

# THE REVIEW OF SECURITIES & COMMODITIES REGULATION

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS  
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 58 No. 13

July 16, 2025

## DIRECTOR INDEPENDENCE: OVERVIEW AND RECENT DEVELOPMENTS

*This article provides an overview of the legal and regulatory standards governing director independence for U.S. public companies, with a focus on SEC rules, NYSE and Nasdaq listing standards, Delaware law and proxy advisory firm guidelines. While formal “bright-line” criteria exist for different regimes, companies should note that independence determinations are highly fact-driven and context-specific and are ultimately a product of judgment.*

By Rory A. Leraris and Kyoko Takahashi Lin \*

In recent years, director independence has come under increasing scrutiny amid evolving regulatory expectations and increasing public attention drawn by lawsuits involving high-profile individuals. In early 2024, the Delaware Court of Chancery struck down Elon Musk’s multi-billion dollar compensation plan approved by Tesla, Inc.’s board of directors partially on the basis that certain ostensibly independent board members had both extensive business ties and personal ties to the effect that they were “beholden” to Musk (*Tornetta v. Musk*).<sup>1</sup> In March 2025, the Delaware General Assembly enacted amendments to the Delaware General Corporation Law (the “DGCL”) to provide a presumption of disinterestedness for directors of public companies who are not a party to the act or transaction at issue and who satisfy the criteria for director independence under applicable stock exchange listing standards.<sup>2</sup>

Amid this increasing scrutiny, navigating the complexity of determining whether an individual director is “independent” — a determination that could change depending on circumstances — can be challenging. Securities laws,<sup>3</sup> SEC regulations,<sup>4</sup> listing standards,<sup>5</sup> applicable state case laws, as well as the voting guidelines of proxy advisory firms, contribute to the proliferation of criteria applied to this determination. This article provides an overview of the standards for determining director independence defined and enforced through the channels mentioned above. That said, public companies should be mindful of the fact that, although “bright-line” tests exist, much of the determination is intensely fact-driven and ultimately a product of

<sup>1</sup> *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024).

<sup>2</sup> 8 Del. C. § 144(d).

<sup>3</sup> 15 U.S.C. § 78a et seq.

<sup>4</sup> 17 C.F.R. § 240.

<sup>5</sup> New York Stock Exchange, *Listed Company Manual* § 303A; The Nasdaq Stock Market LLC, *Listing Rules*, Rules 5605, 5615(b) and (c), IM-5605 and IM-5615.

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