

: 1 :

**INDEPENDENT DIRECTORS**

**On October 22, 2019 MCA has notified following four notifications amending certain requirements related to Independent Directors which shall be effective from December 01, 2019:**

- A. The Notification of Institute by Central Government as per section 150 (1) and Rules as per Section 150 (3) of the Companies Act, 2013 (“CA 2013”),
- B. The Companies (Appointment and Qualification of Director) Fifth Amendment Rules, 2019,
- C. The Companies (Creation and Maintenance of databank of Independent Directors Rules, 2019, and
- D. The Companies (Accounts) Amendment Rules, 2019.

**A. The Notification of Institute by Central Government as per section 150 (1) and Rules as per Section 150 (3),**

Section 150 of CA 2013 provides for Manner of selection of Independent Director (ID) and maintenance of Data Bank of ID.

Section 150 (1) gives power to Central Government to notify any body, institute or association having expertise in creation and maintenance of Data Bank containing name, address and qualification of persons who are eligible and willing to act as ID and put on their website for the use by the Company making appointment of ID.

Section 150 (3) gives power to MCA to prescribe Rules to follow by such body, Institute or association for creating and maintaining Data Bank for ID

According to the powers conferred on MCA under Section 150 it has notified **“Indian Institute of Corporate Affairs” situated at Manesar (Haryana) (“IICA”)** as such Institute, which shall create and maintain Data Bank for ID.

The link of the aforesaid Notification is as under:

[http://www.mca.gov.in/Ministry/pdf/NotificationIICA\\_22102019.pdf](http://www.mca.gov.in/Ministry/pdf/NotificationIICA_22102019.pdf)

: 2 :

**B. The Companies (Appointment and Qualification of Director) Fifth Amendment Rules, 2019 :**

With this notification Rule 6 of the above referred Rules is substituted with the change of title of the Rules from “Creation and Maintenance of Data Bank of persons offering to become Independent Director” to “Compliances required by person eligible and willing to be appointed as an Independent Director”. The Rules are as follow :

**1. Application to Indian Institute of Corporate Affairs, Manesar, Haryana (“IICA”)**

- a. **Existing Independent Director** of a Company is required to apply to IICA **before 1<sup>st</sup> March 2020** for inclusion of his name in Data Bank for a period of one year or five years or for his life-time or from time to time renew the same; and
- b. **Any individual** who intends to get appointed as an Independent Director in a company (even if he has no DIN) is required to apply to IICA **after 1<sup>st</sup> December, 2019 and before his appointment as ID** for inclusion of his name in Data Bank for a period of one year or five years or for his life-time or from time to time renew the same.

**2. Renewal with IICA**

Every individual whose name has been included in the data bank with IICA shall file an application for renewal for a further period of 1 year or 5 years or for his life-time, within a period of 30 days from the date of expiry of the period upto which the name of the individual was applied for inclusion in the data bank of IICA, failing which, the name of such individual shall stand removed from the data bank of IICA. However individual who had made application to IICA and paid life time fees for inclusion of his name in the data bank of IICA is not required to renew the application.

: 3 :

### **3. Declaration by ID**

Every ID along with his declaration of meeting the criteria of independence as per Section 149 (7) of CA 2013 also now required to submit a declaration that his name is included in the Data Bank of IICA .

### **4. Proficiency Test & exemptions**

Every individual whose name is included in Data Bank of IICA shall pass an online proficiency self-assessment test (**Proficiency test**) with score of not less than 60% in aggregate **within a period of one year from the date of inclusion of name in data Bank**, failing which his name shall stand removed from the databank of IICA.

However, Individual who has served (a) Listed Public Company or (b) Unlisted Public Company having a paid-up share capital of Rs. 10 Crore or more, as a Director or Key Managerial Personnel (KMP) for a period of not less than \*10 years are not required to give Proficiency Test.

\*Note: Period during which an individual was acting as Director or KMP in two or more companies at the same time shall be counted only once for calculation of the period of 10 years .

A person can give as many attempts as he wish to, for passing the Proficiency Test as there is no limit of number of attempt.

The link of the aforesaid Notification is as under:

[http://www.mca.gov.in/Ministry/pdf/CmpFifthAmndtRules\\_22102019.pdf](http://www.mca.gov.in/Ministry/pdf/CmpFifthAmndtRules_22102019.pdf)

: 4 :

**C. The Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019**

Section 150 (3) of CA 2013 gives power to MCA to prescribe Rules to follow for creating and maintaining Data Bank for ID, by any body, Institute or association which may be notified by Central Government under Section 150 (1).

Accordingly, MCA has prescribed the new Rules namely **“The Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019”** which will be effective from **1<sup>st</sup> December 2019**, except **Rule 2** for “Definition” and **Rule 5** for “Panel” of 10 members nominated by the Central Government for the purpose of approving the outline of course and study material for Proficiency Test, which will be effective from **October 22, 2019**.

**Rule 3 is Creation and Maintenance of Data Bank by IICA**

(a) IICA shall create and maintain an **Online Data Bank** of persons, willing and eligible to be appointed as ID including individuals already serving as ID on the Board of companies, **which shall be placed on its websites.**

(b) The Online Data Bank shall contain **the following details of each person** whose name included in such data bank to be eligible and willing to be appointed as ID including individuals already serving as ID on the Board of companies,:

- a) DIN , if applicable ;
- b) Income Tax PAN ;
- c) the name and surname in full;
- d) the father’s name ;
- e) the date of Birth ;
- f) gender ;
- g) the nationality ;
- h) the occupation ;
- i) Full Address with PIN code (present and permanent) ;
- j) Phone number ;
- k) E-mail ID;
- l) the educational and professional qualification;
- m) experience or expertise, if any

## Amita Desai & Co. Company Secretaries, Mumbai

---

- n) any preceding criminal proceedings as specified under section 164(1)(d) that is conviction by a court for offence , involving moral turpitude or otherwise and sentenced to imprisonment thereof for a period not less than 6 months and a period of 5 years has not yet elapsed from the date of expiry of the sentence. However if a person is convicted by the Court for an offence and sentenced in respect thereof to imprisonment for a period of 7 years or more, is not eligible to be appointed as a Director in any company ;
  - o) the list of LLP in which he is or was a Designated Partner along with the name of LLP, nature of industry and duration with dates ; and
  - p) the list of companies in which he is or was director, along with the name of the company, the nature of industry , the nature of directorship like Executive or non- executive or Managing Director or ID or Nominee Director and the duration with dates.
- (c) IICA shall provide the information of online data bank **only to Companies** which requires to appoint ID.
- (d) A person whose name has been included in the online data bank of IICA **may restrict his personal information to IICA to be disclosed** in the data bank.
- (e) Any individual, whose name appears in the data bank of IICA, shall make **changes in his particulars within 30 days of such change** through web based framework which is made available by IICA for this purpose so that all the information of such person is updated.
- (f) IICA will display on its Online Data Bank its **Disclaimer conspicuously** that the a company must carry out its own due diligence before appointment of any person as an ID.
- (g) IICA shall with prior approval of the Central Government **fix a reasonable fees to be charged from :**
- (i) Individuals for inclusion of his/ her names in the data bank of ID and
  - (ii) Companies for providing information of ID available on data bank

: 6 :

**Rule 4 Duties of IICA:**

- (a) IICA shall provide the **following facilities without charging any fees** with respect to every individual who is either already appointed as an ID on the Board of company or who intends to be an ID :
- (i) conduct an online **proficiency self-assessment test** (Proficiency test) covering companies law, securities law, basic accountancy, and such other areas relevant to the functioning of an individual as ID ;
  - (ii) prepare a **basic study material, online lessons**, including audio-visuals for easy reference of individuals taking the online Proficiency Test.
- (b) IICA shall daily share with the Central Government, a cumulative list of all individuals:
- (i) whose names have been **included** in the data bank along with the date of inclusion and their Income Tax PAN or Passport number in case of foreign director;
  - (ii) whose applications for inclusion in the data bank have been **rejected** along with grounds and the dates of such rejection; and
  - (iii) whose names have been **removed** from the data bank along with grounds and the dates of such removal.

The link of the aforesaid Notification is as under:

[http://www.mca.gov.in/Ministry/pdf/CmpInpdtDirectorsRules\\_22102019.pdf](http://www.mca.gov.in/Ministry/pdf/CmpInpdtDirectorsRules_22102019.pdf)

**D. The Companies (Accounts) Amendment Rules, 2019.**

In the Companies (Accounts) Rules, 2014, in Rule 8 regarding “Matters to be included in Board Report” in sub-rule (5)a new clause (iiia) is inserted and accordingly in the **Directors Report , the Board has to give a statement** regarding its opinion with regard to integrity, expertise and experience (including “proficiency”) of the Independent Directors appointed during the year. “proficiency” means the proficiency of the Independent Director as ascertained from the online proficiency self-assessment test (Proficiency Test) conducted by the **Indian Institute of Corporate Affairs at Manesar (Haryana) (IICA)** as notified under section 150(1) of the Companies Act , 2013

The link of the aforesaid Notification is as under:

[http://www.mca.gov.in/Ministry/pdf/CmpAccAmndtRules\\_22102019.pdf](http://www.mca.gov.in/Ministry/pdf/CmpAccAmndtRules_22102019.pdf)

# Amita Desai & Co. Company Secretaries, Mumbai

---

## **\*Provisions in other countries**

Directors in the UK can also obtain a Chartered Director qualification from the Institute of Directors (IoD). This experience-based assessment requires directors to show how they work within the context of their boards, use their knowledge and skills and discharge their duties.

Canada's Institute of Corporate Directors (ICD) offers the ICD.D designation. To apply, directors need to be an ICD member of good standing, have completed the ICD-Rotman Directors Education Program, have signed the ICD's Member Code of Conduct and have passed the ICD.D online examination. They also must pass an ICD.D oral peer examination and commit to a minimum of 14 hours ongoing governance education annually.

The Institute of Directors in Southern Africa (IoDSA) confers the Chartered Director (SA) professional designation. To receive the CD (SA) an applicant must comply with the entrance requirements, have been a practising director (or held equivalent office of an organisation of substance) for at least 3 years during the 5 years prior to application, and be sponsored by two individuals, preferably IoDSA members. Chartered directors must maintain their professional development through the IoDSA Continuing Professional Development (CPD) scheme.

Australian Institute of Company Directors (AICD) started in 1975 its course for being a company director. Since then about 40,000 have completed the course, which is widely seen as a base level of knowledge for a role as a board director. The course, following the facilitator-led and scenario-centric Harvard teaching model, focuses on two key capabilities — judgement and decision making. It takes five full days to complete, on top of 40 to 50 hours of preparation, mostly reading. Then there's a 3000 word assignment, an online quiz and a written exam, to pass the whole thing. The course can be taken part-time, full-time or residential, and via correspondence.

**Conclusion** : These new rules in India will serve two purposes, (A) **more accountability by Independent Director** (ID), the recent debacles of large corporates and banks have raised questions on the role of (ID) as why ID have failed to detect the signs of trouble in time. The ID should know their fiduciary capacity, duties, roles and responsibilities. ID are decision makers and help a company to choose the correct path when approaching major forks in the road. The decision maker should be well versed to prevent any fiascos in the working of the Company where large stakes are involved. In order to improvise corporate

# Amita Desai & Co. Company Secretaries, Mumbai

---

governance system in India, Government thought it prudent to mandate measures to strengthen the competency, capacity and composition of boards. The Proficiency Test will cover Companies Law, Securities Law, basic Accountancy and such other relevant areas require for acting as ID. The entry standard is created by such proficiency test, and (B) **The Data Bank of ID will be a repository** available online from Indian Institute of Corporate Affairs (IICA) as one stop platform for the companies to find ID, which is a mandatory requirement. Many companies were appointing ID, who are ID only on paper and at times not having adequate skills of corporate laws. Currently, there is no requirement of minimum educational qualification for a person to be appointed as ID. However, the test will be simple and designed for ID to have the basic knowledge of corporate laws and those who are having basic knowledge of corporate working should have no wrath for this Proficiency Test. It's a welcome move by MCA though the Companies Act 2013 provides number of other measures like capping the number of directorship, meeting with quorum of disinterested directors, audit committee, Code of Conduct for ID and risk management principles. However, we also need ongoing development and training for ID on regular basis and there must be a strong disciplinary and complaints procedure if there is misconduct by ID.

\*\*\*\*\*

**Disclaimer** *This legal update is not intended to be a form of solicitation or advertising. The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate thereafter. No person should act on such information without appropriate professional advice based on the circumstances of a particular situation. This update is intended for knowledge sharing only.*

By Amita Desai/ Sheetal Shukla

**Amita Desai & Co.**

**Company Secretaries**

1005, Hubtown Solaris

Prof N S Phadke Marg,

Andheri (East), Mumbai -400 069,

Landline : + 91-22-2684-5920/21

Fax : + 91-22-6678-7499

Mobile : + 91-982-017-7691

Website : [www.amitadesai.com](http://www.amitadesai.com)

Email : [info@amitadesai.com](mailto:info@amitadesai.com)

\*<https://aicd.companydirectors.com.au/membership/company-director-magazine/2019-back-issues/march/director-qualifications>

<https://www.businessinsider.com.au/review-the-aicd-company-director-course-2017-10>