

Duties and Liabilities of Directors

The following duties and liabilities have been imposed on the directors of companies, by the Indian Companies Act of 2013, under its **Section 166**: ---

- A director of a company shall act in accordance with the Articles of Association (AOA) of the company.
- A director of the company shall act in good faith, in order to promote the objects of the company, for the benefits of the company as a whole, and in the best interests of the stakeholders of the company.
- A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
- A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
- A director of a company shall not assign his office and any assignment so made shall be void.
- If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one Lakh Rupees but which may extend to five Lac Rupees.

The duties set out in this Section are not exhaustive. Apart from the duties set out in Section 166, directors are also responsible for various obligations provided under other Sections of the 2013 Act. For example:

- The board needs to lay the financial statements for approval and adoption at the annual general meeting of the shareholders (**Section 129**);
- The directors are responsible for devising proper systems to ensure compliance with the provisions of all applicable laws and to ensure that such systems are adequate and are operating effectively (**Section 134**);
- Director needs to ensure that the company complies with obligations relating to corporate social responsibility provided under **Section 135**;
- The board is responsible for appointing first auditors (**Section 139**);
- A director needs to disclose his interest in a contract with the company (**Section 184**);
- A director is prohibited from engaging in forward dealing of securities (**Section 194**);

- The board is responsible for appointment of whole time key managerial personnel (**Section 203**);
- The directors are responsible for issuance of notice and holding of board meetings and general meetings etc.

INDEPENDENT DIRECTORS

Apart from the duties mentioned above, which are applicable to all directors, independent directors are also additionally required to comply with code of conduct specified under **Schedule IV** of the 2013 Act. The Schedule has stipulated 13 (thirteen) different duties to be performed by an independent director. Some of these duties include:

- (a) Regularly updating and refreshing the skills, knowledge and familiarity with the company.
- (b) Strive to attend and participate actively in all meetings of the Board and the committees and general meetings.
- (c) Keeping well informed about the company and the external environment in which it operates.
- (d) Not to unfairly obstruct the functioning of a proper board or committee.
- (e) To pay sufficient attention and ensure that adequate deliberations are held before approving related party transactions and assure himself that the same are in the interest of the company.
- (f) To ensure that the company has an adequate and functional vigil mechanism and also to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use.
- (g) Not to disclose confidential information, including commercial secrets, technologies, unpublished price sensitive information, etc., unless such disclosure is expressly approved by the board or is required by law. Apart from the duties, the Code also covers other aspects, such as it provides guidelines for professional conduct, role and functions of independent directors, manner of appointment, reappointment, resignation/removal, need for separate meetings of independent directors and evaluation of independent directors by the entire board. As seen from the above, various duties and responsibilities have been cast on independent directors, including protecting interests of minority shareholders, harmonizing conflict of interests of stakeholders, acting as a mediator in cases of conflicting interests etc considering the importance of their role from a corporate governance perspective.

LIABILITY OF DIRECTORS

Contravention of provisions of Section 166 (relating to codified duties) is punishable with a fine which shall not be less than Rs 1 Lakh but which may extend to Rs 5 lakhs.

Further, penal provisions throughout the 2013 Act have been made more stringent and provide for increased penalties as compared to the 1956 Act. On an average, 5 the minimum amount of fine that is imposed under certain Sections is Rs 25,000 which in certain cases extends to Rs 25 crores or even more.

Set out below is the list of few contraventions, where the penalties are Rs 1 crore or more:

- (a) Violation of provisions relating to not-for-profit companies (**Section 8**);
- (b) Violation of provisions relating to subscription of securities on private placement (Section 42);
- (c) Issue of duplicate share certificates with an intent to defraud (**Section 46 (5)**);
- (d) Failure to repay deposits within specified time (**Section 74 (3)**);
- (e) Contravention of provisions relating to insider trading (**Section 195 (2)**).

Apart from monetary penalties, certain offences even attract imprisonment. Most of the offences leading to imprisonment under the 2013 Act are non-cognizable (that is would need warrant to arrest) but there are certain serious offences which are cognizable in nature and would not require a warrant to arrest. These offences are mainly connected to fraud or intent to defraud.

Some of such offences are listed below:

- (a) Furnishing of any false or incorrect particulars of any information or suppressing any material information in any of the documents filed with the Registrar of Companies in relation to the registration of a company (**Section 7 (6)**);
- (b) Including in the prospectus any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead (**Section 34**);
- (c) Fraudulently inducing persons to invest any money (**Section 36**);
- (d) Default under **Section 56** relating to transfer and transmission of shares with an intent to defraud;
- (e) Offences relating to reduction of share capital (**Section 66**).

The company has the right to initiate legal action against directors, in case of breach of their duties. Apart from this, the 2013 Act has also introduced the novel concept of ‘class action suits’ under Section 245. Under this concept, a group of shareholders (constituting a minimum of 100 shareholders or such minimum percentage of total shareholders as may be prescribed) can bring an action on behalf of all affected parties, against the company and/or its directors, for any fraudulent or wrongful act or omission of conduct on its/their part.

Further, the 2013 Act proposes to set up a National Company Law Tribunal which is expected to provide speedier and more efficient remedy. Apart from the 2013 Act, there are several other statutes, such as Negotiable Instruments Act, Consumer Protection Act, which lay down increased liabilities on directors. In case of default on the part of the Company, there are several instances where the complainant as a strategy, would make all the directors party to the suit, to put pressure on the company. Once a director is made a party, he will have to go through the time consuming and cumbersome court procedures to prove his innocence. This will no doubt cause lots of hardship and inconvenience to an innocent director.

FORWARD DEALING AND INSIDER TRADING

Specific provisions (**Section 195, 196**) have been introduced in the ICA 2013 prohibiting forward dealing and insider trading of securities.

In the case where a director or a member of key managerial personnel enters into forward dealing in securities of a company, he will be punishable with:

- imprisonment for up to two years;
- a fine ranging from INR0.1 million to INR0.5 million.

Both imprisonment and a fine can be imposed. He will also be liable to surrender the acquired securities to the company.

In the case where a director or a member of key managerial personnel enters into insider trading, he will be punishable with:

- imprisonment for up to five years;
- a fine ranging from INR0.5 million to INR250 million, or three times the amount of profit made out of the insider trading (whichever is higher).

Both imprisonment and a fine can be imposed.

WINDING UP

The ICA 2013 also makes provisions for winding up a company. A company can be wound up by the Tribunal under specified circumstances, which include:

- The inability of the company to pay its debts.
- Where the revival and rehabilitation of a company is not possible.
- Where the affairs of the company have been conducted in a fraudulent manner.

The winding up petition must be presented by specified persons, which can include:

- Creditors.
- Registrar of Companies.
- Persons authorised by central government.
- The company itself.

A company liquidator must be appointed by the Tribunal for the purposes of winding up a company.

The directors and other officers of a company for which a winding up order has been passed by the Tribunal must submit the company's complete and audited books of accounts to the liquidator specified by the Tribunal within 30 days of the passing of the winding up order. In the case of a contravention of this provision, the director or officer can be liable to:

- Imprisonment for up to six months.
- A fine ranging from INR25,000 to INR0.5million.

Both imprisonment and a fine can be imposed.

The promoters, directors, officers and employees must extend full co-operation to the company liquidator in relation to the winding up proceedings. In the case of contravention of this provision, the promoters, directors, officers and employees can be liable to:

- Imprisonment for up to six months.
- A fine of up to INR50,000.

Both imprisonment and a fine can be imposed.

PERSONAL CRIMINAL LIABILITY: WHEN APPLICABLE

The law on individual criminal liability of directors is established in two sets of cases:

1. Where expressly provided for by the statute

Where the vicarious liability of a director for acts of the company in his individual capacity is expressly provided for in a provision, then the director may be held liable for such actions. In *S.K Alagh v. State of U.P*[1] it was held that there is no deemed liability of the director in case of criminal acts of the company unless there is a statutory provisions to that effect. Further, this point was cemented in 2015 by the Supreme Court in *Sunil Mittal v.*

CBI[2] where it was held that if the Company is an accused, vicarious liability is not automatically imputed in the absence of a statutory provision to that effect.

1. Where implied liability by acts of directors

The conditions for a director to be made an accused were laid down by the SC in *Sabitha Ramamurthy v. R.B.S Channabasavaradhya*[3] where the court said that for a director to be made an accused for actions of the company, specific allegations as to the part played by the director in the illegal transaction and also specific evidence in this regard needs to be brought to out. Only when these conditions are satisfied can a director be validly made an accused in a criminal case.

To add to this, the SC in *Sunil Mittal v. CBI* (supra) has stated that for any offence involving mens rea, the intent and action of the individual who acts on behalf of the company is to be shown. Sufficient evidence of active role coupled with criminal intent must necessarily be show for a director to be made accused along with the company.

It has been held by the SC in *Gunmala Sales v. Anu Mehta*[4] that although there is no deemed liability of the directors in absence of statute, if the complainant makes out a case whereby the specific acts may be attributable to the director in question such that at the 'relevant time' the director was in charge or in actual control over the actions that took place, the director may be held accused and subsequently vicariously liable for the actions of the company.

Miscellaneous:

The Indian Companies Act 2013 (ICA 2013) makes specific provision for fraud (by any person). Based on **section 447 of the ICA 2013**, fraud in relation to a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position, with the intent to deceive, to gain undue advantage from, or to injure the interests of, the company/its shareholders/its creditors/any other person, whether or not there is any wrongful gain or wrongful loss. A case of fraud can attract imprisonment for a term ranging from six months to ten years, and also a fine ranging from the amount involved in the fraud to three times the amount involved in the fraud.

The 2013 Act does not make specific provisions for theft and bribery. Theft has been dealt with under the Indian Penal Code 1860 (IPC 1860). Relevant provisions under the IPC 1860 have general applicability (that is, they apply to any person, including directors). Bribery has been dealt with under the Prevention of Corruption Act 1988, the IPC 1860, and special statutes such as the Representation of People Act 1951 and other subordinate legislation. These items of legislation do not make specific provisions for the liability of directors. However, directors will be held liable if found guilty under the various legislation (due to their general applicability).

This is the current law on the criminal liability of directors for actions of the company.

[1] (2008) 5 SCC 662

[2] (2015) 4 SCC 609

[3] (2006) 10 SCC 581

[4] (2015) 15 SCC 103

DIRECTORS LIABILITIES UNDER SECURITIES LAW

The main pieces of legislation dealing with securities in India are:

- The SEBI Act and the regulations issued under that Act. These include, in particular:
 - SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009.
 - SEBI Takeover Regulations.
 - SEBI Insider Trading Regulations.
 - SEBI Delisting Regulations.
 - Securities Contracts (Regulation) Act, 1956 (SCRA).
- Listing Agreement with stock exchanges.

CERTAIN OFFENCES UNDER THE SEBI ACT

Securities and Exchange Board of India Act, 1992 [As amended by the Securities Laws(Amendment) Act, 2014]

Offences. (Section 24)

(1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules or regulations made there under, he shall be punishable with imprisonment for a term which may extend to [ten years, or with fine, which may extend to twenty-five crore rupees or with both].

(2) If any person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any of his directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to [ten years, or with fine, which may extend to twenty-five crore rupees or with both].

Offences by companies.(Section 27)

1. (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall

render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Explanation : For the purposes of this section,

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.

CODE OF CONDUCT UNDER THE CLAUSE 49 OF THE LISTING AGREEMENT

The Board Members and Senior Management Personnel shall observe the highest standards of ethical conduct and integrity and shall work to the best of their ability and judgment.

The Board Members and the Senior Management Personnel of the Company:

1. Shall maintain and help the Company in maintaining highest degree of Corporate Governance practices.
2. Shall act in utmost good faith and exercise due care, diligence and integrity in performing their office duties.
3. Shall not involve in taking any decision on a subject matter in which a conflict of interest arises or which, in his opinion, is likely to arise.
4. Shall not utilize bribery or corruption in conducting the Company’s business. No Director or employee will offer or provide either directly or indirectly any undue pecuniary or other advantages for the purpose of obtaining, retaining, directing or securing any improper business advantage.
5. Shall not indulge themselves in Insider Trading and shall comply with the Insider Trading Code and Insider Trading Regulations as laid down by SEBI and the Company.
6. Shall ensure that they shall protect the Company’s assets and properties including physical assets, information and intellectual rights and not use the same for their personal gain.
7. Shall not seek or accept any compensation (in any form), directly or indirectly, for services performed for the Company from any source other than the Company.
8. Shall not, without the prior approval of the Board or Senior Management, as the case may be, accepts employment or a position of responsibility with any other organization for remuneration or otherwise that are prejudicial to the interests of the

Company and shall not allow personal interest to conflict with the interest of the Company.

9. Shall not receive any gift, payments or favor in whatsoever form from Company's business associates, which can be perceived as being given to gain favor or dealing with the Company and shall ensure that the Company's interests are never compromised.
10. Shall maintain confidentiality of information entrusted by the Company or acquired during performance of their duties and shall not use it for personal gain or advantage. No Board Members and Senior Management Personnel shall provide any information either formally or informally, to the press or any other publicity media, unless specifically authorized. However, that Board Members and Senior Management Personnel shall be free to disclose such information as is part of the public domain at the time of disclosure/ authorized or required to be disclosed pursuant to a decision of the Board/ required to be disclosed in accordance with applicable laws, rules, regulations or guidelines or to any authority.
11. Shall avoid any dealings with a Contractor or Supplier that compromises the ability to transact business on a professional, impartial and competitive basis or influence decision to be made by the Company.
12. Shall avoid conducting business with (a) a relative (b) a Private Limited Company in which he or his relative is a Member or a Director (c) a Public Limited Company in which he or his relative holds 2% or more shares or voting right and (d) with a firm in which the relative is a partner, except with the prior approval of the Board, and shall make proper disclosure of related party transactions to the Board of Directors, the Chairman and Managing Director or the Competent Authority under the provisions of Accounting Standard 18 issued by the Institute of Chartered Accountants of India.
13. Shall not commit any offences involving moral turpitude or any act contrary to law or opposed to the public policy resulting in a conviction.

ROLE AND FUNCTION OF INDEPENDENT DIRECTORS:

The independent directors:

1. Shall 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. Shall bring an objective view in the evaluation of the performance of board and management;
3. Shall scrutinize the performance of management in meeting agreed goals and objectives and monitor the reporting of performance;
4. Shall satisfy themselves on the integrity of financial information and that financial controls and the systems of risk management are robust and defensible;
5. Shall safeguard the interests of all stakeholders, particularly the minority shareholders;

6. Shall balance the conflicting interest of the stakeholders;
7. Shall 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. Shall moderate and arbitrate in the interest of the company as a whole, in situations of conflict between management and shareholder's interest.

DUTIES OF INDEPENDENT DIRECTORS:

The independent directors:

1. Shall undertake appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the company;
2. Shall 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. Shall strive to attend all meetings of the Board of Directors and of the Board committees of which he is a member;
4. Shall participate constructively and actively in the committees of the Board in which they are chairpersons or members;
5. Shall strive to attend the general meetings of the company;
6. Shall 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. Shall keep themselves well informed about the company and the external environment in which it operates;
8. Shall not to unfairly obstruct the functioning of an otherwise proper Board or committee of the Board;
9. Shall 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. Shall 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. Shall report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy;
12. Shall acting within his authority, assist in protecting the legitimate interests of the company, shareholders and its employees;
13. Shall not disclose confidential information, including commercial secrets, technologies, advertising and sales promotion plans, unpublished price sensitive information, unless such disclosure is expressly approved by the Board or required by law.

DISCLOSURE OF INFORMATION :-

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.

COMMUNICATION OF VIOLATIONS :-

Directors shall communicate any suspected violations of this Code promptly to the Chairman of the Audit Committee. Senior Management should communicate any suspected violation of this code to the Managing Director who in turn shall communicate it to the Chairman of the Audit Committee. Violations will be investigated by the Board or by persons designated by the Board, and appropriate action will be taken in the event of any violations of the Code.

CONSEQUENCES OF NON- COMPLIANCE OF THIS CODE :-

In case of breach of this Code, the same shall be considered by the Board of Directors for initiating appropriate action, as deemed necessary. Any waiver of this Code may be made only by the Board of Directors and must be promptly disclosed to the Company's shareholders.

FURTHER LIABILITIES UNDER THE LISTING AGREEMENT

(A) Basis of related party transactions i. A statement in summary form of transactions with related parties in the ordinary course of business shall be placed periodically before the audit committee. ii. Details of material individual transactions with related parties which are not in the normal course of business shall be placed before the audit committee. iii. Details of material individual transactions with related parties or others, which are not on an arm's length basis should be placed before the audit committee, together with Management's justification for the same..

(B) Disclosure of Accounting Treatment: 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.

(C) Board Disclosures – Risk management The company shall lay down procedures to inform Board members about the risk assessment and minimization procedures. These procedures shall be periodically reviewed to ensure that executive management controls risk through means of a properly defined framework.

(D) Proceeds from public issues, rights issues, preferential issues etc. When money is raised through an issue (public issues, rights issues, preferential issues etc.), it shall disclose to the Audit Committee, 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. 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. 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. The audit committee shall make appropriate recommendations to the Board to take up steps in this matter.

(E) Remuneration of Directors i. All pecuniary relationship or transactions of the non-executive directors vis-à-vis the company shall be disclosed in the Annual Report. ii. Further 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. iii. 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. iv. The company shall disclose the number of shares and convertible instruments held by non-executive directors in the annual report. v. 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

(F) Management i. 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: 1. Industry structure and developments. 2. Opportunities and Threats. 3. Segment-wise or product-wise performance. 4. Outlook 5. Risks and concerns. 6. Internal control systems and their adequacy. 7. Discussion on financial performance with respect to operational performance. 8. Material developments in Human Resources / Industrial Relations front, including number of people employed. ii. 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 (for e.g. dealing in company shares, commercial dealings with bodies, which have shareholding of management and their relatives etc.) Explanation: For this purpose, the term "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.