

# Duties and Responsibilities of Directors

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*“At common law, once a person accepts appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf.”*

- Howard v Herrigel 1991 2 SA 660 (A) 678

### Who is a Director

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# Meaning of Director

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- Clause 34 of S. 2 of the Companies Act, 2013 (“the Act”) defines the term Director to mean “a director appointed to the Board of a company”.
- Clause 10 of S. 2 of the Act defines the term Board of Directors or the Board in relation to a company to mean “a collective body of the directors of the company.”
- Thus, only the person appointed to the Board of company is a ‘director’ under the Act and not every person designated as such.

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## Role of a Director

As an agent : Directors act as representatives of shareholders

Directors as employees : Director appointed as whole time employee

Directors as officers : Directors are included in the definition of officers of a company

Director as a trustee : Director is regarded as a trustee of the company, money and property of the company and the powers in respect of the same are entrusted to and vested in the trustee only.

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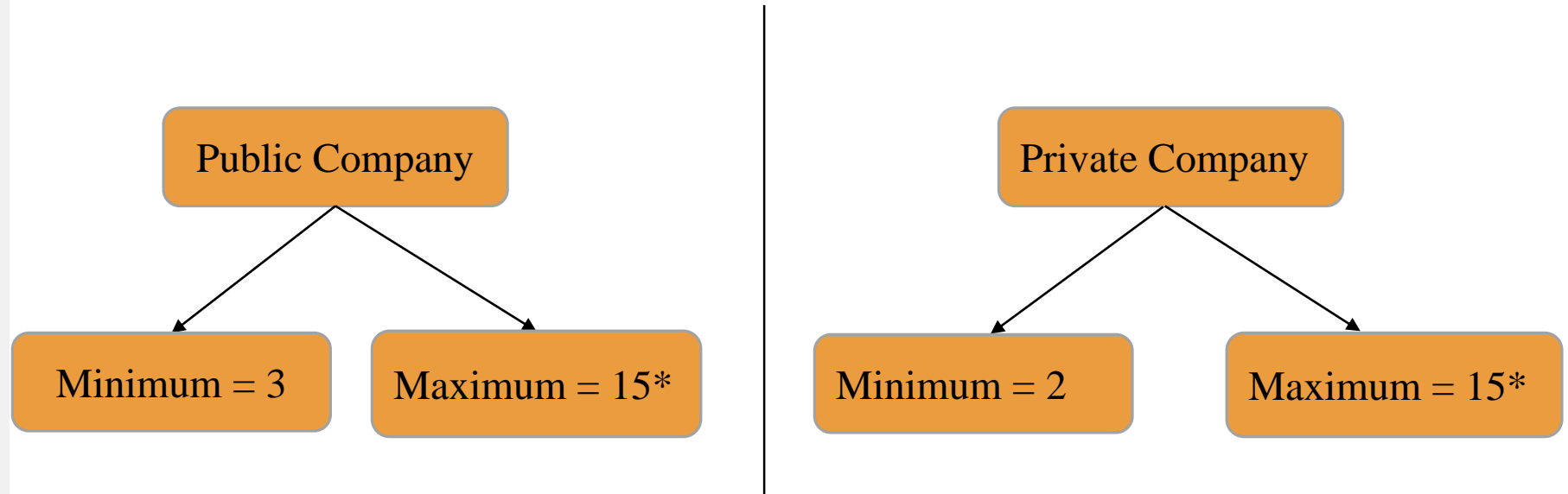
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## Number of Directors

- S. 149 (1) of the Act specifies the number of Directors that can be appointed in a company as under:



\*A company may appoint more than 15 directors after passing a special resolution

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- One person company has only one person as a member. Minimum number of Director can be only one.
- Following companies shall have atleast one woman director :
  - i. Every listed company;
  - ii. Every other public company having –
    - ✓ Paid-up share capital of Rs. 100 crore or more; or
    - ✓ Turnover of Rs. 300 crore or more

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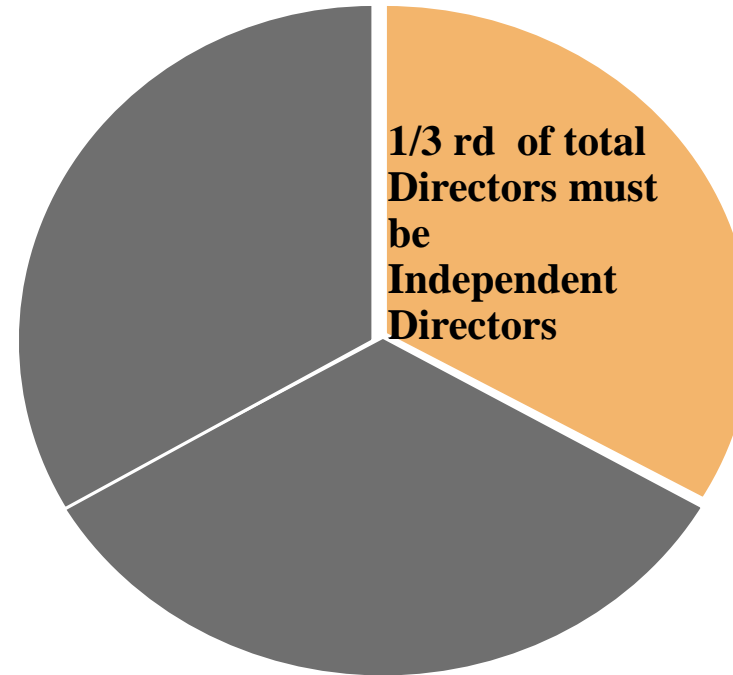
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# Composition of Board of Directors



This composition of directors is applicable to every public listed company

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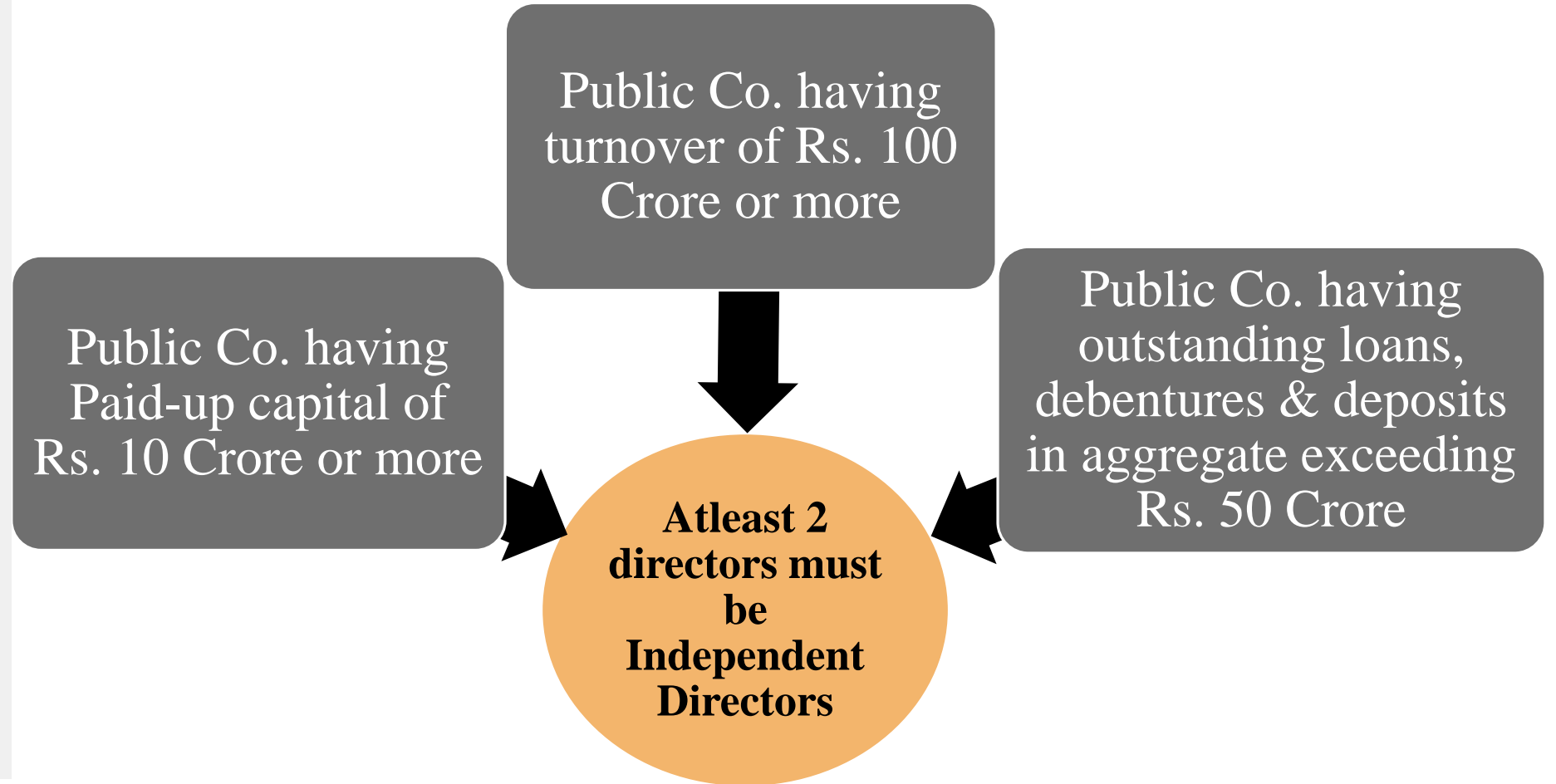
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# Requirement of Independent Directors (“ID’s)





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# Positions held by Directors

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- ❖ Managing Director
- ❖ Manager
- ❖ Whole Time Director
- ❖ Key Managerial Personnel (KMP)
- ❖ Officer in default
- ❖ IDs

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# Managing Director – S. 2(54)

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- ‘Managing Director’ – Director by virtue of Articles/Agreement/Shareholders’ Resolution/Board of Directors .
- Entrusted with substantial powers of management of the affairs of the company.
- Includes a director occupying the position of managing director, by whatever name called.

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# Manager – S. 2(53)

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- ‘Manager’ – An individual who, subject to the superintendence, control and direction of the Board of Directors
- Has the management of the whole, or substantially the whole, of the affairs of a Company.
- Includes a director occupying the position of a Manager, by whatever name called, whether under a contract of service or not (eg. Whole-time/Finance/Technical)

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# Whole Time Director – S. 2(94)

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- ‘Whole-time director’ – includes a director in the whole-time employment of the Company.

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# Officer who is in default – S. 2(60)

- ‘Officer who is in default’ means any of the following officers of the company:
  - Whole-time director;
  - KMP;
  - Where there is no KMP, director specified by the Board and who has consented as such, and if no director is specified, all the directors;
  - Any person charged with any responsibility under the authority of the Board or any KMP, knowingly permits or fails to prevent defaults.
  - Any person in accordance with whose advice, the Board is accustomed to act, other than a person who gives advice in a professional capacity;

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# Officer who is in default – S. 2(60)

- **Every director aware of the contravention by virtue of receiving proceedings of the Board or participation in proceedings without objecting or where contravention takes place with the consent or connivance of the director;**
- Share transfer agents, registrars and merchant bankers in respect of issue or transfer of shares of a company;

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# Officer who is in default – S. 2(60) – comparison with the 1956 Act

- Scope of ‘Officer who is in default’ has been widened as compared to the Companies Act, 1956 (“the 1956 Act”);
- Clause (vi) of section 2(60) could be used where any offence happened without knowledge of the concerned Director.- Guidelines of Master Circular 1/2011 dt 29.7.2011 brought on statute now.
- Share transfer agents, registrars and merchant bankers are brought under the ambit of officer in default;
- CFO is also covered under this category;

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# IDs S. 2(47) r.w.s. 149(6)

- ‘ID’ means an ID referred to in sub-section (6) of section 149 of the Act.
- Other than MD or WTD or Nominee Director.
- In the opinion of the Board, a person of integrity, possessing relevant expertise and experience.
- To ensure independence and equitableness of the Board, the Act puts various responsibilities listed under section 149 (6) of the Act by way of qualifications.



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# IDs- S. 2(47) r.w.s. 149(6)

- Independence of Directors/Qualifications of Independent Directors is determined by :
  - Relationship of such director with the company;
  - Relationship of relatives of such Director with the company;
  - Holding positions with the company or relationship with auditors, etc.
  - Other Qualifications

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### Qualifications based on Relationship of such Director of the company

Not a promoter of the company or its holding, subsidiary or associate company

Not related to the promoters or directors in the holding, subsidiary or associate company

No *pecuniary* relationship other than :

- remuneration; or
  - having transaction not exceeding 10% of his total income or such amount as may be prescribed with the company, its *related companies* or *related persons* during two immediately preceding FYs or during the current FY. (Provision yet to be notified)
- General Circular 14/2014-IDs entering into transactions with the company that are at par with the members of general public and at the same price will not be said to have ‘pecuniary relationship’. Also, receipt of fee, reimbursement of expenses and profit related commission to be excluded from “pecuniary relationship.”

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### Qualifications based on relationship of relatives of such Director of the company

Relatives not to hold any security or interest in the company its *related companies* during two immediate preceding FYs or current FY above the threshold.

Threshold- Face value  $\leq$  Rs. 10 lakhs or 2% of paid-up capital.

Relative not to be indebted to the company, its related company or their related persons in excess of prescribed amount during two immediate preceding FYs or current FY

Relatives not to have given guarantee or provided any security to the company, its related company or their related person for the prescribed amount during the two immediate preceding FYs or current FY.

Relatives not to have any other pecuniary transaction or relationship with the company or its related company amounting to 2% or more of its gross turnover or total income singly or in combination with the transactions referred to in (i), (ii) or (iii)

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Qualifications based on holding positions with the company or relationship with auditors, etc.

ID /relatives not to be KMP or employee of the company, its related company in any of the 3 FYs immediately preceding the FY in which he is proposed to be appointed

ID/relatives not to be employee or proprietor or partner in any of the 3 FYs immediately preceding the FY in which he is proposed to be appointed of:

- a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company;
- **Any legal or 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**

ID together with his relatives not to hold 2% or more of the total voting power of the company

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## Other Qualifications

ID/ his relative not to be CEO or director, of any NPO that receives 25% or more of its receipts from the company, any of its promoters or directors or its related companies or that holds 2% or more of the total voting power of the company

Every ID 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 FY or whenever there is any change in the circumstances which may affect his status as an ID, give a declaration that he meets the criteria of independence as provided in S. 149(6) of the Act.

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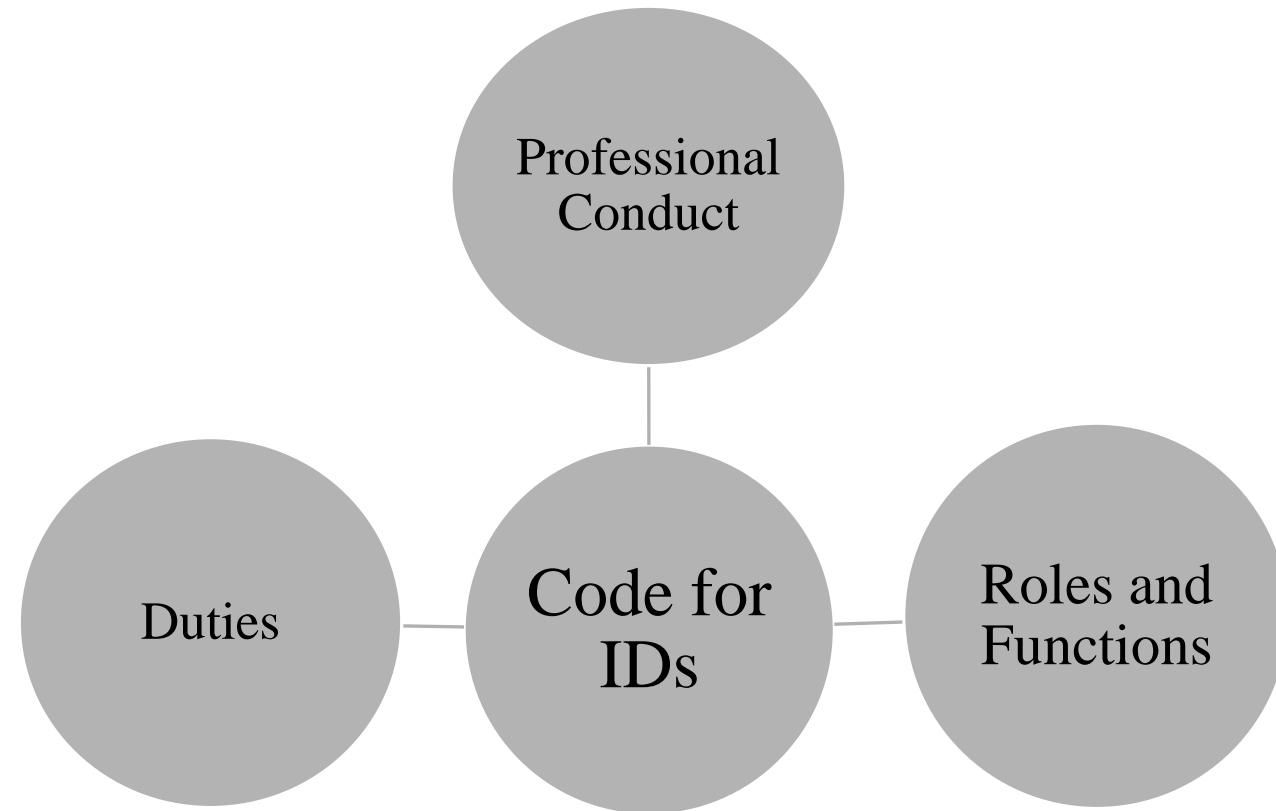
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# Schedule IV - IDs

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# Guidelines of Professional Conduct

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- Uphold ethical standards of integrity and probity;
- Act objectively and constructively while exercising duties;
- Exercise responsibilities in a *bonafide* manner in the interest of the company;
- Devote time and attention to professional obligations for balanced decision making;
- Not allow any extraneous considerations that vitiate his exercise of objective independent judgement in decision making;

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# Guidelines of Professional Conduct

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- Refrain from abusing his position against the detriment of the company or for gaining direct or indirect personal advantage;
- Refrain from any action that would lead to loss of his independence;
- Inform the Board immediately when ID loses his independence;
- Assist the company in implementing the best corporate governance practice.



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# Role and functions

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- Bring an independent judgement to bear on Board's deliberations on issues of strategy, performance, risk management, resources, key appointments and standards of conduct;
- Objective evaluation of Board and management's performance;
- Scrutinise management performance and monitor reporting of performance
- Satisfy themselves on integrity of financial information and that the financial controls and systems of risk management are robust and defensible;
- Safeguard interests of all stakeholders, particularly minority shareholders;

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# Role and functions

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- Balance conflicting interest of the stakeholders;
- Determine appropriate levels of remuneration, appoint and recommend removal of executive directors, KMP and senior management
- Moderate and arbitrate in situations of conflict between management and shareholder's interest

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- Regularly updating and refreshing the skills, knowledge and familiarity with the company;
- Seek clarification, and where necessary, take opinion of the experts;
- Participate actively in all meetings of the Board and the committees and general meetings
- Be well informed about the company and the external environment in which it operates
- Not unfairly obstruct the functioning of a proper board or committee;

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- Ensure that adequate deliberations are held before approving related party transactions and that they are in the interest of the company;
- Ensure that the company has functional vigil mechanism and person who uses such mechanism is not prejudicially affected on account of such use;
- Report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy;
- Act within authority, assist in protecting the legitimate interest of the company, its shareholders and its employees;
- Not disclose confidential information unless such disclosure is expressly approved by the board or required by the law.

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# Liabilities of IDs

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- S. 149(12) provides for the liability of ID and Non-executive directors.
- Liabilities of an ID (not being a promoter or KMP) are limited, to the acts of omission or commission, which
  - i. Occurs with his knowledge, attributable through board processes, and
  - ii. With their consent or connivance or where they had not acted diligently

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# Duties of Directors – S. 166

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- Director of a company (incl of a private company) shall act in accordance with the articles the company;
- Promote the objects for the benefit of its members as a whole and the best interest of the company;
- Exercise duties with reasonable care, skill and exercise independent judgement;
- Not involve in situations which conflict with the interest of the company;
- Not to achieve or attempt to achieve any undue gain or advantage
- Shall not assign his office

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# As a member of Audit Committee – S. 177

- Recommendation for appointment, remuneration of auditors;
- Review and monitor auditor's independence and performance and effectiveness of audit process;
- Examination of financial statement and auditor's report thereon;
- Approval or modification of Related Party Transactions;
- Recommendations to the Board, in case of transactions other than transactions referred to in s. 188 where the Audit committee does not approve the transaction (Provision yet to be notified);
- Scrutinise inter-corporate loans and investments;
- Valuation of undertakings or assets of the company, wherever it is necessary;
- Evaluation of internal financial controls & risk management systems;
- Monitor end use of funds raised through public offers and related matters



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# As a member of Corporate Social Responsibility Committee (CSR)

- Functions of the CRS Committee:
  - Formulate and recommend to the Board, a CSR Policy;
  - Recommend the amount of expenditure to be incurred on the activities specified in Schedule VII;
  - Monitor CSR Policy;
- Functions of the Board:
  - Approve and disclose contents of the CSR Policy after taking into account the recommendations of CSR Committee;
  - Ensure that the activities included in the CSR Policy are undertaken by the Company;
  - Ensure that every company spends atleast 2% of the average net profits of the company made during 3 immediately preceding FYs

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# As a member of Nomination and Remuneration Committee (NRC) – S. 178

- Identify persons to be appointed as directors and in the senior management of the company;
- Specify the manner for effective evaluation of performance of Board, its committees and individual directors;
- Formulate criteria for directors and recommend remuneration policy for the directors, KMP and other employees;
- Ensure reasonable composition of remuneration and its sufficiency;
- Ensure balance between fixed and incentive pay of remuneration paid to directors, KMP and senior management.

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# Disclosure of interest by director – S. 184

- Every director shall at the :
  - i. first meeting of the Board where he participates as a director; and
  - ii. thereafter every first meeting of the Board in a financial year;
  - iii. Where there is change in the disclosures already made, then at the first meeting of the Board after such change;  
  
disclose his concern or interest in companies, body corporate, firms or other association of individuals
- Every director of a company, interested in a contract with the specified entities to disclose nature of his interest at the meeting of the Board and not to participate in such meeting.
- The director to disclose his interest forthwith when he becomes subsequently interested, at the first meeting of the Board immediately after he becomes so interested.

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# Miscellaneous Duties

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- Where the director receives remuneration (in excess of the prescribed limits), it is his duty to refund such sum to the company within 2 years or prescribed period and until such refund, he hold it in trust for the company – S. 197;
- Promoters, directors, officers and employees who are or have been in employment of the of the company shall extend full co-operation to the company liquidator in discharge of his functions and duties – S. 284;

# DUTIES UNDER SEBI (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS) REGULATIONS, 2015

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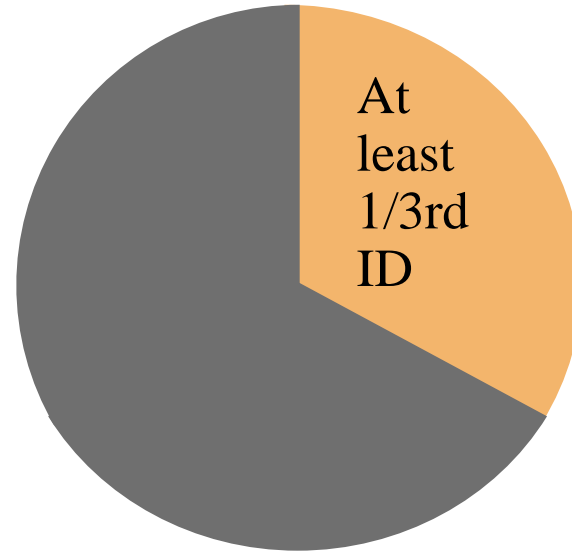
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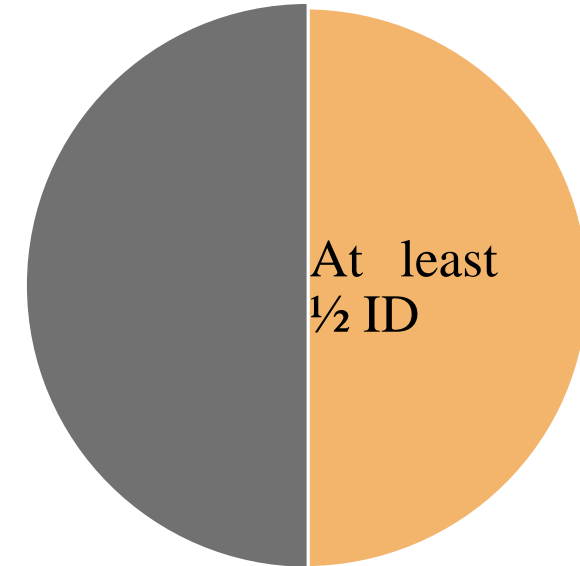
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# Number of Directors

Chairperson of the BOD is a non-executive director



Entity does not have a regular non-executive chairperson



The Board to have optimum combination of executive and non-executive directors with at least one woman director and not less than fifty percent to comprise of NED.

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# Responsibilities as a member of the Board

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## i. Disclosure of information:

- Disclosure of material interest in any transaction or matter affecting the listed entity;
- Maintain operational transparency and confidentiality of information

## ii. Key functions of the board of directors:

- Review corporate strategy, set performance objectives and oversee capital expenditure and acquisitions;
- Monitor effectiveness of the listed entity and make changes to the same

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# Responsibilities as a member of the Board

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- Selecting, compensating, replacing KMP and overseeing succession planning;
- Ensure transparent nomination process;
- Monitoring and managing potential conflicts of interest;
- Ensure integrity of listed entity's systems and compliance with the law and relevant standards;
- Monitor and review evaluation framework of the Board



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# Responsibilities as a member of the Board

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### iii. Other important responsibilities:

- To act on informed basis and in the best interest of the listed entity;
- Treat all shareholders fairly;
- Maintain high ethical standards;
- Exercise objective independent judgement;
- Periodically review compliance reports in respect of applicable laws;
- Lay down a code of conduct for members of the Board and senior management of the listed entity;

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# Recommendations of Kotak Committee Report accepted by SEBI

- Reduction in maximum no. of in public companies from 10 to 8 by April 1, 2019 and to 7 by April 1, 2020;
- Expanding the eligibility criteria for IDs;
- Enhanced role of Audit Committee, NRC and Risk Management Committee;
- Disclosure of expertise/skills of directors;
- Minimum 6 directors in top 1000 listed entities by market capitalisation;
- At least 1 woman ID in top 500 listed entities by market capitalisation
- Separation of CEO/MD and Chairperson in top 500 listed entities by market capitalisation

# LIABILITIES OF DIRECTORS (Important Provisions)

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- Officer in Default shall be liable:
  - where the provisions specifically provide for penalties or imprisonment
  - Under section 450 where no such specific penalty is provided
  - S.450 imposes a penalty which may extend to ₹ 10,000 and a further fine of ₹ 1000 per day in case of a continuing default.

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- Personal Liability:
  - A director can be held personally liable if he:
    - i. Enters into a contract in his own name;
    - ii. Enters into contracts on behalf of the Company but fails to use the words “LTD. Or PVT LTD.”;
    - iii. Acts ultra vires the Act or the MOA or AOA of the Company;
    - iv. Singly Enters into a contract on behalf of company without authorisation by the Board.

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- Personal Liability:
  - Civil liability for mis-statement in prospectus – S. 35
  - Damages for fraud for failure to repay deposits – S. 75
  - Liability for fraudulent conduct of business – S. 339

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# Liabilities of Directors

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- Fraud (S. 447):
  - Fraud includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner with the intent to deceive whether or not there is any wrongful gain or wrongful loss;
  - Any person found to be guilty of fraud, punishable with
    - i. Imprisonment for a term between 6 months and 10 years; and
    - ii. Fine not less than amount involved in the fraud, which may extend to 3 times the amount involved in fraud..

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# Liabilities of Directors

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- LEGAL ACTION AND SUITS:
  - Legal action by the Company against directors, in case of breach of duties;
  - Class action suits by minority shareholders/depositors against its directors for – S. 245:
    - i. fraudulent act or
    - ii. wrongful act or
    - iii. omission of conduct



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# Changing scenario

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- Rising concerns on role, accountability and responsibility of the NED, nominee, IDs, who can be held for the company's disputes;
- Confession by chairman of irregularities leading to prosecution;
- Accusation of several IDs;
- Facing severe backlash on failure to detect fraud;
- Arrest of a leading investment banker in his role as an ID of a company for failure of the company to return the amounts collected from depositors
- Onerous to become NED due to high level of responsibilities;
- Merely being a NED liability/criminal prosecution.

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# Precautions & Safeguards

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- Considering the stringent penal provisions imposed, Directors must adopt an extra cautious approach;
- Exercise due diligence while getting appointed for the first time and even subsequent appointments;
- All directors (including IDs) must endeavour to attend as many board/committee meetings as possible to ensure that they are fully aware of the company's business.
- Peruse agenda papers and background information made available to them for meetings to enable their meaningful participation and contribution.

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# Precautions & Safeguards

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- Ensure that any questions raised by them in a board meeting or any dissent expressed is properly recorded in the minutes of the meeting;
- Directors (especially new directors in technical field) should receive appropriate training on do's and don'ts of directors' legal duties;
- Take legal advice, in cases of doubt;
- Insist on the company giving regular orientation on business aspects;
- Insist on Directors and Officers' liability with adequate coverage and amount;
- Engage external agencies for addressing whistleblowing issues.

# Role of a Board of Directors summarised

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*“The Board’s role is to pull management out of the trees to see the forest.”*

-Pearl Zhu, Digitizing Boardroom: The Multifaceted Aspects of Digital Ready Boards

Thank You

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