

Sandeep Khosla
Director General

dg@bombaychamber.com
9821075224 / 61200201

Ref : DGO/2020-21/007

30th November 2020

Shri Rajesh Verma
Secretary
Ministry of Corporate Affairs
A Wing, Shastri Bhawan
Rajendra Prasad Road
New Delhi - 110 001

Dear Sir,

Sub: Registration of the Databank of Independent Directors.

This is with reference to requirement of registration of independent directors on the databank of independent directors.

1. As you are aware, Section 150 of the Companies Act, 2013 ("**Companies Act**") regulates the Manner of Selection of Independent Directors and Maintenance of Databank of Independent Directors, and Section 150(1) provides:

*"Subject to the provisions contained in sub-section (5) of section 149, an independent director **may** be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, maintained by any body, institute or association, as may be notified by the Central Government, having expertise in creation and maintenance of such data bank and put on their website for the use by the company making the appointment of such directors"*

2. Section 150(1) clearly uses the term 'may' when selecting independent directors from the databank and it was not meant to be a mandatory requirement of selecting independent directors only from the databank. Further, the intention was also made expressly clear to the Standing Committee on the Companies Bill, 2011, where the Ministry of Corporate Affairs had asserted this view. Please find below an extract of the 57th Report issued by Standing Committee on Finance (2011-12) (attached) that was submitted to the Lok Sabha, in relation to the submission made to the Ministry of Corporate Affairs on Section 150 –

. contd. on page 2

Clause/ title/ Issue	Suggestion	Comments of Ministry
150(1) Selection of Directors from panel	<p>(i) Flexibility to be given to Companies to appoint independent directors from outside the mandated panel.</p> <p>(ii) Constitution of a panel may complicate the appointment process and raise issue regarding the selection, verification, validation and management of independent directors in the pane</p>	<p>(i) and (ii):- (a) Kind attention is drawn to the following extracts from Para 29 of report of Hon'ble Committee:- —</p> <p><i>**** The appointment process of IDs may also be made independent of the company management by constituting a panel or a data bank to be maintained by the MCA, out of which companies may choose their requirement of Independent Directors. ****.</i></p> <p>(b) In view of above recommendation, the provisions of clause 150 have been included in the Bill. The provisions do not require companies to mandatorily choose IDs from such databank. The conditions/ attributes for appointment of IDs specified in clause 149(5) shall have to be fulfilled by every ID. Databank shall only disclose names, addresses and qualifications of persons who are eligible and willing to act as IDs. This is basically to facilitate the users. More safeguards to ensure independence and convenience for users about these issues can be prescribed in the rules under this clause.</p>

3. The MCA had represented to the Committee that companies do **not** have to mandatorily choose the independent directors from the databank, but it was to facilitate the users.

4. However, the Companies (Appointment and Qualification of Directors) Rules, 2014 (as amended by Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019 and effective from December 1, 2019) ("**Director Appointment Rules**") which has been issued under Section 150, specifies certain additional requirement. Specifically Rule 6 provides:

"(1) Every individual –

(a) who has been appointed as an independent director in a company, on the date of commencement of the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019, shall within a period of thirteen months from such commencement; or

(b) *who intends to get appointed as an independent director in a company after such commencement, shall before such appointment,*

apply online to the institute for inclusion of his name in the data bank for a period of one year or five years or for his life-time, and from time to time take steps as specified in sub-rule (2), till he continues to hold the office of an independent director in any company.”

5. Therefore, Rule 6(1) of the Director Appointment Rules seem to make the requirement to register with the independent director data bank a mandatory requirement for (a) all existing independent directors on or prior to December 31, 2020 and (b) all directors who propose to get appointed as independent director prior to their appointment (effective from December 1, 2019).
6. We would like to submit that this Rule 6(1) which makes the registration of data bank mandatory is going beyond the requirements of the Companies Act and is ultra virus the Companies Act, and directly against the assertions made by the Ministry of Corporate Affairs in 2012.
7. Section 150 of the Companies Act provides the option to companies to select independent directors from the databank. It was never mandatory for an independent director to be registered with the databank. The requirement of centralising the database and mandating every independent director to register with the database transgresses the provisions of Section 150, which is non-mandatory.
8. Further, the registration of the data bank does not provide any criteria for independence and every individual who is proposed to be appointed as a director still has to meet the independence criteria provided under Section 149 of the Act. This *mere* formality of registration on the data bank should not be made mandatory, as companies are following rigorous process for determining independence.
9. In addition to this, having independent directors subject to proficiency examination, which are purely technical in nature (e.g. questions relate to which forms need to be filed, what is filing fees, etc) is not adding material value of the independent director selection and is a global exception. The proficiency examination needs to ensure that independent director have the ability to apply independent judgment, and not fill the role of the company secretary. The nature and design of the proficiency examination appear to indicate that it more of an eligibility criterion rather than a training exercise. It is a one-time test – once a director passes it, nothing further is required to be done. In other words, it is not a continuing professional education where directors are kept abreast of changing regulations or changing market expectations, which makes it nothing more than a check-the-box. Whilst there is no denying that independent directors need training, the training needs to focus on taking the right decision for all stakeholders – not on ensuring compliance (since all companies have professional legal teams for that purpose).

Independent directors are appointed on the boards of companies to fit the requirements of each case, depending on the core skills, expertise and competencies identified by the nomination and remuneration committee as required in the context of its business(es) and sector(s). There are no common skill sets which are expected from independent directors. To that extent, the contents of the proficiency examination fail to assess the capability of an

individual who has technical competence on the specific sector and line of business. Many companies also prefer having industry experts with years of skills and expertise pertinent to that specific industry such as insurance or pharmaceutical in their boards as independent directors. In such instances, subjecting such industry experts, who may have minimal technical knowledge of the questions that are asked in proficiency examination, may act as deterrence for such people to be appointed as independent directors. Mandating proficiency examination for independent directors will hurt the diversity that is currently required in boards of companies. Furthermore, passing the proficiency examination is unlikely to guarantee independence, which is what is most needed from such directors. The specific knowledge of which filing needs to be made with a regulator is not relevant to ensure independence.

10. Further, the Companies Act allows a company to appoint non-resident individuals as independent directors. It would be unreasonable to subject them to the proficiency examination with such technical questions, which will shrink the pool of independent directors. In view of the above, the Ministry of Corporate Affairs should consider exempting the non-resident individuals who have relevant experience and equivalent expertise in their respective countries.
11. The requirement to have independent director is mandatory for certain companies and the independence criteria is set very high, the availability of individual willing to act as independent director is reducing. This issue is compounded by responsibilities and liabilities being attached to the office of an independent director and now the requirement of mandatorily registering the data bank and taking proficiency examination has made the role of independent director almost undesirable. News report indicate that approximately 170 independent directors of listed companies have resigned due to not wanting to comply with these requirements just in a span of 2 months. (Please see: <https://cfo.economictimes.indiatimes.com/news/independent-directors-prefer-resignation-over-mca-tests/74439146>) enclosed as **Annexure A**. Therefore, while we want the independent director to act as gatekeeper of good governance, they are being burdened with such formalities that it is leading to individuals not take up the role, and also individual who were independent directors – from giving up the role. This will in the long run adversely impact corporate governance – as there will not be sufficient independent directors for companies to appoint, and if only those individuals clear the proficiency examination – which is merely high on technical compliance – we may end up with only individuals who are qualified as company secretaries to fill the role of independent directors, and not individuals who have the necessary sectorial experiences, other educational qualifications.
12. The industry is strongly against such mandatory requirements as there is no material benefit from such registration, and as there are other checks and balances to check on the role of independent director, we would also like to submit that by adding to the compliances without any benefit will adversely impact the ‘ease of doing business’. Therefore, we strongly urge the Ministry of Corporate Affairs to reconsider the mandatory requirement of registering with the data bank. Further, please also consider relaxing the requirement of taking the proficiency examination, or ensure that the proficiency examination is not for checking technical compliances on the forms, filing etc, but for checking substantive governance issues.

13. The relevant extracts of Section 150 and Rules under the Companies (Appointment and Qualification of Directors) Rule, 2014 are enclosed in the **Annexure B**.

Please let us know if you have any queries or require any additional information.

We look forward to a positive legislative change to enable and ensure that the 'ease of doing business' is observed not only in text but also in spirit.

Yours sincerely,



Sandeep Khosla

Independent directors prefer resignation over MCA tests

As per MCA-notified rules, all existing Independent Directors are required to register themselves in the Independent Directors Databank by March 1, 2020 and pass an online proficiency self-assessment test within 12 months thereafter. The approach aims to increase diligence and caution among independent directors about their roles and responsibilities. Thereby enhancing the infrastructure of corporate governance.

Examination, a concept that is not only considered a sure enemy for students of all age groups but also recently seems to have gained the enmity of Independent company directors, who would rather call it quits than attend classroom sessions and clear qualifying exams to continue in their roles.

Around 170 [independent directors](#) of NSE-listed companies have resigned in the last two months reported ET. Some have cited lack of availability of time to study and appear for exams as one of the reasons to drop out said ET.

As per the Ministry Of Corporate Affairs ([MCA](#)) notified rules, all existing Independent Directors are required to register themselves in the Independent Directors Databank by March 1, 2020 and pass an online proficiency self-assessment test within 12 months thereafter. The approach aims to increase diligence and caution among independent directors about

their roles and responsibilities. Thereby enhancing the infrastructure of [corporate governance](#).

“The glamour of an independent director no longer exists now and many of the independent directors do not want to study and appear for the exams after being in the profession for several years,” said [Shriram Subramanian](#), Founder, [InGovern Research Services](#).

He explained “if they (independent directors) fail in the exams, it will be a huge loss of face for them.”

Echoing Subramanian's sentiment, [Pranav Haldea](#), MD, Prime Database Group, said the risk-reward for being an independent director is getting skewed with new regulations and recent court rulings holding them personally liable for wrongdoing in the company. “They do not want to put their personal reputation at stake,” he told the ET.

Apart from the exam scare the cold feet (resignations) may also come from the new provisions in the Companies Act, 2013, and Securities and Exchange Board of India’s listing norms, which make independent directors responsible for wrongdoings in the company.

“There could be several reasons for the resignations such as the new provisions in the Companies Act and Sebi listing norms, age factor and the latest norms on self-assessment exams,” said [Harsh Mariwala](#), chairman, [Marico](#). “Companies with high governance practices will not find it difficult to find independent directors,” he said to ET.

While some many still have to face the exam monster yet there is still a breather for some independent directors who have served as either a Director or Key Managerial Personnel (KPM) for at least 10 years in a listed Public Company or an Unlisted Public Company having a paid up share

Capital of Rs 10 Crores or more would be exempted from taking the test.

Follow and connect with us on [Twitter](#), [Facebook](#)

Extracts of the relevant provisions:

Section 150 of the Companies Act, 2013:

150. Manner of Selection of Independent Directors and Maintenance of Databank of Independent Directors

- (1) Subject to the provisions contained in sub-section (5) of section 149, an independent director **may** be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, maintained by any body, institute or association, as may be notified by the Central Government, having expertise in creation and maintenance of such data bank and put on their website for the use by the company making the appointment of such directors: Provided that responsibility of exercising due diligence before selecting a person from the data bank referred to above, as an independent director shall lie with the company making such appointment.
- (2) The appointment of independent director shall be approved by the company in general meeting as provided in sub-section (2) of section 152 and the explanatory statement annexed to the notice of the general meeting called to consider the said appointment shall indicate the justification for choosing the appointee for appointment as independent director.
- (3) The data bank referred to in sub-section (1), shall create and maintain data of persons willing to act as independent director in accordance with such rules as may be prescribed.
- (4) The Central Government may prescribe the manner and procedure of selection of independent directors who fulfil the qualifications and requirements specified under section 149.

Companies (Appointment and Qualification of Directors) Rules, 2014 (as amended by Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019 and effective from December 1, 2019).

Rule 6. Compliances required by a person eligible and willing to be appointed as an independent director.

- (1) Every individual –
 - (a) who has been appointed as an independent director in a company, on the date of commencement of the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019, shall within a period of thirteen months from such commencement; or
 - (b) who intends to get appointed as an independent director in a company after such commencement, shall before such appointment,

apply online to the institute for inclusion of his name in the data bank for a period of one year or five years or for his life-time, and from time to time take steps as specified in sub-rule (2), till he continues to hold the office of an independent director in any company:

Provided that any individual, including an individual not having DIN, may voluntarily apply to the institute for inclusion of his name in the data bank.
- (2) Every individual whose name has been so included in the data bank shall file an application for renewal for a further period of one year or five years or for his life-time, within a period of thirty days from the date of expiry of the period upto which the name of the individual was applied for

inclusion in the data bank, failing which, the name of such individual shall stand removed from the data bank of the institute:

Provided that no application for renewal shall be filed by an individual who has paid life-time fees for inclusion of his name in the data bank.

- (3) Every independent director shall submit a declaration of compliance of sub-rule (1) and sub-rule (2) to the Board, each time he submits the declaration required under sub-section (7) of section 149 of the Act.
- (4) Every individual whose name is so included in the data bank under sub-rule (1) shall pass an online proficiency self-assessment test conducted by the institute within a period of one year from the date of inclusion of his name in the data bank, failing which, his name shall stand removed from the databank of the institute:

Provided that an individual shall not be required to pass the online proficiency self-assessment test, when he has served as a director or key managerial personnel, for a total period of not less than ten years, as on the date of inclusion of his name in the databank, in one or more of the following, namely:-

- (a) listed public company; or
- (b) unlisted public company having a paid-up share capital of rupees ten crore or more; or
- (c) body corporate listed on a recognized stock exchange:

Provided further that for the purpose of calculation of the period of ten years referred to in the first proviso, any period during which an individual was acting as a director or as a key managerial personnel in two or more companies or bodies corporate at the same time shall be counted only once.

Explanation: For the purposes of this rule,-

- (a) the expression "institute" means the 'Indian Institute of Corporate Affairs at Manesar' notified under sub-section (1) of section 150 of the Companies Act, 2013 as the institute for the creation and maintenance of data bank of Independent Directors;
- (b) an individual who has obtained a score of not less than sixty percent. in aggregate in the online proficiency self-assessment test shall be deemed to have passed such test;
- (c) there shall be no limit on the number of attempts an individual may take for passing the online proficiency self-assessment test.