective corporate governance system is one, which allows the board to perform these dual functions efficiently. The board of directors of a company, thus directs and controls the management of a company and is accountable to the shareholders.

6.2 The board directs the company, by formulating and reviewing company’s policies, strategies, major plans of action, risk policy, annual budgets and business plans, setting performance objectives, monitoring implementation and corporate performance, and overseeing major capital expenditures, acquisitions and divestitures, change in financial control and compliance with applicable laws, taking into account the interests of stakeholders. It controls the company and its management by laying down the code of conduct, overseeing the process of disclosure and communications, ensuring that appropriate systems for financial control and reporting and monitoring risk are in place, evaluating the performance of management, chief executive, executive directors and providing checks and balances to reduce potential conflict between the specific interests of management and the wider interests of the company and shareholders including misuse of corporate assets and abuse in related party transactions. It is accountable to the shareholders for creating, protecting and enhancing wealth and resources for the company, and reporting to them on the performance in a timely and transparent manner. However, it is not involved in day-to-day management of the company, which is the responsibility of the management.

New clause 49(I)(D) of the Listing Agreement lays down the following role and responsibilities of the Board in relation to Listed Companies:

**D. Responsibilities of the Board**

1. Disclosure of Information:
   (a) Members of the Board and key executives should be required to disclose to the board whether they, directly, indirectly or on behalf of third parties, have a material interest in any transaction or matter directly affecting the company.
   (b) The Board and top management should conduct themselves so as to meet the expectations of operational transparency to stakeholders while at the same time maintaining confidentiality of information in order to foster a culture for good decision-making.

2. Key functions of the Board

The board should fulfil certain key functions, including:

(a) Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestments.

(b) Monitoring the effectiveness of the company’s governance practices and making changes as needed.

(c) Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning.
(d) Aligning key executive and board remuneration with the longer term interests of the company and its shareholders.

(e) Ensuring a transparent board nomination process with the diversity of thought, experience, knowledge, perspective and gender in the Board.

(f) Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.

(g) Ensuring the integrity of the company’s accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.

(h) Overseeing the process of disclosure and communications.

(i) Monitoring and reviewing Board Evaluation framework.

3. Other responsibilities:

(a) The Board should provide the strategic guidance to the company, ensure effective monitoring of the management and should be accountable to the company and the shareholders.

(b) The Board should set a corporate culture and the values by which executives throughout a group will behave.

(c) Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.

(d) The Board should encourage continuing directors training to ensure that the Board members are kept up to date.

(e) Where Board decisions may affect different shareholder groups differently, the Board should treat all shareholders fairly.

(f) The Board should apply high ethical standards. It should take into account the interests of stakeholders.

(g) The Board should be able to exercise objective independent judgment on corporate affairs.

(h) Boards should consider assigning a sufficient number of non-executive Board members capable of exercising independent judgment to tasks where there is a potential for conflict of interest.

(i) The Board should ensure that, while rightly encouraging positive thinking, these do not result in over-optimism that either leads to significant risks not being recognised or exposes the company to excessive risk.

(j) The Board should have ability to ‘step back’ to assist executive management by challenging the assumptions underlying: strategy, strategic initiatives (such as acquisitions), risk appetite, exposures and the key areas of the company’s focus.

(k) When committees of the board are established, their mandate, composition and working procedures should be well defined and disclosed by the board.
(l) Board members should be able to commit themselves effectively to their responsibilities.

(m) In order to fulfil their responsibilities, board members should have access to accurate, relevant and timely information.

(n) The Board and senior management should facilitate the Independent Directors to perform their role effectively as a Board member and also a member of a committee.

149.5 Size of the board [Section 149(1)/(2)]

Section 149(1) provides as under:

- **Minimum number of directors** which company should have is as under:
  
<table>
<thead>
<tr>
<th>Type of company</th>
<th>Minimum number of directors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public company</td>
<td>Three directors</td>
</tr>
<tr>
<td>Private company</td>
<td>Two directors</td>
</tr>
<tr>
<td>One Person company</td>
<td>One director</td>
</tr>
</tbody>
</table>

- **Maximum number of directors**: 15. However, a company, may appoint more than 15 directors by passing a special resolution.

Section 149(2) provides that every company existing on or before the date of commencement of this Act shall within one year from such commencement comply with the requirements of the provisions of sub-section (1) above.

Article (II)(60) of Table F of Schedule I provides that the number of the directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum or a majority of them.

149.5-1 Reduction of Board strength below minimum number

Where board, which was originally competent to transact business, is for any reason diminished to a number less than that provided for by articles, continuing clause would apply and remaining directors would be competent to transact company's business. But if there never existed a board sufficient in number, the continuing clause [in Regulation 75 of Table A of Schedule I of the 1956 Act (corresponding to Regulation (69) of Table F of Schedule I of the 2013 Act)] would be of no help in authorising the board to carry on business. - Fateh Chand Kad v. Hindsons (Patiala) Ltd. [1957] 27 Comp. Cas. 340 (Pepsu)

Where article of company provided that there should be at least four directors, but two of them could form a quorum for a directors’ meeting, their number being still more than the necessary quorum, the continuing directors, notwithstanding the vacancy, were legally entitled to carry on the management. It was only where the number was reduced below the necessary quorum that the directors were not competent to function for
any purpose other than those specified in article.- Fateh Chand Kad v. Hindsons (Patiala) Ltd. [1957] 27 Comp. Cas. 340 (Pepsu)

Reduction of strength of board of directors pending filling up of a vacancy, does not make board invalid. Under section 262 of the 1956 Act [corresponding to section 161 of the 2013 Act], provision has been made for filling up a casual vacancy. Under this section if the office of a director became vacant, before, the expiry of his term, the casual vacancy created thereby could be filled by the board of directors at a meeting of the board. But if the board becomes invalid the moment there is a vacancy, as contended, because there is a reduction in the number of existing directors, the casual vacancy could not be filled up at the meeting of the board of directors, as it had ceased to be a valid board. Thus, the Act quite clearly recognises that in spite of the reduction in the number of directors, the board does not become invalid and can still function as a board and is still authorised to so function, because it is the board which fills up the casual vacancy.- Bengal Luxmi Cotton Mills Ltd., In re [1965] 35 Comp. Cas. 187 (Cal.)

In Sly, Spink & Co., In re [1911] 2 Ch. 430 the articles of company S laid down that the ‘number of directors shall not be less than four’. For a meeting of the board, the articles fixed a quorum of three. But the number appointed was never four and the company had only three directors. The question was whether when the company having only three directors sufficient to constitute a quorum, but below the minimum strength of the board, the acts of the board were not valid.

The Court held that it was quite clear that the provision that a quorum of the board of four may act, did not make legitimate the acts by a board consisting of less than four members. The company must have a board of four before there could be a quorum, saying that the quorum shall be three was quite different from saying that three directors could act as board when the articles themselves provided that the number of directors should not be less than four. Thus, when the company having only three directors sufficient to constitute a quorum, but below the minimum strength of the board, the acts of the board were not valid.

149.5-2 Agreement amongst directors not to increase the number of directors

Directors cannot enter into agreement thereby agreeing not to increase number of directors in absence of such restriction in Articles of Association-Rolta India Ltd. v. Venire Industries Ltd. [2000] 24 SCL 13 (Bom.)

149.5-3 Kumar Mangalam Birla Committee Report

The Kumar Mangalam Birla Committee Report on Corporate Governance discusses the importance of Composition of board of directors as under :
The composition of the board is important in as much as it determines the ability of the board to collectively provide the leadership and ensures that no one individual or a group is able to dominate the board. The executive directors (like director-finance, director-personnel) are involved in the day to day management of the companies; the non-executive directors bring external and wider perspective and independence to the decision making. Till recently, it has been the practice of most of the companies in India to fill the board with representatives of the promoters of the company, and independent directors if chosen were also handpicked thereby ceasing to be independent. This has undergone a change and increasingly the boards comprise of following groups of directors-promoter director (promoters being defined by the erstwhile Malegam Committee), executive and non-executive directors, a part of whom are independent. A conscious distinction has been made by the Committee between two classes of non-executive directors, namely, those who are independent and those who are not.

149.6 Requirement to have at least one woman director [Section 149(1)/(2)]

Such class/classes of companies as may be prescribed shall have at least one woman director [Second proviso to section 149(1)].

Sub-section (2) of section 149 provides that every company existing on or before the date of commencement of this Act shall within one year from such commencement comply with the requirements of the provisions of sub-section (1).

New Clause 49(II)(A)(1), effective from 1-4-2015, of the Listing Agreement only stipulates that the listed company must have a woman director on its Board. It does not further stipulate whether the woman director should be an Executive Director or an Non-Executive Director. So long as the company has a woman director, it does not matter whether she is an Executive Director or a Non-Executive Director. Neither the Companies Act, 2013 nor New Clause 49 requires that the woman director be unrelated to executive directors or promoters.

Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides as under:

(A) The following class of companies shall appoint at least one woman director—

   (i) Every listed company;

   (ii) Every other public company having —

      (a) paid-up share capital [see Para 2.64] of one hundred crore rupees or more; or

      (b) turnover [see Para 2.91] of three hundred crore rupees or more.
Paid up share capital/Turnover as on the last date of audited financial statement shall be taken into account.

(B) A company, which has been incorporated under the Act and is covered under provisions of second proviso to sub-section (1) of section 149 [i.e., covered by (A) above] shall comply with such provisions within a period of six months from the date of its incorporation. [1st Proviso to Rule 3]

Section 149(2) provides that companies [in (A) above] existing on or before the commencement of the 2013 Act shall comply with provisions regarding woman director.

Section 149(2) applies to existing companies while the 1st proviso to Rule 3 applies to newly incorporated companies incorporated under the 2013 Act.

(C) Any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later. [2nd Proviso to Rule 3]

149.7 Composition of Board in case of Listed Companies

Clause 49(II)(A) provides as under:

A. Composition of Board

◆ The Board of Directors of the company shall have an optimum combination of executive and non-executive directors with at least one woman director and not less than fifty per cent of the Board of Directors comprising non-executive directors.

◆ Where the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise independent directors and in case the company does not have a regular non-executive Chairman, at least half of the Board should comprise independent directors:

Where the regular non-executive Chairman is a promoter of the company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board, at least one-half of the Board of the company shall consist of independent directors.

For the purpose of the expression “related to any promoter”:

(i) If the promoter is a listed entity, its directors other than the independent directors, its employees or its nominees shall be deemed to be related to it;

(ii) If the promoter is an unlisted entity, its directors, its employees or its nominees shall be deemed to be related to it. (For details, see para 149.9)
149.8 At least one director to be a resident [Section 149(3)]

Section 149(3) provides that every company shall 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.

MCA in its written submissions to the Parliamentary Standing Committee [Para 11.11(i) of the 2009 report] had clarified the rationale behind the provisions of section 149(3) as under:

“(i) The requirement for every company to have at least one director who is resident in India as per provisions of this clause is considered to be very important from the point of view of accountability of Board.”

In P.R. Aiyar’s Advanced Law Lexicon, the word “stay” has been defined as follows:

“………stay itself is a continuous idea………‘stay’ means ‘dwell’ which again is a continuous act and not a repetition of several acts. - Rasool v. State of Mysore AIR Mysore 136,138

The words “stayed in India” in section 149(3) stand out in contrast to the words “is in India” used in section 6(1)(a) of the Income-tax Act,1961 and “residing in India” used in section 2(v) of FEMA,1999. The words “is in India” requires nothing more than a physical presence in India whether it is voluntary or involuntary. “Residing in India” requires more than physical presence in India. The words “residing in India” mean not just physical presence but physical presence coupled with intention to stay in India.

Section 149(3) requires that at least one director should have stayed in India for 182 days or more in the previous calendar year. New Clause 49 of the Listing Agreement is silent on this. Listed Company will have to comply with this condition also so as not to fall foul of the Act.

In Circular No. 25/2014, dated 26-6-2014 it is clarified that the ‘residency requirement’ would be reckoned from the date of commencement of section 149 of the Act i.e. 1st 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 the remaining period of calendar year 2014 (i.e. 1st April to 31st December). Therefore, on a proportionate basis, the number of days for which the director(s) would need to be resident in India, during Calendar Year 2014, shall exceed 136 days.

It is further clarified that regarding newly incorporated companies it is clarified that companies incorporated between 1-4-2014 to 30-9-2014 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 the date of incorporation itself.
149.9 Requirement to have independent directors on the board
[Section 149(4)/(5)]

Section 149 provides as under:

◆ Every listed public company shall have at least one-third of the total number of directors as independent directors. Any fraction contained in the one-third number shall be rounded off as one. [Section 149(4)] (see para 149.9-2)

The 2013 Act defines the expression “listed company” [See section 2(52)]. However, it does not define the expression ‘listed public company’ Presumably, ‘listed public company’ as above refers to ‘listed company’ as defined in section 2(52) of the 2013 Act [See para 2.52]

◆ The Central Government may prescribe minimum number of independent directors in case of any class or class of public companies. [Section 149(4)] (see para 149.9-1)

◆ Every company existing on or before the commencement of this Act shall comply with the requirements relating to independent directors within one year from the date of commencement of this Act or from the date of notification of the rules in this regard as may be applicable (i.e., 1-4-2014). [Section 149(5)]

For definition of ‘independent director’- See para 149.10.

149.9-1 Class of public companies

Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that:

(A) The following class or classes of companies shall have at least two directors as independent directors—

(i) the Public Companies having paid up share capital [see para 2.64] of ten crore rupees or more; or

(ii) the Public Companies having turnover [see para 2.91] of one hundred crore rupees or more; or

(iii) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits [see para 138.4] exceeding fifty crore rupees.

(B) Where a company ceases to fulfil any of three conditions as above for three consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions.

(C) The paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.
(D) Any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

(E) In case a company covered under this rule is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.

(F) A company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law.

149.9-2 Listed Companies

New clause 49 of the Listing Agreement applies to listed companies w.e.f. 1-10-2014. Clause 49(II)(A)(1) provides that the Board of Directors of the company shall have

- an optimum combination of executive and non-executive directors (NEDs)
- with at least one woman director and
- not less than 50% of the Board of Directors comprising non-executive directors.

New Clause 49(II)(A)(2) provides as under:

<table>
<thead>
<tr>
<th>Situation</th>
<th>Minimum proportion of Independent Directors (IDs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where the Chairman of the Board is a non-executive director</td>
<td>at least one-third of the Board should comprise Independent Directors (IDs)</td>
</tr>
<tr>
<td>Where the regular non-executive Chairman is a promoter of the company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board, Note: The expression “related to any promoter” is defined as under: (i) If the promoter is a listed entity, its directors other than the independent directors, its employees or its nominees shall be deemed to be related to it; (ii) If the promoter is an unlisted entity, its directors, its employees or its nominees shall be deemed to be related to it.</td>
<td>at least one-half of the Board shall consist of IDs.</td>
</tr>
<tr>
<td>In case the company does not have a regular non-executive Chairman.</td>
<td>at least half of the Board should comprise IDs.</td>
</tr>
</tbody>
</table>
According to ICAI, since this clause refers to ‘not less than’ and ‘at least’, it would be appropriate to compute the number by rounding off any fraction to the next integer. For example, in a Board headed by non-executive Chairman and comprising of six other directors (i.e., seven directors) the independent directors should be three or more.

149.9-2a **Executive Director and Non-executive Director** - New Clause 49 does not define the terms ‘Executive Director’ and ‘Non-Executive Director’. Rule 2(1)(k) of the Companies (Specification of Definitions Details) Rules, 2014 defines the term ‘Executive Director’ to mean “a whole time director as defined in clause (94) of section 2 of the Act”. Section 2(94) defines ‘whole-time director’ to include ‘a director in the whole-time employment of the company’.

Thus, a Whole-time director would not qualify as a ‘Non-Executive Director’.

Even the definition of ‘whole-time director’ in section 2(94) is not exhaustive. It is an inclusive definition. So, Companies Act, 2013 does not clarify ‘non-executive director’ except in a negative sense. Therefore, one needs to go by the commercial parlance.

Para 6.3 of the Kumar Mangalam Birla Committee Report on Corporate Governance explains the distinction between ‘executive directors’ and ‘non-executive directors’ as under:

“...The executive directors (like director-finance, director-personnel) are involved in the day-to-day management of the companies. The non-executive directors bring external and wider perspective and independence to the decision-making....”

Thus, non-executive directors are directors who are not involved in day-to-day management of the entity.

149.9-2b **Optimum combination of executive/non-executive directors** - The Board of Directors of the company shall have

- an optimum combination of executive and non-executive directors (NEDs)
- with at least one woman director and
- not less than 50% of the Board of Directors comprising non-executive directors.

The three requirements as above are distinct. Satisfying the second and third requirements will not by itself mean that company has “an optimum combination of executive and non-executive directors (NEDs)” Unlike old clause 49, new clause 49 does not leave ‘optimum combination’ to the discretion of the Board of Directors. The word ‘optimum’ will have to be interpreted in the light of the principles set out in New Clause 49(I)
especially the Principles on “Responsibilities of the Board” in New Clause 49(I)(D). The composition of the Board should enable it to discharge its Responsibilities especially the responsibility - “The Board should be able to exercise objective independent judgment on corporate affairs.”

New Clause 49 does not stipulate what is to be done if the proportion of NEDs on the Board of a listed company fall below 50% due to reasons such as death, disqualification, registration, removal of the NED. New clause 49 does not stipulate any time-bound filling up of vacancies to restore the proportion. Since an Independent Director is basically a Non-Executive Director satisfying certain additional conditions, the reduction in proportion of NEDs may also effect the proposition of IDs which may fall below the stipulated minimum proportion. In that event, New Clause 49 prescribes time-bound filling of vacancies within 3 months - See New Clause 49(II)(D)(4)/(5).

149.9-2c What if the number of IDs falls below the minimum proportion of one-third/ 50% due to resignation/ removal - New Clause 49(II)(D)(4)/(5) provides as under:

- An independent director who resigns or is removed from the Board of the Company shall be replaced by a new independent director at the earliest but not later than the immediate next Board meeting or three months from the date of such vacancy, whichever is later.

- Where the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation or removal, as the case may be, the requirement of replacement by a new independent director shall not apply.

A non-executive director may or may not be independent. However, an executive director cannot qualify as an independent director. A non-executive director (NED) who satisfies the criteria in New Clause 49(II)(B)(1) [See Para 149.10-3] is an independent director.

149.9-2d Distribution between Non-executive directors and Independent Directors - The following Table explains the distinction between NEDs and IDs as under:

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Non-Executive Director</th>
<th>Independent Director</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Non-Executive Director is one who is not involved in day to day management of the company. Every NED is not an ID. To qualify as ID, he has to fulfil additional conditions - See Para 149.10-3</td>
<td>Every Independent Director is a NED. However, every NED is not an ID.</td>
</tr>
<tr>
<td>Sr. No.</td>
<td>Non-Executive Director</td>
<td>Independent Director</td>
</tr>
<tr>
<td>---------</td>
<td>------------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>2.</td>
<td>Nominee Director would count as NED</td>
<td>Nominee Director would not count as ID</td>
</tr>
<tr>
<td>3.</td>
<td>New Clause 49 does not impose any limit on Non-Executive director-ships of listed companies</td>
<td>New Clause 49 provides that a person shall not be ID in more than 7 listed companies</td>
</tr>
<tr>
<td>4.</td>
<td>No provision in New Clause 49 for separate meeting of all Non-Executive Directors</td>
<td>New Clause 49 provides that IDs shall hold at least one meeting in a year without the attendance of non-independent directors</td>
</tr>
<tr>
<td>5.</td>
<td>No provision in New Clause 49 for any programmes for formalisation of company to NEDs</td>
<td>New Clause 49 provides that the company shall provide suitable programmes for familiarisation of company to IDs.</td>
</tr>
<tr>
<td>6.</td>
<td>NEDs who are not IDs can be granted stock options with previous approval of shareholders in general meeting.</td>
<td>IDs shall not be entitled to any stock options</td>
</tr>
<tr>
<td>7.</td>
<td>No provision for time-bound replacement in case of resignation/renewal of NEDs who are not IDs.</td>
<td>New Clause 49 provides for replacement of ID in case of resignation/renewal not later than immediate next Board meeting or three months from the date of vacancy, whichever is later. This replacement is required if proportion of IDs would fall below the stipulated minimum as a result of resignation/removal.</td>
</tr>
<tr>
<td>8.</td>
<td>NED who is not ID cannot be Chairman of Audit Committee/ Nomination &amp; Remuneration Committee. He can, however, chair the Stakeholders Remuneration Committee</td>
<td>Only ID can be Chairman of Audit Committee/ Nomination &amp; Remuneration Committee</td>
</tr>
<tr>
<td>9.</td>
<td>No requirement to issue formal letter of appointment to NEDs who are not IDs.</td>
<td>Formal letter of appointment required to be issued to IDs</td>
</tr>
<tr>
<td>10.</td>
<td>No requirement for Performance Evaluation (PE) of NEDs by the entire Board.</td>
<td>New Clause 49 requires PE of IDs by entire Board (excluding the director being evaluated)</td>
</tr>
<tr>
<td>11.</td>
<td>No provision as to maximum tenure of NEDs who are not IDs</td>
<td>Term of 5 years. Maximum another term of 5 years on passing special resolution. No reappointment after 2 terms until cooling period of 3 years is over.</td>
</tr>
</tbody>
</table>
149.10 Definition of “independent director” [Section 149(6)/(7)]

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 [para 149.10-1].—

(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 [see para 149.10-2] 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 `50,00,000 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 ten per cent, or more of the gross turnover of such firm;

(iii) holds together with his relatives 2% 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
- holds 2% or more of the total voting power of the company; or

(f) who possesses such other qualifications as may be prescribed. Rule 5 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that an independent director shall possess 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.

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 above. [Section 149(7)]

149.10-1 Nominee director

“Nominee director” means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

149.10-2 Pecuniary relationship

(a) This provision inter alia requires that an ‘ID’ should have no ‘pecuniary relationship’ with the company concerned or its holding/subsidiary/associate company and certain other categories specified therein during the current and last two preceding financial years. A question arises as to whether transaction entered into by an ‘ID’ with the company concerned at par with any member of the general public and at the same price as is payable/paid by such member of
public would attract the bar of ‘pecuniary relationship’ under section 149(6)(c). MCA has clarified that in view of the provisions of section 188 which take away transactions in the ordinary course of business at arm’s length price from the purview of related party transactions, an ‘ID’ will not be said to have ‘pecuniary relationship’ under section 149(6)(c) in such cases. [MCA’s General Circular No. 14/2014, dated 9-6-2014]

(b) Whether receipt of remuneration (in accordance with the provisions of the Act) by an ‘ID’ from a company would be considered as having pecuniary interest while considering his appointment in the holding company, subsidiary company or associate company of such company. MCA has clarified that ‘pecuniary relationship’ provided in section 149(6)(c) of the Act does not include receipt of remuneration, from one or more companies, by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission approved by the members, in accordance with the provisions of the Act. [MCA’s General Circular No. 14/2014, dated 9-6-2014]

149.10-3 Definition of ‘Independent Director’ as per Revised Clause 49(II)(B)

The expression ‘independent director’ shall mean a non-executive director, other than a nominee director of the company:

(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) apart from receiving director’s remuneration, has or had no material 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;

One wonders what the words ‘as may be prescribed’ mean. Presumably, it is as may be prescribed under the Companies Act, 2013. SEBI needs to clarify this.

(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 2% 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

ɻ that receives 25% or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or

ɻ that holds 2% or more of the total voting power of the company;

(v) is

ɻ a material supplier,
ɻ service provider or
customer or
a lessor or
lessee
of the company;

(f) who is (not) less than 21 years of age.

[Note: Clause 49(I)(A)(f) says “Who is less than 21 years of age”. It should actually be “who is not less than 21 years of age”.]

149.10-3a Associate - "Associate" shall mean a company which is an “associate” as defined in Accounting Standard (AS) 23, “Accounting for Investments in Associates in Consolidated Financial Statements”, issued by the Institute of Chartered Accountants of India.

149.10-3b “Key Managerial Personnel” - “Key Managerial Personnel” shall mean “Key Managerial Personnel” as defined in section 2(51). According to section 2(51) of the Act, “Key Managerial Personnel”, in relation to a company, means:

◆ the Chief Executive Officer or the managing director or the Manager;
◆ the Company Secretary;
◆ the whole-time director;
◆ the Chief Financial Officer; and
◆ such other officer as may be prescribed.

According to section 2(18) of the Act, “Chief Executive Officer” means an officer of a company, who has been designated as such by it.

According to section 2(19) of the Act, “Chief Financial Officer” means a person appointed as the Chief Financial Officer of a company.

149.10-3c Relative - “Relative” shall mean “relative” as defined in section 2(77) of the Companies Act, 2013 and rules prescribed thereunder. According to section 2(77) of the Act, “Relative” means a person who is related to any other person as under:

(i) they are members of a Hindu undivided family;
(ii) they are husband and wife; or
(iii) the one is related to the other in the manner as may be prescribed.

Rule 4 of the Companies (Specification of Definitions Details) Rules, 2014 titled ‘List of relatives in terms of clause (77) of section 2’ provides that a person shall be deemed to be the relative of another, if he or she is related to another in the following manner, namely:—

◆ Father (the term “Father” includes step-father).
◆ Mother (the term “Mother” includes the step-mother).
Son (the term “Son” includes the step-son).
Son’s wife.
Daughter.
Daughter’s husband.
Daughter (the term “Brother” includes the step-brother).
Brother (the term “Sister” includes the step-sister).

149.10-3d Differences in the definition of ‘Independent Director’ given in New Clause 49 and the Companies Act, 2013 - Note the following:

(i) Section 149(6) provides that, managing director or whole-time director or manager cannot be regarded as Independent Director. New Clause 49 provides that only non-executive director can qualify as Independent Director. Executive Director cannot be regarded as Independent Director.

(ii) New clause 49 prescribes two additional criteria –

(a) the director should not be a material supplier, service provider or customer or a lessor or lessee of the company and

(b) should not be less than 21 years of age.

(iii) If director has or had even immaterial pecuniary relationship with the company or its holding, subsidiary or associate company or their promoters or directors during the current financial year or during the two immediately preceding financial years, he would not qualify as ID under section 149(6). Under clause 49(II)(B)(1)(c), only material pecuniary relationship of the above nature shall disqualify a director from being regarded as ID. (In both cases, receiving director’s remuneration will not be regarded as a pecuniary relationship so as to disentitle a director to be regarded as ID.)

(iv) Section 149(6) provides that ID shall possess such other qualifications as may be prescribed. Rule 5 of the Companies (Appointment and Qualification of Directors) Rules, 2014 titled ‘Qualifications of Independent Director’ provides that an ID shall possess 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.

Clause 49 is silent on this point.

(v) Both Clause 49 and section 149(6) provide that 'nominee director' shall not be regarded as ID. However, Clause 49 does not define 'nominee director'. Explanation below section 149(7) defines 'nominee director' to mean a director:
- nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or
- appointed by any Government or other person to represent its interests.

(vi) The term 'associate company' in section 149(6) has to be understood as defined in section 2(6). For Clause 49 purposes, it has to be understood as defined in (AS) 23.

Definition given in section 2(6) of the Companies Act, 2013 is the same as in (AS) 23 except that:
- Controlling 20% of voting power of the other company by the investor company was only rebuttable presumption of significant influence in (AS) 23 - In section 2(6) control of at least 20% of total share capital is irrebuttable presumption of investor company's significant influence.

(vii) Section 149(7) requires that 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 section 149(6). There is no such requirement in New Clause 49.

(viii) The term 'promoter' is defined by section 2(69) of the Act, but not by New clause 49.

Section 2(69) defines 'promoter' to mean a person—
(a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
(c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.
Nothing in (c) above shall apply to a person who is acting merely in a professional capacity.

(ix) Para IV of Schedule IV to the Companies Act, 2013 provides that

1. Appointment process of independent directors shall be independent of the company management;
   While selecting independent directors, the Board shall ensure that there is appropriate balance of skills, experience and knowledge in the Board so as to enable the Board to discharge its functions and duties effectively;

2. The appointment of independent directors of the company shall be approved at the meeting of the shareholders;

3. The explanatory statement attached to the notice of the meeting for approving the appointment of independent director shall include a statement that in the opinion of the Board, the independent director proposed to be appointed fulfils the conditions specified in the Act and the rules made thereunder and that the proposed director is independent of the management.

New Clause 49 is silent on the above aspects covered by Schedule IV.

149.10-3e Limit on number of Independent Directorship of listed companies - Clause 49(II)(B)(2) provides that it should also be ensured by a listed company that independent director is not an independent director in more than 7 listed companies.

Further, any person who is serving as a whole-time director in any listed company shall serve as independent director in not more than 3 listed companies. It may be noted that such person, by definition, cannot be ID in the company in which he is a whole-time director.

149.11 Tenure of independent directors [Section 149(10)/(11)]

New Clause 49(II)(B)(3) provides as under:

- The maximum tenure of Independent Directors shall be in accordance with the Companies Act, 2013 and clarifications/circulars issued by the Ministry of Corporate Affairs, in his regard, from time to time.

Sub-sections (10) and (11) of section 149 provides as under:

- No Independent Director shall have a tenure exceeding in the aggregate a period of five consecutive years on the Board of a company.
◆ He shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board’s report.

◆ 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.

◆ 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.

◆ Any tenure of an independent director on the date of commencement of this Act shall not be counted as a term.

Section 149(13) provides that the provisions in respect of retirement of directors by rotation [see section 152(6)/(7)] shall not be applicable to appointment of independent directors.

The following clarifications of MCA vide General Circular No. 14/2014, dated 9-6-2014 may be noted:

◆ Section 149: Appointment of ‘IDs’: Clarification has been sought if ‘IDs’ appointed prior to April 1, 2014 may continue and complete their remaining tenure, under the provisions of the Companies Act, 1956 or they should demit office and be re-appointed (should the company so decide) in accordance with the provisions of the new Act.

The matter has been examined in the light of the relevant provisions of the Act, particularly section 149(5) and 149(10) & (11). Explanation to section 149(11) clearly provides that any tenure of an ‘ID’ on the date of commencement of the Act shall not be counted for his appointment/holding office of director under the Act. In view of the transitional period of one year provided under section 149(5), it is hereby clarified that it would be necessary that if it is intended to appoint existing ‘IDs’ under the new Act, such appointment shall be made expressly under section 149(10)/(11) read with Schedule IV of the Act within one year from 1st April, 2014, subject to compliance with eligibility and other prescribed conditions.

◆ Section 149(10)/(11) - Appointment of ‘IDs’ for less than 5 years: Clarification has been sought as to whether it would be possible to appoint an individual as an ID for a period less than five years.

It is clarified that section 149(10) of the Act provides for a term of “upto five consecutive years” for an ‘ID’. As such while appointment of an ‘ID’ for a term of less than five years would be permissible,
appointment for any term (whether for five years or less) is to be treated as a one term under section 149(10) of the Act. Further, under section 149(11) of the Act, no person can hold office of 'ID' for more than 'two consecutive terms'. Such a person shall have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years. In such a case the person completing 'consecutive terms of less than ten years' shall be eligible for appointment only after the expiry of the requisite cooling-off period of three years.”

149.12 Code of conduct for independent directors/Manner and terms of appointment of Independent Director [Section 149(8)]

The company and independent directors shall abide by the provisions specified in Schedule IV [Section 149(8)]. Schedule IV deals with Code of Conduct for Independent Directors. It provides that the Code is a guide to professional conduct for independent directors. Adherence to these standards by independent directors and fulfilment of their responsibilities in a professional and faithful manner will promote confidence of the investment community, particularly minority shareholders, regulators and companies in the institution of independent directors.

Following are the provisions of Schedule IV:

I. 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;
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.

II. 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.

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;
(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 is required by law.

IV. Manner of appointment:
(1) Appointment process of independent directors shall be independent of the company management; while selecting independent directors of the Board shall ensure that there is appropriate balance of skills, experience and knowledge in the Board so as to enable the Board to discharge its functions and duties effectively;
(2) The appointment of independent directors of the company shall be approved at the meeting of the shareholders;
(3) The explanatory statement attached to the notice of the meeting for approving the appointment of independent director shall include a
statement that in the opinion of the Board, the independent director proposed to be appointed fulfils the conditions specified in the Act and the rules made thereunder and that the proposed director is independent of the management;

(4) The appointment of independent directors shall be formalised through a letter of appointment, which shall set out:

(a) the term of appointment;
(b) the expectation of the Board from the appointed director; the Board-level committees in which the director is expected to serve and its tasks;
(c) the fiduciary duties that come with such an appointment along with accompanying liabilities;
(d) provision for Directors and Officers (D and O) insurance, if any;
(e) the Code of Business Ethics that the company expects its directors and employees to follow;
(f) the list of actions that a director should not do while functioning as such in the company; and
(g) the remuneration, mentioning periodic fees, reimbursement of expenses for participation in the Boards and other meetings and profit related commission, if any.

(5) The terms and conditions of appointment of independent directors shall be open for inspection at the registered office of the company by any member during normal business hours.

(6) The terms and conditions of appointment of independent directors shall also be posted on the company's website.

A question arises whether the requirement in (4) above would also be applicable for appointment of existing ‘IDs'? MCA has clarified vide General Circular No. 14/2014, dated 9-6-2014 that in view of the specific provisions of Schedule IV, appointment of ‘IDs' under the new Act would need to be formalized through a letter of appointment.

V. Reappointment:
The reappointment of independent director shall be on the basis of report of performance evaluation.

VI. Resignation or removal:

(1) The resignation or removal of an independent director shall be in the same manner as is provided in sections 168 and 169 of the Act;
(2) An independent director who resigns or is removed from the Board of the company shall be replaced by a new independent director within a period of not more than one hundred and eighty days from the date of such resignation or removal, as the case may be;

(3) Where the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation or removal, as the case may be, the requirement of replacement by a new independent director shall not apply.

VII. 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.

VIII. Evaluation mechanism:

(1) The performance evaluation of independent directors shall be done by the entire Board of Directors, excluding the director being evaluated.

(2) On the basis of the report of performance evaluation, it shall be determined whether to extend or continue the term of appointment of the independent director.

149.12-1 Listed companies

Following provisions of Clause 49 of the Listing Agreement may be noted:

149.12-1a Formal Letter of appointment of IDs - Clause 49(II)(B)(4) provides as under:
(a) The company shall issue a formal letter of appointment to independent directors in the manner as provided in the Companies Act, 2013. Para IV(4) of Schedule IV to the Companies Act, 2013 provides that the letter of appointment, shall set out:

(a) the term of appointment;
(b) the expectation of the Board from the appointed director; the Board-level committees in which the director is expected to serve and its tasks;
(c) the fiduciary duties that come with such an appointment along with accompanying liabilities;
(d) provision for Directors and Officers (D and O) insurance, if any;
(e) the Code of Business Ethics that the company expects its directors and employees to follow;
(f) the list of actions that a director should not do while functioning as such in the company; and
(g) the remuneration, mentioning periodic fees, reimbursement of expenses for participation in the Boards and other meetings and profit related commission, if any.

(b) The terms and conditions of appointment shall be disclosed on the website of the company.

149.12-1b Performance evaluation of IDs - New Clause 49(II)(B)(5) provides as under:

1. The Nomination Committee shall lay down the evaluation criteria for performance evaluation of independent directors.
2. The company shall disclose the criteria for performance evaluation, as laid down by the Nomination Committee, in its Annual Report.
3. The performance evaluation of independent directors shall be done by the entire Board of Directors (excluding the director being evaluated).
4. On the basis of the report of performance evaluation, it shall be determined whether to extend or continue the term of appointment of the independent director.

Para VIII of Schedule IV provides as under:

(1) The performance evaluation of independent directors shall be done by the entire Board of Directors, excluding the director being evaluated.
(2) On the basis of the report of performance evaluation, it shall be determined whether to extend or continue the term of appointment of the independent director.

Part V of Schedule IV provides that the reappointment of independent director shall be on the basis of report of performance evaluation.

Cumulative impact of New Clause 49 and the Companies Act, 2013 is that Performance Evaluation of Independent Directors of listed companies shall be done by the Board based on criteria laid down by the Nomination Committee. Such evaluation shall be the basis for re-appointment.

149.12-1c Separate meetings of IDs - Clause 49(II)(B)(6) provides as under:

(a) 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.

   All the independent directors of the company shall strive to be present at such meeting.

(b) The independent directors in the meeting shall, inter alia:
   (i) review the performance of non-independent directors and the Board as a whole;
   (ii) review the performance of the Chairperson of the company, taking into account the views of executive directors and non-executive directors;
   (iii) 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.

Identical provisions are contained in Para VII of Schedule IV to the Companies Act, 2013.

149.12-1d Familiarisation programme for IDs - New Clause 49(II)(B)(7) provides as under:

(a) The company shall familiarize the Independent Directors with
   - the company,
   - their roles, rights, responsibilities in the company,
   - nature of the industry in which the company operates,
   - business model of the company, etc.
   - through various programmes.
(b) The details of such familiarisation programmes shall be disclosed on the company's website and a web link thereto shall also be given in the Annual Report.

There is no provision in the Companies Act, 2013 regarding familiarisation programme for IDs. Listed companies will have to comply with new clause 49(II)(B)(7).

149.12-1e Resignation or removal of IDs - New Clause 49(II)(D)(4)/(5) provide as under:

- An independent director who resigns or is removed from the Board of the Company shall be replaced by a new independent director at the earliest but not later than the immediate next Board meeting or three months from the date of such vacancy, whichever is later.

- Where the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation or removal, as the case may be, the requirement of replacement by a new independent director shall not apply.

SEBI had clarified the corresponding provision in Old Clause 49 which provided replacement of ID within 180 days as under:

"The gap between resignation/removal of an independent director and appointment of another independent director in his place shall not exceed 180 days. However, this provision would not apply in case a company fulfils the minimum requirement of independent directors in its Board, i.e., one-third or one-half as the case may be, even without filling the vacancy created by such resignation/removal." [Circular No. CFD/DIL/CG/1/2008/08/04, dated 8-4-2008]

Para VI of Schedule IV provides as under:

1. The resignation or removal of an independent director shall be in the same manner as is provided in sections 168 and 169 of the Act;

2. An independent director who resigns or is removed from the Board of the company shall be replaced by a new independent director within a period of not more than 180 days from the date of such resignation or removal, as the case may be;

3. Where the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation or removal, as the case may be, the requirement of replacement by a new independent director shall not apply.

A plain reading of clause 49(II)(D)(4)/(5) as well as Para VI of Schedule IV shows that these provisions for time-bound filling up of vacancies of Independent Directorships arise only when they arise due to resignation or removal. These provisions would not apply where the vacancies arise due to reasons other than resignation or removal such as death, disqualifies etc.
The provisions of New Clause 49(II)(D) and Schedule IV are the same except the time-limits.

New Clause 49(II)(D)(4) provides that the vacancy must be filled not later than the date of following:

(a) immediate next Board meeting, or
(b) three months from the date of such vacancy.

Schedule IV provides a time-limit of 6 months from the date of such vacancy. Since gap between 2 Board meetings cannot exceed 120 days, the time limit in clause 49(II)(D)(4) is expected to be shorter than Schedule IV time-limit.

Since Clause 49(II)(D)(4) time-limit is shorter than Schedule IV time-limit, listed companies should fill the vacancy within the former time-limit to ensure that they do not violate either clause 49 or Schedule IV.

As New Clause 49 does not provide any procedure for resignation or removal of IDs, the procedure in sections 168 and 169 of the Companies Act, 2013 needs to be followed.

**149.12-1f Succession Planning** - New Clause 49(II)(D)(6) provides that the Board of the company shall satisfy itself that plans are in place for orderly succession for appointments to the Board and to senior management.

**149.12-1g Code of conduct for Board in case of Listed Companies** - New Clause 49(II)(E) provides as under:

- The Board shall lay down a code of conduct for all Board members and senior management of the company.
- The term “senior management” shall mean personnel of the company who are members of its core management team excluding Board of Directors. Normally, this would comprise all members of management one level below the executive directors, including all functional heads.
- The Code of Conduct shall suitably incorporate the duties of Independent Directors as laid down in the Companies Act, 2013.
- The code of conduct shall be posted on the website of the company.
- All Board members and senior management personnel shall affirm compliance with the code on an annual basis. The Annual Report of the company shall contain a declaration to this effect signed by the CEO.

**149.13 Remuneration of independent directors [Section 149(9)]**

Subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option:
An independent director may receive remuneration by way of:

- a sitting fee [See section 197(5)]

  Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides that a company may pay a **sitting fee** to a director for attending meetings of the Board or committees thereof, such sum as may be decided by the Board of directors thereof which shall not exceed `1,00,000 per meeting of the Board or committee thereof;

- reimbursement of expenses for participation in the Board and other meetings; and

- profit-related commission as may be approved by the members.

New Clause 49(II)(C) provides as under:

- All fees/compensation, if any paid to non-executive directors, including independent directors,

  - shall be fixed by the Board of Directors and
  - shall require previous approval of shareholders in general meeting.

- The shareholders' resolution shall specify the limits for the maximum number of stock options that can be granted to non-executive directors, in any financial year and in aggregate. Independent directors shall not be entitled to any stock option.

- The requirement of obtaining prior approval of shareholders in general meeting shall not apply to payment of sitting fees to non-executive directors, if made within the limits prescribed under the Companies Act, 2013 for payment of sitting fees without approval of the Central Government.

**149.14 Liability of independent directors [Section 149(12)]**

Notwithstanding anything contained in this Act, —

(i) an independent director,

(ii) a non-executive director not being promoter or key managerial personnel,

shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.
New Clause 49(II)(E) provides that an independent director shall be held liable, only in respect of such acts of omission or commission by a company
- which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or
- where he had not acted diligently with respect of the provisions contained in the Listing Agreement.

It would appear that the formal letter of appointment issued to every Independent Director would have to incorporate the liability limitation clause in New Clause 49(II)(E)(4).

149.15 Applicability of retirement by rotation to independent directors [Section 149(3)]
The provisions in respect of retirement of directors by rotation [see section 152(6)/(7)] shall not be applicable to appointment of independent directors.

CORPORATE GOVERNANCE

NEW CLAUSE 49 OF THE LISTING AGREEMENT
A Comprehensive Analysis of New Clause 49 of the Listing Agreement is given below. Relevant provisions of New Clause are discussed under relevant sections also.

149.16 Concept of ‘Corporate Governance’
All corporate entities need to be governed as well as managed. Corporate governance is not the same thing as management. Bob Tricker who first introduced the term ‘corporate governance’ in his book in 1984 states that “Corporate Governance is concerned with the way corporate entities are governed, as distinct from the way business within those companies are managed.”

The structure, membership and processes of the board of directors of a company are central to corporate governance. So is the linkage between the board and senior management. The relationships between the board and the shareholders, the auditors, the regulators and other stakeholders are also crucial to effective corporate governance.

Corporate governance is the system by which companies are directed and governed by the management in the best interests of the stakeholders and others. The three key aspects of corporate governance are accountability, transparency and equality of treatment for all stakeholders. The pivotal role in corporate governance is performed by the Board of Directors who
are primarily accountable and responsible for governance of their companies.

OECD explains the concept as under:

“Corporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.”

The Cadbury Committee Report defined ‘Corporate Governance’ as under:

“Corporate Governance is the system by which companies are directed and controlled. The shareholders’ role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the Board include setting the company’s strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board’s actions are subject to laws, regulations and the shareholders in general meeting”.

N.R. Narayana Murthy Committee on Corporate Governance constituted by SEBI in 2003 defines ‘Corporate Governance’ as under:

“Corporate governance is the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders. It is about commitment to values, about ethical business conduct and about making a distinction between personal and corporate funds in the management of a company.”

149.16-1/2 SEBI’s Code of Corporate Governance for Listed Companies (clause 49 of the Listing Agreement)

Based on Birla Committee report, SEBI has by Circular No. MDRP/POLCY/CIR-10/2000, dated 21-2-2000 directed Stock Exchanges to amend the Listing Agreement between them (i.e., stock exchange) and entities whose securities are listed on such stock exchange and include a new clause 49 in such Listing Agreement. Based on the recommendations of Committee on Corporate Governance set up by SEBI under the Chairmanship of Shri N. R. Narayana Murthy, SEBI replaced Clause 49 (2000 version) with Clause 49 (2004 version) (hereinafter referred to as ‘Old clause 49’) vide Master Circular SEBI/CFD/DIL/CG/1/2004/12/10, dated 29th October, 2004. Clause 49 (2004 version) was amended in 2006 and 2008.

The Companies Act, 2013 was enacted on August 30, 2013 which provides for a major overhaul in the Corporate Governance norms for all companies. The rules pertaining to Corporate Governance were notified on March 27, 2014. The requirements under the Companies Act, 2013 and the rules
notified thereunder would be applicable for every company or a class of companies (both listed and unlisted) as may be provided therein. In order to align clause 49 with the provisions of the Companies Act, 2013 and the Rules made thereunder and to adopt best practices on corporate governance and to make the corporate governance framework more effective, SEBI again replaced Clause 49 (2004 version) with New Clause 49 (2014 version) (hereinafter referred to as ‘New clause 49’ or just ‘Clause 49’) vide Circular CIR/CFD/POLICY CELL/2/2014, dated 17-4-2014.

149.16-3 Applicability of new Clause 49
Circular No. CFD/Policy Cell/2/2014, dated 17-4-2014 provides that new Clause 49 would be applicable to all listed companies with effect from October 1, 2014. However, the provisions of New Clause 49(VI)(C) shall be applicable to top 100 listed companies by market capitalisation as at the end of the immediate previous financial year. The provisions of New Clause 49(VII) as regards Related Party Transactions shall be applicable to all prospective transactions. All existing material related party contracts or arrangements as on 17-4-2014 which are likely to continue beyond March 31, 2015 shall be placed for approval of the shareholders in the first General Meeting subsequent to October 1, 2014. However, a company may choose to get such contracts approved by the shareholders even before October 1, 2014.

For other listed entities which are not companies, but body corporate or are subject to regulations under other statutes (e.g. banks, financial institutions, insurance companies etc.), Clause 49 will apply to the extent that it does not violate their respective statutes and guidelines or directives issued by the relevant regulatory authorities. Clause 49 is not applicable to Mutual Funds.

Circular No. CFD/Policy Cell/7, dated 15-9-2014 provides as under :

Applicability of Clause 49
The Clause 49 of the Listing Agreement shall be applicable to all companies whose equity shares are listed on a recognized stock exchange. However, compliance with the provisions of Clause 49 shall not be mandatory, for the time being, in respect of the following class of companies:

(a) Companies having paid up equity share capital not exceeding ` 10 crore and Net Worth not exceeding ` 25 crore, as on the last day of the previous financial year :

Provided that where the provisions of Clause 49 becomes applicable to a company at a later date, such company shall comply with the requirements of Clause 49 within six months from the date on which the provisions became applicable to the company.

(b) Companies whose equity share capital is listed exclusively on the SME and SME-ITP Platforms.
149.16-3a Applicability of New clause 49 to companies seeking listing for the first time - SEBI Circular No. CFD/DIL/CG/ 1/ 2004/ 12/ 10, dated 29-10-2004 has clarified as regards old clause 49 that the Stock Exchanges shall ensure that all provisions of clause 49 have been complied with by a company seeking listing for the first time, before granting the in principle approval for such listing. Such a company was required to set up up its Board and constitute committees such as Audit Committee, Shareholders/ Investors Grievances Committee etc. in accordance with clause 49 before seeking in-principle approval for listing.

Unlike Old Clause 49, New Clause 49 is not required to be complied with Companies seeking listing for the first time before seeking in principle approval for listing. New Clause 49 only applies to listed companies. Circular CIR/CFD/Policy Cell/ Z/ 2014, dated 17-4-2014 omits the stipulation regarding companies seeking application for the first time.

149.16-4 Quarterly Compliance Report to be submitted by Listed Companies and Other Listed Entities

The companies shall submit a quarterly compliance report to the stock exchanges within 15 days from the close of quarter as per the format given in Annexure XI to the Listing Agreement. The report shall be signed either by the Compliance Officer or the Chief Executive Officer of the company.

149.16-5 Requirements of New Clause 49

The requirements may be classified as under:

<table>
<thead>
<tr>
<th>Requirements</th>
<th>Mandatory requirements</th>
<th>Non-mandatory requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sub-clauses (II) to (XI) of Clause 49 contain the mandatory requirements of new clause 49 [See Annexure XI to the Listing Agreement.]</td>
<td>The non-mandatory requirements given in Annexure XIII to the Listing Agreement may be implemented as per the discretion of the company.</td>
<td></td>
</tr>
<tr>
<td>Disclosures of compliance with mandatory requirements shall be made in the section on the corporate governance of the Annual Report. The non-compliance of any mandatory requirements of New Clause 49 with reasons thereof should be specifically highlighted in the Corporate Governance Report section of the annual report. [See Annexure II of the Listing Agreement]</td>
<td>The extent to which the non-mandatory requirements have been adopted/complied with should be mentioned in the Corporate Governance section of the Annual Report.</td>
<td></td>
</tr>
</tbody>
</table>
149.16-6 Compliance certificate from Auditors/Practicing Company Secretaries

The company shall obtain a certificate from either the auditors or practicing company secretaries regarding compliance of conditions of corporate governance as stipulated in New Clause 49 and annex the certificate with the directors' report, which is sent annually to all the shareholders of the company. The same certificate shall also be sent to the Stock Exchanges along with the annual report filed by the company.

The Guidance Note - ‘Guidance Note on Certification of Corporate Governance’ (As stipulated in 49 of the Listing Agreement) - Revised 2006 edition [Issued by the Institute of Chartered Accountants of India (ICAI)] offers guidance to auditors for certification of corporate governance as stipulated in clause 49. The Guidance Note was also issued in the context of old Clause 49 and will also be useful in the context of New Clause 49. The following general principles laid down by the Guidance Note are noteworthy.

| **Objective of ICAI’s Guidance Note** | To provide guidance for auditors in certification of the compliance of conditions of Corporate Governance as stipulated in clause 49. |
| **Management’s Responsibility** | To ensure implementation of Mandatory conditions of corporate governance as stipulated in clause 49 of the Listing Agreement. |
| **Auditors’ Responsibility** | Limited to verification and certifying factual implementation of conditions of corporate governance as conditions stipulated in clause 49 of the Listing Agreement. |
| **Nature of auditor’s certificate issued under clause 49** | Neither an audit nor an expression of opinion on financial statements of the entity. Neither an assurance as to the future viability of the entity nor the efficiency or effectiveness with which the management has conducted the affairs of the entity. |
| **General Principles** | The Standards on Auditing (SAs) would be to the extent relevant. In certification of compliance of conditions of corporate governance, the auditor should comply with the “Code of Conduct”, issued by the Institute of Chartered Accountants of India. The auditor should conduct certification of compliance of conditions on corporate governance as stipulated in clause 49 of the Listing Agreement in accordance with “Guidance Note on Certification of Corporate Governance”. |
The auditor should document matters, which are important in providing evidence to support the certificate of factual findings in accordance with SA 230 (Revised) “Audit Documentation”.

149.17 Corporate Governance - Principles [Clause 49(I)]

149.17-1 Comparative Study with old Clause 49

The Old Clause 49 contained no corresponding provisions along the lines of New Clause 49(I). The principles set out in New Clause 49(I) are along the lines of Chapters II to VI of the OECD Principles of Corporate Governance (hereinafter referred to as ‘the OECD Principles’ in this Book) with some regroupings/adaptations/changes as under:

<table>
<thead>
<tr>
<th>New Clause 49(I)</th>
<th>Corresponding Para of the OECD Principles</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Clause 49(I)(A) - The Rights of Shareholders</strong></td>
<td><strong>Chapter II - The Rights of Shareholders and Key Ownership Functions</strong></td>
</tr>
<tr>
<td>Clause 49(I)(A)(1)(a)</td>
<td>OECD(II)(B)</td>
</tr>
<tr>
<td>Clause 49(I)(A)(1)(b)</td>
<td>OECD(II)(C)</td>
</tr>
<tr>
<td>Clause 49(I)(A)(1)(c)</td>
<td>OECD(II)(C)</td>
</tr>
<tr>
<td>Clause 49(I)(A)(1)(d)</td>
<td>OECD(II)(C)(2)</td>
</tr>
<tr>
<td>Clause 49(I)(A)(1)(e)</td>
<td>OECD(II)(C)(3)</td>
</tr>
<tr>
<td>Clause 49(I)(A)(1)(f)</td>
<td>OECD(II)(F)</td>
</tr>
<tr>
<td>Clause 49(I)(A)(1)(g)</td>
<td>—</td>
</tr>
<tr>
<td>Clause 49(I)(A)(1)(h)</td>
<td>OECD(III)(A)(2)</td>
</tr>
<tr>
<td><strong>Clause 49(I)(A)(2) - The Rights of Shareholders</strong></td>
<td><strong>Chapter II - The Rights of Shareholders and Key Ownership Functions</strong></td>
</tr>
<tr>
<td>Clause 49(I)(A)(2)(a)</td>
<td>OECD(II)(C)(1)</td>
</tr>
<tr>
<td>Clause 49(I)(A)(2)(b)</td>
<td>OECD(II)(D)</td>
</tr>
<tr>
<td><strong>Clause 49(I)(A)(3) - The Equitable Treatment of Shareholders</strong></td>
<td><strong>Chapter III - The Equitable Treatment of Shareholders</strong></td>
</tr>
<tr>
<td>Clause 49(I)(A)(3)(a)</td>
<td>OECD(III)(A)(1)</td>
</tr>
<tr>
<td>Clause 49(I)(A)(3)(b)</td>
<td>OECD(III)(A)</td>
</tr>
<tr>
<td>Clause 49(I)(A)(3)(c)</td>
<td>OECD(II)(C)(3)</td>
</tr>
<tr>
<td>Clause 49(I)(A)(3)(d)</td>
<td>OECD(III)(B)</td>
</tr>
<tr>
<td>New Clause 49(I)</td>
<td>Corresponding Para of the OECD Principles</td>
</tr>
<tr>
<td>------------------</td>
<td>------------------------------------------</td>
</tr>
<tr>
<td><strong>Clause 49(I)(B) - Role of Stakeholders in Corporate Governance</strong></td>
<td><strong>Chapter IV - The Role of Stakeholders in Corporate Governance</strong></td>
</tr>
<tr>
<td>Clause 49(I)(B)(1)(a)</td>
<td>OECD(IV)(A)</td>
</tr>
<tr>
<td>Clause 49(I)(B)(1)(b)</td>
<td>OECD(IV)(B)</td>
</tr>
<tr>
<td>Clause 49(I)(B)(1)(c)</td>
<td>OECD(IV)(C)</td>
</tr>
<tr>
<td>Clause 49(I)(B)(1)(d)</td>
<td>OECD(IV)(D)</td>
</tr>
<tr>
<td>Clause 49(I)(B)(1)(e)</td>
<td>OECD(IV)(E)</td>
</tr>
<tr>
<td><strong>Clause 49(I)(C) - Disclosure and Transparency</strong></td>
<td><strong>Chapter V - Disclosure and Transparency</strong></td>
</tr>
<tr>
<td>Clause 49(I)(C)(1)</td>
<td>OECD(V)(A)</td>
</tr>
<tr>
<td>Clause 49(I)(C)(1)(a)</td>
<td>OECD(V)(B)</td>
</tr>
<tr>
<td>Clause 49(I)(C)(1)(b)</td>
<td>OECD(V)(E)</td>
</tr>
<tr>
<td>Clause 49(I)(C)(1)(c)</td>
<td>—</td>
</tr>
<tr>
<td>Clause 49(I)(C)(1)(d)</td>
<td>OECD(V)(C)</td>
</tr>
<tr>
<td><strong>Clause 49(I)(D) - Responsibilities of the Board</strong></td>
<td><strong>Chapter VI - The Responsibilities of the Board</strong></td>
</tr>
<tr>
<td>Clause 49(I)(D)(1)(a)</td>
<td>OECD(III)(C)</td>
</tr>
<tr>
<td>Clause 49(I)(D)(1)(b)</td>
<td>—</td>
</tr>
<tr>
<td>Clause 49(I)(D)(2)</td>
<td>OECD(VI)(D)</td>
</tr>
<tr>
<td>Clause 49(I)(D)(3)(a)</td>
<td>—</td>
</tr>
<tr>
<td>Clause 49(I)(D)(3)(b)</td>
<td>—</td>
</tr>
<tr>
<td>Clause 49(I)(D)(3)(c)</td>
<td>OECD(VI)(A)</td>
</tr>
<tr>
<td>Clause 49(I)(D)(3)(d)</td>
<td>—</td>
</tr>
<tr>
<td>Clause 49(I)(D)(3)(e)</td>
<td>OECD(VI)(B)</td>
</tr>
<tr>
<td>Clause 49(I)(D)(3)(f)</td>
<td>OECD(VI)(C)</td>
</tr>
<tr>
<td>Clause 49(I)(D)(3)(g)</td>
<td>OECD(VI)(E)</td>
</tr>
<tr>
<td>Clause 49(I)(D)(3)(h)</td>
<td>OECD(VI)(E)(1)</td>
</tr>
<tr>
<td>Clause 49(I)(D)(3)(i)</td>
<td>—</td>
</tr>
<tr>
<td>Clause 49(I)(D)(3)(j)</td>
<td>—</td>
</tr>
</tbody>
</table>
Old Clause 49 adopted compliance-oriented approach. New Clause 49(II) to (XI) contain the compliances to be made and reported in Quarterly compliance reports to the stock exchanges within 15 days from the close of quarter as per the format given in Annexure XI to the Listing Agreement. However, these compliances are to be implemented by listed companies in a manner so as to achieve the objectives of principles set out in New Clause 49(I) titled ‘Corporate Governance’. In case of any ambiguity, the requirements of New Clause 49(II) to (XI) shall be interpreted and applied in alignment with the principles set out in New Clause 49(I).

Clause 49(I) sets out the principles which cover:

(A) The Rights of shareholders
   1. Right to participate in meetings and decisions
   2. Right to adequate and timely information
   3. Right to equitable treatment of all shareholders including minority and foreign shareholders

(B) Role of Stakeholders in Corporate Governance

(C) Disclosure and Transparency

(D) Responsibilities of the Board

Thus, New Clause 49 shifts from a pure compliance-centric approach to corporate governance to a principle-centric or objectives-oriented approach. Mechanically complying with the requirements is not what is envisaged in New Clause 49. The compliances should achieve the objectives of principles set out in clause 49(I). Clause 49(I) provides that the provisions of clause 49(II) to (XI) shall be interpreted and applied in alignment with the principles set out in clause 49(I).

149.17-2 Comparison of New Clause 49(I) with the Companies Act, 2013

There are no corresponding provisions in the Companies Act, 2013.

149.17-3 The Rights of Shareholders [New Clause 49(I)(A)]

New Clause 49(I)(A) contains principles dealing with the Rights of Shareholders. These are along the lines of Paras 2 and 3 of the OECD Principles of Corporate Governance.
New Clause 49(I)(A) provides as under:

**A. The Rights of Shareholders**

1. The company should seek to protect and facilitate the exercise of shareholders’ rights.

   (a) Shareholders should have the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes.

   Note: OECD gives the following examples of ‘fundamental corporate changes’:
   1. amendments to the statutes, or articles of incorporation or similar governing documents of the company
   2. the authorization of additional shares
   3. extraordinary transactions, including the transfer of all or substantially all assets that in effect result in the sale of the shares

   (b) Shareholders should have the opportunity to participate effectively and vote in general shareholder meetings.

   (c) Shareholders should be informed of the rules, including voting procedures that govern general shareholder meetings.

   (d) Shareholders should have the opportunity to ask questions to the board, to place items on the agenda of general meetings, and to propose resolutions, subject to reasonable limitations.

   (e) Effective shareholder participation in key Corporate Governance decisions, such as the nomination and election of board members, should be facilitated.

   (f) The exercise of ownership rights by all shareholders, including institutional investors, should be facilitated.

   (g) The Company should have an adequate mechanism to address the grievances of the shareholders.

   (h) Minority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders acting either directly or indirectly, and should have effective means of redress.

2. The company should provide adequate and timely information to shareholders.

   (a) Shareholders should be furnished with:
   - sufficient and timely information concerning the date, location and agenda of general meetings,
   - as well as full and timely information regarding the issues to be discussed at the meeting.

   (b) Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed.
Some capital structures allow a shareholder to exercise a degree of control over the corporation disproportionate to the shareholders’ equity ownership in the company.

Pyramid structures, cross shareholdings and shares with limited or multiple voting rights can be used to diminish the capability of non-controlling shareholders to influence corporate policy.

Shareholder agreements are a common means for groups of shareholders, who individually may hold relatively small shares of total equity, to act in concert so as to constitute an effective majority, or at least the largest single block of shareholders.

Shareholder agreements usually give those participating in the agreements preferential rights to purchase shares if other parties to the agreement wish to sell. These agreements can also contain provisions that require those accepting the agreement not to sell their shares for a specified time. Shareholder agreements can cover issues such as who will be selected. The agreements can also oblige those in the agreement to vote as a block.

Voting caps limit the number of votes that a shareholder may cast, regardless of the number of shares the shareholder may actually possess. Voting caps therefore redistribute control and may affect the incentives for shareholder participation in shareholder meetings.

Given the capacity of these mechanisms to redistribute the influence of shareholders on company policy, shareholders can reasonably expect that all such capital structures and arrangements be disclosed.

(c) All investors should be able to obtain information about the rights attached to all series and classes of shares before they purchase.

OECD explains this principle as under:

Investors can expect to be informed regarding their voting rights before they invest.

Once they have invested, their rights should not be changed unless those holding voting shares have had the opportunity to participate in the decision.

Proposals to change the voting rights of different series and classes of shares should be submitted for approval at general shareholders meetings by a specified majority of voting shares in the affected categories.

3. The company should ensure equitable treatment of all shareholders, including minority and foreign shareholders.
(a) All shareholders of the same series of a class should be treated equally.
(b) Effective shareholder participation in key Corporate Governance decisions, such as the nomination and election of board members, should be facilitated.
(c) Exercise of voting rights by foreign shareholders should be facilitated.
(d) The company should devise a framework to avoid insider trading and abusive self-dealing.
   The OCED Principles clarify that “Abusive self-dealing occurs when persons having close relationships to the company, including controlling shareholders, exploit those relationships to the detriment of the company and investors.”
(e) Processes and procedures for general shareholder meetings should allow for equitable treatment of all shareholders.
(f) Company procedures should not make it unduly difficult or expensive to cast votes.

149.17-4 Role of Stakeholders in Corporate Governance [New Clause 49(I)(B)]
New Clause 49(I)(B) provides that the company should recognise the rights of stakeholders and encourage co-operation between company and the stakeholders. Clause 49(I)(B) is along the lines of Chapter IV of the OECD Principles.
New clause 49(I)(B) provides as under :
   (a) The rights of stakeholders that are established by law or through mutual agreements are to be respected.
   (b) Stakeholders should have the opportunity to obtain effective redress for violation of their rights.
   (c) Company should encourage mechanisms for employee participation.
   (d) Stakeholders should have access to relevant, sufficient and reliable information on a timely and regular basis to enable them to participate in Corporate Governance process.
   (e) The company should devise an effective whistle blower mechanism enabling stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices.

149.17-5 Disclosure and transparency [New Clause 49(I)(C)]
New Clause 49(I)(C) contains principles dealing with disclosure and transparency. These are along the lines of Chapter V of OECD Principles.
New Clause 49(I)(C) provides that the company should ensure timely and accurate disclosure on all material matters including the financial situation, performance, ownership, and governance of the company. New clause 49(I)(C) further provides:

(a) Information should be prepared and disclosed in accordance with the prescribed standards of accounting, financial and non-financial disclosure.

(b) Channels for disseminating information should provide for equal, timely and cost efficient access to relevant information by users.

(c) The company should maintain minutes of the meeting explicitly recording dissenting opinions, if any.

(d) The company should implement the prescribed accounting standards in letter and spirit in the preparation of financial statements taking into consideration the interest of all stakeholders and should also ensure that the annual audit is conducted by an independent, competent and qualified auditor.

New Clause 49(I)(C) provides that “The company should ensure timely and accurate disclosure on all material matters including the financial situation, performance, ownership, and governance of the company.” Para 5A of OECD Principles clarifies that disclosure should include, but not be limited to, material information on:

1. The financial and operating results of the company;
2. Company objectives;
3. Major share ownership and voting rights;
4. Remuneration policy for members of the board and key executives and information about the board members, including their qualifications, the selection process, other company directorships and whether they are regarded as independent by the board;
5. Related party transactions;
6. Foreseeable risk factors;
7. Issues regarding employees and other stakeholders;
8. Governance structures and policies, in particular, the content of any corporate governance code or policy and the process by which it is implemented.

149.17-6 Responsibilities of the Board [New Clause 49(I)(D)]

New Clause 49(I)(D) is along the same lines as Chapter VI of the OECD Principles.
New Clause 49(l)(D) provides that the responsibilities of the Board are as under:

1. Disclosure of Information
   (a) Members of the Board and key executives should be required to disclose to the board whether they, directly, indirectly or on behalf of third parties, have a material interest in any transaction or matter directly affecting the company.
   (b) The Board and top management should conduct themselves so as to meet the expectations of operational transparency to stakeholders while at the same time maintaining confidentiality of information in order to foster a culture for good decision-making.

2. Key functions of the Board
   The board should fulfil certain key functions, including:
   (a) Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestments.
   (b) Monitoring the effectiveness of the company’s governance practices and making changes as needed.
   (c) Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning.
   (d) Aligning key executive and board remuneration with the longer term interests of the company and its shareholders.

   The OECD Principles explains this responsibility as under:
   ◆ It is regarded as good practice for boards to develop and disclose a remuneration policy statement covering board members and key executives.
   ◆ Such policy statements specify the relationship between remuneration and performance, and include measurable standards that emphasise the longer run interests of the company over short term considerations.
   ◆ Policy statements generally tend to set conditions for payments to board members for extra-board activities, such as consulting. They also often specify terms to be observed by board members and key executives about holding and trading the stock of the company, and the procedures to be followed in granting and re-pricing of options.
In some countries, policy also covers the payments to be made when terminating the contract of an executive.

It is considered good practice that remuneration policy and employment contracts for board members and key executives be handled by a special committee of the board comprising either wholly or a majority of independent directors.

There are also calls for a remuneration committee that excludes executives that serve on each others’ remuneration committees, which could lead to conflicts of interest.

(e) Ensuring a transparent board nomination process with the diversity of thought, experience, knowledge, perspective and gender in the Board.

(f) Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.

OECD Principles explains this responsibility as under:

- In fulfilling its control oversight responsibilities it is important for the board to encourage the reporting of unethical/unlawful behaviour without fear of retribution.
- The existence of a company code of ethics should aid this process which should be underpinned by legal protection for the individuals concerned.
- In a number of companies either the audit committee or an ethics committee is specified as the contact point for employees who wish to report concerns about unethical or illegal behaviour that might also compromise the integrity of financial statements.

(g) Ensuring the integrity of the company’s accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.

(h) Overseeing the process of disclosure and communications.

(i) Monitoring and reviewing Board Evaluation framework.

3. Other responsibilities

(a) The Board should:

- provide the strategic guidance to the company,
- ensure effective monitoring of the management, and
- be accountable to the company and the shareholders.
(b) The Board should set a corporate culture and the values by which executives throughout a group will behave.

(c) Board members should act:
   - on a fully informed basis,
   - in good faith, with due diligence and care, and
   - in the best interest of the company and the shareholders.

(d) The Board should encourage continuing directors training to ensure that the Board members are kept up to date.

(e) Where Board decisions may affect different shareholder groups differently, the Board should treat all shareholders fairly.

(f) The Board should apply high ethical standards. It should take into account the interests of stakeholders.

(g) The Board should be able to exercise objective independent judgment on corporate affairs.

(h) Boards should consider assigning a sufficient number of non-executive Board members capable of exercising independent judgment to tasks where there is a potential for conflict of interest.

   Note: OECD gives the following examples of such tasks:
   - ensuring the integrity of financial and non-financial reporting,
   - the review of related party transactions,
   - nomination of board members and key executives, and
   - board remuneration.

(i) The Board should ensure that, while rightly encouraging positive thinking, these do not result in over-optimism that either leads to significant risks not being recognised or exposes the company to excessive risk.

(j) The Board should have ability to ‘step back’ to assist executive management by challenging the assumptions underlying: strategy, strategic initiatives (such as acquisitions), risk appetite, exposures and the key areas of the company’s focus.

(k) When committees of the board are established, their mandate, composition and working procedures should be well defined and disclosed by the board.

   The OECD Principles caution that “Disclosure should not extend to committees set up to deal with, for example, confidential commercial transactions”

(l) Board members should be able to commit themselves effectively to their responsibilities.
The OECD Principles provide as under:

- Companies may wish to consider whether multiple board memberships by the same person are compatible with effective board performance and disclose the information to shareholders.

- Some countries have limited the number of board positions that can be held.

- Achieving legitimacy would also be facilitated by the publication of attendance records for individual board members (e.g. whether they have missed a significant number of meetings) and any other work undertaken on behalf of the board and the associated remuneration.

(m) In order to fulfil their responsibilities, board members should have access to accurate, relevant and timely information.

(n) The Board and senior management should facilitate the Independent Directors to perform their role effectively as a Board member and also a member of a committee.

149.18 Board of Directors [Clause 49(II)]

“Non-Executive Directors need to act as “loyal opposition” to management to challenge and check their proposals. However, NEDs can be inhibited from challenging management when management can determine or influence their tenure on the Board” - Shann Turnbull, Australia

“….In these days of conglomerates and perhaps transnational conglomerates at that, the opportunity for non-executive directors to exercise meaningful control over management is as slight as the ability of ministers to control a vast bureaucracy” - Justice Andrew Rogers

“I think the whole idea of independence is bunkum—and dangerous too. It leads to “them” and “us” approach with the independent directors feeling they carry the can for the executives and the executives leaving the governance to part-timers” - Pruce Leith, cookery expert, business woman and NED

“Women directors used to be in politics or good works; today they are younger, with relevant business experience” - Viki Holton

149.18-1 Comparative study with old clause 49

New Clause 49(II) corresponds to Old Clause 49(I). The differences between them are as under:
<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Old Clause 49</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Clause 49(II)(A) - Composition of Board</strong></td>
<td><strong>Clause 49(I)(A)(i)/ (ii) - Composition of Board</strong></td>
<td>New Clause 49 requires that the Board should have at least one woman director. Otherwise, no change.</td>
</tr>
<tr>
<td><strong>Clause 49(II)(B)(1) - Definition of Independent Director(ID)</strong></td>
<td><strong>Clause 49(I)(A)(iii)/ (iv) - Definition of Independent Director</strong></td>
<td>Changes made to align Clause 49 with Companies Act, 2013. Under New Clause 49, Nominee Director shall not be regarded as an ID. [see para 149.10-3d]</td>
</tr>
<tr>
<td><strong>Clause 49(II)(B)(2) - Limit on number of directorships of an ID</strong></td>
<td>—</td>
<td>New Requirement to align Clause 49 with Schedule IV to the Companies Act, 2013.</td>
</tr>
<tr>
<td><strong>Clause 49(II)(B)(3) - Maximum Tenure of IDs</strong></td>
<td>—</td>
<td>New Requirement to align Clause 49 of the Listing Agreement with the Companies Act, 2013 and clarifications and circulars issued by MCA.</td>
</tr>
<tr>
<td><strong>Clause 49(II)(B)(4) - Formal Letter of appointment to IDs</strong></td>
<td>—</td>
<td>New Requirement to align Clause 49 with Schedule IV to the Companies Act, 2013.</td>
</tr>
<tr>
<td><strong>Clause 49(II)(B)(5) - Performance Evaluation of IDs</strong></td>
<td>—</td>
<td>New Requirement to align Clause 49 with Schedule IV to the Companies Act, 2013.</td>
</tr>
<tr>
<td><strong>Clause 49(II)(B)(6) - Separate meetings of the IDs</strong></td>
<td>—</td>
<td>New Requirement to align Clause 49 with Schedule IV to the Companies Act, 2013.</td>
</tr>
<tr>
<td><strong>Clause 49(II)(B)(7) - Familiarisation programme for IDs</strong></td>
<td>—</td>
<td>New Requirement.</td>
</tr>
<tr>
<td><strong>Clause 49(II)(C) - Non-Executive Directors’ compensation and disclosures</strong></td>
<td><strong>Clause 49(I)(B) - Non-Executive Directors’ compensation and disclosures</strong></td>
<td>No Change.</td>
</tr>
<tr>
<td><strong>Clause 49(II)(D) - Other provisions as to Board and Committees</strong></td>
<td><strong>Clause 49(I)(C) - Other provisions as to Board and Committees</strong></td>
<td>Requirement introduced for Succession planning for appointments to Board and senior management. Otherwise, no change.</td>
</tr>
<tr>
<td><strong>Clause 49(II)(E) - Code of Conduct</strong></td>
<td><strong>Clause 49(I)(D) - Code of Conduct</strong></td>
<td>Changes consequential to Companies Act, 2013.</td>
</tr>
<tr>
<td><strong>Clause 49(II)(F) - Whistle Blower Policy</strong></td>
<td>—</td>
<td>New requirement introduced in view of Companies Act, 2013 making it mandatory for listed companies to have a ‘vigil mechanism’. It was a non-mandatory requirement under Old Clause 49.</td>
</tr>
</tbody>
</table>
149.18-2 Comparative study with Companies Act, 2013

The comparison between clause 49(II) and Companies Act, 2013 is as under:

<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Companies Act, 2013</th>
<th>Comparison</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Clause 49(II)(A) - Composition of Board</strong></td>
<td>Section 149</td>
<td>Section 149 prescribes maximum board size of 15 directors. This can be increased only by company passing a special resolution. New Clause 49 doesn't deal with this. Section 149 requires that at least one director should have stayed in India for 182 days or more in the previous calendar year. New Clause 49 is silent on this. New Clause 49 deals with composition of Board-proportion of executive and non-executive directors. Companies Act, 2013 is silent on this.</td>
</tr>
</tbody>
</table>
| **Clause 49(II)(B)(1) - Definition of Independent Director(ID)** | **Section 149(6) - Definition of Independent Director** | Definitions same except the following differences:  
  (i) New clause 49 provides that ID shall be a non-executive director. Section 149(6) provides that an ID shall not be a managing director or whole-time director or manager.  
  (ii) New clause 49 prescribes two additional criteria - (a) the director should not be a material supplier, service provider or customer or a lessor or lessee of the company and (b) should not be less than 21 years of age.  
  (iii) Section 149(6) provides that ID shall possess such other qualifications as may be prescribed.  
  (iv) If director has or had even immaterial pecuniary relationship with the company or its holding, subsidiary or associate company or their promoters or directors during the current financial year or during the two immediately preceding financial years, he would not qualify as ID under section 149(6). Under clause 49(II)(B)(1)(c), only **material** pecuniary relationship of the above nature shall disqualify a director from being regarded as ID. (In both cases, receiving director's remuneration will not be regarded as a pecuniary relationship so as to disentitle a director to be regarded as ID.) |
| Clause 49(II)(B)(2) - Limit on number of directorships of an ID | — | Companies Act, 2013 has no provision in this regard |
| Clause 49(II)(B)(3) - Maximum Tenure of IDs | Section 149(10)/Section 149(11) | No difference |
| Clause 49(II)(B)(4) - Formal Letter of appointment to IDs | Para IV(4)/(5)/(6) of Schedule IV to the Companies Act, 2013 | New Clause 49 requires that company shall issue a formal letter of appointment to IDs shall be in accordance with the Companies Act, 2013. No difference between clause 49 and the Companies Act, 2013 on this issue. |
| Clause 49(II)(B)(5) - Performance Evaluation of IDs | Para VIII of Schedule IV to the Companies Act, 2013 - Evaluation mechanism | Both New Clause 49 and Schedule IV provide that performance evaluation shall be entire by with the Board of Directors (excluding director being evaluated) and the evaluation shall be the basis to determine whether to extend the term or continue the ID. In addition, New Clause 49 provides that the Nomination Committee shall lay down the PE criteria and also provides for disclosure of PE criteria in its Annual Report |
| Clause 49(II)(B)(6) - Separate meetings of the IDs | Para VII of Schedule IV to the Companies Act, 2013 - Separate Meetings | No Difference |
| Clause 49(II)(B)(7) - Familiarisation programmes for IDs | — | There is no corresponding requirement in the Companies Act, 2013. The Act is silent on this. |
| Clause 49(II)(C) - Non-Executive Directors’ compensation and disclosures | — | There is no corresponding requirement in the Companies Act, 2013. The Act is silent on this. |
| Clause 49(II)(D) - Other provisions as to Board and Committees | Section 173(1) of the Companies Act, 2013 | Both New Clause 49 and the Act provide for 4 Board meetings in a year with not more than 120 days gap between 2 board meetings. |
New clause 49 stipulates: (i) limit on director’s membership of committees; (ii) periodic review of compliance of laws by Board; (iii) time-bound filling of vacancies caused by resignation/removal of IDs; (iv) succession planning of appointments to Board and senior management. Companies Act, 2013 is silent on these matters.

<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Companies Act, 2013</th>
<th>Comparison</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>New clause 49 stipulates: (i) limit on director’s membership of committees; (ii) periodic review of compliance of laws by Board; (iii) time-bound filling of vacancies caused by resignation/removal of IDs; (iv) succession planning of appointments to Board and senior management. Companies Act, 2013 is silent on these matters.</td>
</tr>
</tbody>
</table>

**Clause 49(II)(E) - Code of Conduct**

Schedule IV to the Companies Act, 2013 - Code for Independent Directors

Schedule IV to the Companies Act provides a Code of Conduct only for IDs. New clause 49 requires the Board to frame a Code for all directors.

**Clause 49(II)(F) - Whistle blower Policy**

Section 177(9)/(10) of the Companies Act, 2013

New requirement introduced in view of Whistle blower (10) of the Companies Act, 2013 making it mandatory for listed companies to have a ‘vigil mechanism’. Section 177(9) only provides that vigil mechanism shall provide for employees to report their genuine concerns. New Clause 49 provides that concerns about unethical behaviour, actual or suspected fraud or violation of the company’s code of conduct or ethics policy. Otherwise, there is no difference between Revised clause 49 and section 177.

149.18-3 Composition of Board of Directors - New Clause 49(II)(A)

New Clause 49(II)(A)(1) provides that the Board of Directors of the company shall have:

- an optimum combination of executive and non-executive directors (NEDs)
- with at least one woman director (w.e.f. 1-4-2015) and
- not less than 50% of the Board of Directors comprising non-executive directors.

New Clause 49(II)(A)(2) provides as under:

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Situation</th>
<th>Minimum proportion of Independent Directors (IDs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Where the Chairman of the Board is not a non-executive director who is not a promoter or person occupying management positions at the Board level or one level below</td>
<td>at least one-third of the Board should comprise (IDs)</td>
</tr>
</tbody>
</table>
2. Where the regular non-executive Chairman is at least one-half of the promoter of the company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board.

Note: The expression “related to any promoter” is defined as under:
(i) If the promoter is a listed entity, its directors other than the independent directors, its employees or its nominees shall be deemed to be related to it;
(ii) If the promoter is an unlisted entity, its directors, its employees or its nominees shall be deemed to be related to it.

at least one-half of the Board shall consist of IDs.

3. In case the company does not have a regular non-executive Chairman.

at least half of the Board should comprise IDs.

Section 149 of the Companies Act, 2013 requires that at least one director should have stayed in India for 182 days or more in the previous calendar year. New Clause 49 is silent on this. Listed Company will have to comply with this condition also so as not to fall foul of the 2013 Act.

Executive Director & Non-Executive Director - New Clause 49 does not define the terms ‘Executive Director’ and ‘Non-Executive Director’. Rule 2(1)(k) of the Companies (Specification of Definitions Details) Rules, 2014 defines the term ‘Executive Director’ to mean “a whole time director as defined in clause (94) of section 2 of the Act”. Section 2(94) of the Companies Act, 2013 defines ‘whole-time director’ to include ‘a director in the whole-time employment of the company’.

Thus, a Whole-time director would not qualify as a ‘Non-Executive Director’.

Even the definition of ‘whole-time director’ in section 2(94) is not exhaustive to. It is an inclusive definition. So, Companies Act, 2013 does not clarify ‘non-executive director’ except in a negative sense. Therefore, one needs to go by the commercial parlance.

Para 6.3 of the Kumar Mangalam Birla Committee Report on Corporate Governance explains the distinction between executive directors and ‘non-executive directors’ as under:

“...The executive directors (like director-finance, director-personnel) are involved in the day-to-day management of the companies. The non-executive directors bring external and wider perspective and independence to the decision-making....”
Thus, non-executive directors are directors who are not involved in day-to-day management of the entity.

**149.18-3b Optimum combination of Executive Directors & Non-Executive Directors** - The Board of Directors of the company shall have:

- an optimum combination of executive and non-executive directors (NEDs)
- with at least one woman director and
- not less than 50% of the Board of Directors comprising non-executive directors.

The three requirements as above are distinct. Satisfying the second and third requirements will not by itself mean that company has “an optimum combination of executive and non-executive directors (NEDs)” Unlike old clause 49, new clause 49 does not leave ‘optimum combination’ to the discretion of the Board of Directors. The word ‘optimum’ will have to be interpreted in the light of the principles set out in New Clause 49(I) especially the Principles on “Responsibilities of the Board” in New Clause 49(I)(D). The composition of the Board should enable it to discharge its Responsibilities especially the responsibility, “The Board should be able to exercise objective independent judgment on corporate affairs.”

New Clause 49 does not stipulate what is to be done if the proportion of NEDs on the Board of a listed company fall below 50% due to reasons such as death, disqualification, registration, removal of the NED. New clause 49 does not stipulate any time-bound filling up of vacancies to restore the proportion. Since an Independent Director is basically a Non-Executive Director satisfying certain additional conditions, the reduction in proportion of NEDs may also effect the proportion of IDs which may fall below the stipulated minimum proportion. In that event, Non Clause 49 prescribes time-bound filling of vacancies within 3 months - See New Clause 49(II)(D)(4)/(5).

**149.18-3c Woman Director** - New Clause 49 only stipulates that the listed company must have a woman director on its Board. It does not further stipulate whether the woman director should be an Executive Director or an Non-Executive Director. So long as the company has a woman director, it does not matter whether she be an Executive Director or a Non-Executive Director. Neither the Companies Act, 2013 nor New Clause 49 requires that the woman director be unrelated to executive directors or promoters.

Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides as under:

(A) The following class of companies shall appoint at least one woman director—

(i) Every listed company;

(ii) Every other public company having —
(a) paid-up share capital of one hundred crore rupees or more; or
(b) turnover of three hundred crore rupees or more.

(B) A company, which has been incorporated under the Act and is covered under provisions of sub-section (1) of section 149 [i.e., covered by (A) above] shall comply with such provisions within a period of six months from the date of its incorporation.

(C) Any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

**149.18-3d Mandatory Minimum proportion of Independent Directors**

A non-executive director may or may not be independent. However, an executive director cannot qualify as an independent director. A non-executive director (NED) who satisfies the criteria in New Clause 49(II)(B)(1) [See Para 149.18-4a] is an independent director.

The Mandatory minimum proportion of directors on the Board who should be IDs are as under:

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Situation</th>
<th>Minimum proportion of Independent Directors (IDs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Where the Chairman of the Board is a non-executive director who is not a promoter or not related to any promoter or person occupying management positions at the Board level or one level below</td>
<td>at least one-third of the Board should comprise IDs.</td>
</tr>
<tr>
<td>2.</td>
<td>Where the regular non-executive Chairman is a promoter of the company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board. Note: The expression “related to any promoter” is defined as under: (i) If the promoter is a listed entity, its directors other than the independent directors, its employees or its nominees shall be deemed to be related to it; (ii) If the promoter is an unlisted entity, its directors, its employees or its nominees shall be deemed to be related to it.</td>
<td>at least one-half of the Board shall consist of IDs.</td>
</tr>
<tr>
<td>3.</td>
<td>In case the company does not have a regular non-executive Chairman.</td>
<td>at least half of the Board should comprise IDs.</td>
</tr>
</tbody>
</table>

According to ICAI, since this clause refers to ‘not less than’ and ‘at least’, it would be appropriate to compute the number by rounding off any fraction to the next integer. For example, in a Board headed by non-executive Chairman and comprising of six other directors (i.e., seven directors) the independent directors should be three or more.
WHAT IF THE NUMBER OF IDs FALLS BELOW THE MINIMUM PROPORTION OF ONE-THIRD/50% DUE TO RESIGNATION/REMOVAL - New Clause 49(II)(D)(4)/(5) provides as under:

- An independent director who resigns or is removed from the Board of the Company shall be replaced by a new independent director at the earliest but not later than the immediate next Board meeting or three months from the date of such vacancy, whichever is later.
- Where the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation or removal, as the case may be, the requirement of replacement by a new independent director shall not apply.

149.18-3e Distinction between Non-Executive Directors and Independent Directors - The following Table explains the distinction between NEDs and ID as under:

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Non-Executive Director</th>
<th>Independent Director</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Non-Executive Director is one who is not involved in day to day management of the company. Every NED is not an ID. To qualify as ID, he has to fulfil additional conditions - See Para 149.18-4a</td>
<td>Every Independent Director is a NED. However, every NED is not an ID.</td>
</tr>
<tr>
<td>2.</td>
<td>Nominee Director would count as NED</td>
<td>Nominee Director would not count as ID</td>
</tr>
<tr>
<td>3.</td>
<td>New Clause 49 does not impose any limit on Non-Executive directorships of listed companies</td>
<td>New Clause 49 provides that a person shall not be ID in more than 7 listed companies</td>
</tr>
<tr>
<td>4.</td>
<td>No provision in New Clause 49 for separate meeting of all Non-Executive Directors</td>
<td>New Clause 49 provides that IDs shall hold at least one meeting in a year without the attendance of non-independent directors and members of management</td>
</tr>
<tr>
<td>5.</td>
<td>No provision in New Clause 49 for familiarisation programme for NEDs</td>
<td>New Clause 49 provides that the company shall have a familiarisation programme for IDs - See Para 149.18-4g</td>
</tr>
<tr>
<td>6.</td>
<td>NEDs who are not IDs can be granted stock options with previous approval of shareholders in general meeting.</td>
<td>IDs shall not be entitled to any stock options</td>
</tr>
<tr>
<td>7.</td>
<td>No provision for time-bound replacement in case of resignation/removal of NEDs who are not IDs.</td>
<td>New Clause 49 provides for replacement of ID in case of resignation/removal not later than immediate next Board meeting or three months from</td>
</tr>
</tbody>
</table>

82
<table>
<thead>
<tr>
<th>No.</th>
<th>Sr. Non-Executive Director</th>
<th>Independent Director</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>the date of vacancy, whichever is later. This replacement is required if proportion of IDs would fall below the stipulated minimum as a result of resignation/removal.</td>
</tr>
<tr>
<td>8.</td>
<td>NED who is not ID cannot be Chairman of Audit Committee/Nomination &amp; Remuneration Committee. He can, however, chair the Stakeholders Remuneration Committee</td>
<td>Only ID can be Chairman of Audit Committee/Nomination &amp; Remuneration Committee</td>
</tr>
<tr>
<td>9.</td>
<td>No requirement to issue formal letter of appointment to NEDs who are not IDs</td>
<td>Formal letter of appointment required to be issued to IDs</td>
</tr>
<tr>
<td>10.</td>
<td>No requirement for Performance Evaluation (PE) of NEDs by the entire Board.</td>
<td>New Clause 49 requires PE of IDs by entire Board (excluding the director being evaluated)</td>
</tr>
<tr>
<td>11.</td>
<td>No provision as to maximum tenure of NEDs who are not IDs</td>
<td>Maximum tenure shall be in accordance with the Companies Act, 2013 and MCA's clarifications/circulars issued time to time in this regard.</td>
</tr>
</tbody>
</table>

**149.18-4 Independent Directors [New Clause 49(II)(B)]**

New Clause 49(II)(B) contains the following provisions regarding Independent Directors:

1. Definition of ‘Independent Director’ [New Clause 49(II)(B)(1)] [See para 149.18-4a]
2. Limit on number of independent directorships of listed companies [New Clause 49(II)(B)(2)] [See para 149.18-4b]
3. Maximum tenure of IDs [New Clause 49(II)(B)(3)] [See para 149.18-4c]
4. Formal letter of appointment to IDs [New Clause 49(II)(B)(4)] [See para 149.18-4d]
5. Performance Evaluation of IDs [New Clause 49(II)(B)(5)] [See para 149.18-4e]
6. Separate meetings of IDs [New Clause 49(II)(B)(6)] [See para 149.18-4f]
7. Familiarisation programme for IDs [New Clause 49(II)(B)(7)] [See para 149.18-4g].
149.18-4a Definition of ‘Independent Director’ [New Clause 49(II)(B)]

(1) - The expression ‘independent director’ shall mean a non-executive director, other than a nominee director of the company:

(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) apart from receiving director’s remuneration, has or had no material 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 trans-
   - 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;

Note:

One wonders what the words ‘as may be prescribed’ mean. Presumably, it is as may be prescribed under the Companies Act, 2013. SEBI needs to clarify this.

(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 2% 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 2% or more of the total voting power of the company;

(v) is

◆ a material supplier,

◆ service provider or

◆ customer or

◆ a lessor or

◆ lessee

of the company;

(f) who is less than 21 years of age.

[Note: Clause 49(I)(A)(f) says “Who is less than 21 years of age”. It should actually be “who is not less than 21 years of age”.]

Associate - “Associate” shall mean a company which is an “associate” as defined in Accounting Standard (AS) 23, “Accounting for Investments in Associates in Consolidated Financial Statements”, issued by the Institute of Chartered Accountants of India.

“Key Managerial Personnel” - “Key Managerial Personnel” shall mean “Key Managerial Personnel” as defined in section 2(51) of the Companies Act, 2013. According to section 2(51) of the Act, “Key Managerial Personnel”, in relation to a company, means:

(i) the Chief Executive Officer or the Managing Director or the Manager;
(ii) the Company Secretary;
(iii) the whole-time Director;
(iv) the Chief Financial Officer; and
(v) such other officer as may be prescribed.

According to section 2(18) of the Act, “Chief Executive Officer” means an officer of a company, who has been designated as such by it.

According to section 2(19) of the Act, “Chief Financial Officer” means a person appointed as the Chief Financial Officer of a company.

Relative- “Relative” shall mean “relative” as defined in section 2(77) of the Companies Act, 2013 and rules prescribed thereunder. According to section 2(77) of the Act, “Relative” means a person who is related to any other person as under:

- (i) they are members of a Hindu undivided family;
- (ii) they are husband and wife; or
- (iii) the one is related to the other in the manner as may be prescribed.

Rule 4 of the Companies (Specification of Definitions Details) Rules, 2014 titled ‘List of relatives in terms of clause (77) of section 2’ provides that a person shall be deemed to be the relative of another, if he or she is related to another in the following manner, namely:—

1. Father (the term “Father” includes step-father).
2. Mother (the term “Mother” includes the step-mother).
3. Son (the term “Son” includes the step-son).
4. Son’s wife.
5. Daughter.
6. Daughter’s husband.
7. Brother (the term “Brother” includes the step-brother);
8. Sister (the term “Sister” includes the step-sister).

Differences in the definition of ‘Independent Director’ given in New Clause 49 and the Companies Act, 2013 - Section 149(6) of the Companies Act, 2013 also defines ‘Independent Director’. Definitions of New Clause 49(l)(B) and section 149(6) are as under:

(i) Section 149(6) provides that, managing director or whole-time director or manager cannot be regarded as Independent Director. New Clause 49 provides that only non-executive director can qualify as Independent Director. Executive Director cannot be regarded as Independent Director.

(ii) New clause 49 prescribes two additional criteria -
   (a) the director should not be a material supplier, service provider or customer or a lessor or lessee of the company; and
   (b) should not be less than 21 years of age.
(iii) If director has or had even immaterial pecuniary relationship with the company or its holding, subsidiary or associate company or their promoters or directors during the current financial year or during the two immediately preceding financial years, he would not qualify as ID under section 149(6). Under clause 49(II)(B)(1)(c), only material pecuniary relationship of the above nature shall disqualify a director from being regarded as ID. (In both cases, receiving director’s remuneration will not be regarded as a pecuniary relationship so as to disentitle a director to be regarded as ID.)

(iv) Section 149(6) provides that ID shall possess such other qualifications as may be prescribed. Rule 5 of the Companies (Appointment and Qualification of Directors) Rules, 2014 titled ‘Qualifications of Independent Director’ provides that an ID shall possess 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.

Clause 49 is silent on this point.

(v) Both Clause 49 and section 149(6) provide that ‘nominee director’ shall not be regarded as ID. However, Clause 49 does not define ‘nominee director’. Explanation below section 149(7) of the Companies Act, 2013 defines ‘nominee director’ to mean a director:

- nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or
- appointed by any Government or other person to represent its interests.

(vi) The term ‘associate company’ in section 149(6) has to be understood as defined in section 2(6). For Clause 49 purposes, it has to be understood as defined in (AS) 23.

Definition given in section 2(6) of the Companies Act, 2013 is the same as in (AS) 23 except that:
- Controlling 20% of voting power of the other company by the investor company was only rebuttable presumption of significant influence in (AS) 23 - In section 2(6) control of at least 20% of total share capital is irrebuttable presumption of investor company’s significant influence.

(vii) Section 149(7) requires that 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 section 149(6). There is no such requirement in New Clause 49.

(viii) The term ‘promoter’ defined by section 2(69) of the Act, but not by New clause 49.

Section 2(69) defines ‘promoter’ to mean a person—

(a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or

(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or

(c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

Nothing in (c) above shall apply to a person who is acting merely in a professional capacity.

(ix) Para IV of Schedule IV to the Companies Act, 2013 provides that:

(1) Appointment process of independent directors shall be independent of the company management;

While selecting independent directors, the Board shall ensure that there is appropriate balance of skills, experience and knowledge in the Board so as to enable the Board to discharge its functions and duties effectively;

(2) The appointment of independent directors of the company shall be approved at the meeting of the shareholders;

(3) The explanatory statement attached to the notice of the meeting for approving the appointment of independent director shall include a statement that in the opinion of the Board, the independent director proposed to be appointed fulfils the conditions specified in the Act and the rules made thereunder and that the proposed director is independent of the management.

New Clause 49 is silent on the above aspects covered by Schedule IV.
Cumulative Impact of New Clause 49 and Companies Act, 2013 - Thus, to qualify as an ‘independent director’, a director will have to satisfy the following criteria:

(i) he should be a non-executive director.
(ii) he should not be a nominee director. A nominee director may qualify as NED but not as ID.
(iii) he should satisfy the criteria in Clause 49(II)(B)(1) except that the ‘material pecuniary relationship’ requirement in clause 49(II)(B)(I)(c) should be read as ‘any pecuniary relationship’ whether material or not.

It must be noted that clause 49(II)(V)(I)(c) is less stringent than section 149(6) and hence the above reading of clause 49(II)(B)(I)(c) will ensure compliance with section 149(6) as well as clause 49(II)(B)(I)(c).
(iv) he should possess 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.

It should also be ensured by a listed company that independent director is not an independent director in 6 other listed companies.

149.18-4b Limit on Number of Independent Directorship of listed company [New Clause 49(II)(B)(2)] - New Clause 49(II)(B)(2) provides as under:

(a) person shall not serve as an independent director in more than 7 listed companies.

(b) any person who is serving as a whole time director in any listed company shall serve as an independent director in not more than 3 listed companies.

149.18-4c Maximum tenure of IDs [New Clause 49(II)(B)(3)] - New Clause 49(II)(B)(3) provides as that the maximum tenure of Independent directors shall be in accordance with:

◆ the Companies Act, 2013 and
clarifications/circulars issued by the Ministry of Corporate Affairs in this regard from time to time.

Sub-sections (10) and (11) of section 149 provides as under:

- No Independent Director shall have a tenure exceeding in the aggregate a period of five consecutive years on the Board of a company.
- He shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.
- 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.
- 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.
- Any tenure of an independent director on the date of commencement of this Act shall not be counted as a term.

Section 149(13) provides that the provisions in respect of retirement of directors by rotation [see section 152(6)/(7)] shall not be applicable to appointment of independent directors.

**149.18-4d Formal Letter of appointment of IDs [New Clause 49(II)(B)(4)]**

- Clause 49(II)(B)(4) provides as under:
  (a) The company shall issue a formal letter of appointment to independent directors in the manner as provided in the Companies Act, 2013. Para IV(4) of Schedule IV to the Companies Act, 2013 provides that the letter of appointment, shall set out:
    (a) the term of appointment;
    (b) the expectation of the Board from the appointed director; the Board-level committees in which the director is expected to serve and its tasks;
    (c) the fiduciary duties that come with such an appointment along with accompanying liabilities;
    (d) provision for Directors and Officers (D and O) insurance, if any;
    (e) the Code of Business Ethics that the company expects its directors and employees to follow;
    (f) the list of actions that a director should not do while functioning as such in the company; and
the remuneration, mentioning periodic fees, reimbursement of
expenses for participation in the Boards and other meetings and
profit related commission, if any.

(b) The terms and conditions of appointment shall be disclosed on the
website of the company.

149.18-4e Performance Evaluation of IDs [New Clause 49(II)(B)(5)] -
New Clause 49(II)(B)(5) provides as under:

1. The Nomination Committee shall lay down the evaluation criteria
for performance evaluation of independent directors.

2. The company shall disclose the criteria for performance evaluation,
as laid down by the Nomination Committee, in its Annual Report.

3. The performance evaluation of independent directors shall be done
by the entire Board of Directors (excluding the director being
evaluated).

4. On the basis of the report of performance evaluation, it shall be
determined whether to extend or continue the term of appointment
of the independent director.

Para VIII of Schedule IV to the Companies Act, 2013 provides as under:

(1) The performance evaluation of independent directors shall be done
by the entire Board of Directors, excluding the director being evalu-
ated.

(2) On the basis of the report of performance evaluation, it shall be
determined whether to extend or continue the term of appointment
of the independent director.

Part V of Schedule IV provides that the reappointment of independent
director shall be on the basis of report of performance evaluation.

Cumulative impact of New Clause 49 and the Companies Act, 2013 is that
Performance Evaluation of Independent Directors of listed companies shall
be done by the Board based on criteria laid down by the Nomination Com-
mittee. Such evaluation shall be the basis for re-appointment.

149.18-4f Separate meetings of the IDs [New Clause 49(II)(B)(6)] -
Clause 49(II)(B)(6) provides as under:

(a) The independent directors of the company shall
◆ hold at least one meeting in a year,
◆ without the attendance of non-independent directors and mem-
bers of management.

All the independent directors of the company shall strive to be
present at such meeting.

(b) The independent directors in the meeting shall, inter alia:
(i) review the performance of non-independent directors and the
Board as a whole;
(ii) review the performance of the Chairperson of the company, taking into account the views of executive directors and non-executive directors;

(iii) 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.

Identical provisions are contained in Para VI of Schedule IV to the Companies Act, 2013.

149.18-4g Familiarisation programme for IDs [New Clause 49(II)(B)(7)]
- New Clause 49(II)(B)(7) provides as under:
  (a) The company shall, through various programmes, familiarise the independent directors with:
     - the company,
     - their roles, rights, responsibilities in the company,
     - nature of the industry in which the company operates,
     - business model of the company, etc.
  (b) The details of such familiarisation programme shall be disclosed on the Company’s website and a web link thereto shall also be given in the Annual Report.

There is no provision in the Companies Act, 2013 regarding familiarisation programme for IDs. Listed companies will have to comply with new clause 49(II)(B)(7).

149.18-5 Non-executive directors’ compensation and disclosures [New Clause 49(II)(C)]
- New Clause 49(II)(C) provides as under:
  - All fees/compensation, if any paid to non-executive directors, including independent directors,
    - shall be fixed by the Board of Directors and
    - shall require previous approval of shareholders in general meeting.
  - The shareholders’ resolution shall specify the limits for the maximum number of stock options that can be granted to non-executive directors, in any financial year and in aggregate. Independent directors shall not be entitled to any stock option.
  - The requirement of obtaining prior approval of shareholders in general meeting shall not apply to payment of sitting fees to non-executive directors, if made within the limits prescribed under the Companies Act, 2013 for payment of sitting fees without approval of
the Central Government. Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides that a company may pay a sitting fee to a director for attending meetings of the Board or committees thereof, such sum as may be decided by the Board of directors thereof which shall not exceed ‘1,00,000 per meeting of the Board or committee thereof.

149.18-6 Board meetings [New Clause 49(II)(D)(1)]
The Board shall meet:
- at least 4 times a year,
- with a maximum time gap of 120 days between any two meetings.
The above provisions of New Clause 49(II)(D)(1) are exactly the same as section 149(1) of the Companies Act, 2013.

149.18-7 Minimum information to be made available to the board [New Clause 49(II)(D)(1)]
The minimum information to be made available to the Board is given in Annexure X to the Listing Agreement which is as under:
1. Annual operating plans and budgets and any updates.
2. Capital budgets and any updates.
3. Quarterly results for the company and its operating divisions or business segments.
4. Minutes of meetings of audit committee and other committees of the board.
5. The information on recruitment and remuneration of senior officers just below the board level, including appointment or removal of Chief Financial Officer and the Company Secretary.
6. Show cause, demand, prosecution notices and penalty notices which are materially important.
7. Fatal or serious accidents, dangerous occurrences, any material effluent or pollution problems.
8. Any material default in financial obligations to and by the company, or substantial non-payment for goods sold by the company.
9. Any issue, which involves possible public or product liability claims of substantial nature, including any judgment or order which, may have passed strictures on the conduct of the company or taken an adverse view regarding another enterprise that can have negative implications on the company.
10. Details of any joint venture or collaboration agreement.
11. Transactions that involve substantial payment towards goodwill, brand equity, or intellectual property.

12. Significant labour problems and their proposed solutions. Any significant development in Human Resources/Industrial Relations front like signing of wage agreement, implementation of Voluntary Retirement Scheme etc.

13. Sale of material nature, of investments, subsidiaries, assets, which is not in normal course of business.

14. Quarterly details of foreign exchange exposures and the steps taken by management to limit the risks of adverse exchange rate movement, if material.

15. Non-compliance of any regulatory, statutory or listing requirements and shareholders service such as non-payment of dividend, delay in share transfer etc.

The above requirements are exactly the same as under the Old Clause 49. The Companies Act, 2013 contains no provisions on the above lines. Listed companies shall have to furnish minimum information as above to comply with New Clause 49.

149.18-8 Limits on Membership/Chairmanship of Committees [New Clause 49(II)(D)(2)]

New Clause 49(II)(D)(2) provides as under:

- A director shall not
  - be a member in more than 10 committees or
  - act as Chairman of more than 5 committees across all companies in which he is a director.

- For the purpose of considering the limit of the committees on which a director can serve,
  - all public limited companies, whether listed or not, shall be included and
  - all other companies including private limited companies, foreign companies and companies under section 8 of the Companies Act, 2013 shall be excluded.

- For the purpose of reckoning the limit, Chairmanship/ membership of the Audit Committee and the Stakeholders' Relationship Committee alone shall be considered.

- Every director shall inform the company about the committee positions he occupies in other companies and notify changes as and when they take place.
The following points flow form a plain reading of New Clause 49(II)(D)(3):

- The limit is in terms of number of Committees and not in terms of number of companies. If a director is member of Audit Committee and also of Stakeholders Relationship committee in same company, this will count as 2 Committees though of the same company.
- If a director is a chairman of Audit Committee or the Stakeholders’ Relationship Committee, this will be counted and computed the limit of 10 membership as well as 5 chairmanships. Chairman is also a member of the Committee. [This is based on the analogy of the riddle “2 mothers and 2 daughters are seated on 3 chairs. How is this possible?” (The three ladies seated on the three chairs are grandmother, mother and daughter. The mother is counted among the number of daughters as well as number of mothers.)]

149.18-9 Periodic compliance review by the board [New Clause 49(II)(D)(3)]

The Board shall periodically review:

- compliance reports of all laws applicable to the company, prepared by the company.
- as well as steps taken by the company to rectify instances of non-compliances.

149.18-10 Resignation/removal of ID [New Clause 49(II)(D)(4)(5)]

New Clause 49(II)(D)(4)(5) provide as under:

- An independent director who resigns or is removed from the Board of the Company shall be replaced by a new independent director at the earliest but not later than the immediate next Board meeting or three months from the date of such vacancy, whichever is later.
- Where the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation or removal, as the case may be, the requirement of replacement by a new independent director shall not apply.

SEBI had clarified the corresponding provision in Old Clause 49 which provided for replacement of ID within 180 days as under:

“The gap between resignation/ removal of an independent director and appointment of another independent director in his place shall not exceed 180 days. However, this provision would not apply in case a company fulfils the minimum requirement of independent directors in its Board, i.e., one-third or one-half as the case may be, even without filling the vacancy created by such resignation/ removal.”

[Circular No. CFD/ DIL/ CG/ 1/ 2008/ 08/ 04, dated 8-4-2008]
Para VI of Schedule IV provides as under:

1. The resignation or removal of an independent director shall be in the same manner as is provided in sections 168 and 169 of the Act;

2. An independent director who resigns or is removed from the Board of the company shall be replaced by a new independent director within a period of not more than 180 days from the date of such resignation or removal, as the case may be;

3. Where the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation or removal, as the case may be, the requirement of replacement by a new independent director shall not apply.

149.18-10a Does New Clause 49(II)(D)(4)/(5) apply to Vacancies Caused by reasons other than resignation or removal? - A plain reading of clause 49(II)(D)(4)/(5) as well as Para VI of Schedule IV shows that these provisions for time-bound filling up of vacancies of Independent Directorships arise only when they arise due to resignation or removal. These provisions would not apply where the vacancies arise due to reasons other than resignation or removal such as death, disqualification etc.

149.18-10b Cumulative impact of New Clause 49(II)(D)(4)/(5) and Companies Act, 2013 - The provisions of New Clause 49(II)(D) and Schedule IV are the same except the time-limits. New Clause 49(II)(D)(4) provides that the vacancy must be filled not later than the date of following:

(a) immediate next Board meeting, or

(b) three months from the date of such vacancy.

Schedule IV provides a time-limit of 6 months from the date of such vacancy. Since gap between 2 Board meetings cannot exceed 120 days, the time limit in clause 49(II)(D)(4)/(5) is expected to be shorter than Schedule IV time-limit.

As New Clause 49 does not provide any procedure for resignation or removal of IDs, the procedure in sections 168 and 169 of the Companies Act, 2013 needs to be followed.

149.18-11 Succession Planning [New Clause 49(II)(D)(6)]

New Clause 49(II)(D)(6) provides that the Board of the company shall satisfy itself that plans are in place for orderly succession for appointments to the Board and to senior management.
149.18-12 Code of Conduct for all directors & senior management [New Clause 49(II)(E)]

New Clause 49(II)(E) provides as under:

- The Board shall lay down a code of conduct for all Board members and senior management of the company.
- The term “senior management” shall mean personnel of the company who are members of its core management team excluding Board of Directors. Normally, this would comprise all members of management one level below the executive directors, including all functional heads.
- The Code of Conduct shall suitably incorporate the duties of Independent Directors as laid down in the Companies Act, 2013. [See para 149.18-12a below]
- The code of conduct shall be posted on the website of the company.
- All Board members and senior management personnel shall affirm compliance with the code on an annual basis. The Annual Report of the company shall contain a declaration to this effect signed by the CEO.

149.18-12a Code of conduct for IDs [Section 149(8)] - The company and independent directors shall abide by the provisions specified in Schedule IV. The provisions of Schedule IV are as under:

I. 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 best corporate governance practices.

II. 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.

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;

(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 is required by law.

149.18-13 Liability of independent director [New Clause 49(II)(E)]

New Clause 49(II)(E) provides that an independent director shall be held liable, only in respect of such acts of omission or commission by a company:

◆ which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or

◆ where he had not acted diligently with respect of the provisions contained in the Listing Agreement.

Section 149(11) of the Companies Act, 2013 provides that notwithstanding anything contained in this Act,—

(i) an independent director,

(ii) a non-executive director not being promoter or key managerial personnel,

shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable
through Board processes, and with his consent or connivance or where he had not acted diligently.

It would appear that the formal letter of appointment issued to every Independent Director would have to incorporate the liability limitation clause in New Clause 49(II)(E)(4).

149.18-14 Whistle Blower Policy [New Clause 49(II)(F)]

New Clause 49(II)(F) provides as under:

- The company shall establish a vigil mechanism for directors and employees to report concerns about
  - unethical behaviour,
  - actual or suspected fraud or
  - violation of the company's code of conduct or ethics policy.

- This mechanism should also provide for:
  - adequate safeguards against victimization of director(s)/employee(s) who avail of the mechanism and
  - also provide for direct access to the Chairman of the Audit Committee in exceptional cases.

- The details of establishment of such mechanism shall be disclosed by the company on its website and in the Board's report.

Section 177(9)/(10) of the Companies Act, 2013 as under:

- Every listed company or such class or classes of companies, as may be prescribed, shall establish a vigil mechanism for directors and employees to report genuine concerns in such manner as may be prescribed.

- The details of establishment of such mechanism shall be disclosed by the company on its website, if any, and in the Board's Report.

- The vigil mechanism shall provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases.

Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides as under:

(1) Every listed company and the companies belonging to the following class or classes shall establish a vigil mechanism for their directors and employees to report their genuine concerns or grievances—
   (a) the Companies which accept deposits from the public;
   (b) the Companies which have borrowed money from banks and public financial institutions in excess of fifty crore rupees.
(2) The companies which are required to constitute an audit committee shall oversee the vigil mechanism through the committee.

If any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the others on the committee would deal with the matter on hand.

(3) In case of other companies, the Board of directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism to whom other directors and employees may report their concerns.

(4) The vigil mechanism shall provide for:

(i) an adequate safeguard against victimisation of employees and directors who avail of the vigil mechanism and

(ii) also direct access to the Chairperson of the Audit Committee or the director nominated to play the role of Audit Committee, as the case may be, in exceptional cases.

(5) In case of repeated frivolous complaints being filed by a director or an employee, the audit committee or the director nominated to play the role of audit committee may take suitable action against the concerned director or employee including reprimand.

149.19 Audit Committee [Clause 49(III)]

“The ultimate responsibility of the board for reviewing and approving the annual report and accounts and the half-year report remains undiminished by the appointment of an audit committee, but it provides an important assurance that a key area of a board’s duties will be rigorously discharged” — Cadbury Committee Report.

“Audit Committees will fall short of their potential if they lack the understanding to deal adequately with the auditing or accounting matters that they are likely to face” — Cadbury, 1992.

149.19-1 Comparative study with old clause 49

New Clause 49(III) corresponds to Old Clause 49(II). The differences between them are as under:

<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Old Clause 49</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clause 49(III) - Audit Committee</td>
<td>Clause 49(II) - Audit Committee</td>
<td>No change except that role of audit committee will cover the following additional aspects:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(i) review and monitor auditor’s independence and performance</td>
</tr>
</tbody>
</table>
149.19-2 **New clause 49 vis-a-vis Companies Act, 2013**

Matters covered by both section 177 and new clause 49.

A comparison of the requirements of New Clause 49 and section 177 of the Companies Act, 2013 as regards audit committee is as under:

<table>
<thead>
<tr>
<th>New Clause 49 of the Listing Agreement</th>
<th>Section 177 of the Companies Act, 2013</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Composition of Audit Committee</strong></td>
<td>The audit committee shall have minimum three directors as members. Two-thirds of the members of audit committee shall be independent directors.</td>
<td>New Clause 49 requirements are stricter. Listed Companies should ensure that two thirds of the members of audit committee are independent directors to avoid violation of either Clause 49 or section 177</td>
</tr>
<tr>
<td><strong>Financial literacy of members</strong></td>
<td>Majority of its members including its chairperson having ability to read and understand financial statements.</td>
<td>New Clause 49 requirements are stricter. All members of audit committee to be financially literate.</td>
</tr>
<tr>
<td><strong>Attendance of statutory auditors at audit committee meetings</strong></td>
<td>The auditors of a company and the key managerial personnel shall have a right to be heard in the meetings of the Audit Committee when it</td>
<td>Section 177 much stricter than New clause 49.</td>
</tr>
</tbody>
</table>
committee, but on occasions it may also meet without the presence of any executives of the company. The finance director, head of internal audit and a representative of the statutory auditor may be present as invitees for the meetings of the audit committee.

<table>
<thead>
<tr>
<th>New Clause 49 of the Listing Agreement</th>
<th>Section 177 of the Companies Act, 2013</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>committee, but on occasions it may also meet without the presence of any executives of the company. The finance director, head of internal audit and a representative of the statutory auditor may be present as invitees for the meetings of the audit committee</td>
<td>considers the auditor’s report but shall not have the right to vote.</td>
<td></td>
</tr>
</tbody>
</table>

**Additional requirements stipulated by New Clause 49 of the Listing Agreement on which section 177 (relating to audit committee) is silent:**

(i) The company secretary shall act as secretary to the committee.

(ii) The audit committee shall meet at least four times in a year. The gap between two meetings should not be more than four months.

(iii) The quorum of the audit committee shall be two members or one-third of the members of the audit committee whichever is higher and minimum of two independent directors be present.

(iv) The powers and role of the audit committee are contained in New Clause 49(III)(C) & (D).

(v) At least one member shall have accounting or related financial management expertise. A member will be considered to have accounting or related financial management expertise if he or she possesses:

- experience in finance or accounting, or
- requisite professional certification in accounting, or
- any other comparable experience or background which results in the individual’s financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

(vi) The Audit Committee shall mandatorily review the following information:

1. Management discussion and analysis of financial condition and results of operations;
2. Statement of significant related party transactions (as defined by the Audit Committee), submitted by management;
3. Management letters/letters of internal control weaknesses issued by the statutory auditors;
4. Internal audit reports relating to internal control weaknesses; and

5. The appointment, removal and terms of remuneration of the Chief internal auditor shall be subject to review by the Audit Committee - New Clause 49(III)(E)

(vii) The Audit Committee of the listed holding company shall also review the financial statements, in particular, the investments made by the unlisted subsidiary company. [New Clause 49(V)(B)]

(viii) All Related Party Transactions (RPTs) shall require prior approval of the Audit Committee. However, the Audit Committee may grant omnibus approval to RPTs subject to certain specified conditions [New Clause 49(VII)(D)]

Additional requirements stipulated as per section 177 of the Companies Act, 2013 (relating to audit committee) on which New Clause 49 of the Listing Agreement is silent:

(i) The audit committee constituted shall act in accordance with terms of reference to be specified in writing by the Board.

(ii) If the Board does not accept the recommendations of the audit committee, it shall disclose the same in the Board’s report under section 134(3) along with the reasons therefor.

149.19-3 Qualified and Independent Audit Committee [New Clause 49(III)(A)]

A qualified and independent audit committee shall be set up, giving the terms of reference subject to the conditions discussed below.

New Clause 49(I)(D)(3)(k) provides that when committees of the board are established, their mandate, composition and working procedures should be well defined and disclosed by the Board. The Board resolution constituting the Audit Committee should comply with New Clause 49(I)(D)(3)(k).

149.19-3a Composition of the Audit Committee - New clause 49(III)(A) provides as under:

- The audit committee shall have minimum 3 directors as members.

- **Two-thirds** of the members of audit committee shall be independent directors.

  (Interestingly, New Clause 49(III)(A) stipulates ‘two-thirds’ and not ‘at least two-thirds’ or ‘not less than two-thirds’ or ‘minimum two-thirds’)

- All members of audit committee shall be financially literate (i.e. having the ability to read and understand basic financial statements i.e. balance sheet, profit and loss account, and statement of cash flows)
At least one member shall have accounting or related financial management expertise.

**Note:**
A member will be considered to have accounting or related financial management expertise if he or she possesses:

- experience in finance or accounting, or
- requisite professional certification in accounting, or
- any other comparable experience or background which results in the individual’s financial sophistication, including being or having been:
  - a chief executive officer,
  - chief financial officer or
  - other senior officer with financial oversight responsibilities.

**149.19-3b Chairman of the Audit Committee** - New Clause 49(III)(A) provides as under:

- The Chairman of the Audit Committee shall be an independent director.
- The Chairman of the Audit Committee shall be present at Annual General Meeting to answer shareholder queries.

**149.19-3c Invitees to the Audit Committee Meetings** - The Audit Committee may invite such of the executives, as it considers appropriate (and particularly the head of the finance function) to be present at the meetings of the committee, but on occasions it may also meet without the presence of any executives of the company. The finance director, head of internal audit and a representative of the statutory auditor may be present as invitees for the meetings of the audit committee.

**149.19-3d Secretary** - The Company Secretary shall act as the secretary to the committee.

**149.19-4 Meetings of Audit Committee [New Clause 49(III)(B)]**

New Clause 49(III)(B) provides as under:

**Number & Frequency of meetings**

- The Audit Committee should meet at least four times in a year.
- Not more than four months shall elapse between two meetings.

**The quorum shall be**

- either two members or one third of the members of the audit committee whichever is greater,
but there should be a minimum of two independent members present.

149.19-5 Powers of Audit Committee [New Clause 49(III)(C)]

The Audit Committee shall have powers, which should include the following:

1. To investigate any activity within its terms of reference.
2. To seek information from any employee.
3. To obtain outside legal or other professional advice.
4. To secure attendance of outsiders with relevant expertise, if it considers necessary.

149.19-6 Role of the Audit Committee [New Clause 49(III)(D)]

The role of the Audit Committee shall include the following:

1. Oversight of the company's financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible;
2. Recommendation for appointment, remuneration and terms of appointment of auditors of the company;
3. Approval of payment to statutory auditors for any other services rendered by the statutory auditors;
4. Reviewing, with the management, the annual financial statements and auditor's report thereon before submission to the board for approval, with particular reference to:
   (a) Matters required to be included in the Director's Responsibility Statement to be included in the Board's report in terms of clause (c) of sub-section (3) of section 134 of the Companies Act, 2013
   (b) Changes, if any, in accounting policies and practices and reasons for the same
   (c) Major accounting entries involving estimates based on the exercise of judgment by management
   (d) Significant adjustments made in the financial statements arising out of audit findings
   (e) Compliance with listing and other legal requirements relating to financial statements
   (f) Disclosure of any related party transactions
      Note: The term “related party transactions” shall have the same meaning as provided in Clause 49(VII) of the Listing Agreement
   (g) Qualifications in the draft audit report
5. Reviewing, with the management, the quarterly financial statements before submission to the board for approval;

6. ◆ Reviewing, with the management,
   ◆ the statement of uses/application of funds raised through an issue (public issue, rights issue, preferential issue, etc.),
   ◆ the statement of funds utilized for purposes other than those stated in the offer document/prospectus/notice and
   ◆ the report submitted by the monitoring agency monitoring the utilisation of proceeds of a public or rights issue, and
   ◆ making appropriate recommendations to the Board to take up steps in this matter; [See also New Clause 49(VIII)(I) - See Para 149.24-10/11]

7. Review and monitor
   ◆ the auditor’s independence and performance, and
   ◆ effectiveness of audit process;

8. Approval or any subsequent modification of transactions of the company with related parties;

9. Scrutiny of inter-corporate loans and investments;

10. Valuation of undertakings or assets of the company, wherever it is necessary;

11. Evaluation of internal financial controls and risk management systems;

12. Reviewing, with the management
    ◆ performance of statutory and internal auditors,
    ◆ adequacy of the internal control systems;

13. Reviewing the adequacy of internal audit function, if any, including :
    ◆ the structure of the internal audit department,
    ◆ staffing and seniority of the official heading the department,
    ◆ reporting structure coverage and frequency of internal audit.

14. Discussion with internal auditors of any significant findings and follow up thereon;

15. Reviewing the findings of any internal investigations by the internal auditors into matters where :
    ◆ there is suspected fraud or irregularity or
    ◆ a failure of internal control systems of a material nature and
    ◆ reporting the matter to the board;

16. Discussion with statutory auditors
    ◆ before the audit commences, about the nature and scope of audit
    ◆ as well as post-audit discussion to ascertain any area of concern;
17. To look into the reasons for substantial defaults in the payment to the
◆ depositors,
◆ debenture holders,
◆ shareholders (in case of non-payment of declared dividends) and
◆ creditors;
18. To review the functioning of the Whistle Blower mechanism;
19. Approval of appointment of CFO (i.e., the whole-time Finance Direc-
tor or any other person heading the finance function or discharging
that function) after assessing the qualifications, experience and
background, etc. of the candidate;
20. Carrying out any other function as is mentioned in the terms of
reference of the Audit Committee.

149.19-7 Review of information by Audit Committee [New Clause
49(III)(E)]
The Audit Committee shall mandatorily review the following information:
1. Management discussion and analysis of financial condition and
results of operations;
2. Statement of significant related party transactions (as defined by the
Audit Committee), submitted by management;
3. Management letters/letters of internal control weaknesses issued by
the statutory auditors;
4. Internal audit reports relating to internal control weaknesses; and
5. The appointment, removal and terms of remuneration of the Chief
internal auditor shall be subject to review by the Audit Committee.

149.19-8 Checklist for verification by auditor/practicing company sec-
retary
◆ Ascertain from the minutes book of the Board Meetings whether a
qualified and independent audit committee is set up which com-
prises at least 3 directors as members.
◆ Ascertain whether two-thirds of members of audit committee are
independent directors and whether all members are financially
literate and at least one member has accounting or related financial
management expertise.
◆ Ascertain from the minutes book of the audit committee whether
■ audit committee has met at least 4 times in a year
■ not more than 4 months have elapsed between two meetings
■ quorum was present in every meeting (either two members or
one third of the members of the audit committee whichever is
greater, but there should be a minimum of two independent members present)

- Ascertain whether Chairman of Audit Committee was an ID.
- Ascertain from the Annual General Meeting (AGM) attendance book and minute book whether the chairman of the audit committee was present at such meeting to answer shareholders queries.
- The AGM of the financial year which is under audit would be held subsequent to the auditor submitting the certificate of compliance of conditions of corporate governance. Hence, the ICAI opines that the requirement would be to verify this condition with reference to the last AGM held. In case the Chairman has not been present at the AGM, auditor should ensure that this is suitably disclosed.
- Ascertain from the minutes book of the audit committee whether finance director, head of internal audit and a representative of the statutory auditor may be present as invitees for the meetings of the audit committee.
- Ascertain from the minutes book of the audit committee whether audit committee has reviewed information which is mandatorily required to review - See New Clause 49(III)(E)

149.20 Nomination and Remuneration Committee [Clause 49(IV)]

“......Its (Nomination Committee) an attempt to prevent the Board from becoming a cosy club, in which incumbent members appoint like minded people to join their ranks....” ‘Directors An A-Z Guide’ by Bob Tricker.

149.20-1 Comparative study with old clause 49

<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Old Clause 49</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clause 49(IV)- Nomination and Remuneration Committee</td>
<td>It was a non-mandatory requirement</td>
<td>New mandatory requirement introduced in view of Companies Act, 2013 making it mandatory for listed companies to set up NRCs</td>
</tr>
</tbody>
</table>

149.20-2 New Clause 49 vis-a-vis Companies Act, 2013

<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Companies Act, 2013</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clause 49(IV)- Nomination and Remuneration Committee</td>
<td>Section 178 of the Companies Act, 2013 - Nomination and Remuneration Committee</td>
<td>New requirement introduced in view of Companies Act, 2013 making it mandatory for listed companies to set up NRCs</td>
</tr>
</tbody>
</table>

New Clause 49 provides that Chairman of the NRC shall be an ID. Section 178 is silent on this.
New Clause 49 envisages that the role of the committee shall inter alia include (i) formulation of criteria for evaluation of IDs and the Board (ii) Devising a policy on Board Diversity. Section 178 doesn’t provide for these.

Section 178 makes it obligatory for chairman of NRC or in his absence any other member of the committee authorized in this behalf shall attend the general meetings. New Clause 49 makes it discretionary for chairman to attend AGM.

<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Companies Act, 2013</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>New Clause 49 envisages that the role of the committee shall inter alia include (i) formulation of criteria for evaluation of IDs and the Board (ii) Devising a policy on Board Diversity. Section 178 doesn’t provide for these. Section 178 makes it obligatory for chairman of NRC or in his absence any other member of the committee authorized in this behalf shall attend the general meetings. New Clause 49 makes it discretionary for chairman to attend AGM.</td>
</tr>
</tbody>
</table>

149.20-3 Nomination and Remuneration Committee [New Clause 49(IV)(A)]

The company through its Board of Directors shall constitute a Nomination and Remuneration Committee.

149.20-3a Composition of NRC - The Composition of NRC shall be as under:

- At least three directors,
- All of whom shall be non-executive directors and
- At least half of them shall be independent.

The chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.

149.20-3b Chairman of NRC - Chairman of the committee shall be an independent director.

149.20-4 Role of nomination and remuneration committee [New Clause 49(IV)(B)]

The role of the committee shall, inter alia, include the following:

1. ◆ Formulation of the criteria for determining
   - qualifications,
   - positive attributes and
   - independence of a director and
   - recommend to the Board a policy, relating to the remuneration of the directors, key managerial personnel and other employees;

2. Formulation of criteria for evaluation of Independent Directors and the Board;

3. Devising a policy on Board diversity.
4. Identifying persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, and recommend to the Board their appointment and removal. The company shall disclose the remuneration policy and the evaluation criteria in its Annual Report.

It is interesting that New Clause 49 requires the NRC to devise a policy on ‘Board Diversity’. However, it does not explain what ‘Board Diversity’ means.

149.20-5 Chairman of NRC to attend AGM [New Clause 49(IV)(C)]

- The Chairman of the nomination and remuneration committee could be present at the Annual General Meeting, to answer the shareholders’ queries.
- However, it would be up to the Chairman to decide who should answer the queries.

149.20-6 Checklist for verification by auditor/practicing company secretary

- Ascertain from the minutes book of Board meetings whether the company has set up a nomination and remuneration committee comprising at least three directors, all of whom shall be non-executive directors and at least half shall be independent.
- Ascertain from the minutes book of NRC meetings whether the NRC has:
  1. Formulated the criteria for determining qualifications, positive attributes and independence of a director;
  2. Recommended to the Board a policy, relating to the remuneration of the directors, key managerial personnel and other employees;
  3. Formulated criteria for evaluation of Independent Directors and the Board;
  4. Devised a policy on Board diversity;
  5. Identified persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, and recommend to the Board their appointment and removal. The company shall disclose the remuneration policy and the evaluation criteria in its Annual Report.

149.21 Subsidiary Companies [Clause 49(V)]

149.21-1 Comparative study with Old Clause 49

The differences between New Clause 49 and Old Clause 49 are as under:
<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Old Clause 49</th>
<th>Differences</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Clause 49(V) - Subsidiary Companies</strong></td>
<td><strong>Clause 49(III)- Subsidiary Companies</strong></td>
<td>New requirements : Special resolution required by Clause 49 for:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(i) <strong>Desubsidiarisation of material subsidiary</strong> - Disposal of shares in material subsidiary which would reduce its shareholding (either on its own or together with other subsidiaries) to less than 50% or cease the exercise of control over the subsidiary</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(ii) <strong>Sale of more than 20% of assets of material subsidiary</strong> - Selling, disposing and leasing of assets of material subsidiary on an aggregate basis during a financial year</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No special resolution required if (i)/(ii) is under a scheme of arrangement duly approved by a Court/Tribunal.</td>
</tr>
</tbody>
</table>

**149.21-2 New Clause 49 vis-a-vis the Companies Act, 2013**

There is no corresponding requirement in the Companies Act, 2013. However, New Clause 49 does not define the expressions ‘holding company’, ‘subsidiary company’, ‘free reserves’, ‘net worth’, ‘paid-up capital’. All these expressions are defined by the Companies Act, 2013.

**149.21-3 Definition of ‘subsidiary company’**

New Clause 49 does not define the expressions ‘holding company’, ‘subsidiary company’. These expressions are defined by the Companies Act, 2013.

According to section 2(87) of the Companies Act, 2013, “Subsidiary company” or “subsidiary”, in relation to any other company (“the holding company”), means a company in which the holding company—

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than 50% of the total share capital [see **Para 149.21-3a**] either at its own or together with one or more of its subsidiary company.

For a company to have the legal status of holding company of another, it is not necessary that it must both be a member of that other company (i.e. subsidiary) and also control the composition of its Board of directors. It is enough to have control over the composition of the Board of directors of the other company. - Oriental Industrial Investment Corpn. Ltd. v. Union of India [1981] 51 Comp. Cas. 487 (Delhi)
149.21-3a **Total share capital** - Rule 2(1)(r) of the Companies (Specification of Definitions Details) Rules, 2014 provides that “Total Share Capital”, means the aggregate of the —

(a) paid-up equity share capital; and
(b) convertible preference share capital.

149.21-3b **‘Control’** - Explanation to New Clause 49(VII)(B) provides that for the purposes of New Clause 49(V) and New Clause 49(VII)(B), ‘control’ shall have the same meaning as defined in SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

The definition of ‘Control’ in Regulation 2(1)(e) of the SEBI (SAST) Regulations, 2011 has the following ingredients:

- “Control” includes the right or the ability to appoint a majority of the directors or to control the management or policy decisions.
- The aforesaid rights may be exercisable by a person or persons acting individually or in concert.
- The aforesaid rights may be exercisable directly or indirectly including by virtue of their shareholding or management rights or shareholding agreements or voting agreements or in any other manner.

This definition differs from the definition of ‘control’ in section 2(27) of the Companies Act, 2013. Though both the definitions are inclusive definitions, the definition in SAST Regulations includes ‘ability’ in addition to the ‘right’ to appoint a majority of directors or to control the management or policy decisions. Thus, the definition in SAST Regulations is wider than the definition in section 2(27).

149.21-3A **Applicability of various requirements of New clause 49(v) to different subsidiaries of a listed holding company**

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Sub-Clause No. of new clause 49</th>
<th>Requirement in brief</th>
<th>Applicable in respect of which subsidiaries</th>
<th>Materiality criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>(V)(A)</td>
<td>At least one ID of holding company shall be a director on the Board of every material non-listed Indian subsidiary company</td>
<td>Applicable in respect of every material non-listed Indian subsidiary company</td>
<td>Explanation(i) to Clause 49(V)</td>
</tr>
<tr>
<td>2.</td>
<td>(V)(B)</td>
<td>Audit Committee to review financial statements, in particular, investments made by</td>
<td>Applicable in respect of every unlisted subsidiary company, whether Indian or</td>
<td>—</td>
</tr>
<tr>
<td>Sl. No.</td>
<td>Sub-Clause No. of new clause 49</td>
<td>Requirement in brief</td>
<td>Applicable in respect of which subsidiaries</td>
<td>Materiality criteria</td>
</tr>
<tr>
<td>--------</td>
<td>-------------------------------</td>
<td>---------------------</td>
<td>---------------------------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>3.</td>
<td>(V)(C)</td>
<td>Minutes of unlisted subsidiary company to be placed before the Board meeting of listed holding company</td>
<td>Applicable in respect of every unlisted subsidiary company, whether Indian subsidiary or foreign subsidiary</td>
<td>—</td>
</tr>
<tr>
<td>4.</td>
<td>(V)(C)</td>
<td>A statement of all significant transactions and arrangements entered into by unlisted subsidiary company to be placed before the Board of listed holding company</td>
<td>Applicable in respect of every unlisted subsidiary company, whether Indian subsidiary or foreign subsidiary</td>
<td>Sub-Clause (V)(D) and (V)(E) of new clause 49 (See also Explanation (ii) to clause 49(V))</td>
</tr>
<tr>
<td>5.</td>
<td>(V)(D)</td>
<td>Formulate and disclose a policy for determining material subsidiaries</td>
<td>Applicable in respect of every material subsidiary, whether listed or unlisted and whether Indian or foreign</td>
<td>Sub-Clause (V)(D) and (V)(E) of new clause 49</td>
</tr>
<tr>
<td>6.</td>
<td>(V)(E)</td>
<td>Definition of material subsidiary for purposes of sub-clauses (V)(D) to (V)(G)</td>
<td>Applicable in respect of every material subsidiary, whether listed or unlisted and whether Indian or foreign</td>
<td>—</td>
</tr>
<tr>
<td>7.</td>
<td>(V)(F)</td>
<td>De-subsidiarisation of material subsidiary requires prior approval of shareholders by way of a special resolution</td>
<td>Applicable in respect of every material subsidiary, whether listed or unlisted and whether Indian or foreign</td>
<td>Sub-Clause (V)(D) and (V)(E) of new clause 49</td>
</tr>
<tr>
<td>8.</td>
<td>(V)(G)</td>
<td>Selling, leasing or disposal of more than 20% of assets of a material subsidiary requires prior approval of shareholders by way of a special resolution</td>
<td>Applicable in respect of every material subsidiary, whether listed or unlisted and whether Indian or foreign</td>
<td>Sub-Clause (V)(D) and (V)(E) of new clause 49</td>
</tr>
</tbody>
</table>
Comparison of materiality criteria in Explanation (i) and sub-clause (V)(D)/(E)

(i) Materiality criteria in Explanation (i) applies only to sub-clause (V)(A). Materiality criteria in sub-clauses (V)(D) & (V)(E) apply to sub-clauses (V)(C)(2nd part), (V)(D), (V)(F) and (V)(G)

(ii) Net worth for Explanation (i) purposes is defined as paid-up capital and free reserves. Net worth for the purposes of sub-clause (V)(D) is not defined. Therefore, it will have to be understood as defined in section 2(57) of the 2013 Act [See Para 149.21-4c]

(iii) Subsidiary whose income exceeds 20% of the consolidated income is material subsidiary under Explanation (i). In terms of sub-clause (V)(E), Subsidiary which “has generated 20% of consolidated income” is material subsidiary for sub-clauses (V)(C)(2nd part), (V)(D), (V)(F) and (V)(G). Sub-clause (V)(E) doesn’t say “at least 20%” or “20% or more”. It refers to 20% (no more, no less).

(iv) Subsidiary in which investment of the holding company exceeds 20% of its consolidated net worth is material subsidiary for sub-clauses (V)(C)(2nd part), (V)(D), (V)(F) and (V)(G) but not for sub-clause (V)(A)

(v) Subsidiary whose net worth exceeds 20% of consolidated net worth is material subsidiary for sub-clause (V)(A) but not for sub-clauses (V)(C)(2nd part), (V)(D), (V)(F) and (V)(G).

149.21-4 Representation of ID on the board of every material non-listed Indian subsidiary [New Clause 49(V)(A)]

At least one independent director of the (listed) holding company shall be a director on the Board of Directors of every material non-listed Indian subsidiary.

149.21-4a “Material non-listed Indian subsidiary” [Explanation (ii) to Clause 49(V)] - For the purpose of sub-clause (V)(A) of new clause 49, the term “material non-listed Indian subsidiary” shall mean—

◆ an unlisted subsidiary, incorporated in India,
◆ whose income or net worth (i.e. paid up capital and free reserves) exceeds 20% of the consolidated income or net worth respectively, of the listed holding company and its subsidiaries in the immediately preceding accounting year.

The word ‘respectively’ in Explanation (i) suggests that to qualify as a “material non-listed Indian subsidiary”:

◆ The unlisted Indian subsidiary’s income should exceed 20% of consolidated income of the listed holding company and its subsidiaries in the immediately preceding accounting year.
The unlisted Indian subsidiary’s net worth should exceed 20% of consolidated net worth of the listed holding company and its subsidiaries in the immediately preceding accounting year.

149.21-4b Free Reserves - New Clause 49 does not define ‘free reserves’. According to section 2(43) of the Companies Act, 2013, “free reserves” means reserves which are available for distribution as dividend, as per the latest audited balance sheet of a company.

According to section 2(43), the following shall not be treated as ‘free reserves’:

- Any amount representing unrealized gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise; and
- Any change in carrying amount of an asset or liability recognized in equity including surplus in profit and loss account on measurement of the asset or liability at fair value.

A ‘free reserve’ has to be a ‘reserve’ in the first instance. A mass of undistributed profits (i.e. P&L account credit balance or ‘surplus’) does not automatically become a reserve. Somebody possessing the required authority must clearly indicate that a portion thereof has been earmarked or separated from the general mass of profits with a view to constituting it into a general reserve or a specific reserve [Vazir Sultan Tobacco Ltd. v. CIT [1981] 7 Taxman 28 (SC)]. Thus, the amount carried forward in Profit and Loss Account without appropriating it to any reserve is ‘surplus’ and not a ‘reserve’ and consequently not a ‘free reserve’.

149.21-4c Net Worth - The term ‘Net Worth’ is not defined by New Clause 49 for sub-clause (V)(E) purposes. It is defined for the purposes of Explanation (i) to sub-clause (V) of clause 49 as ‘paid-up capital and free reserve’. For sub-clause (V)(E) purposes, it appears that definition of ‘net worth’ in section 2(57) of the Companies Act, 2013 shall apply.

According to section 2(57), ‘Net Worth’ means:

The aggregate value of:

- the paid-up share capital;
- all reserves created out of the profits; and
- Securities Premium Account.

After deducting the aggregate value of:

- accumulated losses,
- deferred expenditure; and
- miscellaneous expenditure not written off,
All the above figures taken to compute net worth should be as per the audited balance sheet.

The following reserves should not be included for computation of net worth:

- reserves created out of revaluation of assets,
- reserves created out of write-back of depreciation and
- reserves created out of amalgamation.

PAID-UP SHARE CAPITAL - The term “paid-up share capital” is defined by section 2(64) of the Companies Act, 2013.

According to section 2(64), the term “paid-up share capital” or “share capital paid-up”:

- **Means** such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid up in respect of shares issued.
- **Includes** any amount credited as paid-up in respect of shares of the company.
- **Does not include** any other amount received in respect of such shares, by whatever name called.

As per Statement on CARO, 2003 issued by ICAI, the paid-up capital should be calculated as under:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Called up equity share capital</td>
<td>XXX</td>
</tr>
<tr>
<td>Add: Called up preference share capital</td>
<td>XX</td>
</tr>
<tr>
<td>Less: Calls in arrears</td>
<td>XX</td>
</tr>
<tr>
<td>Add: Shares forfeited account</td>
<td>XX</td>
</tr>
<tr>
<td>Paid-up capital</td>
<td>XXXX</td>
</tr>
</tbody>
</table>

RESERVES CREATED OUT OF THE PROFITS - The words “out of the profits” means out of the net profit. An agreement to pay an annual sum “out of the profits” of a business, refers to net profits (per Parke B., Bond v. Pittard, 7 L J. Ex. 78). (Stroud's Judicial Dictionary). The above interpretation seems reasonable since the definition expressly excludes the following items from computation of net worth:

- reserves created out of revaluation of assets,
- reserves created out of write-back of depreciation and
- reserves created out of amalgamation.

What is common between the three above reserves excluded from computation of the net worth by the definition is that they are not created out of net profits - i.e. by appropriation out of the net profit. Thus, it would
appear that any “reserve” (including capital redemption reserve, debenture redemption reserve, Tonnage Tax Reserve created under the IT Act, 1961) which is created out of the net profit will qualify as “reserves created out of the profits”. As long as it is created by appropriation of net profits, it will be considered for calculation of net worth. It does not matter whether appropriation is pursuant to a statutory compulsion or voluntary. Also it does not matter whether the reserve created out of profits is available for dividends or not.

The three reserves expressly excluded from computation of net worth should be regarded as illustrative and not as exhaustive. In other words, any other reserve not created by appropriation of net profits would also have to be excluded from the computation of net worth—e.g., capital reserve created by crediting subsidy in the nature of promoters' contribution by crediting profit on reissue of forfeited shares would not be included in computation of net worth. The Mimansa Principle of Interpretation Kakebhyo Dadhi Rakshitam (Protect the curds from the crow) applied by the Allahabad High Court supports the above view. It cannot be said that the above maxim should be understood as saying that the curds should be protected from crows but should be allowed to be eaten by dogs, cats etc. The word “crow” is only used in an illustrative sense here.

WHETHER PROFITS CARRIED FORWARD IN P&L ACCOUNT IS TO BE INCLUDED IN NET WORTH - A mass of undistributed profits (i.e., P&L account credit balance or ‘surplus’) does not automatically become a reserve. Somebody possessing the required authority must clearly indicate that a portion thereof has been earmarked or separated from the general mass of profits with a view to constituting it into a general reserve or a specific reserve [Vazir Sultan Tobacco Ltd. Co. v. CIT [1981] 7 Taxman 28 (SC)]. Therefore, since profit and loss balance (surplus) have not been expressly included by definition in computation of net worth, it would appear that the same is not covered by “all reserves created out of profits” and cannot be included in computation of net worth.

WHETHER AUDITOR’S QUALIFICATIONS SHOULD BE ADJUSTED FOR CALCULATING NET WORTH? - Though the definition requires figures to be taken as per audited balance sheet, there is no mention of whether the auditor's qualifications in the audit report should be taken into account to compute the net worth.

1. See LIC writ petition No. 3807 of 1993, decided on 9-4-1998 by the Allahabad High Court reported in 1998 (2) All CJ 1364 where this rule of interpretation was applied. [See K.L. Sarkar's Mimansa Rules of Interpretation].
149.21-5 Review of financial statements of unlisted subsidiaries by audit committee of listed holding company [Clause 49(V)(B)]

New Clause 49(V)(B) provides as under:

♦ Audit committee of listed holding company to review financial statements of every unlisted subsidiary.

♦ In particular, investments made by the unlisted subsidiary to be reviewed.

The requirement in New Clause 49(V)(B) applies to all unlisted subsidiaries irrespective of materiality and irrespective of the place of their incorporation. If the subsidiary company is itself a listed company, Explanation (iii) would apply. (See Para 149.21-9)

149.21-6 Minutes of board meetings of unlisted subsidiary company [New Clause 49(V)(C) (1st Part)]

New Clause 49(V)(C) (1st Part) provides that the minutes of Board meetings of the unlisted subsidiary company shall be placed at the Board meeting of the listed holding company. This requirement applies to all unlisted subsidiaries irrespective of materiality and irrespective of the place of their incorporation.

149.21-7 Statement of significant transactions of unlisted subsidiaries [New Clause 49(V)(C) (2nd Part)]

New Clause 49(V)(C) (2nd Part) provides that the management shall periodically submit to the Board of Directors of listed holding company, a statement of all significant transactions and arrangements entered into by unlisted subsidiary company. From the definition of “significant transaction or arrangement” given in Explanation (ii) to Clause 49(V), it is clear that this requirement applies only in respect of every material unlisted subsidiary.

149.21-7a “Significant transaction or arrangement” [Explanation (ii) to Clause 49(V)] - For the purposes of sub-clause (v)(c), the term “significant transaction or arrangement” shall mean any individual transaction or arrangement that exceeds or is likely to exceed 10% of the total revenues or total expenses or total assets or total liabilities, as the case may be, of the material unlisted subsidiary for the immediately preceding accounting year.

ICAI has interpreted Explanation (ii) as under:

♦ The use of the words ‘or’ coupled with ‘as the case may be’ would suggest that the 10% test should be applied by comparing with like items.

♦ For example a capital expenditure has to be compared with aggregate capital expenditure for the year.
When comparing any transaction with “total revenues”, “total expenses” etc., one may take into consideration the total revenue or expenditure ‘likely to’ arise for the entire financial year and not necessarily the aggregate expenditure incurred.

149.21-8 Requirements of New Clause 49(V) which are applicable to all material subsidiaries

New Clauses 49(V)(D) to (G) apply to all “material subsidiaries” irrespective of their listing status and irrespective of whether they are incorporated in India or abroad. New clause (V)(C) applies to all material subsidiaries which are unlisted irrespective of whether they are incorporated in India or abroad. Explanation (ii) defines “material non-listed Indian subsidiary” which is applicable to clause 49(V)(A) whereas New Clauses 49(V)(D) and 49(V)(E) define ‘material subsidiary’ [applicable to clauses 49(V)(C), (V)(D), (V)(F) and (V)(G)].

149.21-8a Material Subsidiaries - New Clause 49(V)(D) and 49(V)(E) define ‘material subsidiary’ as under:

- The company shall formulate a policy for determining ‘material’ subsidiaries and such policy shall be disclosed on the Company’s website and a web link thereto shall be provided in the Annual Report. - New Clause 49(V)(D)

- For the purpose of this clause, a subsidiary shall be considered as material:
  
  (a) if the investment of the company in the subsidiary exceeds 20% of its consolidated net worth as per the audited balance sheet of the previous financial year or
  
  (b) if the subsidiary has generated 20% of the consolidated income of the company during the previous financial year. - New Clause 49(V)(E)

It appears that for clause 49(V)(D) purposes, subsidiaries covered by clause 49(V)(E) will have to be considered. Besides subsidiaries covered by clause 49(V)(E), company will have to identify other subsidiaries as material based on its policy.

149.21-8b Special resolution for desubsidiarisation of material subsidiaries [New Clause 49(V)(F)] - Without passing a special resolution in its general meeting, no (listed holding) company shall dispose of shares in its material subsidiary which would:

- reduce its shareholding (either on its own or together with other subsidiaries) to less than 50% or
- cease the exercise of control over the subsidiary.
No such special resolution is required if such divestment is made under a scheme of arrangement duly approved by a court/Tribunal.

149.21-8c Prior special resolution of listed holding company for disposal of more than 20% of assets of material subsidiary [New Clause 49(V)(G)]
- Selling, disposing and leasing of assets amounting to more than 20% of the assets of the material subsidiary on an aggregate basis during a financial year, shall require prior approval of shareholders by way of special resolution.

No such special resolution is required if such sale/disposal/lease is made under a scheme of arrangement duly approved by a Court/Tribunal.

149.21-9 When a listed holding company has a listed subsidiary which itself is a holding company [Explanation (iii) to New Clause 49(V)]
Where a listed holding company has a listed subsidiary which is itself a holding company, the above provisions of Clause 49(V) shall apply to the listed subsidiary insofar as its subsidiaries are concerned.

149.22 Risk Management - Clause 49(VI)

“Nothing Risked, Nothing Gained” - Adage

“The American economy has been built and sustained by risk-taking entrepreneurs whose pioneering ideas and hard work gave birth to flourishing businesses.” - Mike Pence

149.22-1 Comparative Study with Old Clause 49
The differences between New Clause 49 and Old Clause 49 are as under:

<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Old Clause 49</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Clause 49(VI) - Risk Management</strong></td>
<td><strong>Clause 49(IV)(C) - Board Disclosures - Risk Management</strong></td>
<td>Top 100 listed companies by market cap as the end of immediate previous financial year required to constitute a Risk Management Committee (RMC). Directors and Senior executives can be members of the RMC. Majority of RMC shall be directors and it shall be chaired by a director only. Otherwise no change.</td>
</tr>
</tbody>
</table>

149.22-2 New Clause 49 vis-a-vis the Companies Act, 2013
Section 134(3) of the Companies Act, 2013 provides that there shall be attached to every financial statement laid before a company in general meeting, a report by its Board of Directors.
The Board’s report shall inter alia include “a statement indicating development and implementation of a risk management policy for the company including identification therein of elements of risk, if any, which in the opinion of the Board may threaten the existence of the company”. [Section 134(3)(n)]

Thus, the Companies Act does not obligate the company to frame and implement a risk management plan. It only requires disclosures in this regard. However, New clause 49 requires the listed companies to frame, implement and monitor the risk management plan for the company.

149.22-3 Procedures to inform board members about risk assessment and minimisation procedures [New Clause 49(VI)(A)]

The company shall lay down procedures to inform Board members about the risk assessment and minimization procedures.

149.22-4 Board’s responsibilities [New Clause 49(VI)(B)]

The Board shall be responsible for framing, implementing and monitoring the risk management plan for the company.

149.22-5 Risk Management Committee [New Clause 49(VI)(C) to 49(VI)(E)]

New Clause 49(VI)(C) provides as under:

◆ The company through its Board of Directors shall also constitute a Risk Management Committee. [New Clause 49(VI)(C)]

◆ The Board shall define the roles and responsibilities of the Risk Management Committee and may delegate monitoring and reviewing of the risk management plan to the committee and such other functions as it may deem fit. [New Clause 49(VI)(C)]

◆ The majority of Committee shall consist of members of the Board of Directors. [New Clause 49(VI)(D)]

◆ Senior executives of the company may be members of the said Committee but the Chairman of the Committee shall be a member of the Board of Directors. [New Clause 49(VI)(E)]

The provisions of New Clause 49(VI)(C) as above shall be applicable to top 100 listed companies by market capitalisation as at the end of the immediate previous financial year. [SEBI’s Circular No. CIR/CFD/Policy Cell/ 2/ 2014, dated 17-4-2014]
149.23 Related Party Transactions [Clause 49(VII)]

“The company should devise a framework to avoid .....abusive self-dealing”.

“Abusive self-dealing occurs when persons having close relationships to the company, including controlling shareholders, exploit those relationships to the detriment of the company and investors.” - OECD Principles of Corporate Governance.

Circular No. CFD/Policy Cell/2/2014, dated 17-4-2014 provides that the provisions of Clause 49(VII) shall be applicable to all prospective transactions. All existing material related party contracts or arrangements as on the date of this circular which are likely to continue beyond March 31, 2015 shall be placed for approval of the shareholders in the first General Meeting subsequent to October 1, 2014. However, a company may choose to get such contracts approved by the shareholders even before October 1, 2014.

149.23-1 Comparative Study with Old Clause 49

The differences between New Clause 49 and Old Clause 49 are as under:

<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Old Clause 49</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Part VII - Related Party Transactions</strong></td>
<td><strong>Para IV(A) - Disclosures of Basis of Related Party Transactions</strong></td>
<td>New requirements - ‘Related Party Transaction’ and “Related Party” defined. All related party transactions shall require prior approval of audit committee. However, subject to compliance with certain conditions, Audit Committee may grant omnibus approval for period not exceeding one year at a time. All material related party transactions shall require approval of shareholders by special resolutions and all the related parties shall abstain from voting on such resolution irrespective of whether they are party to the transaction or not. The above requirements not applicable to: (a) transactions between two government companies (b) transactions between a holding company and its wholly-owned subsidiary (WOS) whose accounts are consolidated with holding company. Old Clause 49 only required reporting of material individual transactions with related parties on exception basis to Audit Commit-</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Old Clause 49</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>tee, i.e., Related Party Transactions, RPTs not in ordinary course of business or on Arm’s Length basis.</td>
</tr>
</tbody>
</table>

### 149.23-2 New Clause 49 vis-a-vis the Companies Act, 2013

The differences between New Clause 49 and Companies Act, 2013 are as under:

<table>
<thead>
<tr>
<th>Definition of related party</th>
<th>New Clause 49</th>
<th>Companies Act, 2013</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Related parties comprise:</td>
<td>Related parties as defined in section 2(76) of the 2013 Act</td>
<td>For section 188 purposes, only parties covered by section 2(76) of the 2013 Act are ‘related parties’</td>
<td>Definition in new clause 49 is wider</td>
</tr>
<tr>
<td>Related parties as per applicable accounting standards</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Definition of related party transaction</th>
<th>New Clause 49</th>
<th>Companies Act, 2013</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>A related party transaction is a transfer of resources, services or obligations between a company and a related party, regardless of whether a price is charged. A ‘transaction’ shall be construed to include single transaction or a group of transactions in a contract.</td>
<td>According to section 188(1), a related party transaction is any contract or arrangement with a related party [See section 2(76)] with respect to— (a) sale, purchase or supply of any goods or materials; (b) selling or otherwise disposing of, or buying, property of any kind; (c) leasing of property of any kind; (d) availing or rendering of any services; (e) appointment of any agents for purchase or sale of goods, materials, services or property; (f) such related party’s appointment</td>
<td>New clause 49 definition is much wider in scope. Section 188(1) does not cover loan transactions. New Clause 49 would cover even loan transactions. Section 188(1) does not define ‘transaction’</td>
<td></td>
</tr>
<tr>
<td>Approvals required for related party transactions</td>
<td>New Clause 49</td>
<td>Companies Act, 2013</td>
<td>Remarks</td>
</tr>
<tr>
<td>-------------------------------------------------</td>
<td>---------------</td>
<td>---------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Prior approval of audit committee for all RPTs</td>
<td>-</td>
<td>to any office or place of profit in the company, its subsidiary company or associate company; and (g) underwriting subscription of any securities or derivatives thereof, of the company</td>
<td></td>
</tr>
<tr>
<td>For Material RPTs-Special resolution.</td>
<td>-</td>
<td>-</td>
<td>Section 188 requires consent of Board of Directors by resolution passed at Board meeting. New Clause 49 silent on this aspect.</td>
</tr>
<tr>
<td>Every Related party should abstain from voting on such resolution irrespective of whether he is a party to the particular transaction or not. No requirement that such approval by special resolution shall be prior approval</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Above approvals not required in the following cases:</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>◆ transactions between two government companies</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>◆ transactions between a holding company and a consolidated wholly-owned subsidiary (WOS)</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Materiality Criteria for RPTs</th>
<th>New Clause 49</th>
<th>Companies Act, 2013</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>A transaction with a related party shall be considered material if the transaction/transactions to be entered into individually or taken together with previous transactions during a financial year, exceeds 10% of the annual consolidated turnover of the company as per the last audited financial statements of the company.</td>
<td>-</td>
<td>Rule 15(3)(ii) of the Companies (Meetings of Board and its Powers) Rules, 2014 stipulates materiality criteria for RPTs as under: (a) as contracts or arrangements with respect to clauses (a) to (e) of sub-section (1) of section 188 with criteria, as mentioned below -</td>
<td>Uniform materiality criteria in New Clause 49 for all related party transactions. Materiality criteria in section 188 differs transaction category-wise</td>
</tr>
<tr>
<td>-</td>
<td>-</td>
<td>Section 188 is more pragmatic than New Clause 49</td>
<td></td>
</tr>
<tr>
<td>New Clause 49</td>
<td>Companies Act, 2013</td>
<td>Remarks</td>
<td></td>
</tr>
<tr>
<td>---------------</td>
<td>---------------------</td>
<td>---------</td>
<td></td>
</tr>
<tr>
<td>(i) sale, purchase or supply of any goods or materials directly or through appointment of agents exceeding 25% of the annual turnover as mentioned in clause (a) and clause (e) respectively of sub-section (1) of section 188;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(ii) selling or otherwise disposing of, or buying, property of any kind directly or through appointment of agents exceeding 10% of net worth as mentioned in clause (b) and clause (e) respectively of sub-section (1) of section 188;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(iii) leasing of property of any kind exceeding 10% of the net worth or exceeding 10% of turnover as mentioned in clause (c) of sub-section (1) of section 188;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(iv) availing or rendering of any services directly or through appointment of agents exceeding 10% of the net worth as mentioned in clause (d) and clause (e) of sub-section (1) of section 188;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) appointment to any office or place of profit in the company, its subsidiary company or associate company at a monthly remuneration exceeding `2,50,000 as mentioned in clause (f) of</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
149.23-3 Related party transaction [New Clause 49(VII)(A)]

A related party transaction is a transfer of resources, services or obligations between a company and a related party, regardless of whether a price is charged.

Explanation below clause 49(VII)(A) clarifies that a “transaction” with a related party shall be construed to include single transaction or a group of transactions in a contract.

149.23-4 Definition of ‘related party’ [New Clause 49(VII)(B)]

For the purpose of Clause 49(VII), an entity shall be considered as related to the company if:

(i) such entity is a related party under section 2(76) of the Companies Act, 2013; or
(ii) such entity is a related party under the applicable accounting standards.

149.23-5 Policy on related party transactions [New Clause 49(VII)(C)]

The company shall formulate a policy:
- on materiality of related party transactions and
- also on dealing with Related Party Transactions.

149.23-5a Materiality of RPTs - A transaction with a related party shall be considered material if the transaction/transactions to be entered into individually or taken together with previous transactions during a financial
\textbf{year, exceeds 10\% of the annual consolidated turnover of the company as per the last audited financial statements of the company.}

149.23-5b \textbf{Turnover} - According to section 2(91), “Turnover” means the aggregate value of realization made by the company during a financial year from:

\begin{itemize}
  \item the sale, supply or distribution of goods or
  \item services rendered or
  \item both.
\end{itemize}

\textbf{The following views of ICAI expressed by it in statement of CARO, 2003 are relevant with regard to the definition of ‘turnover’ :}

\begin{itemize}
  \item Turnover is the aggregate amount (i.e. gross consideration) for which the sales are effected by the company/services are rendered by the company.
  \item For an agent, turnover is the amount of commission earned.
  \item Turnover should be calculated in accordance with the method of accounting regularly adopted by the company. That is to say, whether to include certain items such as sales tax/excise duty collected would depend upon the method of accounting regularly employed by the company.
  \item If the principal business of the company is letting out of property of the company, then only the rental income should be considered as part of ‘turnover’ for the purposes of determining the applicability of CARO, 2003 to a private limited company. Interest/dividend income should be treated as turnover for the aforesaid purpose only if the company is an investment company.
\end{itemize}

\textbf{According to ICAI’s Guidance Note on Tax Audit, the following points should be kept in mind while determining ‘turnover’ :}

\begin{itemize}
  \item For an agent, turnover is the commission earned by him and not the aggregate amount for which sales are effected or services are rendered.
  \item Trade discount should be deducted from sales.
  \item Commission allowed to third parties should not be deducted from ‘sales’.
  \item Sales of scrap shown under ‘miscellaneous income’ should be included in ‘turnover’.
  \item Goods returned, price adjustments, trade discount and cancellation of bills for the period under audit should be deducted from total sales.
\end{itemize}
Ancillary charges packing, freight, forwarding, interest, commission etc. should be excluded from turnover. However, where separate demarcation of these charges is not possible due the method of accounting followed by the assessee or where company does not show these charges separately in its bill/invoice, turnover will include these charges. If charges such as packing, freight, forwarding and handling represent reimbursement of actual cost, these will not form part of ‘turnover’.

If sales tax/excise duty are included in sales price, no adjustment should be made in respect of these for determining the turnover. This method of accounting may be said to be the ‘inclusive method’. If sales tax/excise duty recovered are credited to a separate accounts (Excise Duty Payable account/Sales Tax payable account) and payments to the authority are debited to the said separate account (exclusive method), these would not form part of turnover. However, ICAI’s ‘Guidance Note on Accounting for State-Level VAT’ specifies that the right way to account for taxes collected is the exclusive method.

**149.23-6 Prior Audit Committee approval for all related party transactions [New Clause 49(VII)(D)]**

All Related Party Transactions shall require prior approval of the Audit Committee. However, the Audit Committee may grant omnibus approval for Related Party Transactions proposed to be entered into by the company subject to the following conditions:

(a) The Audit Committee shall lay down the criteria for granting the omnibus approval in line with the policy on Related Party Transactions of the company and such approval shall be applicable in respect of transactions which are repetitive in nature.

(b) The Audit Committee shall satisfy itself the need for such omnibus approval and that such approval is in the interest of the company;

(c) Such omnibus approval shall specify (i) the name/s of the related party, nature of transaction, period of transaction, maximum amount of transaction that can be entered into, (ii) the indicative base price/current contracted price and the formula for variation in the price if any and (iii) such other conditions as the Audit Committee may deem fit.

Where the need for Related Party Transaction cannot be foreseen and aforesaid details are not available, Audit Committee may grant omnibus approval for such transactions subject to their value not exceeding Rs.1 crore per transaction.
(d) Audit Committee shall review, at least on a quarterly basis, the details of RPTs entered into by the company pursuant to each of the omnibus approval given.

(e) Such omnibus approvals shall be valid for a period not exceeding one year and shall require fresh approvals after the expiry of one year. The above requirement applies to all RPTs and not just to material RPTs.

It may be noted that clause 49(VII)(D) and (E) shall not be applicable in the following cases:

(i) transactions entered into between two government companies ("Government company" shall have the same meaning as defined in section 2(45) of the Companies Act, 2013);

(ii) transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

149.23-7 Prior approval by special resolution for all material RPTs [New Clause 49(VII)(E)]

All material Related Party Transactions shall require approval of the shareholders through special resolution and the related parties shall abstain from voting on such resolutions.

All entities falling under the definition of related parties shall abstain from voting irrespective of whether the entity is a party to the particular transaction or not. [Explanation (ii) to clause 49(VII)]

Clause 49(VII)(D) and (E) shall not be applicable in the following cases:

(i) transactions entered into between two government companies ("Government company" shall have the same meaning as defined in section 2(45) of the Companies Act, 2013);

(ii) transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

A transaction with a related party shall be considered material if the transaction/transactions to be entered into individually or taken together with previous transactions during a financial year, exceeds ten per cent of the annual consolidated turnover of the company as per the last audited financial statements of the company.

The distinction between clause 49(VII)(D) and clause 49(VII)(E) may be noted. The former clause applies to all RPTs-material or not. The latter clause applies only to material RPTs.
149.23-8 Cumulative effect of New Clause 49 and Companies Act, 2013

As a result of new clause 49, listed Companies will have to get prior approval of Audit Committee for all related party transactions even if they are in ordinary course of business at arm’s length. For material RPTs, special resolution will have to be passed even if they are in ordinary course of business at arm’s length.

New Clause 49 is far more stringent than section 188 of the Companies Act, 2013. Even transactions in ordinary course of business are not exempted from approvals.

149.24 Disclosures [Clause 49(VIII)]

149.24-1 Comparative study with Old Clause 49

The differences between New Clause 49 and Old Clause 49 are as under:

<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Old Clause 49</th>
<th>Differences</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Clause 49(VIII)(A)</strong> - Disclosures-Related Party Transactions (RPTs)</td>
<td><strong>Clause 49(III)(A)</strong> - Basis of related party transactions</td>
<td>New requirements to disclose all material RPTs quarterly along with compliance report on corporate governance. Disclose policy on dealing with RPTs on its website and a web link thereto provided shall be provided in the annual report. There was no requirement in old clause 49 to disclose RPTs as above. Requirement was to only disclose RPTs to Audit Committee.</td>
</tr>
<tr>
<td><strong>Clause 49(VIII)(B)</strong> - Disclosures-Disclosure of Accounting Treatment</td>
<td><strong>Clause 49(IV)(B)</strong> - Disclosures-Disclosure of Accounting Treatment</td>
<td>No change</td>
</tr>
<tr>
<td><strong>Clause 49(VIII)(C)</strong> - Disclosures-Remuneration of Directors</td>
<td><strong>Clause 49(IV)(E)</strong> - Disclosures-Remuneration of Directors</td>
<td>No change</td>
</tr>
<tr>
<td><strong>Clause 49(VIII)(D)</strong> - Disclosures- Management</td>
<td><strong>Clause 49(IV)(F)</strong> - Disclosures-Management</td>
<td>New requirement: The Code of Conduct for the Board of Directors and the senior management shall be disclosed on the website on the company. Otherwise, no change</td>
</tr>
<tr>
<td><strong>Clause 49(VIII)(E)</strong> - Disclosures- Shareholders</td>
<td><strong>Clause 49(IV)(G)</strong> - Disclosures-Shareholders</td>
<td>No change</td>
</tr>
<tr>
<td><strong>Clause 49(VIII)(F)</strong> - Disclosures- Resignation of Directors</td>
<td>—</td>
<td>New requirement consequent on Companies Act, 2013 coming into force</td>
</tr>
<tr>
<td>New Clause 49</td>
<td>Old Clause 49</td>
<td>Differences</td>
</tr>
<tr>
<td>----------------</td>
<td>----------------</td>
<td>-------------</td>
</tr>
<tr>
<td><strong>Clause 49(VIII)(I)</strong>- Disclosures- Proceeds from public issues, rights issue, preferential issues, etc.</td>
<td><strong>Clause 49(IV)(D)</strong>- Disclosures- Proceeds from public issues, rights issue, preferential issues, etc.</td>
<td>No change</td>
</tr>
</tbody>
</table>

**Note:** Clause 49(VIII)(F), (G) and (H) omitted by Circular No. CIR/ CFD/ Policy Cell/ 7/ 2014, dated 15-9-2014 w.e.f. 1-10-2014.

### 149.24-2 New clause 49 vis-a-vis the Companies Act, 2013

The differences between New Clause 49 and Companies Act, 2013 are as under:

<table>
<thead>
<tr>
<th>New Clause 49</th>
<th>Companies Act, 2013</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Clause 49(VIII)(A)</strong>- Disclosures- Related Party Transactions</td>
<td>No corresponding requirement in Companies Act, 2013</td>
<td>—</td>
</tr>
<tr>
<td><strong>Clause 49(VIII)(B)</strong>- Disclosures- Disclosure of Accounting Treatment</td>
<td>No corresponding requirement in Companies Act, 2013</td>
<td>—</td>
</tr>
<tr>
<td><strong>Clause 49(VIII)(C)</strong>- Disclosures- Remuneration of Directors</td>
<td>No corresponding requirement in Companies Act, 2013</td>
<td>—</td>
</tr>
<tr>
<td><strong>Clause 49(VIII)(D)</strong>- Disclosures- Management</td>
<td>No corresponding requirement in Companies Act, 2013</td>
<td>—</td>
</tr>
<tr>
<td><strong>Clause 49(VIII)(E)</strong>- Disclosures- Shareholders</td>
<td>Section 178(5) to (7) of the Companies Act, 2013</td>
<td>Section 178(5) requires a company to set up Stakeholders Relationship Committee (SRC) if company has more than 1000 shareholders, debenture holders, deposit-holders and any other security-holders at any time during the financial year. New Clause 49 requires a listed company to set up SRC irrespective of number of shareholders, debenture-holders, deposit-holders and any other security-holders. Section 178(7) requires that the chairperson of the SRC or in his absence any other members of the committee authorized by him in this...</td>
</tr>
</tbody>
</table>
behalf shall attend the general meetings of the company. New Clause 49 is silent on this.

**149.24-3 Disclosures - Related party transactions [New Clause 49(VIII)(A)]**

Clause 49(VIII)(A) provides as under:

- Details of all material transactions with related parties shall be disclosed quarterly along with the compliance report on corporate governance.
  
  Note: It appears that criteria for determining materiality of related party transactions shall be the same as in New Clause 49(VII).

- The company shall disclose the policy on dealing with Related Party Transactions on its website and a weblink thereto shall be provided in the Annual Report.

**149.24-4 Disclosure of accounting treatment [New Clause 49(VIII)(B)]**

Where in the preparation of financial statements, a treatment different from that prescribed in an Accounting Standard has been followed:

- the fact shall be disclosed in the financial statements,

- together with the management's explanation as to why it believes such alternative treatment is more representative of the true and fair view of the underlying business transaction in the Corporate Governance Report.

**149.24-5 Disclosure-remuneration of directors [New Clause 49(VIII)(C)]**

New Clause 49(VIII)(C) provides as under:

**Remuneration**

1. All pecuniary relationship or transactions of the non-executive directors vis-à-vis the company shall be disclosed in the Annual Report.

2. In addition to the disclosures required under the Companies Act, 2013, the following disclosures on the remuneration of directors shall be made in the section on the corporate governance of the Annual Report:

   a. All elements of remuneration package of individual directors summarized under major groups, such as salary, benefits, bonuses, stock options, pension etc.
b. Details of fixed component and performance linked incentives, along with the performance criteria.
c. Service contracts, notice period, severance fees.
d. Stock option details, if any - and whether issued at a discount as well as the period over which accrued and over which exercisable.

3. The company shall publish its criteria of making payments to non-executive directors in its annual report. Alternatively, this may be put up on the company's website and reference drawn thereto in the annual report.

**Shareholdings of Non-Executive Directors**

4. The company shall disclose the number of shares and convertible instruments held by non-executive directors in the annual report.

5. Non-executive directors shall be required to disclose their shareholding (both own or held by/for other persons on a beneficial basis) in the listed company in which they are proposed to be appointed as directors, prior to their appointment. These details should be disclosed in the notice to the general meeting called for appointment of such director.

**149.24-6 Management Discussion and Analysis Report (MDAR) [New Clause 49(VIII)(D)]**

New Clause 49(VIII)(D) provides as under:

**MDAR**

1. As part of the directors' report or as an addition thereto, a Management Discussion and Analysis Report should form part of the Annual Report to the shareholders. This Management Discussion & Analysis should include discussion on the following matters within the limits set by the company’s competitive position:
   a. Industry structure and developments.
   b. Opportunities and Threats.
   d. Outlook.
   e. Risks and concerns.
   f. Internal control systems and their adequacy.
   g. Discussion on financial performance with respect to operational performance.
h. Material developments in Human Resources/Industrial Relations front, including number of people employed.

**Disclosures by Senior Management to the Board**

2. Senior management shall make disclosures to the board relating to all material financial and commercial transactions, where they have personal interest, that may have a potential conflict with the interest of the company at large (e.g. dealing in company shares, commercial dealings with bodies, which have shareholding of management and their relatives etc.).

“Senior management” shall mean personnel of the company who are members of its core management team excluding the Board of Directors. This would also include all members of management one level below the executive directors including all functional heads.

**Code of Conduct for Directors**

3. The Code of Conduct for the Board of Directors and the senior management shall be disclosed on the website of the company.

**149.24-7 Disclosures-shareholders [New Clause 49(VIII)(E)]**

New Clause 49(VIII)(E) provides as under:

**Appointment of a new director or re-appointment of a director**

1. In case of the appointment of a new director or reappointment of a director the shareholders must be provided with the following information:
   a. A brief resume of the director.
   b. Nature of his expertise in specific functional areas.
   c. Names of companies in which the person also holds the directorship and the membership of Committees of the Board.
   d. Shareholding of non-executive directors as stated in Clause 49(IV)(E)(v).

**Disclosure of relationships between directors inter se**

2. Disclosure of relationships between directors inter se shall be made in:
   - the Annual Report,
   - notice of appointment of a director,
   - prospectus and letter of offer for issuances and any related filings made to the stock exchanges where the company is listed.
Quarterly results and presentations made by the company to analysts

3. Quarterly results and presentations made by the company to analysts:
   ◆ shall be put on company’s website, or
   ◆ shall be sent in such a form so as to enable the stock exchange on which the company is listed to put it on its own website.

149.24-8 Stakeholders’ Relationship Committee [New Clause 49(VIII)(E)]

New Clause 49(VIII)(E) provides as under:
   ◆ A committee under the Chairmanship of a non-executive director and such other members as may be decided by the Board of the company shall be formed to specifically look into the redressal of grievances of shareholders, debenture holders and other security holders.
   ◆ This Committee shall be designated as ‘Stakeholders Relationship Committee’ and shall consider and resolve the grievances of the security holders of the company including complaints related to transfer of shares, non-receipt of balance sheet, non-receipt of declared dividends.

149.24-9 Delegation of share transfers [New Clause 49(VIII)(E)]

To expedite the process of share transfers, the Board of the company shall delegate the power of share transfer to an officer or a committee or to the Registrar and share transfer agents. The delegated authority shall attend to share transfer formalities at least once in a fortnight.

149.24-10/11 Proceeds from public issues, rights issue, preferential issues, etc. [New Clause 49(VIII)(I)]

New Clause 49(VIII)(I) provides as under:

Quarterly disclosures to Audit Committee
   ◆ When money is raised through an issue (public issues, rights issues, preferential issues etc.), the company shall disclose the uses/applications of funds by major category (capital expenditure, sales and marketing, working capital, etc.), on a quarterly basis as a part of their quarterly declaration of financial results to the Audit Committee.

Annual Disclosures to Audit Committee
   ◆ Further, on an annual basis, the company shall prepare a statement of funds utilized for purposes other than those stated in the offer
document/prospectus/ notice and place it before the audit committee.

- Such disclosure shall be made only till such time that the full money raised through the issue has been fully spent.
- This statement shall be certified by the statutory auditors of the company.

**Disclosure of monitoring agency's report to Audit Committee**

- Furthermore, where the company has appointed a monitoring agency to monitor the utilisation of proceeds of a public or rights issue, it shall place before the Audit Committee the monitoring report of such agency, upon receipt, without any delay.

**Audit Committee Recommendations**

- The audit committee shall make appropriate recommendations to the Board to take up steps in this matter.

149.25 CEO/CFO Certification [Clause 49(IX)]

**149.25-1 Comparative study with Old Clause 49**

The corresponding requirement as regards CEO/CFO certification in Old Clause 49, was covered in Clause 49(V). Old Clause 49(V) provided that the CEO (i.e. the Managing Director or the Manager appointed under the Companies Act, 1956) and the CFO (i.e. the whole-time director or any other person heading the finance function discharging that function) shall issue necessary certificate to the Board of Directors.

New Clause 49(IX) requires certification by the CEO or the Managing Director or Manager or in their absence, Whole Time Director and the CFO.

149.25-2 New clause 49 vis-a-vis the Companies Act, 2013

There is no requirement in Companies Act, 2013 corresponding to Clause 49(IX).

149.25-3 CEO/CFO certification [Clause 49(IX)]

The CEO or the Managing Director or Manager or in their absence, a Whole Time Director appointed in terms of the Companies Act, 2013 and the CFO shall certify to the Board that:

- They have reviewed financial statements and the cash flow statement for the year and that to the best of their knowledge and belief:
  - these statements do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading;
these statements together present a true and fair view of the company’s affairs and are in compliance with existing accounting standards, applicable laws and regulations.

- There are, to the best of their knowledge and belief, no transactions entered into by the company during the year which are fraudulent, illegal or violative of the company’s code of conduct.

- They accept responsibility for establishing and maintaining internal controls for financial reporting and
  - that they have evaluated the effectiveness of internal control systems of the company pertaining to financial reporting and they have disclosed to the auditors and the Audit Committee, deficiencies in the design or operation of such internal controls, if any, of which they are aware and the steps they have taken or propose to take to rectify these deficiencies.

- They have indicated to the auditors and the Audit committee:
  - significant changes in internal control over financial reporting during the year;
  - significant changes in accounting policies during the year and that the same have been disclosed in the notes to the financial statements; and
  - instances of significant fraud of which they have become aware and the involvement therein, if any, of the management or an employee having a significant role in the company’s internal control system over financial reporting.

149.26 Report on Corporate Governance - Clause 49(X)

149.26-1 Comparative study with old clause 49
The corresponding requirement in Old Clause 49 was contained Old Clause 49(VI). There is no change in requirements of new Clause 49(X) vis-a-vis Old Clause 49(VI).

149.26-2 New clause 49 vis-a-vis the Companies Act, 2013
There is no requirement in Companies Act, 2013 corresponding to Clause 49(X).

149.26-3 Report on Corporate Governance [New Clause 49(X)]
New Clause 49(X) provides as under:

Separate section on Corporate Governance in the Annual Report:

- There shall be a separate section on Corporate Governance in the Annual Reports of company, with a detailed compliance report on Corporate Governance.
Matters to be specifically highlighted in the compliance report on Corporate Governance

- Non-compliance of any mandatory requirement of this clause with reasons thereof and the extent to which the non-mandatory requirements have been adopted should be specifically highlighted.

Suggested list of items to be included in this report

- The suggested list of items to be included in this report is given in Annexure XII to the Listing Agreement (Para 149.26-3a) and list of non-mandatory requirements is given in Annexure XIII to the Listing Agreement. (Para 149.26-3b)

Quarterly compliance report to the stock exchanges

- The companies shall submit a quarterly compliance report to the stock exchanges within 15 days from the close of quarter as per the format given in Annexure XI to the Listing Agreement. (Para 149.26-3c) The report shall be signed either by the Compliance Officer or the Chief Executive Officer of the company.

ICAI has recommended the following draft form of certificate under clause 49.

Auditor’s Certificate under clause 49 (Illustrative draft)

To the Members of ..................
(name of the entity)

We have examined the compliance of conditions of corporate governance by ............. (name of the entity), for the year ended on __________, as stipulated in clause 49 of the Listing Agreement of the said company* with stock exchange(s).

The compliance of conditions of corporate governance is the responsibility of the management. Our examination was limited to procedures and implementation thereof, adopted by the company* for ensuring the compliance of the conditions of the Corporate Governance. It is neither an audit nor an expression of opinion on the financial statements of the company*.

In our opinion and to the best of our information and according to the explanations given to us, subject to the following:

1.
2.

We certify that the company* has complied with the conditions of Corporate Governance as stipulated in the above-mentioned Listing Agreement.

We further state that such compliance is neither an assurance as to the future viability of the company* nor the efficiency or effectiveness with which the management has conducted the affairs of the company*. 

139
For and on behalf of
ABC & Co.
Chartered Accountants
( )
Partner/Proprietor

Place :
Date :
*In the event the entity is not a “company” under the Companies Act, 2013, appropriate reference may be made in place of the word “company”.
**Delete, if not applicable.
***Delete whichever is not applicable.

149.26-3a Annexure XII to the Listing Agreement - Annexure XII to the Listing Agreement is as follows :

ANNEXURE XII TO THE LISTING AGREEMENT
SUGGESTED LIST OF ITEMS TO BE INCLUDED IN THE REPORT ON CORPORATE GOVERNANCE IN THE ANNUAL REPORT OF COMPANIES

1. A brief statement on company’s philosophy on code of governance.
2. Board of Directors:
   (a) Composition and category of directors, for example, promoter, executive, non-executive, independent non-executive, nominee director, which institution represented as lender or as equity investor.
   (b) Attendance of each director at the Board meetings and the last AGM.
   (c) Number of other Boards or Board Committees in which he/she is a member or Chairperson.
   (d) Number of Board meetings held, dates on which held.
3. Audit Committee:
   (i) Brief description of terms of reference
   (ii) Composition, name of members and Chairperson
   (iii) Meetings and attendance during the year
4. Nomination and Remuneration Committee:
   (i) Brief description of terms of reference
   (ii) Composition, name of members and Chairperson
   (iii) Attendance during the year
(iv) Remuneration policy
(v) Details of remuneration to all the directors, as per format in main report.

5. Stakeholders’ Grievance Committee:
   (i) Name of non-executive director heading the committee
   (ii) Name and designation of compliance officer
   (iii) Number of shareholders’ complaints received so far
   (iv) Number not solved to the satisfaction of shareholders
   (v) Number of pending complaints

6. General Body meetings:
   (i) Location and time, where last three AGMs held.
   (ii) Whether any special resolutions passed in the previous 3 AGMs
   (iii) Whether any special resolution passed last year through postal ballot - details of voting pattern
   (iv) Person who conducted the postal ballot exercise
   (v) Whether any special resolution is proposed to be conducted through postal ballot
   (vi) Procedure for postal ballot

7. Disclosures:
   (i) Disclosures on materially significant related party transactions that may have potential conflict with the interests of company at large.
   (ii) Details of non-compliance by the company, penalties, strictures imposed on the company by Stock Exchange or SEBI or any statutory authority, on any matter related to capital markets, during the last three years.
   (iii) Whistle Blower policy and affirmation that no personnel has been denied access to the audit committee.
   (iv) Details of compliance with mandatory requirements and adoption of the non-mandatory requirements of this clause

8. Means of communication:
   (i) Quarterly results
   (ii) Newspapers wherein results normally published
   (iii) Any website, where displayed
   (iv) Whether it also displays official news releases; and
   (v) The presentations made to institutional investors or to the analysts.

9. General shareholder information:
   (i) AGM: Date, time and venue
   (ii) Financial year
   (iii) Date of Book closure
(iv) Dividend Payment Date
(v) Listing on Stock Exchanges
(vi) Stock Code
(vii) Market Price Data: High, Low during each month in last financial year
(viii) Performance in comparison to broad-based indices such as BSE Sensex, CRISIL index etc.
(ix) Registrar and Transfer Agents
(x) Share Transfer System
(xi) Distribution of shareholding
(xii) Dematerialization of shares and liquidity
(xiii) Outstanding GDRs/ADRs/Warrants or any Convertible instruments, conversion date and likely impact on equity
(xiv) Plant Locations
(xv) Address for correspondence.

149.26-3b Annexure XIII to the Listing Agreement - Annexure XIII to the Listing Agreement is as follows:

ANNEXURE XIII TO THE LISTING AGREEMENT
NON-MANDATORY REQUIREMENTS

1. The Board
The Board - A non-executive Chairman may be entitled to maintain a Chairman’s office at the company’s expense and also allowed reimbursement of expenses incurred in performance of his duties.

2. Shareholder Rights
A half-yearly declaration of financial performance including summary of the significant events in last six months, may be sent to each household of shareholders.

3. Audit qualifications
Company may move towards a regime of unqualified financial statements.

4. Separate posts of Chairman and CEO
The company may appoint separate persons to the post of Chairman and Managing Director/CEO.
**ANNEXURE XI TO THE LISTING AGREEMENT**

**FORMAT OF QUARTERLY COMPLIANCE REPORT ON CORPORATE GOVERNANCE**

**Name of the Company:**

**Quarter ending on:**

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Clause of Listing agreement</th>
<th>Compliance Status Yes/No</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>II. Board of Directors</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(A) Composition of Board</td>
<td>49(II)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(B) Independent Directors</td>
<td>49(IIIA)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(C) Non-executive Directors’ compensation &amp; disclosures</td>
<td>49(IIIB)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(D) Other provisions as to Board and Committees</td>
<td>49(IIIC)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(E) Code of Conduct</td>
<td>49(IIID)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(F) Whistle Blower Policy</td>
<td>49(IIIE)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>III. Audit Committee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(A) Qualified &amp; Independent Audit Committee</td>
<td>49(IIIA)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(B) Meeting of Audit Committee</td>
<td>49(IIIB)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(C) Powers of Audit Committee</td>
<td>49(IIIC)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(D) Role of Audit Committee</td>
<td>49(IIID)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(E) Review of Information by Audit Committee</td>
<td>49(IIIE)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>IV. Nomination and Remuneration Committee</td>
<td>49(IV)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>V. Subsidiary Companies</td>
<td>49(V)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>VI. Risk Management</td>
<td>49(VI)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>VII. Related Party Transactions</td>
<td>49(VII)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>VIII. Disclosures</td>
<td>49(VIII)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(A) Related party transactions</td>
<td>49(VIIIA)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(B) Disclosure of Accounting Treatment</td>
<td>49(VIIIB)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(C) Remuneration of Directors</td>
<td>49(VIIIC)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(D) Management</td>
<td>49(VIIID)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(E) Shareholders</td>
<td>49(VIIIE)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(F) Disclosure of resignation of directors</td>
<td>49(VIIIF)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(G) Disclosure of formal letter of appointment</td>
<td>49(VIIG)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(H) Disclosures in the Annual report</td>
<td>49(VIIIH)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Note:

1. The details under each head shall be provided to incorporate all the information required as per the provisions of the Clause 49 of the Listing Agreement.

2. In the column No. 3, compliance or non-compliance may be indicated by Yes/No/N.A. For example, if the Board has been composed in accordance with the Clause 49-I of the Listing Agreement, “Yes” may be indicated. Similarly, in case the company has no related party transactions, the words “N.A.” may be indicated against 49(VII).

3. In the remarks column, reasons for non-compliance may be indicated, for example, in case of requirement related to circulation of information to the shareholders, which would be done only in the AGM/EGM, it might be indicated in the “Remarks” column as - “will be complied with at the AGM”. Similarly, in respect of matters which can be complied with only where the situation arises, for example, “Report on Corporate Governance” is to be a part of Annual Report only, the words “will be complied in the next Annual Report” may be indicated.

149.27 Compliance [Clause 49(XI)]

The company shall obtain a certificate from either the auditors or practicing company secretaries regarding compliance of conditions of corporate governance as stipulated in this clause and annex the certificate with the directors’ report, which is sent annually to all the shareholders of the company. The same certificate shall also be sent to the Stock Exchanges along with the annual report filed by the company.

The non-mandatory requirements given in Annexure XIII to the Listing Agreement (see para 149.26-3b) may be implemented as per the discretion of the company. However, the disclosures of the compliance with mandatory requirements and adoption (and compliance)/non-adoption of the non-mandatory requirements shall be made in the section on corporate governance of the Annual Report.