

Companies Act Series

December 26, 2019

INDEPENDENT DIRECTOR? CHECK THIS BOX FIRST! - GOVERNMENT INTRODUCES INDEPENDENT DIRECTOR'S DATABANK

- Independent Directors are required to register themselves in the Data Bank.
- Existing independent directors have three months from December 1, 2019 for registration.
- A proficiency self-assessment test for independent directors has been introduced.

Pursuant to the notification of the Ministry of Corporate Affairs ("MCA") dated October 22, 2019¹, an online data bank for the independent directors ("Data Bank") has been rolled out by the Indian Institute of Corporate Affairs ("IICA"). All individuals who are proposed to be appointed as an independent director ("ID") or who are already appointed as an ID on board of companies in India have to register themselves in the Data Bank and then appear for an online proficiency test. This is a new check the box requirement for being appointed as an independent director ("ID") on the board of company in India. The below write-up gives a glimpse of this new initiative of MCA towards enhancing good corporate governance standards.

BACKGROUND:

Amongst all directors, IDs are considered to bring credibility to the board as they are outside the sphere of influence. However, recent corporate scams have turned the heat on company directors, who, the government feels, have failed to detect any signs of trouble. The accountability on the IDs became biggest reason for many IDs to resign leading to a total of 606 IDs resigning from the National Stock Exchange - listed company boards in 2018. In comparison, 412 IDs resigned between January and July this year.²

In order to curb the above scenario and to improve corporate literacy by making the ID's aware of their duties, roles and responsibilities towards the company and its stakeholders, MCA has introduced an online proficiency self-assessment test which will be conducted by IICA within a period of one year from the date of inclusion of name in the Data Bank, failing which, his/her name shall stand removed from the Data Bank.

KEY TAKEAWAYS:

Please see below key takeaways from the afore-mentioned amended rules and notification issued by MCA:

a) Introduction of Data Bank for IDs and inclusion of name: MCA has introduced the concept of Data Bank for ID's vide its notification dated October 22, 2019 which came into effect from December 1, 2019. IICA has been authorized to create and maintain the Data Bank. Every person who is currently acting as an ID has to register themselves with IICA by February 29, 2019. For those intend to be appointed as an ID, are required to apply for inclusion of name in the Data Bank before such appointment.

b) Period of Registration: The application for inclusion of name in the Data Bank can be for one year, five years or for the person's life-time.

c) Steps for registration:

1. An individual whether having valid Director Identification Number ("DIN") or not, needs to create a user account on MCA portal (www.mca.gov.in) and verify the DIN/Permanent Account Number ("PAN")/Passport and once the verification is completed, MCA portal re-directs the application to IICA portal.
2. The applicant will then receive login credentials to his/her registered email and mobile number using which, the applicant needs to login to IICA portal and populate all his personal details, the information relating to educational and professional qualifications etc.
3. On successful population of information and giving necessary declarations, the applicant has to select the privacy options and pay the fee (basis the subscription plan) to complete the registration process.
4. Once the registration process is completed, the applicant will receive a registration certificate from IICA capturing the details of name of the applicant, registration number and validity of the registration.³

d) Renewal: IDs will also have to get their registration renewed 30 days before the expiry of the registration, unless the registration is availed for life-time. If an ID fails to renew the registration, his/her name shall stand removed from the Data Bank.

e) Additional declaration by ID: Pursuant to provisions of rule 6(3) of the Companies (Appointment and Qualification of Directors) Rules, 2014, every ID is now required to declare that their names are included in the Data Bank each time the independency declaration is submitted under section 149(7) of CA, 2013. Further, the company has to declare annually in its boards' report that the IDs appointed on the Board have cleared online proficiency self-assessment test conducted by IICA, unless they are otherwise exempted from same.

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f) Online proficiency test: Every individual whose name is entered in the Data Bank shall within 1 (one) year from the date of inclusion of his/her name in the Data Bank shall appear for an online proficiency self-assessment test and secure at least in aggregate 60 (sixty) per cent of the marks and failing which, his/her name shall stand removed from the Data Bank of IICA. There's no bar on how many times the test can be taken.

g) Exemption from online proficiency test: An individual who has served a period of not less than 10 (ten) years either as director or key managerial personnel in a listed public company or in an unlisted public company having paid-up share capital of INR 10 (ten) crore or more shall not be required to pass online proficiency self-assessment test. However, he/she will still be required to get his/her name included in the Data Bank.

h) Corporate Registration: Companies which are required/desire to appoint IDs and seek the information on IDs can also register themselves with the Data bank using their Corporate Identity Number (CIN) and by following the registration process.

i) e-Learning courses: As IDs come from different backgrounds and have diverse skill sets and after realizing the increasing complexity among the working of IDs, MCA and IICA have designed online courses which aim to refresh the basic knowledge base and enhance the efficiency of IDs.

ANALYSIS AND CONCLUSION:

The online self-assessment test would cover company law, securities law, accountancy, and such other areas relevant to the functioning of an individual acting as an independent director and as on date, a non-resident individual is also required to pass the said test. It is considerate to note that the syllabus of the said test includes the Indian laws and practices and it may not be reasonable for such non-resident individual them to prepare and pass for the exam which can shrink the pool for of IDs. Also, per our knowledge, none of the other comparable countries have introduced any such exam to test the skills or knowledge of the IDs and their appointment is purely based on judgement/decision of Board and shareholders.

In view of the above, MCA should consider exempting the non-resident individuals who have relevant experience and equivalent expertise in their respective countries. This will help the corporates to consider the deserving non-resident individuals as well for appointment as ID on their Board.

Further, the corporate industry is divided in their view on this development. One considers that the online Data Bank will improve the knowledge and functioning of the IDs and create a larger pool of capable individuals who could act as Independent Directors. The other group thinks that the process of creating Data Bank and online test may in fact further decrease the pool of IDs available as on date and is not a viable step. However, we are still to see the actual impact of the said move and hope that it should come out as one of the progressive steps that enhance the corporate governance standards across the boards of companies in India.

SwiftTeam

¹ The following rules were notified by MCA on October 22, 2019:

- a) Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019;
- b) Companies (Creation and Maintenance of Data Bank of Independent Directors) Rules, 2019;
- c) Companies (Accounts) Amendment Rules, 2019; and
- d) Data Bank Notification relating to IICA.

² Source: https://www.business-standard.com/article/companies/independent-directors-to-take-an-online-proficiency-self-assessment-test-119j102201639_1.html

³ The below links can be accessed for more details:

https://www.independentdirectorsdatabank.in/databank_video

<https://www.independentdirectorsdatabank.in/faq>

https://www.independentdirectorsdatabank.in/databank_help <https://www.independentdirectorsdatabank.in/pdf/handbook/Handbook-v15.pdf>

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