भारतीय प्रतिभूति और विनिमय बोर्ड
Securities and Exchange Board of India

CONSULTATIVE PAPER ON REVIEW OF CORPORATE GOVERNANCE NORMS IN INDIA

1. Concept of Corporate Governance

1.1. *"Corporations pool capital from a large investor base both in the domestic and in the international capital markets. In this context, investment is ultimately an act of faith in the ability of a corporation's management. When an investor invests money in a corporation, he expects the board and the management to act as trustees and ensure the safety of the capital and also earn a rate of return that is higher than the cost of capital. In this regard, investors expect management to act in their best interests at all times and adopt good corporate governance practices.*

1.2. *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."*[1]

2. Evolution of Corporate Governance framework in India:

2.1. Companies Act, 1956 provides for basic framework for regulation of all the companies. Certain provisions were incorporated in the Act itself to provide for checks and balances over the powers of Board viz.**:**

- ✓ Loan to directors or relatives or associated entities (need CG permission) (Sec 295)
- ✓ Interested contract needs Board resolution and to be entered in register (Sec 297)
- ✓ Interested directors not to participate or vote (Sec 300)
- ✓ Appointment of director or relatives for office or place of profit needs approval by shareholders. If the remuneration exceeds prescribed limit , CG approval required (Sec 314)
- ✓ Audit Committee for Public companies having paid-up capital of Rs. 5 Crores (Sec 292A)
- ✓ Shareholders holding 10% can appeal to Court in case of oppression or mismanagement (397/398).

2.2. In Companies Act, 1956, SEBI has been given power only to administer provisions pertaining to issue and transfer of securities and non-payment of dividend.

2.3. Apart from the basic provisions of the Companies Act, every listed company needs to comply with the provisions of the listing agreement as per Section 21 of Securities

[1] Report of Narayana Murthy Committee on Corporate Governance, 2003

Contract Regulations Act, 1956. Non-compliance with the same, would lead to delisting under Section 22A or monetary penalties under Section 23 E of the said Act.

2.4. Further, SEBI is empowered under Section 11 and Section 11A of SEBI Act to prescribe conditions for listing. However, Section 32 of the SEBI Act, 1992 states that the provisions of the SEBI Act, 1992 shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

2.5. Considering the emergence of code of best Corporate Governance practices all over the world (like Cadbury Greenbury and Hampel Committee reports), in 1999, SEBI constituted a Committee on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla, to promote and raise the standard of Corporate Governance in respect of listed companies. SEBI's Board, in its meeting held on January 25, 2000, considered the recommendations of the Committee and decided to make the amendments to the listing agreement on February 21, 2000 for incorporating the recommendations of the committee by inserting a new clause in the Equity Listing Agreement – i.e. Clause 49.

2.6. Subsequently, after Enron, WorldCom, and other corporate governance catastrophes, SEBI felt that there was a need to improve further the level of corporate governance standards in India and constituted a second corporate governance committee chaired by Mr. Narayana Murthy, of Infosys Technologies Limited. Based on the recommendations of the aforesaid Committee, SEBI issued a circular on August 26, 2003 revising Clause 49 of the Listing Agreement. Based on the public comments received thereon and the revised recommendations of the Committee, certain provisions of the regulatory framework for corporate governance were modified and relevant amendments were made to Clause 49 of the Listing Agreement. The revised clause 49 superseded all the earlier circulars on the subject and became effective for listed companies from January 01, 2006. It is applicable to the entities seeking listing for the first time and for existing listed entities having a paid up share capital of Rs. 3 crores and above or net worth of Rs. 25 crores or more at any time in the history of the company.

3. *Clause 49*:

3.1. Clause 49 of the Equity Listing Agreement consists of mandatory as well as non-mandatory provisions. Those which are absolutely essential for corporate governance can be defined with precision and which can be enforced without any legislative amendments are classified as mandatory. Others, which are either desirable or which may require change of laws are classified as non-mandatory. The non-mandatory requirements may be implemented at 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.

3.2. Gist of Cause 49 is as follows:

- **Mandatory provisions** comprises of the following:

- Composition of Board and its procedure - frequency of meeting, number of independent directors, code of conduct for Board of directors and senior management;
- Audit Committee, its composition, and role
- Provision relating to Subsidiary Companies
- Disclosure to Audit committee, Board and the Shareholders
- CEO/CFO certification
- Quarterly report on corporate governance
- Annual compliance certificate

• **Non-mandatory provisions** consist of the following:

- Constitution of Remuneration Committee
- Despatch of Half-yearly results
- Training of Board members
- Peer evaluation of Board members
- Whistle Blower policy

3.3. As per Clause 49 of the Listing Agreement, there should be a separate section on Corporate Governance in the Annual Reports of listed companies, with detailed compliance report on Corporate Governance. The companies should also submit a quarterly compliance report to the stock exchanges within 15 days from the close of quarter as per the prescribed format. The report shall be signed either by the Compliance Officer or the Chief Executive Officer of the company.

4. Apart from Clause 49 of the Equity Listing Agreement, there are certain other clauses in the listing agreement, which are protecting the minority share holders and ensuring proper disclosures

- Disclosure of Shareholding Pattern
- Maintenance of minimum public shareholding (25%)
- Disclosure and publication of periodical results
- Disclosure of Price Sensitive Information
- Disclosure and open offer requirements under SAST

5. *OECD Principles on Corporate Governance*:

5.1. OECD, in its endeavour to improve the governance practices, had published its revised principles on Corporate Governance in 2002. The OECD Principles of Corporate Governance have since become an international benchmark for policy makers, investors, corporations and other stakeholders worldwide. They have advanced the corporate governance agenda and provided specific guidance for legislative and regulatory initiatives in both member and non-member countries. The Financial Stability Forum has designated the Principles as one of the 12 key standards for sound financial systems.

5.2. OECD Principles on Corporate Governance are as follows:

i. **Principle I: Ensuring the Basis for an Effective Corporate Governance Framework**

The corporate governance framework

- should promote transparent and efficient markets,
- be consistent with the rule of law and
- clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities

ii. **Principle II: The Rights of Shareholders and Key Ownership Functions- protected and facilitated**

- protect and facilitate the exercise of shareholders' rights

iii. **Principle III: The Equitable Treatment of Shareholders**

- Should ensure the equitable treatment of all shareholders
- opportunity to obtain effective redress for violation of their rights

iv. **Principle IV: The Role of Stakeholders in Corporate Governance- recognized**

- should recognise the rights of stakeholders
- encourage co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of enterprises

v. **Principle V: Disclosure and Transparency**

- Timely and accurate disclosure is made on all material matters including the financial situation, performance, ownership, and governance of the company.

vi. **Principle VI: The Responsibilities of the Board-Monitoring Management and Accountability to Shareholders**

- should ensure the strategic guidance of the company,
- the effective monitoring of management by the board, and
- the board's accountability to the company and the shareholders

5.3. Indian Corporate Governance Framework is in compliance with the Corporate Governance principles of OECD.

5.4. OECD steering committee on corporate governance reviews the principles and its compliance by member and non-member countries by conducting regular thematic peer review of member and non-member countries. Various topics in which thematic peer review conducted by OECD are as follows:

S.No	**Thematic Peer Review**	**Topic**
1	First	Board Practices- Incentives and Governing Risks
2	Second	The Role of Institutional Investors in promoting good corporate governance
3	Third	Minority Protection- Related Party Transactions

4	Fourth	Board Member Nomination and Election
5	Fifth	Supervision and Enforcement

5.5. SEBI has been actively participating in the OECD Asian Roundtable Conferences and in Corporate Governance Committee and sub-committee meetings as observers. SEBI and OECD have entered into bi-lateral co-operation agreement in the area of Corporate Governance. In the Third Thematic Peer Review Exercise of OECD on "Minority Protection- Related Party Transactions", India was one of the five jurisdictions (Belgium, France, India, Israel and Italy) that were subject to the in-depth review.

5.6. As a part of ongoing bi-lateral policy dialogue between SEBI and OECD, a Policy Dialogue on "Minority Protection- Related Party Transactions" was held on December 14-15, 2011 at SEBI Bhavan. Apart from Representatives of SEBI, MCA, Stock Exchanges, Professional Bodies and Industry Experts, OECD representatives, participants from regulatory authorities in Israel and Italy participated in the said meeting. Based on the discussions and suggestions came up in the meeting, certain actions points were identified and processed upon.

6. *Recent policy steps taken by SEBI for ensuring better governance in listed companies*:

The introspection that followed the Satyam episode has resulted in some major changes in Indian corporate governance regime. Some of the recent steps taken in this regard are as follows:

6.1. Disclosure of pledged shares: It is made mandatory on the part of promoters (including promoter group) to disclose the details of pledge of shares held by them in listed entities promoted by them. Further, it was decided to make such disclosures both event-based and periodic.

6.2. Peer review: In the light of developments with respect to Satyam SEBI carried out a peer review exercise of the working papers (relating to financial statements of listed entities) of auditors in respect of the companies constituting the NSE – Nifty 50, the BSE Sensex and some listed companies outside the Sensex and Nifty chosen on a random basis.

6.3. Disclosures regarding agreements with the media companies: In order to ensure public dissemination of details of agreements entered into by corporates with media companies, the listed entities are required to disclose details of such agreements on their websites and also notify the stock exchange of the same for public dissemination.

6.4. Maintenance of website: In order to ensure/enhance public dissemination of all basic information about the listed entity, listed entities are mandated to maintain a functional website that contains certain basic information about them, duly updated for all statutory filings, including agreements entered into with media companies, if any.

6.5. Compulsory dematerialization of Promoter holdings: In order to improve transparency in the dealings of shares by promoters including pledge / usage as collateral, it is decided that the securities of companies shall be traded in the normal segment of the exchange if and only if, the company has achieved 100% of promoter's and promoter group's shareholding in dematerialized form. In all cases, wherein the companies do not satisfy the above criteria, the trading in securities of such companies shall take place in trade for trade segment;

6.6. **Peer reviewed Auditor:** It has been decided that in respect of all listed entities, limited review/statutory audit reports submitted to the concerned stock exchanges shall be given only by those auditors who have subjected themselves to the peer review process of ICAI and who hold a valid certificate issued by the 'Peer Review Board' of the said Institute;

6.7. **Approval of appointment of 'CFO' by the Audit Committee**: In order to ensure that the CFO has adequate accounting and financial management expertise to review and certify the financial statements, it is mandated that the appointment of the CFO shall be approved by the Audit Committee before finalization of the same by the management. The Audit Committee, while approving the appointment, shall assess the qualifications, experience & background etc. of the candidate

6.8. **Disclosure of voting results:** In order to ensure wider dissemination of information regarding voting patterns which gives a better picture of how the meetings are conducted and how the different categories of investors have voted on a resolution, listed entities are required to disclose the voting results/ patterns on their websites and to the exchanges within 48 hours from the conclusion of the concerned shareholders' meeting.

6.9. **Enabling shareholders to electronically cast their vote:** In order to enable wider participation of shareholders in important proposals, listed companies are mandated to enable e-voting facility also to their shareholders, in respect of those businesses which are transacted through postal ballot by the listed companies.

6.10. **Manner of dealing audit reports filed by listed entities:** SEBI board has approved a mechanism to process qualified annual audit reports filed by the listed entities with stock exchanges and Annual Audit Reports where accounting irregularities have been pointed out by Financial Reporting Review Board of the Institute of Chartered Accountants of India (ICAI-FRRB). In order to enhance the quality of financial reporting done by listed entities, it has been, *inter-alia*, decided that:

- Deficiencies in the present process would be examined and rectified.
- SEBI would create Qualified Audit Report review Committee (QARC) represented by ICAI, Stock Exchanges, etc. to guide SEBI in processing audit reports where auditors have given qualified audit reports.
- Listed entities would be required to file annual audit reports to the stock exchanges alongwith the applicable Forms (Form A: 'Unqualified' / 'Matter of Emphasis Report'; Form B: 'Qualified' / 'Subject To' / 'Except For Audit Report').
- After preliminary scrutiny and based on materiality, exchanges would refer these reports to SEBI/QARC
- Cases wherein the qualifications are significant and explanation given by Company is unsatisfactory would be referred to the ICAI-FRRB. If ICAI-FRRB opines that the

qualification is justified, SEBI may mandate a restatement of the accounts of the entity and require the entity to inform the same to the shareholders by making the announcement to stock exchanges.

6.11. Recently, NSE held a conference jointly with SEBI and CFA Institute on "Independent Directors - issues and Challenges" – to create awareness among independent Directors;

7. ***Companies Bill, 2012*****:**

7.1. It may be noted that the Companies Bill, 2012 is passed by Lok Sabha. Though SEBI suggested that SEBI may be given jurisdiction to prescribe matters relating to corporate governance for listed companies, it was decided by Ministry of Corporate Affairs that core governing principles of corporate governance may be provided in the bill itself. Thus, in the Companies Bill 2012, various new provisions have been included (which are not provided for in Companies Act, 1956) for better governance of the companies. Some of those new provisions are:

- Requirement to constitute Remuneration and nomination committee and Stakeholders Grievances Committee
- Granting of More powers to Audit Committee
- Specific clause pertaining to duties of directors
- Mode of appointment of Independent Directors and their tenure
- Code of Conduct for Independent Directors
- Rotation of Auditors and restriction on Auditor's for providing non-audit services
- Enhancement of liability of Auditors
- Disclosure and approval of RPTs
- Mandatory Auditing Standards
- Enabling Shareholders Associations/Group of Shareholders for taking class action suits and reimbursement of the expenses out of Investor Education and Protection Fund
- Constitution of National Financial Reporting Authority, an independent body to take action against the Auditors in case of professional mis-conduct
- Requirement to spend on CSR activities

7.2. The Companies Bill contains detailed provisions pertaining to corporate governance. Once the bill is enacted, the entire clause 49 may be revisited to make it consistent with the Companies Act. However, SEBI can impose more stringent conditions to the listed companies through listing agreement, than those proposed in the Companies Bill, considering the need to have better governance practices in the listed companies, provided those provisions are not derogatory to the provisions of the enactment.

8. Policy document on Corporate Governance:

8.1. In December 2009, Ministry of Corporate Affairs specified Voluntary Guidelines on Corporate Governance. These guidelines provide for a set of good practices, which will help the companies to strengthen their internal governance processes and may be voluntarily adopted by the Indian Public companies

8.2. In March 2012, Ministry of Corporate Affairs constituted a committee under the Chairmanship of Mr. Adi Godrej, Chairman, Godrej Industries Limited, to formulate policy document on Corporate Governance. In September, 2012 the Committee submitted its document, specifying seventeen guiding principles on corporate governance.

9. The purpose and scope of the concept paper:

9.1. SEBI is of the view that any code of Corporate Governance must be dynamic, evolving and should change with changing context and times. SEBI, time to time, is in receipt of the suggestions and clarifications from the industries to review the corporate governance code. To keep pace with the changing expectations of the investors, shareholders, and other stakeholders, all such suggestions received are placed before the Primary Market Advisory Committee (PMAC) or SEBI Committee on Disclosure and Accounting Standards (SCODA). Subsequently, these suggestions are taken to SEBI Board and necessary amendments are carried out to extant regulations/Listing Agreement.

9.2. Though the good practices prevailing in other jurisdictions and recent reports of OECD and other international bodies have been referred to in framing this concept paper, only those proposals, which would be relevant to India, considering the uniqueness of shareholding pattern of Indian listed companies and which are consistent with the existing framework have been dealt upon.

9.3. Presently, it is felt that the existing clause 49 may be revisited in the view of change in scenarios subsequent to the framing of the code in 2004. The intention of reviewing the Clause 49 is not to add on to another code of compliance, but to compare the various existing best practices and to make our framework more effective. All the proposals mentioned in Companies Bill, 2012, MCA Voluntary Guidelines, 2009 and the MCA - Guiding principles of corporate governance have been perused and necessary reference has been made in the concept paper at relevant places, so that there is no variation with the guiding principles prescribed by MCA . Pending enactment of the Companies Bill, SEBI may prescribe these conditions detailing the governance conditions of the listed companies, which are mostly in line with the principles and text of the provisions of Companies Bill, 2012. In case of variations, the clause 49 will be revisited on enactment of Companies Bill, 2012.

9.4. The objective of the concept paper is to entice a wider debate on the governance requirement for the listed companies so as to adopt better global practices. While it needs to be ensured that the proposals suggested would not result in increasing the additional cost of compliances by huge margin and that the cost should not outweigh the benefit of listing, at the same time, it is necessary to bring back the confidence of the investors back to the capital market, for channelizing savings into investment, which is the need of the hour.

9.5. ***Though some of these proposals are already provided for in the Companies Bill, 2012 and the Companies Bill is waiting parliamentary nod, it is proposed to advance the implementation of these proposals to listed companies to make them acclimatize to these provisions*.**

9.6. Considering the need to revise existing clause 49 on enactment of the Companies Bill, 2012, the changes needed in Clause 49 are placed at Annexure.

9.7. Following additional proposals may be examined to improve the governance level of companies in India.

10. <u>Overarching principles of Corporate Governance</u>

10.1. While some countries, including the UK and many Commonwealth countries, adopted what became known as a 'principles-based' or 'comply or explain' approach to the enforcement of the provisions of corporate governance codes, in US, provisions of Sarbanes Oxley and other statutes follow a rule based approach. In India, clause 49 is a hybrid approach, as those requirements which can be enforced are classified as mandatory and others, which are desirable, are classified as non-mandatory. 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 in the Annual Report.

10.2. It is felt that rule based approach alone may not serve the purpose of improving the Corporate Governance of listed companies. A hybrid approach, wherein the broad principles are laid down to give broad direction to the companies on Corporate Governance and what is expected of them followed by rules to mandate compliance with specific aspects of Corporate Governance would be considered as the most effective mechanism for improving Corporate Governance in the Indian scenario.

10.3. In this context, it may be noted that OECD has prescribed Six major principles of Corporate Governance which have already been discussed in Para 5. Further, as referred to in Para 8, a Committee constituted by MCA under the Chairmanship of Shri. Adi Godrej has also specified seventeen guiding principles of Corporate Governance. Broadly, the regulatory framework in India is almost in compliance with the said OECD Principles and the seventeen guiding principles, barring a few, which are also sought to be addressed in this concept paper.

10.4. Accordingly, it is proposed to explicitly specify the principles of Corporate Governance in the listing agreement, which are broadly based on the OECD Principles of Corporate Governance and the guiding principles of Corporate Governance specified by Adi Godrej Committee:

i. The company should seek to protect and facilitate the exercise of shareholders' rights

ii. The company should ensure the equitable treatment of all shareholders

iii. The Company should frame its policies/procedures to facilitate shareholders to obtain effective redress for violation of their rights.

iv. The company should recognise the rights of stakeholders in Corporate Governance and encourage co-operation between company and stakeholders.

v. The company should ensure timely and accurate disclosure on all material matters including the financial situation, performance, ownership, and governance of the company.

vi. The company should strive to bring in diversity of thought, experience, knowledge, understanding, perspective, gender and age in the Board.

vii. The company should have an induction/on-boarding program which should also address the unique legal and regulatory compliance issues facing the company and its industry.

viii. The company should appoint an Independent Director as a Lead Director who shall chair the meetings of Independent Directors and act as a liaison between Independent Directors and Management/Board/Shareholder.

ix. The company should facilitate and encourage direct conversations between the independent directors, and one-on-one meetings between a committee of independent directors with the auditors.

x. The company shall maintain minutes of the meetings which should explicitly record dissenting opinions, if any.

xi. The company should encourage continuing Board training and education to ensure that the Board members are kept up to date.

xii. The Company should frame, monitor and review a Board Evaluation framework and disclose the same to shareholders periodically.

xiii. The Company should formulate and implement an effective whistleblower mechanism and disclose the same.

xiv. 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.

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

xvi. 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;

xvii. 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;

xviii. The Board should satisfy and balance the interests of a wider set of stakeholders and should try to balance performance with compliance.

xix. The Board Chair, CEO and the rest of the board should work cohesively to identify as to what is the right mix of skills that is required for selecting the senior management.

xx. Senior Management must place the relevant information immediately/periodically before the board and shall also send the Board Agendas in advance so as to enable the Board to make well informed decision.

xxi. 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.

xxii. Board of a listed company should ensure that plans are in place for the orderly succession for appointments to the board and senior management.

xxiii. The board should eliminate policies that promote excessive risk-taking for the sake of short-term increases in stock price performance and ensure that a risk/crisis management plan is in place.

xxiv. All the directors of the company (including independent directors) shall exercise their duties with due and reasonable care, skill and diligence;

xxv. Incentives to the top management should be based on remuneration that aligns with the long term interest of the company

xxvi. Executive directors and senior management should provide all the facilities for the independent directors to perform the role in a better manner as a Board member and also a member of a committee;

These principles will have overriding effect over the specific rules laid down in the listing agreement. All listed companies would be required to follow the above principles in the governance of the company.

11. ***Proposals*:**

11.1. Appointment of independent directors by minority shareholders

There is a need to adopt a more professional, independent and transparent approach for appointing independent directors. Presently, the appointment/removal of independent directors is done through election by majority. As such, they occupy their position at the pleasure of the controlling shareholders and may therefore be prone to act in accordance with the will of the major shareholders. This, in effect, may hinder their "independence" and may limit their efficacy, which would defeat the purpose of appointment of independent directors.

Companies Bill, 2012 provides for the manner of selection of Independent Directors from a data bank maintained by anybody, institute or association notified by the Central Government. As per the Companies Bill, an independent director may be selected from a databank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors. Responsibility of exercising due diligence before selecting a person from the data bank shall lie with the company making such appointment.

Some jurisdictions, like Italy, have provisions for *appointment of independent directors by minority shareholders*. Similarly, in UK, FSA has proposed a dual voting structure whereby independent directors of premium listed companies with controlling shareholders must be approved both by the shareholders as a whole and the independent shareholders. However, viability of this proposal in Indian context needs to be examined. The requirement in India is to have one-third or half of the member of the Board as Independent Directors. In such cases, if all the independent directors are to be appointed by "majority of minority", it may result in "abuse by minority" (a large corporate firm can easily acquire majority holding among the non-promoter holders, who are normally dispersed and may appoint "its person" to destabilize its rival board).

Section 252 of the Companies Act, 1956 enables a public company having paid-up capital of five crore rupees or more or having one thousand or more small shareholders, to elect a director elected by such small shareholders. "Small shareholders" has been defined as a shareholder holding shares of nominal value of not more than Rs. 20,000 or such other sum as may be prescribed. Clause 151 of the Companies Bill has similar provision enabling a listed company to elect such small shareholders in such manner and with such terms and conditions as may be prescribed. This provision may be workable in Indian context and it may be explored as to whether listed companies beyond a market cap need to be mandated to have at least one *small shareholder director*.

11.2. Cumulative voting for appointment of Independent Director:

There are suggestions that introduction of cumulative voting or proportionate voting, which is permitted in the Philippines and China, may provide alternatives to the director selection process and may foster stronger minority shareholder protection in India's legal framework for corporate governance. Cumulative voting allows shareholders to cast all of their votes for a single nominee for the board of directors when the company has multiple openings on its board. In contrast, in regular voting, shareholders cannot give more than one vote per share to any single nominee. With cumulative voting, one could choose to vote all available votes for one candidate, split his vote between two candidates, or otherwise divide his votes whichever way he wanted. However, there is no empirical evidence to state that cumulative voting has resulted in improving the governance practices. Presently, Companies Act, 1956 enables election of directors through cumulative voting. As per the provisions of the Companies Act, the articles of a company may provide for the appointment of not less than two-thirds of the total number of the directors of a public company, according to the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise, the appointments being made once in every three years and interim casual vacancies being filled in accordance with the provisions. Hence, the said option is already provided in the Companies Act/bill and best left to the choice of the company.

11.3. ***Formal letter of appointment*:**

As per voluntary Guidelines issued by MCA, Companies should issue formal letters of appointment to Non- Executive Directors (NEDs) and Independent Directors - as is done by them while appointing employees and Executive Directors. The letter should specify:

- The term of the appointment;
- The expectation of the Board from the appointed director; the Board-level committee(s) in which the director is expected to serve and its tasks;
- The fiduciary duties that come with such an appointment along with accompanying liabilities;
- Provision for Directors and Officers (D&O) insurance, if any,;
- The Code of Business Ethics that the company expects its directors and employees to follow;
- The list of actions that a director should not do while functioning as such in the company; and
- The remuneration, including sitting fees and stock options etc, if any.

Such formal letter should form part of the disclosure to shareholders at the time of the ratification of his/her appointment or re-appointment to the Board. This letter should also be placed by the company on its website, if any, and in case the company is a listed company, also on the website of the stock exchange where the securities of the company are listed.

The aforesaid provision is also inserted in the Companies Bill, 2012. *It is proposed to align the requirements of clause 49 with aforesaid provision.*

11.4. Certification course and training for independent directors

SEBI has established National Institute of Securities Markets (NISM), a public trust, to add to market quality through educational initiatives. School for Corporate Governance, NISM, jointly works with the Global Corporate Governance Forum of International Finance Corporation in conducting workshops on various aspects of corporate governance. Apart from that NISM is conducting certified course for various market participants. A separate course for independent directors may be devised by NISM for independent directors covering their role, liabilities, expectations from various stake holders, internal controls, risk management systems, business models and independent directors may be mandated to clear such courses, before their appointment. Apart from conducting induction courses, NISM may also conduct training/ review courses for independent directors.

As per the Guiding principles of Corporate Governance, the companies should ensure that directors are inducted through a suitable familiarization process covering, inter-alia, their roles, responsibilities and liabilities. Efforts should be made to ensure that every director has the ability to understand basic financial statements and related documents/papers. There should be a statement to this effect by the Board in the Annual Report. Besides this, the Board should also adopt suitable methods to enrich the skills of directors from time to time.

As part of good governance it is important that the people heading the organisation are up to date with the latest trends in their field. In order to ensure that they are kept up to date, regular training session can be conducted. The training requirements of the independent directors inducted by the listed companies would vary depending upon their qualifications, background, familiarity with business models followed by the company, its size, industry, organizational perspective etc.

OECD recommends that efforts by private-sector institutes, organisations and associations to train directors should be encouraged. Such training should focus on both discharge of fiduciary duties and value-enhancing board activities. International technical-assistance organizations should facilitate these efforts as appropriate.

There is a non-mandatory provision in Clause 49 of the listing agreement, regarding training of Board members stating that the listed company may train its Board members in the business model as well as the risk profile of the business parameters of the company, their responsibilities as directors, and the best ways to discharge them.

While the requirement may be retained as non-mandatory, it is proposed to require disclosure of the methodology/details of training imparted to Independent Directors in the Boards' Report.

11.5. Treatment of nominee director as Non-Independent Director:

Presently, explanation to Clause 49 (I) (A) (iii) provides that the nominee directors appointed by an institution which has invested in or lent to the company shall be deemed to be independent directors. However, it is clarified in the explanatory note that "institution" for the above purpose means only a public financial institution as defined in Section 4A of the Companies Act, 1956 or a "corresponding new bank" as defined in section 2(d) of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 or the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980. Accordingly, the exemption given to 'nominee directors' shall be applicable only to the nominee directors appointed by the above institutions and other nominee directors will not be considered 'independent' for the purpose of Clause 49 of the Listing Agreement.

It may be stated that the requirement of Independent director has been incorporated in Clause 49 of the Listing Agreement so as to bring in an independent judgment on the deliberations of the board of the company, especially on issues of strategy, performance, management of conflicts and standards of conduct. Independent Directors are supposed to serve the interest of the other minority shareholders as well and to act in the paramount interest of the company as a whole. But this principle, may be compromised if the director is appointed, under an agreement by a institution or body or by a lender, as precedence may be given to the interest of the nominating body over the paramount interest of the company and the expected independence of judgment of the nominee director may be lost..

With regard to nominee directors, even Narayana Murthy Committee Report, on the basis of which revised clause 49 has been amended, felt that institution of nominee directors may create conflict of interest as they may be answerable only to the institutions/organisations they represent and generally, may take no responsibility for the company's management or fiduciary responsibility to other shareholders. It is necessary that all directors, whether representing institutions or otherwise, should have the same responsibilities and liabilities.

The Companies Bill, 2012 defines Independent director as a non-executive director of the company, other than a nominee director. Further, the Bill defines "nominee director" as 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.

Thus, it is proposed to exclude the nominee directors from the category of independent directors to align the provisions of Clause 49 with the bill.

11.6. Mandate minimum and maximum age for Independent Directors

There are no existing norms for independent directors in terms of age. While clause 49 of listing agreement fixes the minimum age for the ID to be 21 years, the Bill does not prescribes so.

As per Schedule XIII of Companies Act, 1956, a managing director or whole time director should have completed the age of 25 years and should not have attained the age of 70 years. Where he has not completed the age of 25 years, but has attained the age of majority or he has attained the age of 70 years, his appointment need to be approved by a special resolution passed by the company in general meeting. Otherwise, approval of the Central Government is required. The requirement of special resolution/Central Government approval is expected to address any concern in this regard. A similar provision is also incorporated in the Companies Bill.

It would be difficult to stipulate maximum age for an independent director since it would differ from company to company based on the line of activities it is engaged in. The Bill prescribes maximum age limit for key managerial personnel to retire at age of 70, however for IDs, no retiring age is stipulated.

The proposal to have minimum and maximum age for the independent director may be examined in light of the above.

11.7. Mandating maximum tenure for independent director:

Presently, as per clause 49, Independent Directors may have a tenure not exceeding, in the aggregate, a period of nine years, on the Board of a company. However, this is only a non-mandatory requirement. Over a period of time, an independent director may develop a friendly relationship with the company and the board and may develop a casual approach, which may affect his envisaged role.

As per voluntary guidelines issued by MCA, an Individual may not remain as an Independent Director in a company for more than six years. A period of three years should elapse before such an individual is inducted in the same company in any capacity. No individual may be allowed to have more than three terms as Independent Director.

As per the Companies Bill, Independent Directors shall hold office for a term up to 5 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. He shall hold office for not 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; During the said period of three years, he shall not be appointed in or be associated with the company in any other capacity, either directly or indirectly.

It is proposed to align the requirements with the provisions of Companies Bill.

11.8. Requiring Independent directors to disclose reasons of their resignation:

As per clause 49, 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 day of such resignation or removal, as the case may be. However, there is no provision to disclose the reason of their resignation.

Often directors resign from the board, without quoting any reasons. Resignation of non-executive directors might be due to their disagreement with the management in certain matters. It has been suggested that the reason for the resignation of the independent director should be submitted to the Board of the company which in turn should circulate the same to the shareholders and inform the stock exchange in this regard.

It may be noted that the Combined Code on Corporate Governance, UK (June 2008) states that "*On resignation, a non-executive director should provide a written statement to the chairman, for circulation to the board, if they have any concerns*." But the Combined Code is not mandated, as the "Comply or Explain" principle prevails in UK. However, on the flip side, the proposal to disclose reasons of resignation to the shareholders & stock exchanges would attract speculative media coverage and affect sentiments of the stakeholders. Hence, *non-executive directors may be required to submit the reasons for resignation thereof in writing. Letter of resignation may be tabled at the ensuing Board meeting and reasons thereof read out. Details of deliberations at the meeting may be recorded in the minutes and appropriate disclosures may be made in the Directors' Report.*

As per Companies Bill, a director may resign from his office by giving a notice in writing to the company and the Board shall, on receipt of such notice take note of the same and the company shall intimate the Registrar and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company. Director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days of resignation.

It is proposed to align the requirements with the provisions of Companies Bill.

It may not avoid some directors quoting "personal reasons", however, atleast there would be requirement to ensure recording of such statement before the board. But anyone who uses the 'personal reasons' excuse may, if have other listed directorships, be required to explain in the same announcement why these 'personal reasons' do not make it necessary to resign from those positions, too.

11.9. Clarity on liabilities and on remuneration of independent directors:

There is need to bring in risk-return parity to the post of "independent directors" to attract quality people into the Board. Presently, there is no clarity on the liability of independent directors. The remuneration paid to independent directors (only sitting fees in most cases) is found to be inadequate considering the risk and responsibility associated with the post. Though the Companies Bill states that an independent director shall not be entitled to any stock option, it allows payment of sitting fees, reimbursement of expenses and profit related commissions.

Since most of the responsibilities for governance are placed on the independent directors, to attract competent persons to the board (to improve their participation in the Board and committee meetings), it is reasonable to provide for some minimum monetary compensation. On one hand the quantum of compensation should not be affect their independence and at the same time, it should attract competent persons to occupy the position in the board. Presently, as per clause 49 independent directors are entitled to get directors remuneration (may be a commission on the percentage of net profit, but not monthly remuneration as it may affect their independence and role) apart from the sitting fees. But, it is important to have a balance of fixed and variable pay and introduce an objective process of board evaluation facilitated by external experts.

As per clause 49 of corporate governance, "*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, including independent directors, in any financial year and in aggregate"*.

As per the proposed Companies Bill, independent directors shall not be entitled to any remuneration, other than sitting fees, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members. *It is proposed to align the requirements of Clause 49 with the provisions of Companies Bill.*

The Companies Bill 2012 also makes independent director liable, only in respect of such acts of omission or commission which had occurred with his knowledge, attributable through Board processes and with his consent or connivance or where he had not acted diligently.

11.10. Performance evaluation of independent director:

Presently, Clause 49 requires that the performance evaluation of non-executive directors be done by a peer group comprising the entire Board of Directors, excluding the director being evaluated; and Peer Group evaluation could be the mechanism to determine whether to extend / continue the terms of appointment of non-executive directors. But this is a non-mandatory requirement.

The Companies Bill mentions that performance evaluation of independent directors shall be done by the entire Board of Directors, excluding the director being evaluated. 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.

It is proposed *to mandate the requirement of performance evaluation for Directors and to require such evaluation report of the independent director should also based on his attendance and contribution to the board/committee meetings and such appraisal shall be placed before the nomination committee for taking a decisions for reappointment.*

11.11. Lead Independent Director

The OECD Principles of Corporate Governance (Principle VI (E)) envisages the post of lead-independent director to chair the meetings of outside directors. The UK Corporate Governance Code provides for the post of Senior Independent Director whose name shall be disclosed in the Annual Report. The code also provides that the senior independent director should be available to shareholders if they have concerns which contact through the normal channels of chairman, chief executive or other executive directors has failed to resolve or for which such contact is inappropriate. The 17 guiding principles of Corporate governance also provides for a Lead Independent Director. These principles envisage the lead director as an independent chief among all board members who assists in co-ordinating the activities and decisions of the other non-executive and/or independent directors and chairs the meetings of Independent Directors. *In case the company has an Independent Chairman, he shall act as the Lead Independent Director. On a flip side, such proposal may lead to creation of power centre among independent directors, whereas independent directors are collectively expected to function in tandem in the interest of all the stakeholders. To avoid the same, the post may be rotated among the independent directors every three years. This proposal may be examined in light of the above.*

11.12. Separate meetings of Independent Directors

Meetings of independent directors in the absence of management/executive directors provide an opportunity for the Independent Directors to express their views freely and without hesitation and are expected to improve the level of corporate governance to a higher level. Pursuant to passing of the Sarbanes Oxley Act, the stock exchanges in US amended their listing rules to provide for a compulsory meeting of Independent/Non-management/outside directors separately in the absence of the executive directors. In the United States, NASDAQ Listing Rules (Rule 5605 (2)) requires independent directors to have regularly scheduled meetings at which only independent directors are present, at least twice a year. Rule 303.A.03 of the NYSE Listing Rules also contains similar requirement. UK Corporate Governance Code also provides for meetings of the non-executive directors led by the senior independent director at least annually to appraise chairman's performance and on such other occasions as are deemed appropriate. The Companies Bill 2012 also provides for separate meetings of Independent Directors at least once a year. In these meetings, *Independent Directors would be expected to examine internal controls and general governance practices prevailing in the company and bring out any inefficiency to the attention of shareholders and their report in this regard may form part of the annual report. Further, such meetings may also review the performance of the Chairman, non-independent directors and the Board as a whole. It is proposed to amend clause 49 to align it with the requirements of Bill.*

11.13. Restriction on the number of independent directorships

It has been suggested that there should be a cap on the number of independent directorships a person can serve, so that he can have necessary time to analyse the agendas of the committee meetings and the board meetings of the company in which he is acting as Independent director and to make effective contributions in this regard.

Presently, though there is no restriction on the number of independent directorship. But it is pertinent to note that Section 275 of the Companies Act restricts the number of directorship of a person to fifteen public companies whereas the Companies Bill proposes to restrict the number of directorships of a person to ten public companies.

Though the Companies Act puts a ceiling of 15 directorships of public companies, among public companies, listed ones demand a much greater degree of commitment from an Independent Director, including attending at least four board meetings and several meetings of one or more of the many committees during a year.

As per the Voluntary Guidelines issued by MCA, the maximum number of public companies in which an individual may serve as an Independent Director should be restricted to seven. *It needs to be examined as to whether to restrict number of independent directorships.*

11.14. Separating the position of Chairman and that of the Managing Director / CEO

There are suggestions that the position of Chairman and that of the Managing Director / CEO should be segregated to avoid one person having unfettered powers of management. It might be noted that requirement to segregate the role of Chairman and CEO is common among the most of the developed jurisdiction like US, UK France etc.

As per Voluntary Guidelines issued by MCA, to prevent unfettered decision making power with a single individual, there should be a clear demarcation of the roles and responsibilities of the Chairman of the Board and that of the Managing Director/Chief Executive Officer (CEO). The roles and offices of Chairman and CEO should be separated, as far as possible, to promote balance of power.

As per, OECD report on "Corporate Governance and the Financial Crisis - Conclusions and emerging good practices to enhance implementation of the Principles", when the roles of CEO and the Chairman are not separated, it is important in larger, complex companies to explain the measures that have been taken to avoid conflicts of interest and to ensure the integrity of the chairman function.

As per Companies Bill, 2012, an individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the articles of the company, as well as the managing director or Chief Executive Officer of the company at the same time unless,—

(a) the articles of such a company provide otherwise; or

(b) the company does not carry multiple businesses

As per Clause 49, where the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case he is an executive director, at least half of the Board should comprise of independent directors.

It is proposed to align the requirements of clause 49 with the Bill.

11.15. Board diversity

Report of the Committee constituted by MCA to formulate a Policy Document on Corporate Governance mentions the necessity of having more diversified board, which contributes to better performance, since in such cases decisions would be based on evaluating more alternatives compared to homogenous boards. Diversity, in all its aspects, serves an important purpose for board effectiveness. It can widen perspectives while making decisions, avoid similarity of attitude and help companies better understand and connect with their stakeholders. The handful number of woman directors in the board of Indian listed companies may explain the need for bringing gender diversity in the board. The Companies Bill, 2012 has taken some positive steps in this regard by providing the Central Government with the power to prescribe rules for providing minimal women's representation on corporate boards in certain classes of companies.

Presently, Clause 49 states that the company may ensure that the person who is being appointed as an independent director has the requisite qualifications and experience which would be of use to the company and which, in the opinion of the company, would enable him/her to contribute effectively to the company in his capacity as an independent director. Further, it may be examined whether *to make the nomination committee responsible for ensuring that persons from divergent background and gender are nominated for maintaining board diversity.*

11.16. Succession Planning

Principle VI (D) (3) of the OECD Principles of Corporate Governance – 'Responsibilities of the Board', requires the Board to oversee succession planning. Globally, the standards on succession planning differ in various jurisdictions. In the United States, though succession planning is not mandated, shareholders can require companies to disclose and even put to vote the succession plan of the listed companies. The UK Corporate Governance Code recommends that 'the board should satisfy itself that plans are in place for the orderly succession for appointments to the board and to senior management. The Guiding Principles of Corporate Governance also lists Succession Planning as one of the guiding principles of corporate governance. The best way to ensure that a company does not suffer due to a sudden unplanned for gap in leadership is to develop an action plan for a successful succession transition. Hence, *Board of a listed company may be required to ensure that plans are in place for the orderly succession for appointments to the board and senior management. Further, the viability of mandatory disclosure of Succession Planning to Board/Shareholders at periodic intervals may also be examined.*

11.17. Risk Management

Clause 49(IV)(C) of the Listing Agreement requires the company to lay down procedures to inform Board members about the risk assessment and minimization procedures and to review them periodically to ensure risk control. OECD Report on "Corporate Governance and the Financial crisis - Conclusions and emerging good practices" mentions the need to have an effective risk management as one of the four major findings of the crisis. The 17 guiding principles of Corporate governance enlists Risk Management and Crisis management as two of the corporate governance principles. The Companies Bill requires companies to disclose the development and implementation of risk management policy in the Board's Report. Further, Clause 177 of the Bill enlists evaluation of risk management system as one of the functions of the Audit Committee. In this regard, it may be deliberated on *whether the risk management be made the ultimate responsibility of the Board or the responsibility can be delegated to the Risk Management Committee or to the Audit Committee. The feasibility of appointment of Chief Risk Officer/Risk Manager for large listed companies may also require consideration. Further, it has to be examined as to whether more specific parameters/requirements such as framing a risk management plan, its compulsory monitoring and reviewing by a Board/Board Committee and the disclosure thereof to the shareholders at periodic intervals (preferably on annual basis) be laid down in the Listing Agreement*.

11.18. Reporting of the internal auditor

Audit Committee has been assigned a significant role in the Companies Act, 1956 and in the listing agreement. Audit Committee is expected to oversee the company's financial reporting process, review periodical and annual financial statements (including Related Party transactions) and adequacy of the internal control systems and to review the findings by the internal auditors and also the oversight of the company's risk management policies and programs.

Appropriate reporting relationships are absolutely critical if internal auditing is to achieve the independence, objectivity, and organizational stature necessary to fulfil its obligations and mandate to effectively assess internal controls, risk management, and governance. *To achieve necessary independence, best practices suggest that the internal auditor should report directly to the audit committee or its equivalent. For day to day administrative purposes, the internal auditor should co-ordinate with the senior most executives (i.e. CEO/CFO) of the organization. This suggestion needs to be deliberated upon.*

11.19. Mandatory rotation of audit partners

The quality of financials reported by companies and the true and fair view of the financial statements submitted by listed entities to the stock exchanges have, of late, come into sharp focus, after the Satyam episode. SEBI has recently taken various steps in this regard to repose the faith in the audit done by listed companies

- by mandating compliance with accounting standards,
- by doing peer review audit of Sensex and Nifty Companies,
- by mandating the appointment of peer reviewed auditor for listed companies and companies proposing to list,

- by constituting a Forensic Accounting Cell,
- by mandating re-statement of accounts, by taking action against auditors etc.

In this context, it was felt relevant to discuss the need for independence of the statutory auditors with respect to the listed entity. A longer association between a particular audit firm and a listed entity may lead to developing friendly relationship between the two and defeat the true sense of independence of the auditors. Mandatory rotation of statutory auditors could break such a continued long-term association of an audit firm with the management of the listed entity.

Auditors may become stale and view the audit as a simple repetition of earlier engagements. Mandatory rotation may increase the possibility that the new auditors may detect any oversight, thereby adding to the pressure for the auditor to take a tough stand on any contentious issues. Companies Bill 2012 requires rotation of auditors and states that no listed company shall appoint or re-appoint— (a) an individual as auditor for more than one term of five consecutive years; and (b) an audit firm as auditor for more than two terms of five consecutive years. It further states that an individual auditor who has completed his term shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term. *It is proposed to align the requirement of listing agreement with the Bill.*

11.20. *Making Whistle Blower Mechanism a compulsory requirement*:

Presently, as per clause 49, the listed company may establish a mechanism for employees to report to the management, their concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy. This mechanism could also provide for adequate safeguards against victimization of employees who avail of the mechanism and also provide for direct access to the Chairman of the Audit committee in exceptional cases. Once established, the existence of the mechanism may be appropriately communicated within the organization.

However, this requirement is a non-mandatory requirement.

It may be noted that MCA Voluntary Guidelines also has a similar requirement.

"*The companies should ensure the institution of a mechanism for employees to report concerns about unethical behaviour, actual or suspected fraud, or violation of the company's code of conduct or ethics policy. The companies should also provide for adequate safeguards against victimization of employees who avail of the mechanism, and also allow direct access to the Chairperson of the Audit Committee in exceptional cases*."

Further, the guiding principles of corporate governance enlisted by MCA stresses the need to have well laid out Whistle-Blower Policy mechanism. The need for an effective legislation is essential in India with the growing number of scams related to corrupt practices in corporate India. There are global legislations in place, which protect whistleblowers such as The Public Interest Disclosure Act, 1998, in the UK (which protects whistle blowers from victimization and dismissal) and the Sarbanes Oxley Act, 2002 (which provides for the protection of whistle blowers and is applicable even to employees in public listed companies).

The Companies Bill 2012 has mentioned the concept in respect of higher accountability standards to be maintained by companies. Further, Clause 177 (9) of the Bill requires that 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 vigil mechanism shall provide for adequate safeguards against victimization of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases.

Within the legal framework specified above, companies should look to formulate and implement their own whistleblower policies. Several large organisations have already implemented the same. A committee set up to look into the alerts raised by whistleblowers should investigate such disclosures. A non-executive director could act as an ombudsman and take charge of such an investigation. The whistle blower policy of the company should be under the ambit of the Audit Committee. The identity of the whistleblower and any other employee investigating the matter should be protected. If the disclosures are found to be true, suitable action should be taken and efforts should be made to protect the whistleblower. The action that it takes should be adequate and should act as a deterrent against such offences in the future. The policy should be such that it encourages such disclosures to be made but ensures that frivolous accusations do not become a means to harass senior management.

It is propose to align the requirements of clause 49 with the provisions of the Companies Bill.

11.21. Making the Remuneration committee a mandatory one and expanding its scope:

Constitution of a Remuneration Committee is a non-mandatory requirement under Clause 49. Further, the clause states that to avoid conflicts of interest, the remuneration committee, which would determine the remuneration packages of the executive directors may comprise of at least three directors, all of whom should be non-executive directors, the Chairman of committee being an independent director.

It may be noted that certain well-developed jurisdictions, including US and UK, have the concept of “Nomination committee” which consist of Independent directors, the role of which, inter-alia includes, suggesting to the Board the name of the qualified persons for appointment as independent directors. The suggestion of the nomination committee can be carried forward to the General meeting and this will ensure that there is an objective criteria for appointing the Independent directors and help in reducing the influence of the Promoters/major stakeholders in appointing the independent directors. Further, this committee may also review the remuneration packages to the executive directors and Key

Managerial Persons regularly. The committee shall disclose the remuneration policies in the Board's report.

As per Companies Bill, 2012, Board of Directors of every listed company shall constitute the Nomination and Remuneration Committee consisting of three or more non-executive directors out of which not less than one half shall be independent directors. Such committee shall identify 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 and shall carry out evaluation of every director's performance. Such committee shall also formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees. It shall ensure that the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successful, relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long term performance objectives appropriate to the working of the company and its goals:

It is proposed to align the requirement of clause 49 with the provisions of Companies Bill.

11.22. Enhanced disclosure of remuneration policies:

It may be noted that, on average, the remuneration paid to CEOs in certain Indian Companies are far higher than the remuneration received by their foreign counterparts and there is no justification available to that effect. Presently, Companies Act, 1956 specifies the limit on managerial remuneration and provides for central government approval (approval for the remuneration beyond the specified limit). Similar requirements are also incorporated in the Companies Bill.

In this regard, it may also be noted that the Companies Bill requires the listed companies to constitute "Nomination and Remuneration Committee", which shall recommend to the Board a remuneration policy for the directors, key managerial personnel and other employees. While formulating the policy, it should inter-alia ensure that it involves a balance between fixed and incentive pay reflecting short and long term performance objectives appropriate to the working of the company and its goals. Further, as per the Companies Bill, listed companies need to disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as may be prescribed. *The above provisions may be incorporated in the Listing Agreement.*

11.23. *Stakeholders Relationship Committee*:

Presently, Clause 49 requires constitution of ‘Shareholders/Investors Grievance Committee’, under the chairmanship of a non-executive director for specifically looking into the redressal of investors' complaints like transfer of shares, non-receipt of balance sheet, non-receipt of declared dividends etc.

Clause 178 of the Companies Bill, 2012 mandates constitution of a Stakeholders Relationship Committee which shall be chaired by a non-executive director for companies which consists of more than 1000 shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year. This committee shall consider and resolve the grievances of security holders of the company.

It is proposed to amend the listing agreement, so as to make it in line with the provisions of Companies Bill by expanding the scope of Shareholders/Investors Grievance Committee.

11.24. ***Mandating e-voting for all resolutions of a listed company*:**

To ensure good governance, Section 192A was inserted in the Companies Act, 1956 through Companies (Amendment) Act, 2000. The said section, read with Companies (Passing of the resolution by postal ballot) Rules, 2011, requires listed companies to conduct certain businesses only by way of postal ballot, instead of transacting it in general meeting of the company. Further, it encourages the companies to transact any other business through postal ballot. Companies (Passing of the Resolution by Postal Ballot) Rules, 2011 specifies nine businesses which should be transacted only through postal ballot. In addition, SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 and SEBI (Delisting of Equity Shares) Regulations, 2009 requires listed companies to pass certain additional businesses through postal ballot. However, experience shows that the postal ballot forms returned are negligible. It may be because of the fact that in some cases, the ballot forms do not reach the shareholders on time. Further, Section 192A mentions that “postal ballot” also includes voting by electronic mode.

Considering the same and pursuant to the budget proposal for 2012 for providing opportunities for wider shareholder participation in important decisions of the companies through electronic voting facilities, SEBI has issued circular dated July 13, 2012 mandating the listed companies to provide e-voting facility also to their shareholders, in respect of those businesses which are transacted through postal ballot by the listed companies. To begin with, this requirement was made applicable to top 500 listed entities. Though Companies Act, 1956 requires businesses relating to consideration of the annual report, declaration of a dividend, appointment of directors in the place of those retiring, and appointment and the fixing of remuneration of the auditors to be passed at Annual General Meeting, nothing prevents the companies from offering postal ballot /e-voting facilities to their shareholders. Further, the Companies Bill also specifically recognises voting by electronic means. Hence, *the proposal to require listed companies to provide postal ballot /e-voting facilities for all the resolutions to be passed at general meetings may be explored, so as to enable wider participation of shareholders in the corporate democracy.*

11.25. Abusive RPTs:

Abusive RPTs are real concerns as they can be used for personal aggrandisement of controlling shareholders, especially in Asian jurisdictions, which are characterised by concentrated shareholdings. This would dent the confidence of the investors and jeopardise the process of channelizing savings into capital market/investment. There are two modes for regulating RPTs - approval based controls which require approval by Board of Directors/ Shareholders and disclosure based controls required under AS-18. Focus should not be on making approval norms stringent but on making disclosure norms effective

Some of the proposals to curb such abusive RPTs are as follows:

a) Requiring approval by shareholders for divestment of major subsidiaries:

Divestment of major subsidiaries does not require shareholder's approval as per the existing law. There have been instances where ownership of major subsidiaries was transferred to controlling shareholders, without taking the approval of other shareholders.

Section 292 of the Companies Act, 1956 mentions that the powers for investing funds of the company have to be exercised by the board only in its meeting by means of resolutions passed at meeting (i.e. it cannot be passed through circulation). Section 293 (1) (a) of the Companies Act, 1956 requires shareholder's approval for selling off whole or substantial part of an undertaking. However, there is no specific requirement regarding selling up of the shares in subsidiary (i.e. divesting) in the Companies Act. This has led to abuse by controlling shareholders by divesting the major subsidiaries without proper valuation to the companies indirectly owned by them.

This lacuna is left uncorrected in the Companies Bill. As SEBI have powers under SEBI Act, 1992 to prescribe listing conditions, which may be in addition to but not in derogation of the provisions of the Companies Act, we may require the *listed companies to obtain shareholder's approval, in case of divestment of shares in subsidiaries through inserting a provision in listing agreement.*

b) Immediate and continuous disclosures of material RPTs:

Presently, RPTs are disclosed to Stock Exchanges only annually. This limits the effectiveness of the disclosure as the information reaches the investors much after the transactions were carried out.

Many of the jurisdictions such as Singapore, Italy and Israel have provisions mandating immediate disclosure of the material RPTs. This would help in better scrutiny of the transactions by investors, public, regulators and the media thereby limiting scope for abusive RPTs. This *requirement can be mandated by amending the reporting requirements specified under the Listing Agreement. Suitable threshold limits for the reporting requirements need to be analyzed*.

c) Prohibiting/regulating grant of affirmative rights to certain investors:

Whenever a company seeks funds from a private equity investor or a financial institution, it will enter into shareholders/share subscription or investment agreement. In these agreements, it is normal to find clauses pertaining to "drag along rights" and "tag-along rights". Apart from these rights, sometimes these agreements do grant certain superior rights to these investors like access rights information (right to receive selective information), right to appoint their nominee directors in the board, requirements that the presence of their nominee is necessary to constitute a quorum etc. These rights are subsequently incorporated into the articles of the company by amending the articles. Further, in the case of Messer Holdings Limited, Bombay High Court on September 1, 2010, has held that such consensual agreements between shareholders are legally valid.

Though these rights are intended to protect the institutions investing their funds in these companies, since these rights are not available to all the other shareholders, especially minority shareholders, it is debatable as to whether these superior rights may lead to oppression of minority. Apart from that, there are also concerns regarding selective sharing of price sensitive information to these investors. Though, these may be oppressive to minority shareholders, it appears that presently there are no restrictions for a listed company to enter into such an agreement, as such an amendment to articles may not, presently, be in violation of clauses of listing agreement or SEBI Regulations. The remedy can be obtained by minority holders through a petition made under Section 397/398 to the Company Law Board (against oppression and mis-management).

In this regard*, it has to be examined whether listed company should be permitted to enter into such an agreement granting superior affirmative rights to selective investors*

d) Approval of major RPTs by 'Majority of the minority'

Many of the abusive RPTs are undertaken between company groups controlled by the controlling shareholders. As such, providing for shareholders approval of RPTs may not serve the intended purpose as the controlling shareholders intended to do an abusive RPT would have sufficient majority to obtain the shareholder approval easily. Hence, there is a requirement for mandating approval of such major RPTs by majority of the minority or disinterested shareholders. Such a requirement is in practice in some of the developed jurisdictions.

As suggested by SEBI, Clause-188 of the Companies Bill, 2012 contains a similar provision prohibiting interested shareholders from voting in Related Party Transaction approvals. *Provisions of listing agreement need to be aligned with the Bill*

e) Pre-approval of RPTs by Audit Committee and encouraging them to refer major RPTs for third party valuation.

Presently, the audit committee reviews RPTs on a periodic basis after such transactions have taken place. Such reviews are of limited use as the transaction could not be undone even if the Audit Committee expresses negative opinion on the transactions.

This handicap can be removed if the requirement of pre-approval by audit committee of major RPTs and major restructuring proposals could be mandated.

The Companies Bill, inter-alia, requires the Audit Committee to approve or modify transactions with related parties, scrutinize inter-corporate loans and investments and value undertakings or assets of the company, wherever it is necessary. Further, Companies Bill gives Audit Committee the authority to investigate into any matter falling under its domain and the power to obtain professional advice from external sources and have full access to information contained in the records of the company. *It is proposed to align the requirements of listing agreement with the Bill.*

f) Approval of Managerial Remuneration by disinterested shareholders

The remuneration paid to CEOs in certain Indian Companies is far higher than the remuneration received by their foreign counterparts and there is no justification given to that effect. Presently, Companies Act, 1956 specifies the limit on managerial remuneration and provides for central government approval for the remuneration beyond the specified limit. Similar requirements are also incorporated in the Companies Bill..

It is observed that most of the Indian companies are managed by promoters and this brings in the concern of excessive managerial remuneration to executives forming part of promoter/promoter group, which partakes the nature of an abusive related party transaction.

Clause 188 of the Companies Bill, 2012 contains a provision prohibiting interested shareholders from voting in Related Party Transaction approvals. In line with the above, *it is proposed to consider mandating approval of disinterested/minority shareholders for managerial remuneration beyond a particular limit.*

g) Expanding the scope of Related Party Transactions

Presently, related party transactions, as defined in AS-18 is considered for the purpose of Listing Agreement. The converged Accounting Standard Ind AS-24 which corresponds to IAS-24 and deals with RPTs contains a wider definition of related parties as well as Key Managerial Persons. Existing AS 18 covered key Managerial Personnel (KMPs) of the entity only, whereas, Ind AS 24 covers KMPs of the parent as well. There is extended coverage in case of joint ventures in Ind AS 24 whereas as per existing AS 18, co-ventures or co-associates are not related to each other. Ind AS 24 requires extended disclosures for compensation of KMPs under different categories, whereas the existing AS 18 does not contain a specific provision in this regard. Further, Ind AS 24 requires disclosure of “the amount of the transactions” whereas existing AS 18 gives an option to disclose the “Volume of the transactions either as an amount or as an appropriate proportion.

Considering the wider coverage and more specificity of disclosure provided in Ind-AS 24, it is proposed to consider adoption of the definition and requirements in Ind-AS 24 for the purpose of requirements of the listing agreement.

11.26. Fiduciary responsibility of controlling shareholders

Controlling shareholders, better known as promoters in India, who controls the management of the company, owe a fiduciary responsibility to the minority shareholders and the company as a whole. There have been instances where the controlling shareholders have used the company to steer their personal interests sacrificing the overall interest of the company, mostly through abusive RPTs.

Current laws/regulations do not explicitly lays down fiduciary responsibilities of the controlling shareholders.

In UK, FSA has proposed to reinstate the express provision that a listed company must be capable of acting independently of a controlling shareholder and its associates. Accordingly, it has proposed definitions for controlling shareholders, independent shareholders, etc. Further, proposal has also been made to mandate the listed company to enter into a relationship agreement, where it has a controlling shareholder, and that this agreement must comply with content requirements set out by FSA which may, *inter-alia*, include the following:

- transactions and relationships with a controlling shareholder are conducted at arm's length and on normal commercial terms;
- a controlling shareholder must abstain from doing anything that would have the effect of preventing a listed company from complying with its obligations under the Listing Rules;
- a controlling shareholder must not influence the day to day running of the company at an operational level or hold or acquire a material shareholding in one or more significant subsidiaries;
- the relationship agreement must remain in effect for so long as the shares are listed and the listed company has a controlling shareholder, etc.

The requirement for a relationship agreement will apply to a listed company on a continuous basis. It is also proposed to subject all material amendments to the relationship agreement to a shareholder vote that excludes a controlling shareholder in order to allow independent shareholders to have a say in how the relationship between the listed company and a controlling shareholder is managed and how it develops going forward. In determining what constitutes a material change, the listed company should have regard to the cumulative effect of all changes since the shareholders last had the opportunity to vote on the relationship agreement or, if they have never voted, since listing.

In line with the above, it is proposed *to lay down specific fiduciary responsibilities of controlling shareholders and also consider the feasibility of mandating relationship agreement between the company and the controlling shareholder specifying the duties and responsibilities of controlling shareholders.*

11.27. Strengthening Private Sector Enforcement

Enforcement of Corporate Governance can be through intervention of public sector agencies such as government, regulators and government controlled stock exchanges or through private sector intervention through class action suits etc. The key actors of private enforcement may include individual shareholders and stakeholders, self-regulatory organisations and institutions to which supervision and regulation is delegated, private-sector stock exchanges, associations of industries, shareholder associations, etc. The OECD Thematic Review on Supervision and Enforcement has observed that private supervision and enforcement can complement public supervision and enforcement, but in most countries are seldom used.

In this regard, the following steps, which are expected to strengthen the private sector enforcement, may be considered:

- *Recognising and encouraging proxy advisory firms*
- *Improving financial and other support to investor associations/groups for group action*
- *Delegating more enforcement powers to stock exchanges*
- *Improving Investor education and awareness and the grievance redressal machinery*

11.28. Improving investor education and awareness for better participation and deliberations at General Meetings

Investor education has been hailed as the key for improving governance standards and preventing abusive RPTs. This would not only improve the level of participation in general meetings but also in improving the quality of deliberations happening at the General Meetings.

SEBI has been the front runner in conducting investor education and awareness programmes.

11.29. Provision for regulatory support to class action suits

Presently, Regulation 5 (2) of SEBI (Investor Protection and Education Fund) Regulations, 2009 mentions that Investor Protection and Education Fund created by SEBI may, inter-alia, be used for aiding investors' associations recognized by SEBI to undertake legal proceedings (not exceeding seventy five per cent. of the total expenditure on legal proceedings) in the interest of investors in securities.

Though there are provisions for oppression and mismanagement, there is no express recognition of class action suits in Companies Act, 1956. However, Clause 245 of the Companies Bill, 2012 expressly provides for class action suits and Clause 125 provides for re-imbursement of expenses incurred in class action suits from the Investor Education and Protection Fund of MCA.

This provision in the proposed Companies Bill, if enacted, would address the issue.

11.30. Role of Institutional Investors

Corporate governance codes and guidelines have long recognised the important role that institutional investors have to play in corporate governance. The effectiveness and credibility of the entire corporate governance system and the company oversight to a large extent depends on the institutional investors who are expected to make informed use of their shareholders' rights and effectively exercise their ownership functions in companies in which they invest. Increased monitoring of Indian listed corporations by institutional investors will drive the former to enhance their corporate governance practices, and ultimately their ability to generate better financial results and growth for their investors. At present, there are four main issues with role of institutional investor and corporate governance:

- Issues relating to disclosure by institutional investors of their corporate governance and voting policies and voting records
- Issues relating to the disclosure of material conflicts of interests which may affect the exercise of key ownership rights
- Focus on increasing the size of assets under management rather than on improving the performance of portfolio companies.
- Institutional investors are becoming increasingly short-term investors.

Several countries mandate their institutional investors acting in a fiduciary capacity to disclose their corporate governance policies to the market in considerable details. Such disclosure requirements include an explanation of the circumstances in which the institution will intervene in a portfolio company; how they will intervene; and how they will assess the effectiveness of the strategy. In most OECD countries, Collective Investment Schemes (CIS) are either required to disclose their actual voting record, or it is regarded as good practice and implemented on an "comply or explain" basis.

In addition, Principle 1G of the OECD Principles calls for institutional investors acting in a fiduciary capacity to disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights.

SEBI has recently required listed companies to disclose the voting patterns to the stock exchanges and Asset Management Companies of Mutual Funds to disclose their voting policies and their exercise of voting rights on their web-sites and in Annual Reports. Ministry of Corporate Affairs' (MCA) initiative on E-voting will also enable scattered minority shareholders to exercise voting rights in General Meetings.

a) Institutional investors should have a clear policy on voting and disclosure of voting activity

Institutional investors should seek to vote on all shares held. They should not automatically support the board. If they have been unable to reach a satisfactory outcome through active dialogue then they should register an abstention or vote against the resolution. In both instances, it is good practice to inform the company in advance of their intention and the reasons thereof. Institutional investors should disclose publicly voting records and if they do not, the reasons thereof.

b) Institutional investors to have a robust policy on managing conflicts of interest

An institutional investor's duty is to act in the interests of all clients and/or beneficiaries when considering matters such as engagement and voting. Conflicts of interest will inevitably arise from time to time, which may include when voting on matters affecting a parent company or client. Institutional investors should formulate and regularly review a policy for managing conflicts of interest.

c) Institutional investors to monitor their investee companies

Investee companies should be monitored to determine when it is necessary to enter into an active dialogue with their boards. This monitoring should be regular and the process should be clearly communicable and checked periodically for its effectiveness.

As part of these monitoring, institutional investors should:

- Seek to satisfy themselves, to the extent possible, that the investee company's board and committee structures are effective, and that independent directors provide adequate oversight, including by meeting the chairman and, where appropriate, other board members;
- Maintain a clear audit trail, for example, records of private meetings held with companies, of votes cast, and of reasons for voting against the investee company's management, for abstaining, or for voting with management in a contentious situation; and
- Attend the General Meetings of companies in which they have a major holding, where appropriate and practicable.

Institutional investors should consider carefully the explanations given for departure from the Corporate Governance Code and make reasoned judgements in each case. They should give a timely explanation to the company, in writing where appropriate, and be prepared to enter a dialogue if they do not accept the company's position.

Institutional investors should endeavor to identify problems at an early stage to minimise any loss of shareholder value. If they have concerns they should seek to ensure that the appropriate members of the investee company's board are made aware of them.

Institutional investors may not wish to be made insiders. They will expect investee companies and their advisers to ensure that information that could affect their ability to deal in the shares of the company concerned is not conveyed to them without their agreement.

d) Institutional investors to be willing to act collectively with other investors where appropriate

At times collaboration with other investors may be the most effective manner to engage. Collaborative engagement may be most appropriate during significant corporate or wider economic stress, or when the risks posed threaten the ability of the company to continue. Institutional investors should disclose their policy on collective engagement. When participating in collective engagement, institutional investors should have due regard to their policies on conflicts of interest and insider information.

e) Institutional investors to establish clear guidelines on when and how they will escalate their activities as a method of protecting and enhancing shareholder value

Institutional investors should set out the circumstances when they will actively intervene and regularly assess the outcomes of doing so. Intervention should be considered regardless of whether an active or passive investment policy is followed. Initial discussions should take place on a confidential basis. However, if boards do not respond constructively when institutional investors intervene, then institutional investors will consider whether to escalate their action, for example, by

- holding additional meetings with management specifically to discuss concerns;
- expressing concerns through the company's advisers;
- meeting with the chairman, senior independent director, or with all independent directors;
- intervening jointly with other institutions on particular issues;
- making a public statement in advance of the AGM;
- submitting resolutions at shareholders' meetings; etc.

f) Institutional investors to report periodically on their responsibilities and voting activities

Those who act as agents should regularly report to their client’s details of how they have discharged their responsibilities. Such reports may comprise of qualitative as well as quantitative information. The particular information reported, including the format in which details of how votes have been cast are presented, should be a matter for agreement between agents and their principals.

Those that act as principals, or represent the interests of the end-investor, should report at least annually to those to whom they are accountable on their policy and its execution.

Like US funds, Indian asset management funds are now required to disclose their general policies and procedures for exercising the voting rights in respect of the shares held by them on their websites as well as in the annual report distributed to the unit holders from the financial year 2010-11. However, there is only a marginal increase in for/against votes and many funds fail to even attend meetings and have abstention as a policy. Even among funds that voted, there is little alignment between the votes and the voting policy.

In view of above, existing policy need to be examined. It may be deliberated on how to create incentives for institutional investors that invest in equities to become more active in the exercise of their ownership rights, without coercion, without imposing illegitimate costs on them, and given India's specific situation.

Fund houses should be mandated to adopt the global practice of quarterly vote reporting and fund-wise vote reporting and to adopt detailed voting policies. Further, vote reporting by fund houses should also be subject to audit.

11.31. Enforcement for non-compliance of Corporate Governance Norms

While much has been talked on the policy aspect of the Corporate Governance, at present monitoring of the compliance of the same is done only through disclosures in the annual report of the company and periodic disclosures of the various clauses of Clause 49 of the Listing Agreement on the stock exchange website.

- As per Clause 49 of the Listing Agreement, there should be a separate section on Corporate Governance in the Annual Reports of listed companies, with detailed compliance report on Corporate Governance. The companies should also submit a quarterly compliance report to the stock exchanges within 15 days from the close of quarter as per the prescribed format. The report shall be signed either by the Compliance Officer or the Chief Executive Officer of the company.
- The listed companies should obtain a certificate from either the auditors or practicing company secretaries regarding compliance with all the clauses of 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. Stock exchanges are required to send a consolidated compliance report to SEBI on the compliance level of Clause 49 by the companies listed in the exchanges within 60 days from the end of each quarter.
- Listing Agreement is essentially an agreement between exchanges and the listed company. BSE and NSE have listing departments, which oversee the compliances with the provisions of listing agreement. Non-submission of corporate governance report may result in suspension in trading of the scrip. As per the norms laid by BSE, the securities of the company would trigger suspension for non-submission of Corporate Governance report for 2 consecutive previous quarters or late submission of Corporate Governance report for any 2 out of 4 consecutive previous quarters.

For violations of the provisions of listing Agreement, following course of actions by SEBI is possible:

- o Delisting or suspension of securities
- o Adjudication for levy of monetary penalty on companies/directors/promoters by SEBI
- o Prosecution
- o Debarring directors/promoters from accessing capital market or being associated with listed companies.

Delisting or suspension is generally not considered an investor friendly action and therefore, cannot be resorted to as a matter of routine and can be used only in cases of extreme / repetitive non-compliance. Prosecution, on the other hand, is a costly and time-consuming process.

In order to strengthen the monitoring of the compliance, following measures may be considered:

- Carrying out of Corporate Governance rating by the Credit Rating Agencies.
- Inspection by Stock Exchanges/ SEBI/ or any other agency for verifying the compliance made by the companies.
- Imposing penalties on the Company/its Board of Directors/Compliance Officer/Key Managerial Persons for non-compliance either in sprit or letter

Presently, provisions of listing agreement are being converted into Regulations for better enforcement.

Public Comments

Comments on the above framework may be emailed on or before January 31, 2013 to anandr@sebi.gov.in / cfddil@sebi.gov.in or sent by post to:-

Sunil Kadam
General Manager
Corporation Finance Department - Division of Issues and Listing
Securities & Exchange Board of India
SEBI Bhavan
Plot No. C4-A, "G" Block
Bandra Kurla Complex
Bandra (East)
Mumbai - 400 051
Ph: +912226449630

Annexure- Proposed amendments to Clause 49 of the Listing Agreement pursuant to enactment of the Companies Bill 2012

Sl	**Particulars**	**Provisions in the Companies Bill 2012**	**Provisions in the Listing Agreement**	**Proposed amendments in Clause 49**
1	Composition of the Board- Independent Directors	Clause 149 (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."	Clause 49 (I) (A) – "The Board of directors of the company shall have an optimum combination of executive and non-executive directors with not less than fifty percent of the board of directors comprising of non-executive directors. Where the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case he is an executive director, at least half of the Board should comprise of independent directors. Provided that where the 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."	It is proposed to retain the existing provisions in the listing agreement which have stricter requirement.
2	Definition of Independent	Clause 149(6) "An independent director in relation to a company,	Clause 49(I)(A) (iii) "For the purpose of the sub-clause (ii), the expression	It is proposed to amend Clause 49 to state that an independent

	Director	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,	'independent director' shall mean a non-executive director of the company who: a. apart from receiving director's remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates which may affect independence of the director; b. is not related to promoters or persons occupying management positions at the board level or at one level below the board; c. has not been an executive of the company in the immediately preceding three financial years; d. is not a partner or an executive or was not partner or an executive during the preceding three years, of any of the following: i. the statutory audit firm or the internal audit firm that is associated with the company, and ii. the legal firm(s) and consulting firm(s) that have a material association with the company.	director of a listed company shall apart from complying the criteria of independence specified in the Companies Act (Bill), also complies with the following conditions: (i) He is not related to or having material pecuniary relationship with key managerial personnel; (ii) is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect independence of the director; (iii) is not less than 21 years of age.

		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	e. is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect independence of the director; f. is not a substantial shareholder of the company i.e. owning two percent or more of the block of voting shares. g. is not less than 21 years of age Non-Mandatory Requirements Company may ensure that the person who is being appointed as an independent director has the requisite qualifications, experience and can contribute effectively to the company as an independent director.	

		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 nonprofit 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."		
3	Declaration of Independence	Clause 149(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)"	No similar provisions in Listing Agreement	It is proposed to state that such declaration shall also mention that he meets the criteria of independence provided in listing agreement.
4	Code for Independent	Clause 149 (8) "The company and independent directors shall abide by	No similar provisions in Listing Agreement. However, Clause 49(I)(D) provides that	The companies and independent directors need to abide by the

	Directors	the provisions specified in Schedule IV.”	“The Board shall lay down a code of conduct for all Board members and senior management of the company. 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.”	Code for independent directors prescribed in Schedule IV to the Bill/Act. It is proposed to align the requirements of listing agreement with the provisions of Companies Bill.
5	Remuneration to Independent Directors	Clause 149(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.”	Clause 49(I)(B) “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, including independent directors, in any financial year and in aggregate. Provided that the requirement of obtaining prior approval of shareholders in general meeting shall not apply to payment of	Major difference in the Companies Bill is the prohibition of granting stock option to independent directors. Hence, the Listing agreement provisions needs to be aligned with the requirement in the Companies Bill by removing the reference to payment of stock options to independent directors.

			sitting fees to non-executive directors, if made within the limits prescribed under the Companies Act, 1956 for payment of sitting fees without approval of the Central Government.”	
6	Term of Independent Directors	Clauses 149(10) and 149 (11) “Subject to the provisions of section 152, an independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report. 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	Non-mandatory requirements under Clause 49 provide that “Independent Directors may have a tenure not exceeding, in the aggregate, a period of nine years, on the Board of a company.”	Since the provisions in the Companies Bill is stricter and the companies/ independent directors need to comply with the same, no need to amend clause 49, except removing the reference of nine years.

		indirectly.”		
7	Clarity in the liability of Independent/Non-Executive Directors	Clause 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.”	No provisions in the Listing Agreement	The provisions in the Companies Bill, if enacted would address the issue. It is proposed to align the requirements of listing agreement with the provisions of Companies Bill
8	**Separation of Offices of Chairman & Chief Executive Officer**	Proviso to clause 203 (1) “Provided that an individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the articles of the company, as well as the managing director or Chief Executive Officer of the company at the same time after the date of commencement of this Act unless,— (a) the articles of such a company provide otherwise; or (b) the company does not carry multiple businesses”	No explicit provision. However, relaxed requirement of only one-third Independent Directors in case of Non-Executive Chairman.	It is proposed to align the requirements of listing agreement with the provisions of Companies Bill

9	**Number of Directorships**	Clause 165 "No person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time**:** Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten."	No provisions	It is proposed to align the requirements of listing agreement with the provisions of Companies Bill
10	**Training of Directors**	Schedule IV Code for Independent Directors III. Duties : Independent directors should undertake appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the company;	Non- mandatory Requirements "A company may train its Board members in the business model of the company as well as the risk profile of the business parameters of the company, their responsibilities as directors, and the best ways to discharge them."	While the requirement may be retained as non-mandatory, it is proposed to align the requirements of listing agreement with the provisions of Companies Bill. Further, clause 49 may be amended to state that in the Boards' Report, the methodology/details of training imparted to Independent Directors shall be stated.
11	Provisions regarding meetings	Clause 173(1) "Every company shall hold the first meeting of the Board of Directors within thirty days of the date of its incorporation and thereafter hold a minimum number of four meetings of its Board of Directors every year in such a manner that not more than one hundred and twenty days shall	Clause 49(I)(C) (i) "The board shall meet at least four times a year, with a maximum time gap of four months between any two meetings"	Similar provisions exist in Companies Bill and in Listing Agreement. However, the provisions in Listing Agreement may be aligned with the language of the Companies Bill by substituting "maximum time gap of four months" with "maximum

		intervene between two consecutive meetings of the Board”		time gap of one hundred and twenty days”
12	Constitution of Audit Committee	Clause 177 “The Board of Directors of every listed company and such other class or classes of companies, as may be prescribed, shall constitute an Audit Committee. (2) The Audit Committee shall consist of a minimum of three directors with independent directors forming a majority: Provided that majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand, the financial statement.”	Clause 49(2)(A) “The audit committee shall have minimum three directors as members. Two-thirds of the members of audit committee shall be independent directors. All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise. The Chairman of the Audit Committee shall be an independent director”	It is proposed to retain the existing provisions in the listing agreement which have stricter requirement.
13	Meetings of the Audit Committee	No similar requirement	Clause 49 (II) (B) “The audit committee should meet at least four times in a year and 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.”	The existing provisions in listing agreement may be retained.
14	Performance Evaluation of	Schedule IV **“VIII. Evaluation mechanism:**	Non-mandatory requirement “The performance evaluation of non-	Provision may be made mandatory in line with the

	Independent Directors	(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."	executive directors could be done by a peer group comprising the entire Board of Directors, excluding the director being evaluated; and Peer Group evaluation could be the mechanism to determine whether to extend / continue the terms of appointment of non-executive directors."	provisions of Companies Bill. Further, it is proposed to amend Clause 49 to require that such evaluation report of the independent director should also based on his attendance and contribution to the board/committee meetings and such appraisal shall be placed before the nomination committee for taking a decisions for reappointment.
15	Role/functions of the Audit Committee	Clause 177 (4) "Every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board which shall inter alia, include,— (i) the recommendation for appointment, remuneration and terms of appointment of auditors of the company; (ii) review and monitor the auditor's independence and performance, and effectiveness of audit process; (iii) examination of the financial statement and the auditors' report thereon; (iv) approval or any subsequent	Clause 49(II)(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. Recommending to the Board, the appointment, re-appointment and, if required, the replacement or removal of the statutory auditor and the fixation of audit fees. 3. Approval of payment to statutory auditors for any other services	Companies /Audit Committee need to comply with the additional responsibilities prescribed in the Bill. It is proposed to align the requirements of listing agreement with the provisions of Companies Bill

		modification of transactions of the company with related parties; (v) scrutiny of inter-corporate loans and investments; (vi) valuation of undertakings or assets of the company, wherever it is necessary; (vii) evaluation of internal financial controls and risk management systems; (viii) monitoring the end use of funds raised through public offers and related matters.”	rendered by the statutory auditors. 4. Reviewing, with the management, the annual financial statements 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 (2AA) of section 217 of the Companies Act, 1956 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 g. Qualifications in the draft audit report.	

			5. Reviewing, with the management, the quarterly financial statements before submission to the board for approval 5A. 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. 6. Reviewing, with the management, performance of statutory and internal auditors, adequacy of the internal control systems. 7. 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.	

			8. Discussion with internal auditors any significant findings and follow up there on. 9. 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. 10. 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. 11. 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. 12. To review the functioning of the Whistle Blower mechanism, in case the same is existing. 12A. Approval of appointment of CFO (i.e., the whole-time Finance Director or any other person heading the	

			finance function or discharging that function) after assessing the qualifications, experience & background, etc. of the candidate. 13. Carrying out any other function as is mentioned in the terms of reference of the Audit Committee.	
16	Nomination and Remuneration Committee	Clause 178 "The Board of Directors of every listed company and such other class or classes of companies, as may be prescribed shall constitute the Nomination and Remuneration Committee consisting of three or more non-executive directors out of which not less than one-half shall be independent directors: Provided that 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. (2) The Nomination and Remuneration Committee shall identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the	Non-mandatory requirement i. "The board may set up a remuneration committee to determine on their behalf and on behalf of the shareholders with agreed terms of reference, the company's policy on specific remuneration packages for executive directors including pension rights and any compensation payment. ii. To avoid conflicts of interest, the remuneration committee, which would determine the remuneration packages of the executive directors may comprise of at least three directors, all of whom should be non-executive directors, the Chairman of committee being an independent director. iii. All the members of the remuneration committee could be present at the meeting.	Clause 49 need to be amended to align with the requirements of Companies Bill. However, the requirement of independent chairman for the committee, as provided in the existing clause 49 requirement, be retained in the new clause.

		criteria laid down, recommend to the Board their appointment and removal and shall carry out evaluation of every director's performance. (3) The Nomination and Remuneration Committee shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees. (4) The Nomination and Remuneration Committee shall, while formulating the policy under sub-section (3) ensure that— (a) the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully; (b) relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and (c) remuneration to directors, key	iv. The Chairman of the remuneration committee could be present at the Annual General Meeting, to answer the shareholder queries. However, it would be up to the Chairman to decide who should answer the queries."	

		managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals: Provided that such policy shall be disclosed in the Board's report."		
17	Stakeholders Relationship Committee	Clause 178 (5) "The Board of Directors of a company which consists of more than one thousand shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year shall constitute a Stakeholders Relationship Committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the Board. (6) The Stakeholders Relationship Committee shall consider and resolve the grievances of security holders of the company."	Clause 49(IV)(G) "A board committee under the chairmanship of a non-executive director shall be formed to specifically look into the redressal of shareholder and investors complaints like transfer of shares, non-receipt of balance sheet, non-receipt of declared dividends etc. This Committee shall be designated as 'Shareholders/Investors Grievance Committee'.	Provisions in Clause 49 agreement need to be aligned with Companies Bill.
24	**Risk Management**	Clause 134 (3) "There shall be attached to statements laid before a company in general	Clause 49 (IV) (C) "The company shall lay down procedures to inform Board members about the risk	Provisions of Clause 49 need to be aligned with Companies Bill.

		meeting, a report by its Board of Directors, which shall include— (n) 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;" **Clause 177 (4)(vii)** "Every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board which shall inter alia, include,— (vii) evaluation of internal financial controls and risk management systems;"	assessment and minimization procedures. These procedures shall be periodically reviewed to ensure that executive management controls risk through means of a properly defined framework."	
25	**Whistle Blower**	Clause 177 "(9) 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.	Non-Mandatory Requirement "The company may establish a mechanism for employees to report to the management concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy. This mechanism could also provide for adequate safeguards	The existing provision in the Listing Agreement may be made mandatory and aligned with Companies Bill.

		(10) The vigil mechanism under sub-section (9) 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: Provided that the details of establishment of such mechanism shall be disclosed by the company on its website, if any, and in the Board's report."	against victimization of employees who avail of the mechanism and also provide for direct access to the Chairman of the Audit committee in exceptional cases. Once established, the existence of the mechanism may be appropriately communicated within the organization."	
		Definitions of "associate company", "financial year", "key managerial personnel", "related party", "relative" etc. need to be aligned with the Companies Bill.		Apart from the above, following definitions in the listing agreement: definitions of "associate company", "financial year", "key managerial personnel", "related party", "relative" etc. need to be aligned with the Companies Bill.

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