



CURIOUS CASE OF UNWARRANTED SHAREHOLDERS' ACTIVISM IN RE-APPOINTMENT OF INDEPENDENT DIRECTOR BY INFOSYS

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The appointment of independent director has been an 'evergreen' topic of discussion, under the Listing Agreement, Cos. Bill, 2012, Cos. Act, 2013 ('the Act') and now under the SEBI Listing Regulations. Recently, Infosys Ltd. re-appointed its independent director who had already served as independent director for 10 years. The re-appointment was proposed for a period of 2 years. Such appointment was in limelight for quite some time, as 2 Proxy Advisory Firms (Institutional Investor Advisory Services ('IIAS') and Shareholders Empowerment Services ('SES')) raised certain objections on the re-appointment and recommended investors to vote against the resolution¹. This article is an analysis of the facts, details of independent director's re-appointment, study of the Proxy Advisory Firm's Report and Voting Policy, elaborate discussion on the provisions of the Act and the subsequent clarification provided by MCA and SEBI.

Broad Facts: Vide the Postal Ballot Notice, Infosys Ltd. proposed the re-appointment of Prof. Jeffrey S. Lehman as independent director under the provisions of Section 149(6) of the Act. Prof. Jeffrey S. Lehman was due for retirement from his first term as independent director on April 13, 2016 (i.e. after the notification of the Act). Based on his skills, experience, knowledge and performance evaluation, Infosys proposed that Prof. Lehman be reappointed for another term of 2 years from April 14, 2016 to April 13, 2018 as an Independent Director. Prof. Lehman's tenure as an 'independent director' on Infosys' Board completed 10 years in April 2016. The Proxy Advisory Firms objected to the appointment as he had already completed 10 years on the board of Infosys, majority being under the Cos. Act, 1956 and the then Listing Agreement.

'Proxy Voting Policy' of the Proxy Advisory Firms: IIAS stated that "Global markets are considering

fixing directors' tenure, and some markets are even considering setting it at 9 years. But, the debate is mainly limited to whether there must be a fixed tenure or not – that directors need to be periodically rotated has always been considered a good governance practice and has never been in question". IIAS² also had its own 'Voting Policy' and as per the Policy, the tenure of the independent director is counted from the date of appointment (whether under Cos. Act, 1956 or 2013). It stated that the Voting Policies are based on global best practices that can help Indian markets develop stronger governance standards and the policies are revised periodically based on feedback from market participants, results of its research, and other on-going market and regulatory developments. The Report stated that the Policy on independent directors' tenure has changed. It was earlier set at 9 years, which followed SEBI's Listing Agreement. Following the Cos. Bill 2012 (which was subsequently passed by the President as Cos. Act 2013), the Proxy Advisory Firm changed its voting policy to set independent directors' tenure at 10 years. With reference to the Proxy Advisory Firm's Survey in 2014 (survey titled as 'Institutional Investors' Attitude to Corporate Governance'), 82% of the investors polled favourably to setting a fixed director tenure.

Question raised by Proxy Advisory Firm: IIAS opined that "instead of debating the legality of Prof. Jeffrey Lehman's reappointment, Infosys would be better placed in assessing what it should do as a good corporate governance practice. Infosys has always looked at the bigger picture and set its standards on good governance well ahead of corporate India. Why, then, has it begun nitpicking on as obvious an issue as director rotation?" IIAS stated that they would have supported the resolution, if Infosys had re-

¹ <http://www.livemint.com/Companies/3F3idDHsAHUSyot5hW9moM/ProxyadvisoryfirmstakeonInfosysoverboardappointment.html?facet=print>

² Source: <http://iias.in/>



appointed Prof. Lehman as 'non-independent director' and not as 'Independent Director'.

Reply by Infosys: Infosys replied³ to the concerns raised by the Proxy Advisory Firms and stated that the reappointment of Prof. Lehman is in compliance with the requirements of the Act and SEBI regulations, both of which allow his re-appointment as an independent director for another 5-years term, however, the board was proposing to nominate Prof. Lehman only for 2 years.

Discussion on the provisions relating to 'Independent Director' under the Act: Section 149 of the Act is the principle section governing the provisions relating to the board of directors in a company and contains broad provisions relating to the appointment of directors. Sub-section (6) to Section 149 Act relates to the provisions and criteria relating to appointment of independent director. It defines independent director as a director other than a managing director or a whole-time director or nominee director. The sub-section (6) of Section 149 also prescribes 6 exhaustive and mandatory criteria for appointment of independent director by listed company and prescribed class of unlisted companies.

Tenure of Independent Directors: Sub-section (10) of Section 149 of the Act states that subject to the provisions of Section 152 (relating to 'appointment of directors'), the independent director shall hold office for a term up to 5 consecutive years on the Board of a company. However, he shall be eligible for re-appointment on passing of Special Resolution by the company and disclosure of such appointment in the Board's report.

Sub-section (11) of Section 149 of the Act further states the independent director shall not hold office for more than 2 consecutive terms. However, the independent director shall be

eligible for appointment after the expiration of 3 years of ceasing to become an independent director. The proviso to sub-section (11) of Section 149 of the Act further clarifies that an independent director shall not, during the said period of 3 years, be appointed in or be associated with the company in any other capacity, either directly or indirectly.

Transition issues & MCA Clarification: The Act was effective from April 1, 2014. The listed companies had already appointed Independent Directors under the then Listing Agreement. Considering the transition period and confusion over the tenure of the Independent Directors under the Listing Agreement and the Act, MCA issued a Circular⁴ on certain contentious issues relating to the independent director, which includes – pecuniary interest in certain transactions, appointment and tenure of independent directors and issue of letter of appointment to existing independent directors.

The Circular addressed the question whether it would be possible to appoint an individual as an Independent Director for a period less than 5 years. MCA clarified that Sec. 149(10) of the Act provides for a term of 'up to 5 consecutive years' for an Independent Director and hence the term of less than 5 years would be permissible, however the appointment for any term (whether for 5 years or less) would be as a 1 term. With reference to sub-section (11) of Section 149 of the Act (a person can hold office of Independent Director for more than '2 consecutive terms'), the MCA clarified that such a person shall have to demit office after 2 consecutive terms even if the total number of years of his appointment in such 2 consecutive terms is less than 10 years. The MCA Circular stated that the person completing 'consecutive terms of less than 10 years' shall be eligible for appointment only after the expiry of the requisite cooling-off period of 3 years.

MCA has also clarified on the issue that if independent directors are appointed prior to April

³ <http://www.thehindubusinessline.com/infotech/infosysrespondstoconcernsraisedonkeyresolutionsupforvote/article8388786.ece>

⁴ No. 14/2014 [F.NO.1/22/2013-CL-V], dated June 9, 2014



1, 2014 (i.e. before commencement of the Act), then whether such director can continue and complete their remaining tenure, under the provisions of the Companies Act, 1956 or they should demit office and be re-appointed in accordance with the Act. MCA clarified that explanation to Section 149(11) of the Act clearly provides that any tenure of an Independent Director on the date of commencement of the Act (April 1, 2014) shall not be counted for his appointment/holding office of director under the Act. In view of the transitional period of 1 year provided under Section 149(5) of the Act, MCA clarified that it would be necessary that if it is intended to appoint existing Independent Director under the Act, such appointment shall be made expressly under sub-section (10) or (11) of Section 149 of the Act read with Schedule IV within 1 year from April 1, 2014, subject to compliance with eligibility and other prescribed conditions.

SEBI's clarification on appointment of Independent Director under the then Clause 49 of Listing Agreement: SEBI amended⁵ the then Clause 49 of Listing Agreement and in relation to independent director's tenure stated that he / she shall hold office for a term up to 5 consecutive years and shall be eligible for reappointment for another term of up to 5 consecutive years on passing of a special resolution by the company. SEBI clarified that a person who has already served as an independent director for 5 years or more in a company (as on October 1, 2014) shall be eligible for appointment, on completion of his present term, for one more term of up to 5 years only. In relation the Act, SEBI stated that an independent director, who completes the said

term shall be eligible for appointment as independent director in the company only after the expiration of 3 years of ceasing to be an independent director. SEBI further clarified⁶ that the maximum tenure of Independent Directors shall be in accordance with the Act and clarifications/ circulars issued by the MCA, in this regard, from time to time.

Analysis of the provisions of the Act, Clause 49 provisions & Report of Proxy Advisory Firm: The Proxy Advisory Firms have their independent Voting Policy and accordingly they give suggestions to investors on the voting for a particular resolution. Such policy may be based on global corporate governance standards, good corporate secretarial practice, ethics and values, however, such issues are not always taken into consideration by the companies (i.e. board of directors) in its decision making process. The Companies are required to follow the law, in the present case – the Companies Act, the then Listing Agreement, clarifications issued by MCA and SEBI. The companies are under no obligation to study, analyse and follow the Voting Policy of Proxy Advisory Firms. It may also happen that such Policy changes from Proxy Advisory firms to firms. Though the company ought to have good corporate governance policies and practices, however it is not binding on them to follow such practices. The companies should voluntarily adopt such practices. Though, Infosys is globally known for its corporate governance policies and practices, in my view, the appointment of Prof. Jeffrey S. Lehman as independent director is in compliance of the Act and SEBI's Listing Agreement.

⁵ SEBI Circular dated April 17, 2014, Circular No. CIR/CFD/POLICY CELL/2/2014

⁶ SEBI Circular dated September 15, 2014, Circular No. CIR/CFD/POLICY CELL/7/2014

