

SES view on directorship of Executive Directors (ED) and Non-Executive Directors (NEDs) with Advanced age

SES Proxy Policy Change #3/ 2021-22

Background:

Corporate Law in India viz., Companies Act, 2013 and the SEBI (LODR) Regulations have envisaged that EDs and NEDs beyond the age of 70 years and 75 years, shall require shareholders' approval for their appointment and continuation on the Board of the Companies.

The intent of the Legislation is to prescribe a different process in case of directors with advanced age, where shareholders are given an upper hand in deciding the appointment.

Issue:

Whether shareholders' approval for appointment or continuation of EDs or NEDs (including Independent Directors) requires prior approval or can be ratified by shareholder on *post facto* basis?

A. Executive Director on attainment of 70 years

LAW:

Section 196(3)(a) of Companies Act, 2013 deals with continuation of Executive Directors who have attained the age of 70 years. It states that:

196. Appointment of managing director, whole-time director or manager.

(3) No company shall appoint or continue the employment of any person as managing director, whole-time director or manager who —

(a) is below the age of twenty-one years or has attained the age of seventy years:

Provided that appointment of a person who has attained the age of seventy years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person;

Since, the section 196(3) begins with the phrase “No Company...”, therefore, the legislators in their wisdom have prohibited appointment of any ED who has attained the age of 70 years, unless the process prescribed under the proviso is fulfilled.

Additionally, the Bombay High Court in its judgement on [Sridhar Sundararajan v Ultramarine & Pigments Ltd](#) dated 8th February 2015 held that:

21. “... Since a new clause was added as further disqualification for appointment or continuation as Managing Director of the Company, it would operate not only at the stage of appointment but also would operate in the case of a person who has already been appointed and attained the age of 70 years and such a person, therefore, by virtue of disqualification, had no right to be continued as Managing Director, unless a special resolution was passed by the Company.”

Interpretation of law:

The above provision and aforementioned case law unambiguously sets out that an Executive Director who has attained the age of 70 years, can neither be appointed nor his/her directorship be continued unless a shareholders' approval is passed *via* special resolution. In order words, attainment of 70 years by the ED would work as an automatic disqualification, unless a special resolution with Notice indicating the justification for appointing such person, is obtained.

In order words, Board cannot appoint any ED who has already attained 70 years of age.

Stakeholders Empowerment Services

Registered Office: 109, 1st Floor, Shyam Baba House, Upper Govind Nagar, Malad (East), Mumbai 400097.

Ph: +91 22 4022 0322 | Email: info@sesgovernance.com | Website: www.sesgovernance.com

CIN: U74120MH2012NPL232154 | SEBI Registration Number: INH000000016 (Proxy Adviser)

SES View:

SES shall reckon, in cases where ED above 70 years is continuing on the Board without shareholders' approval, as non-compliant with section 196(3) of the Companies Act, 2013. SES is of the opinion that shareholders' approval must be obtained on or before the date when the ED turns 70 years with the explanatory statement clearly indicating justification in this regard.

B. Non-Executive Directors (Including IDs) on attainment of 75 years

LAW:

Regulation 17(1A) of SEBI LODR, 2015 deals with continuation of Non-Executive Directors (including Independent Directors) (NEDs) who have attained the age of 75 years. It states that:

Board of Directors.

17 (1A) No listed entity shall appoint a person or continue the directorship of any person as a non-executive director who has attained the age of seventy five years unless a special resolution is passed to that effect, in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such a person.

Interpretation of law:

The language used under Regulation 17(1A) for NEDs is similar to that used under section 196(3) for EDs. The language clearly suggests that unless special resolution is passed, Listed Entities cannot appoint or continue the directorship of NED who has attained the age of 75 years.

In simpler terms, the power to appoint or continue the directorship of the Non-Executive Director (above 75 years) has been vested with the shareholders.

SES View:

In view of the above, in cases there is any NED above 75 years is continuing on the Board without shareholders' approval, SES would reckon such cases as non-compliant with Regulation 17(1A) of SEBI LODR.

According to SES, shareholders' approval must be obtained on or before the date when the NED turns 75 years with the explanatory statement clearly indicating justification in this regard.

CONCLUSION:

Board does not have power to appoint or continue EDs or NEDs who have already attained the age of 70 or 75 years, respectively. Such appointments can only be done by shareholders *vide* special resolution.

Hence, SES shall recommend **AGAINST** vote in case shareholders are asked to ratify appointments of ED or NED above the age of 70 years or 75 years, respectively.

Effective Date: 15th March, 2022

Circulation: All Listed Companies in SES coverage and all SES clients