

# A tale of two Patricks: Wipro in a war of words with proxy advisor on rehiring independent directors



## Synopsis

An ambiguous provision in the company law that requires shareholder approval for the reappointment of independent directors has led to divergent practices among listed companies. Though the IT major has asked Stakeholder Empowerment Services to withdraw its voting recommendation to shareholders, the proxy advisor has chosen to stand its ground.

Earlier this year, a discussion paper released by the Securities and Exchange Board of India (Sebi) on independent directors created a flutter in the corporate-governance community.

On March 01, 2021, in a consultation paper titled '*Review of Regulatory Provisions Related to Independent Directors*', the market regulator proposed to make prior shareholder approval mandatory for the appointment and reappointment of all independent directors. While it drew widespread ire and was criticised as a case of regulatory overreach, some corporate-governance experts saw it as a move to strengthen shareholder democracy.

But far from it, the paper's intention was perhaps more humble — to iron out an ambiguity in the company law that is leading to inconsistent compliance practices among listed companies.

This ambiguity has now blown out into a war of words between Bengaluru-based Wipro and Mumbai-based proxy advisor Stakeholder Empowerment Services (SES).

In a strongly worded letter a couple of weeks ago, Wipro's company secretary asked the proxy advisor to withdraw its voting recommendations 'against' the technology giant's upcoming resolutions for reappointment of two of its decorated independent directors — Patrick Dupuis and Patrick J Ennis.

Asserting that it has followed all applicable legal provisions and regulations relating to the reappointments, Wipro said, "...One can conclude at best that there is an ambiguity in the interpretation of Section 149 (10) of the Act [The Companies Act, 2013] due to the language used therein, which would require clarification from the Ministry of Corporate Affairs as currently divergent practices are being followed by listed companies. We are of the view that seeking shareholders' approval for reappointment of independent director prior to expiry of the first term may be seen as a better governance practice, but in no way can be considered as non-compliance with the provisions of the Act or Sebi Listing Regulations."

But SES has held its ground, arguing that such approval through a special resolution of shareholders is mandatory before the end of the earlier term of the directors, and hence seeking it after the beginning of the new term would amount to non-compliance. In an addendum issued to its report following the letter from Wipro, the proxy-advisory firm said, "In [the] opinion of SES, there is no ambiguity in the law and SES cannot take into account any other practice followed by other companies...Shareholders may take into account the justification provided by the company and also SES comments thereon and take an informed decision."

The postal ballot on reappointment of the duo is currently open and will close on June 4.

Coming with diverse backgrounds and impressive profiles, the duo has added significant value to the Wipro board. Their conduct, including attendance records, has not come under any major controversy. SES reiterated in the addendum “in no uncertain terms” that it has “no concerns or issues with respect to the merits of both the directors with the sole exception that procedure is not in compliance with the law”.

Then, what is bothering the proxy-advisory firm?

**"The technical anomaly arises in view of lack of clarity in the rules of the timing of reappointment rather than in the power of the board of directors. Over a period of time, to address this technical anomaly, as an abundant precaution, industry practice has been to reappoint independent directors before their first terms end by way of postal ballot."**

*— SN Ananthasubramanian, former president, Institute of Company Secretaries of India.*

#### **The curious case of 149(10)**

Wipro announced the reappointment of both Ennis and Dupuis in January this year. This was more than two months before their first term ended. Yet, the postal ballot seeking shareholder approval came only in May, a month into their new term, which began on April 1, 2021. This has become the bone of contention between Wipro and SES.

Section 149(10) of the Companies Act contains the specific provision regarding the reappointment of independent directors. It states that “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 the passing of a special resolution by the company and disclosure of such appointment in the board's report”.

According to SES, this provision sets out the eligibility of an independent director for being reappointed on the board of a company. Therefore, unless a special resolution is passed by shareholders, an existing independent director will not be eligible for reappointment.

“In the current case, the term of Patrick J Ennis and Patrick Dupuis already ended on March 31, 2021, [and] therefore, they have ceased to be directors of the company unless reappointed on the board. Since the eligibility of reappointment is a special resolution by shareholders, therefore, such approval should have been obtained on or before March 31, 2021,” SES said.

It also cited a guidance note on independent directors issued by the Institute of Company Secretaries of India (ICSI). The note said, “If the shareholders' approval by special resolution for his reappointment for the second term is not taken as on the last date of the first term, then such independent director cannot be reappointed by the board as an additional director for the second term, as he does not possess the eligibility to get reappointed for the second term and hence, he ceases to be a director at the end of his first term.”

This has led SES to the conclusion that the process followed in reappointments was not in accordance with the law. Calling it a case of “non-compliance”, the proxy-advisory firm issued a recommendation to Wipro shareholders to vote against the resolution.

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## **Inherent powers of the board**

Neutral observers believe things are not in black and white, and the powers given to the board through other sections of the law cannot be ignored. Former president of ICSI, SN Ananthasubramanian, who advises several large companies on secretarial compliance, tells ET Prime, “While it is correct to conclude that independent directors can be reappointed only by special resolution passed by the shareholders, to state that board has no power to reappoint them does not fully reflect the legislative intent.”

He adds that if the board of directors has the power to appoint a director in the first instance, someone who is later classified as an independent director, then it also has the power to reappoint the same person provided all other conditions are met.

In its letter to SES, Wipro also referred to the powers of the board, explaining how historically the authority to propose an individual for appointment as director of a company has been largely vested with the board of directors. “This is one of the foundational principles under company law and seen as an inherent power of the board of directors. Such appointments are typically effective from the date of approval of the board of directors and subsequently regularised through an approval of shareholders wherever required (e.g: appointment of managing director, whole-time director, independent director, etc.),” the company said.

# Framework for director appointments

Key Sections/regulations	Provision
Section 178 and regulation 19	Nomination and remuneration committee shall identify persons to be appointed/reappointed as directors and recommend the same to the board of directors
Sections 149 and 152 read with schedule IV	The board of directors approve the reappointment of independent director, inter alia, on the basis of report of performance evaluation, and confirmation of independence criteria
Section 149(6) and regulation (16)(1)(b)	Independence criteria for independent directors
Regulation 17(11)	Mandatory for the board of directors to include its recommendation on all matters being placed before the shareholders for approval

Note: Sections refer to those of Companies Act, 2013; Regulations refer to those in Sebi listing regulations

Source: Wipro letter

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Citing various sections of the Companies Act and Sebi regulations relating to the appointment of directors, Wipro said, “Based on a harmonised reading of applicable provisions, the sequence of events for reappointment of an independent director is as follows: “The nomination and remuneration committee recommends reappointment of the independent director to the board of directors, which in turn approves and recommends the same to the shareholders for approval by way of a special resolution.”

Therefore, Wipro felt it was not practical for shareholders to “unilaterally take up the reappointment of an independent director without a recommendation from the nomination and remuneration committee or the board of directors”. Such a situation may also be viewed as not in compliance with the existing framework prescribed under the Act and Sebi Listing Regulations, it argued.

With reference to provisions of Section 149(10), Wipro argued that approval does not necessarily mean “prior” approval and that it was not the legislature’s intent to add additional eligibility criteria.

“In our view, the primary intent of Section 149(10) is to stipulate a higher threshold of special resolution approval for regularisation of reappointment of an independent director (compared to ordinary resolution for a first term appointment). The intent does not seem to be to prescribe any additional eligibility criteria as the same are already prescribed under Section 149 and other specific provisions of the Act and rules made thereunder,” the company said.

It added that Section 149(10) did not stipulate that “prior” approval of shareholders is required for reappointment of an independent director, which further strengthens the view that the intention is to require approval by way of a special resolution.

It also cited the recent Sebi consultation paper on independent directors. The market regulator has proposed that independent directors shall be appointed on the board only with prior approval of the shareholders at a general meeting. “This lends further credence to the view that the current regulatory regime does not stipulate a prior approval,” it added.

SES, however, stuck to its guns, arguing that specific provisions in the law override the general provisions and that the word “eligible” has to be read with the import that the approval has to come in advance.

“...The law does not explicitly use the term ‘prior’, however, the word ‘eligible’ itself intends to mean pre-requisite or pre-condition. Therefore, eligibility cannot be ratified at a later date,” it observed.

As far as the first appointment of independent directors on the board is concerned, the law has not laid down such eligibility criteria as it does in the case of reappointment. Therefore, the process for appointment and reappointment of independent directors are distinct to that extent,” it said in an addendum issued on May 15.

ET Prime also found that several firms in the recent past have gone out of their way to ensure that they don’t get called out on this count by taking shareholder approvals months in advance.

## **Playing safe amid ambiguity**

Wipro's Bengaluru neighbour Infosys has a similar reappointment coming up. It has floated a special resolution in its upcoming annual general meeting (AGM) scheduled later this month. The special resolution says that "Michael Gibbs (DIN: 08177291) who holds office as an independent director up to July 12, 2021, be and is hereby reappointed as an independent director, not liable to retire by rotation, for a second term of five years with effect from July 13, 2021, up to July 12, 2026.

While it could be argued that Infosys had the convenience of the last date of Gibbs's term falling after its AGM, several other companies have decided to go for shareholder approval through the postal ballot to ensure that it is in place before the end of the first term of their independent directors.

In February, pharma major Novartis conducted a postal ballot for the reappointment of Sandra Martyres as an independent director. Her first term was ending on April 18, 2021, and the shareholders approved the second term till April 2026.

Strides Pharma is another company that has recently called for a postal ballot for the reappointment of Bharat Shah. The postal ballot is currently open and will close on June 11, in time for Shah's new term to begin on June 15.

Some firms are even taking approvals months ahead of the term ending as a measure of abundant caution. For example, ITC had taken shareholder approval in its AGM held in September last year for the reappointment of former foreign secretary Nirupama Rao whose first term was to end in April 2021. Asian Paints took shareholder approval in December 2018 for the reappointment of MK Sharma, whose term was to end in March 2019.

Similarly, Cyient has put up a special resolution in its upcoming AGM in June for Vikas Sehgal whose reappointment is not due before October.



## Companies that took prior approvals for reappointment of independent directors

Company	Approval/ AGM date	Name of director	New term beginning
Infosys	June 19, 2021	Michael Gibbs	July 13, 2021
Cyient	June 17, 2021	Vikas Sehgal	October 16, 2021
Strides pharma	June 13, 2021	Bharat Shah	June 15, 2021
Novartis	March 25, 2021	Sandra Martyres	April 18, 2021
ITC	September 4, 2020	Nirupama Rao	April 8, 2021

Source: AGM/postal ballot notices

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Ananthasubramanian, who has advised some of these firms in the past, says technical anomaly is forcing many firms to play safe and take prior approvals. “The technical anomaly arises in view of lack of clarity in the rules of the timing of reappointment rather than in the power of the board of directors. Over a period of time, to address this technical anomaly, as an abundant precaution, industry practice has been to reappoint independent directors before their first terms end by way of postal ballot.”

According to him, this particular situation is also sought to be addressed in the recent consultation paper issued by Sebi wherein both appointment and reappointment are sought to be made effective only by shareholders.

In any case, the Sebi recommendations are unlikely to see the light of the day before the postal ballot on Wipro’s Patrick duo is concluded on June 4. Over the next couple of days, like Wipro, its shareholders too, would have to be ‘applying thought’.

*(Graphics by Manali Ghosh)*