COMPARATIVE STUDY ON PROVISIONS GOVERNING INDEPENDENT DIRECTORS BETWEEN INDIA AND US

Naman Gupta, Vivekananda Institute of Professional Studies

ABSTRACT

Independent directors play an important role in the day-to-day working of a corporate firm by virtue of their apparent expertise. It constitutes an inevitable part of the firm. The concept of "independent directors" evolved in tandem with the term "corporate governance." Independent directors have traditionally been expected to invest their knowledge and intellect into the company and not money. The scope of the paper includes the important topics such as laws related to the qualification, tenure, roles and responsibilities, and much more. The research is widened to include a glimpse of laws in the USA and gives insight on the same so as to understand the international trends on same. The paper also provides with a brief about the differences in the laws of India and the USA in the context of Independent Directors. The researcher has chosen this topic considering the fact that the concept is relatively newer to the Indian business world and hence, certain relevant updates from major companies in India have also been mentioned and analyzed to understand how the Indian corporate sector has changed since this position is now being taken up seriously unlike before.

Keywords: Independent, Directors, corporate, governance, US, India.
STATEMENT OF PROBLEM

Even to this day, family business groups control the majority of Indian firms, even those listed on stock markets. Even though the family mostly owns just a small percentage of the company, it is nevertheless controlled and marketed by it. Corporate frauds, such as Satyam, affect not just public shareholders but other stakeholders such as workers, creditors, consumers, and the whole sector. The agency issue between minority and majority shareholders, as well as that between corporation and stakeholders other than shareholders, is a critical topic in Indian environment. The issue of whether Independent Directors (ID(s)) can solve these agency concerns, particularly under the Indian closed-ownership paradigm, is crucial and has been explored hereby. The cornerstone of strong corporate governance is independent and impartial boards dedicated to the company's well-being and equal treatment of all of its shareholders. Independent directors on the board of directors may assist the firm perform better for all of its stakeholders, including shareholders, if their nomination is not based on a conflict of interest with the company. Due to insufficient training and induction programs, independent directors' efforts are missing. The impact of same has also been explored here.

INTRODUCTION

Shareholders, creditors, banks, and other financial institutions, as well as workers, the local community, and the environment, are just some of the many groups that make up a business. The smooth operation of the corporate system is dependent on the satisfaction of the needs of these many stakeholders. As part of SEBI's efforts to improve corporate governance in India, Kumar Mangalam Birla founded a Committee in 1999, which was led by him.\(^1\) In 2000, the Listing Agreement was amended to include "Clause 49-Corporate Governance" in response to the KM Birla Committee's recommendations. The Committee defines independent directors as follows in the Report: "Independent Directors are those who, apart from receiving director compensation, have no material pecuniary relationship or transaction with the company, its promoters, management, or subsidiary that, in the Board's judgment, could impair their independence of judgment."

---

\(^1\) Bhawik Swadia, “Corporate Governance MCOM.2”, Research Gate (December 11, 2021) https://www.researchgate.net/publication/338414534_CORPORATEGOVERNANCE_MCOM2
Corporate governance reforms in the international arena were sparked by Enron, WorldCom, Qwest, and Global Crossing, as well as the landmark legislation SOX.\textsuperscript{2} As a result, the Government of India appointed the “Naresh Chandra Committee” in 2002, which recommended, among other things, that the existing definition of independent director be clarified in accordance with international best practices.

Independent directors constitute a very important part in a corporate company. The work of the independent director has become more difficult in recent years as a result of increased stakeholder scrutiny, increased regulatory obligations, and a general increase in the intricacy of the business environment in which Corporate India operates.

Independent Directors now have increased authority under the Companies Act, 2013 to ensure that a company's management and affairs are conducted fairly and efficiently. Simultaneously, they've been held to a higher standard of accountability. The new Act gives Independent Directors a definitive 'say' in a company's management, significantly strengthening corporate governance.

Since the advent of high-profile business scandals in India, the significant debate has centred on Corporate Governance and the role of company directors, notably the independent director. As a desired investment destination, India must strengthen its governance standards in order to attract the biggest investment ever. Due to the critical nature of the independent director's job in acting as a watchdog, we must also strengthen the independent director's role. \textsuperscript{3}

Independent directors are those who have expertise or connections in a certain area or field. Typically, businesses choose ex-officials for such positions because they possess the industry competence and experience necessary to manage a business successfully. Women directors may also be appointed to the board of directors as independent directors. Independent directors contribute to the maintenance of transparency, a critical component, particularly in the corporate regime.


\textsuperscript{3} This has also been decided by Company Law Board in Central Government \textit{v.} Sterling Holiday Resorts (India) Ltd., ((2006) 131 Comp Cas 6 CLB : 2006 71 SCL 372 CLB) that the Board of directors should be strengthened by appointing IDs.
Independent Director: Definition/ Meaning

As defined in Sec 2(47), "independent director" refers to an independent director as defined in Sec 149's sub-section (6).

That is stated in Section 149(6)4 –

“An independent director is one who is not the managing director, a full-time director, or a nominee director of a company; (a) who, in the Board's opinion, possesses relevant expertise and experience and is a person of integrity; (b) who is or was a promoter of the company or one of its holding, subsidiary, or associate companies; or

(i) has no ties to the company's promoters or directors;

(a) who has or had a financial relationship with the company, its holding, subsidiary, or associate company, or their promoters or directors, during the previous two fiscal years or the current fiscal year;

(b) During the two preceding financial years or the current financial year, none of the company's relatives had or had a pecuniary relationship or transaction with the company, its holding, subsidiary, or associate company, or their promoters or directors in an amount equal to or greater than 2% of the company's gross revenue or total income, or fifty lakh rupees, or such higher amount as may be prescribed;

(ii) is or was an employee, proprietor, or partner of—in any of the three fiscal years immediately preceding the fiscal year in which he is proposed to be appointed; (e) who, by himself or through one of his relatives—is or was employed by the company or any of its holding, subsidiary, or associate companies during any of the three fiscal years immediately preceding the fiscal year in which he is proposed to be appointed;

(A) an auditing firm, a company secretary in practice, or a firm of cost accountants for the company, its holding, subsidiary, or associate company; or (B) an auditing firm, a company secretary in practice, or a firm of cost accountants for the company, its holding, subsidiary, or associate company; or

---

4 The Companies Act, 2013.
(B) any law firm or consulting firm that has or has had a transaction worth 10% or more of its gross income with the corporation, its holding, subsidiary, or associate company;

(iii) together with his relatives, controls at least 2% of the voting power of the corporation; or

(iv) is the Chief Executive Officer or a director of any nonprofit organization that receives 25% or over of its revenue as from company, any of its promoters, directors, or any of holding, subsidiary, or associate companies, or that possesses 2% or more of the company's total voting power, regardless of title.; or

(v) who meets the additional requirements set forth below:

A balanced mix of abilities, experience, and expertise in one or more of the following areas is required of an independent director: finance, legal, management, sales, marketing, admin, studies, corporate governance, technical operations, or other professions relevant to the company's business.”

Independent directors and their responsibilities

Independent Directors play a pivotal role. Independent Directors are critical in ensuring that the corporate regime maintains a transparent work environment. Independent Directors are expected to exercise impartial and objective judgment in order to ensure the company's proper operation. Independent Directors help ensure that boards of directors are effective and balanced.

Independent Directors are critical in helping an organization establish a strong foundation for Corporate Governance. They strengthen the Board's responsibility and legitimacy, while also supporting good practices across the organization. Despite the fact that they are not obliged to engage in the day-to-day operations or decision-making of the firm, they should raise relevant issues about the board's actions at the right moment. They may considerably limit the incidence of undesired circumstances and their related effects by raising the relevant red flags at the proper time. However, despite his commitment to ethical business practices, an Independent Director may be unable to perform effectively in isolation.5

CRITICAL ROLE OF INDEPENDENT DIRECTORS

Independent directors help align management's goals with those of shareholders as well as improve the quality of decision-making. Additionally, because independent directors are strangers to management, an objective study of firm performance will assure compliance with worldwide standards of corporate behaviour including governance. As a result of corporate crises such as Satyam, the Companies Act, 2013 introduced the notion of an Independent Director and required their appointment in certain companies. Independent Directors have grown in importance and necessity as a result of every business scandal and financial catastrophe on the planet.

Section 149(7) of the Companies Act, 2013 requires the Independent Director to submit a self-declaration confirming that they meet the independence criteria.

According to Section 149(7), "Every Independent Director shall make a declaration that he meets the criteria of independence 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 any change in circumstances affects his status as an Independent Director."

Additionally, the independent director prohibits interfering with the company's day-to-day operations. Even the qualifications for the appointment of the independent director are not

---

6 Ibid.
7 Satyam Computers was founded in 1987 by the Raju brothers and listed on the BSE in 1991, with shares that were 17 times oversubscribed. It grew at a steady pace, hitting new milestones year after year. The company's yearly sales grew from $1 billion to $2 billion in 2008. This is the perfect success tale. The fact, as the word 'Satyam' implies, was that the statistics were inflated figures backed up by forged invoices, receipts, and bank statements. Instead of using conventional ERP accounting systems, Satyam used their own ERP system to account for these false receipts. In a Fixed Deposit, the phony invoices totaled approximately 5000 crores (FD). In 2009, the board of directors recommended that the idle money in the FDs be invested, and the Raju brothers chose Matyas, another Raju family property. It was a last-ditch effort to reconcile Satyam and Matyas' comments, which were rejected by the stakeholders. Satyam and PwC's mistakes were brought to light by the heat of conflicts and the pressure that built up as a result of the World Bank's questioning, the consequent drop in share prices, and the difficulty to link Matyas' real estate assertions to an IT business. Raju and 10 others were then detained on three separate counts, which were later combined into a single charge sheet. Following the controversy, Tech Mahindra bought Satyam in a public auction, and the new business was renamed 'Mahindra Satyam.' Price Waterhouse Coopers (PwC), Satyam Computers' auditor, has been forbidden from undertaking any audit procedures for any firm in India for 2 years, beginning in 2018. Satyam's stock dropped from Rs. 554 on BSE and $29.10 on the NYSE in 2008 to Rs. 11.50 and $1.80, accordingly.
9 If a director cannot get into a company's day-to-day operations, he cannot understand how it is governed and will not be in the position to fulfill his responsibilities.
specified, and so the promoters or the majority stakeholders appoint the independent director who works for them. Among the Satyam case, lawsuits have been filed against the independent directors as well, instilling terror in the independent directors. The Satyam debacle has cast doubt on the independent directors' responsibilities and liabilities. In light of the foregoing, the court found Mr. Keshub Mahindra, former Chairman of Union Carbide India Limited, guilty and sentenced him to two years in prison in the Bhopal gas tragedy verdict. All of this contributed to independent director developing a dread psychosis. Nearly 340 independent directors have resigned as a result of these events. Many people are now unwilling to assume the position of independent director and risk having their reputation tarnished.

QUALIFICATION

According to Section 149(6) of the Companies Act, 2013: "In relation to a company, an independent director is a director who is not the managing director, a whole-time director, or a nominee director and who – (a) is, in the opinion of the Board, a person of integrity and possesses relevant expertise and experience; (b) (i) is or was not a promoter of the company or its holding, subsidiary, or associate company; (ii) is not related to promoters or directors in the company, its holding, subsidiary or associate company. According to Rule 5 of the Companies (Appointment and Qualification of Directors) Rules, 2014, an Independent Director shall possess appropriate skills, experience, and knowledge in one or more of the following disciplines: finance, law, management, sales, marketing, administration, research, corporate governance, technical operations, or other disciplines pertinent to the company's business."

DIRECTORS' DUTY

The major role of independent directors is to guarantee that the firm's assets are utilised in the best interests of the company while also balancing the interests of all stakeholders. Inquiries about the company's day-to-day operations and financial standing should be made by the independent director. If he can't get it, he'll have to keep trying. A Director's General Duties

---

10 A corporation's independent directors may be held personally accountable for any omissions or commissions made by the business with their knowledge, approval, connivance, or negligence, according to provisions in Companies Act, 2013, and SEBI listing standards. As a result, independent directors tend to keep their mouths shut and seldom reveal the reasoning behind their actions.

11 For more information read: "Bhopal gas tragedy: Court convicts UCIL Chairman,7 others", The Indian Express (January 1, 2022) https://indianexpress.com/article/india/latest-news/bhopal-gas-tragedy-court-convicts-ucil-chairman-7-others/

12 Supra note 5, pg 5.
should be consistent with the company's articles of association, but not with the statutory duties. Directors have a fiduciary relationship with shareholders as their trustees. As such, directors owe the company fiduciary duties.

Because directors have a fiduciary connection with the business and its members, the prior legislation implied these fiduciary obligations, which were codified in Companies Act, 2013. According to section 166 of the Companies Act, 2013, the following are the director's responsibilities:

(1) A director of a company must act in accordance with the articles of the company, subject to the provisions of this Act.

(2) A director of a company must act in good faith to advance the company's objectives in the best interests of the company, its employees, shareholders, the community, and the environment.

(3) A director of a company is required to exercise reasonable care, skill and diligence in carrying out his or her duties and to exercise independent judgment.

(4) A company's director must avoid circumstances where he has a direct or indirect interest that interferes with, or may conflict with, corporation's interests.  

(5) A company director may not get or seek to achieve any undue benefit or advantage for himself, his family, partners, or colleagues, and if a director is found guilty of acquiring an undue gain, he will be accountable to the business for the gain.

(6) No director of a company may assign his or her office, and any such assignment is void.

While there have been a number of magisterial judgments, other courts have summoned directors on numerous occasions and imputed liability to them solely for holding an office in the company. Srikanta Dutta Narasimharaja Wodiyar v. Enforcement Officer, Mysore14 is one such case in which companies committed violations of the Employees' State Provident Funds and Miscellaneous Provisions Act, 1952 under Sections 2, 14, 14 (1A), and 14A. The issue was whether the company's director was liable for the company's failure to make contributions

13 Supra note 5, pg 5.
14 1993 AIR 1656, 1993 SCR (3) 508
required by the Employees' State Provident Funds and Miscellaneous Provisions Act. In this case, the appellant Director was not managing the company's affairs or supervising its operations. Additionally, the Act was a welfare law requiring employers to provide benefits to employees in accordance with the scheme. It required mandatory implementation and any violation resulted in severe penalties. The Court held that pursuant to Section 14A and the declaration in Form 5-A, directors or managing agents of a corporation are accountable for the proper management of the corporation's affairs.

Fiduciary Obligation; the director has a fiduciary obligation to perform honestly and is not expected to abuse his or her position in any way. The court explained in Fateh Chand Kad v. Hindsons (Patiala) Ltd.\textsuperscript{15} that "to act honestly" includes the obligation not to abuse his position and expertise to the prejudice of the company's interests. The Privy Council concluded in Cook v. Deeks\textsuperscript{16} that directors who assume entire control of a company's business must keep in mind that they are not free to jeopardise the company's interests, which they are obligated to preserve. A corporation may even seek reimbursement for such covert commissions made by its directors. The ID has a fiduciary responsibility with the company, and they may face civil and criminal liability if they breach the fiduciary connection.

The director is obligated to apply the same prudence and thoroughness in their job that a wise businessman would in the administration of his own affairs. The same is true for the ID.

According to Section 165 of the Companies Act, 2013, no person may serve as a director of more than twenty companies. Thus, while a director is not required to attend all board meetings, it was determined in Charitable Corporation v. Sutton\textsuperscript{17} that "if some persons are guilty of gross non-attendance and delegate administration wholly to others, they may be guilty of breach of trust." Additionally, the ID is expected to attend board and committee meetings.

**Independent Directors in India's Laws**

As the name implies, independent directors are individuals who serve on the board of directors of a company but have no other relationship or transaction with the company. Independent directors gained popularity in the late 1980s and early 1990s as a result of the exposure of

\textsuperscript{15} AIR 1956 Pepsu 89
\textsuperscript{16} [1916] 1 A.C. 554 (PC).
\textsuperscript{17} (1742) 26 ER 642
numerous corporate frauds and misbehaviors. In India, independent directors must be appointed to the board of directors of a listed company pursuant to Regulation 17 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. With the 2013 amendments to the Companies Act, the concept of independent directors was incorporated into the statute. The requirements imposed by the Companies Act, 2013 appear to be significantly stricter than those contained in the listing agreement.

We have concentrated our discussion in this article on the various provisions of the Companies Act, 2013 relating to independent directors.

Companies' Applicability

Companies in the following categories are required to designate at least 1/3 of their total number of directors as independent directors:

- Listed Public Company

The following class or classes of companies shall have at least two directors as independent directors:

- Public companies with a paid-up capital of at least 10 crore rupees; or

- the Public Companies having turnover of one hundred crore rupees or more; or

- Public companies with aggregate debt exceeding 50 crore rupees in outstanding loans, debentures, or deposits.

Independent Director's Term of Office

The independent director's term cannot exceed 5 (five) years. They are eligible for re-election for a second term. Following the conclusion of the second term, a mandatory cooling-off period of three years is required. Companies may nominate independent directors for terms of fewer than five years; however, no individual may be chosen for more than 2 (two) terms.¹⁸

• An independent director may serve on a company’s Board of Directors for a maximum of five years in a row, but may be reappointed if the firm adopts a special resolution and the appointment is disclosed in the Board's report.

• No independent director shall serve over than two consecutive terms; however, after a period of three years from ceasing to be an independent director, such independent director may be appointed, given that he isn't yet appointed to that or involved in the work in any other power and ability, either directly or indirectly, during the said period of three years.\(^{19}\)

• Any tenure of an independent director prior to the effective date of this Act shall not be considered a term for the purposes of the preceding provisions.

**Additional Independent Director Requirements**

• Each independent director must certify that he fits the requirements for independence at the first meeting of the Board in which he participates as a director, and the informational statement accompanying the notice of the general meeting convened to consider the said appointment must assert the rationale for selecting the appointee for meeting as independent director.

• The company and its independent directors must comply with the Act's Schedule IV provisions.

• An independent director is not entitled to stock options but may be compensated in the form of a fee, reimbursement of expenses incurred in attending Board and other meetings, and profit-related commissions as approved

• An independent director is liable for acts of omission or commission by a firm that occurred with his knowledge, attributable to Board processes, and with his permission or connivance, or when he engaged in a negligent manner.\(^{20}\)

• The laws relating to rotational retirement of directors shall not apply to independent director appointments.

---

\(^{19}\) Ibid.

\(^{20}\) Supra note 18, pg 10.
Methods for appointing independent directors and maintaining an independent director databank

According to Section 150 of the Companies Act, 2013 read with Companies (Creation and Maintenance of DataBank of Independent Directors) Rules, 2019, the Central Government shall establish and maintain a database of individuals who are willing and eligible to serve as independent directors, which shall be posted on MCA’s website or on such other website as may be approved or notified by the Central Government. The Central Government will provide permission to any person, organization, or institution that demonstrates proficiency in the development and management of such a data bank. All pertinent information about the proposed appointee will be stored in the data bank. However, the company making the appointment is responsible for conducting due diligence prior to selecting an individual from the data bank referred to above as an independent director. It shall not be a defense in any court of law for a business or its directors to have chosen an independent director from a databank, nor shall it be accountable for any breach of any law committed by the company or its directors.21

Independent directors in the United States of America

The companies and its shareholders owe the directors the following:

• Responsibilities: When it comes to being completely informed, a director must pay attention, ask relevant questions, and act actively so that he or she can keep other directors updated as well.22

• Obligation of allegiance: This generally requires that a director make decisions in the best interests of the company, rather than his or her own.

When determining whether a board of directors has discharged its fiduciary duties, courts generally apply the business judgement rule, which protects a board's decision unless the directors violated their duty of care or duty of loyalty.23

---

21 Supra note 18, pg 10.
23 Ibid.
Personal liability for a director's negligence does not exist unless the director acted dishonestly.

Directors' decisions may be scrutinized more closely in certain circumstances, such as the sale or change of control of the corporation, or in situations involving conflicts of interest.

**Criminal activity and deception**

A director may be held criminally liable for theft and fraud under both federal and state statutes. Furthermore, directors may be held liable under additional federal statutory schemes.

**Capital market legislation**

Under state and federal securities laws, directors of public corporations may be held civilly and criminally liable in a variety of situations. For instance, directors are prohibited from trading in the securities of a corporation if they possess material, non-public information (Rule 10b-5, 1934 Act). Federal securities laws also hold directors liable for material misrepresentations or omissions in offering documents or proxy solicitations made intentionally or recklessly.

**Law of bankruptcy**

Directors of a firm that is either potentially insolvent (or nearing insolvency) or really bankrupt have been the subject of many court cases and commentaries during the last several years. When a corporation is bankrupt or demonstrably insolvent, the directors have a fiduciary duty to act in the corporation's best interests, according to the Delaware Supreme Court. Creditors of an insolvent Delaware corporation have standing to bring derivative claims for breach of fiduciary duty on the corporation's behalf, but not direct claims against corporate directors for breach of fiduciary duty (NACEP Inc. v Gheewalla). Other:

Directors may face personal liability under a variety of federal statutory schemes governing health, safety, the environment, and antitrust. For instance, the 1977 Foreign Corrupt Practices Act (FCPA) prohibits corporations from making corrupt payments to certain foreign officials.

---

24 Supra 22, pg 12.
25 930 A.2d (Del 18 May, 2007)
26 Supra 22, pg 12.
Directors may face criminal liability if they are aware of a statutory violation. A company is not permitted to indemnify its directors and officers for FCPA fines.

**COMPARATIVE STUDY OF LAWS IN INDIA AND USA**

Markets are constantly reevaluating and revising their corporate governance regulations and guidelines, which means that corporate governance standards are also evolving at a quick pace. Among the fifty markets being examined, at least 33 have recently amended their corporate governance codes and standards or are presently consulting on impending updates of their codes and standards. Some of the nations undertaking discussions at the moment are Australia; Belgium; France; India; Japan; Singapore; the United Kingdom; etc. According to market maturity and ownership patterns, established markets with more dispersed ownership adopt greater norms of board independence than developing markets. In contrast, the majority of nations in the Asia Pacific, Latin America, Middle East and Africa regions have established board independence limits of less than one-third of the total number of directors. There seems to be a higher link between actual practice and suggested best practice in the Asia Pacific area, where markets largely conform to their various codes and regulatory norms. Codes in Malaysia, Singapore, and India reflect their real degrees of board independence. Malaysian law requires large businesses to have a majority of independent directors and smaller businesses to have 50% independence. Finally, despite being one of the region's most developed economies, Japan ranks significantly lower than its peers when it comes to board independence. The market adopted a corporate governance code only recently (2015) and is already planning revisions in the months ahead.\(^\text{27}\) The United States and Canada, as predicted, set the bar for board independence in the Americas due to the higher standards generated by listing requirements and prescribed practices. A few of Latin American markets, however, have seen a rise in activity after the adoption of new legislation and rules. As one of the region's most advanced corporate governance codes, Colombia's code recommends that 60% of board members be non-executive directors, further increasing the board's total independence. Brazil seems to be implementing the recommendations of the governance code with its multi-tiered structure of listing criteria.\(^\text{28}\)

\(^\text{27}\) Supra note 22, pg 12.  
\(^\text{28}\) Supra note 22, pg 12.
The scenario regarding Independent Directors in India and US is distinct – the institution and its role are much more evolved in the US. The same will be better understood from the analysis undertaken below:

<table>
<thead>
<tr>
<th>Basis</th>
<th>India</th>
<th>USA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Material Relationship</td>
<td>During the two prior financial years or the current financial year, a listed business's or public company’s director should have had no link with the company, its holding, subsidiary, or associate company, or their promoters or directors. No relative of a director has or has had a financial relationship or transaction with the company, its holding, subsidiary, or associate company, or their promoters or directors.</td>
<td>Unless the board of directors affirmatively finds that the director has no significant link with the listed business, the director qualifies as &quot;independent&quot; (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company). Any parent or subsidiary in a consolidated group with the listed firm would be included in the references to &quot;listed company.&quot;</td>
</tr>
<tr>
<td>Employment</td>
<td>In any of the three financial years immediately preceding the financial year in which he is employed as an employee of the listed business, the director has not been an employee of the listed business.</td>
<td>If a director is or has been an employee of the listed business within the past three years, or if an employee of a parent or subsidiary in a consolidated group with the listed business.</td>
</tr>
<tr>
<td>Category</td>
<td>Description</td>
<td>Exception</td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Promoter/director or related to them</td>
<td>The director is or was a promoter of the company, its holding, subsidiary, or associate company, or a member of the company's promoter group. Who is not linked to the company, its holding, subsidiary, or associate company's promoters or directors;</td>
<td>Unless the board of directors affirmatively concludes that the director has no substantial connection with the listed business, either directly or as a partner, shareholder, or officer of an organization having a link with the company, no director qualifies as &quot;independent.&quot;</td>
</tr>
<tr>
<td>Cross Directorship</td>
<td>The director is not a non-independent director of another company whose board of directors includes any non-</td>
<td>The director or a member of their immediate family is or has been employed as an executive officer of another business during the</td>
</tr>
<tr>
<td></td>
<td>immediate family member is or has been an executive officer of the listed company during the last three years, the director is not independent. Other than director and committee fees and pension or other forms of deferred compensation for prior service, the director has received, or has an immediate family member who has received, more than $120,000 in direct compensation from the listed company during any twelve-month period within the last three years.</td>
<td></td>
</tr>
<tr>
<td><strong>Appointmen/Reappointment</strong></td>
<td>In India, the current regulations require the shareholders to vote an ordinary resolution for the appointment of IDs on the basis of the Nomination and Remuneration Committee's (NRC) proposal and the Board's approval. Re-appointment, on the other hand, need a specific resolution.</td>
<td>Where shareholder approval is necessary in the United States, the NASDAQ Listing Rules stipulate that a majority of the total votes cast on the proposal constitutes shareholder approval.</td>
</tr>
<tr>
<td><strong>Constituted body for selecting candidates as IDs</strong></td>
<td>The NRC proposes the people to be appointed as IDs on the company's board of directors in accordance with Indian legislation. This committee is in charge of determining and recommending the directors' and senior management's compensation. The SEBI Board Meeting resolved that the NRC's procedure for choosing individuals for appointment as IDs should be</td>
<td>Companies in the United States must form Compensation Committees in accordance with the NASDAQ Stock Market LLC Rules [5605. Board of Directors and Committees], just as they do in India. &quot;Each Company must have a compensation committee of at least two members, and attest that it has and will continue to have one.&quot; Each member of the committee must be an Independent Director as defined</td>
</tr>
</tbody>
</table>
expanded and made more open, including greater disclosures about the abilities necessary for appointment as an ID and how the recommended applicant fits into that skillset.

by Rule 5605(a)(2)." According to the NYSE Manual, the nominating/corporate governance committee has exclusive power to hire and fire any search company employed to find director candidates, including sole ability to approve the search firm's fees and other retention conditions.

Offering stock options to Independent Directors is illegal in India.

Independent directors shall not take any consulting, advising, or other compensation pay from the Company other than for board service, according to NYSE Manual.

In many ways, India's regulatory system for IDs is a bit similar to that of US. India is unique in that it requires completing an online exam to be qualified for appointment as an ID. However, it is essential to note that the practical situation is much more different given the fact that the institution has only gained importance in India in the recent times.

**SEBI ON INDEPENDENT DIRECTORS**

To safeguard independent directors' independence and efficiency, the capital markets regulator SEBI has changed the regulations governing their selection, dismissal, and compensation. The development is significant given the role of independent directors being scrutinized for their inability to identify and prevent corporate fraud and promoter misconduct. The new laws will take effect on January 1, 2022, according to the Securities and Exchange Board of India (SEBI). A special resolution of shareholders will be required to appoint, re-appoint, or remove independent directors in a publicly traded firm under the new laws. The number of votes in favor of the special resolution should be at least three times the number of votes against it. This will prevent independent directors from being removed or appointed based on the promoters'
whims and fancies. In a notification dated August 3, SEBI said that the listed companies must guarantee that shareholders approve the appointment of a person to the board of directors at the next general meeting or within three months of the date of appointment, whichever comes first. Furthermore, new requirements mandate that the process of appointing independent directors be open and transparent.

The Nomination and Remuneration Committee for independent directors should also explain the abilities necessary for appointment and how a specific applicant fits into that skill set. "For each appointment of an independent director, the nomination and compensation committee should examine the balance of skills, expertise, and experience on the board, and produce a description of the function and competencies needed of an independent director based on such evaluation," SEBI stated. The competencies listed in such a description will be possessed by the individual proposed to the board for nomination as an independent director. The committee may employ the services of external agencies to discover acceptable candidates if necessary; evaluate applicants from a broad variety of backgrounds, with proper attention for diversity; and assess the candidates' time commitments. If an independent director resigns, the corporation must provide the complete resignation letter, as well as a list of her or his current directorships and board committee memberships. For an independent director changing to a full-time director in the same firm/holding/subsidiary/associate company or any company belonging to the promoter group, a one-year cooling-off period has been implemented.

"No independent director who resigns from a listed entity shall be appointed as an executive / whole-time director on the board of the listed entity, its holding, subsidiary, or associate company, or on the board of a company belonging to its promoter group, unless a period of one year has elapsed from the date of resignation as an independent director," according to SEBI.

The regulator has changed the membership of the Nomination and Remuneration committee, which now includes two-thirds of independent directors instead of the previous threshold of 50%. In terms of the audit committee, SEBI said that at least two-thirds of the members must be independent directors, and that all related party transactions must be authorized by the audit committee's independent directors. The markets watchdog has made certain revisions to the independent director qualifying standards.
Other than earning director's salary, independent directors shall have had no other financial relationships with the firm, its promoters, or directors in the three prior financial years. This prerequisite used to be two years. In addition, in the case of independent directors' relatives who are employees other than senior management people, the regulator has reduced limitations on employment in a listed firm. The rule requiring independent directors' relatives to not be employees (other than senior management staff) of the listed corporation or any firm belonging to its promoter group during the three financial years immediately before their proposed appointment would no longer apply. SEBI revised the LODR (Listing Obligations and Disclosure Requirements) Regulations to implement the new regulations. This comes after the SEBI board of directors approved changes to the independent director requirements in June.

The board also agreed to make a referral to the Ministry of Corporate Affairs (MCA) in order to give companies more flexibility in determining remuneration for all directors (including independent directors), which could include profit-linked commissions, sitting fees, and ESOPs, among other things, within the overall prescribed limit set out in the Companies Act of 2013.

**ISSUES RELATED TO ID(s) IN INDIA**

Following the Satyam case, the independent directors were subjected to extensive scrutiny. This resulted in the departure of around 620 independent directors. According to Sec 149 (12) of Companies Act, the Independent Directors must act as both a strategic counsellor and a watchdog. This causes a lot of misunderstanding since the more independent directors are outside, the less willing they are to maximise the company's profit, and the more they are "within," the less independence they have. It is worth noting here that independent directors consider themselves as strategic consultants rather than watchdogs, according to an interview-based research. This is because, as watchdogs, they have more responsibility and the potential for reputational harm is greater. This leads to two conclusions: first, independent directors are not encouraged to monitor the company's management; second, even if some independent directors are, they lack the essential instrument, method, independence, and knowledge to do so. The only method to guarantee the independence of the independent directors is to prohibit the company's shareholders and management from having any influence on the independent directors' selection process. Since a result, the Nomination and Remuneration Committee, which is established by the Board, is a minor and inadequate mechanism, as this committee is only independent on paper due to the fact that it is nominated by board members in accordance
with Section 178(1) of Companies Act. SEBI should enact regulations and practices that may be utilized to oversee independent directors, rather than focusing only on imposing obligations on them. Another option to avoid this issue is to appoint Independent Supervisors who are nominated by a body apart from the firm. They will have a greater opportunity of filling some of the gaps left by the independent directors. Furthermore, it would be beneficial when the independent supervisors have the authority to choose directors. A national level supervisory board of Independent directors may also be used to manage and monitor Independent directors. This will be a wholly independent board that will develop an entirely distinct system to supervise the company's management. Furthermore, this will give a structure for independent directors to function as strategic consultants, while the board would maintain a system of checks and balances.

**CONCLUSION**

With the exception of distributed equity ownership, both the United States and India follow the Anglo-Saxon model of corporate governance. Many of the features of the Anglo-Saxon board model popular in the United States are evident in the Indian business sector. Despite their political and legal differences, India's regulatory authorities have taken major moves to strengthen business standards over the last decade, closely mirroring initiatives in the United States (SOX). Overall, it can be inferred from an empirical assessment and comparison of the findings for the US and India datasets that both countries have significant disparities in board size, board composition and independence, leadership structure, and gender diversity. The findings of the study show that US corporations have larger boards of directors, with a higher number of independent directors and a higher incidence of combined leadership arrangements in the majority of companies. Due to the bulk of Indian corporations having a separate board leadership structure, their boardrooms often contain a lower number of independent directors. Moreover, despite the lack of a female director quota, US corporate boardrooms are more gender diverse than Indian boards, which have only one reserved seat. While India's corporate governance codes were written with a thorough understanding of global governance standards, including US corporate governance standards, more appropriate solutions to aid policy formulation are still needed to make corporate governance standards more effective in Indian conditions. However with time, we can expect that the picture will change. Considering the incidents of company’s shares getting adversely impacted due to ouster of some independent director implies that such changes are now relevant for a company’s business. Hence,
companies have now started considering them at par with other directors and hopefully, their role will become more relevant in the near future.

BIBLIOGRAPHY


10. “Govt to soon clear list of independent directors for various banks”, The Economic Times (December 12, 2021 )
https://economictimes.indiatimes.com/industry/banking/finance/banking/govt-to-soon-clear-list-of-independent-directors-for-various-banks/articleshow/87697695.cms
