Corporate Bytes

Online proficiency self-assessment test for Independent Directors Mandatory

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Ministry of Corporate Affairs ("MCA") on October 22, 2019, notified the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019[1] ("Rule"), which is to be effective from December 01, 2019. As per the Rule, the Indian Institute of Corporate Affairs ("Institute") is required to maintain an online data bank of persons willing and eligible shall of persons willing and eligible to be appointed as independent director. Such Institute shall make the data available to the companies willing to appoint such independent directors upon payment of certain fees. Further, the ultimate responsibility of exercising due diligence in appointing a person as independent director in the company lies completely on the company making such appointment. The Institute shall have the duty of conducting an online proficiency self-assessment test ("Test") for all such persons willing and eligible to be appointed as Independent Directors. The Test should cover companies' law, securities law, basic accountancy, and such other areas relevant to the functioning of an individual acting as an independent director. The Institute shall prepare basic study material, online lessons for the Test. Institute shall optionally also conduct an advance-level test and provide study material accordingly.

Further, MCA notified the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019[2] ("Amendment Rules") on October 22, 2019, which is to be effective from December 01, 2019. The Amendment Rules clearly state that every individual who has been appointed as an independent director in a company as on the date of notification of the Amendment Rules, shall, within a period of three months, and every individual who intends to get appointed as an independent director shall, before such appointment, apply to the Institute for inclusion of their name in the data bank for a period of one year, five years or lifetime. Every application for renewal of name in the data bank has to be made thirty days before the expiry of the agreed upon period.

Every individual having their name in the data bank are mandatorily required to pass the Test within one year from the date of inclusion of its name in the data bank. In case of failure, the Institute has the right to remove such names from the data bank. An individual who has obtained a score of 60% and more in aggregate shall be considered to have passed the Test. The Amendment Rules provides for an exception to the mandatory Test wherein the individual who has served for a period of not less than ten years as on the date of inclusion of his name in the databank as director or key managerial personnel in a listed public company or in an unlisted public company having a paid-up share capital of rupees ten crore or more shall not be required to pass the Test. It is pertinent to mention here that in case a person has acted as director or key managerial personnel in two or more companies at the same time, the tenure shall only be counted once for the abovementioned exemption. Further, the Amendment Rules specifies that there are no limits to the number of attempts that an individual may take for passing the Test.

TRAI releases recommendations on "Review of Terms and Conditions for registration of Other Service Providers"

Mohana Roy, Associate

The Telecom Regulatory Authority of India ("TRAI") in furtherance of the Consultation paper on 'Review of terms and conditions for registration of Other Service Providers (OSP)' dated March 29th, 2019, has released its recommendations on the same on October 21st, 2019.

[1] http://www.mca.gov.in/Ministry/pdf/CmpInpdtDirectorsRules_22102019.pdf

[2] http://www.mca.gov.in/Ministry/pdf/CmpFifthAmndtRules_22102019.pdf

TRAI has finalised its recommendations based upon the suggestions received from various stakeholders. Some of the key features of the same are as follows:

i. Only voice-based, outsourced OSP need to have registration at par with the existing process. Data/internet-based OSP shall be required to furnish intimation only.

ii. Online portal for the complete process of registration has been opened and it shall be in a time-bound manner.

iii. The Requirement of agreement bank guarantee for sharing of infrastructure between domestic and international OSP of the same company has been removed.

iv. The Requirement of agreement and bank guarantee for availing Work-from Home (WFH) facility has also been removed. Further, the requirement of PPVPN has been removed and any commercial VPN can be used to establish connectivity for WFH.

v. International OSP may have EPABX at foreign location.

vi. Internet obtained at one OSP centre can be shared with other OSP centres of the same company (provided the ISP has geographical jurisdiction)

vii. Contact Centre Service Provider (CCSP)/ Hosted Contact Centre Service Provider (HCCSP) providing a platform as a service should be brought under registration. The CCSP/ HCCSP involved in the reselling of telecom resources would require a VNO license.

viii. CCSP/HCCSP to be given a 3 months' time to get themselves necessary registration/license after the declaration of the policy by DoT.

ix. Provision of services for captive purposes i.e. Captive Contact Centres have been kept out from the scope of OSP. They would require to furnish intimation only.

TRAI has done a commendable job in pulling together the recommendations, wherein all the issues raised by various stakeholders were duly captured. Now the ball is in the court of Department of Telecommunication (DoT) and we will have to see whether DoT accepts all the recommendations or not.

- **SEBI issues circular on resignation of statutory auditors from listed entities and material subsidiaries.**

Mohana Roy, Associate

The Securities and Exchange Board of India ("SEBI") vide its circular[3] dated October 18, 2019, has specified conditions a listed entity has to comply with upon resignation of the statutory auditors.

The conditions to be complied with upon resignation of the statutory auditors by a listed company or material subsidiaries with respect to limited review/ audit report are as under:

a. The auditor shall, before such resignation, issue the limited review or audit report for such quarter and as well as the next quarter if the auditor resigns after 45 days from the end of a quarter of a financial year.

b. If the auditor has signed the limited review or audit report for the first three quarters of a financial year, then the auditor shall, before such resignation, issue the limited review or audit report for the last quarter of such financial year as well as the audit report for such financial year.

c. Concerns with respect to the management of the listed entity or its material subsidiaries such as non- availability of information, non-cooperation by the management, etc. must be reported to the audit committee.

d. The auditor shall provide an appropriate disclaimer in the audit report in accordance with the standards of auditing in case if the listed company or its material subsidiaries does not provide the information required by the auditor.

Further, the circular also specifies that the practicing company secretary shall have to certify the compliance of the above by the listed companies in the annual secretarial compliance report.

Furthermore, the audit committee is required to disclose its view to the stock exchange within 24 hours of its meeting upon the resignation of the auditor.

- **Enhanced Governance Norms for Credit Rating Agencies (CRAs)**

Bhavani Navaneedhan, Associate

To further enhance governance and accountability of Credit Rating Agencies ("CRAs"), the Securities and Exchange Board of India has

[3] CIR/CFD/CMD1/114/2019

modified its circular dated November 1, 2016, and issued the following directions on November 4, 2019.

1. As regards the Managing Director ("MD") or Chief Executive Officer ("CEO") being a member of the rating committee, it has been decided that: a.MD/CEO of a CRA shall not be a member of the rating committees of the CRA.

2. Rating committees of a CRA shall report to a Chief Ratings Officer ("CRO").

3. One-third of the board of a CRA shall comprise of independent directors if the board is chaired by a non-executive director. In case the board of the CRA is chaired by an executive director, half of the board shall comprise of independent directors.

4. The board of a CRA shall constitute the following committees: (i) Ratings Sub-Committee, (ii) Nomination and Remuneration Committee.

5. The CRO shall directly report to the Ratings Sub-Committee of the board of the CRA.

6. The Nomination and Remuneration Committee shall be chaired by an independent director.

7. During the rating process, CRAs shall record minutes of the meeting with issuer management and incorporate it into the rating committee note. CRAs shall meet the audit committee of the rated entity, at least once in a year, to discuss issues including related party transactions, internal financial control and other material disclosures made by the management, which have a bearing on the rating of the listed Non-Convertible Debentures (NCDs.).

SEBI issues Foreign Portfolio Investors Regulations, 2019

Pawan Khatri, Associate

SEBI has introduced Foreign Portfolio Regulations, 2019[4] ("regulations"). The new regulations witness a lot of changes in comparison to the previous regime, suggestions regarding which were made by the HR Khan committee. Major highlights of the regulations are as follows:

- Exorbitant taxes on Foreign Portfolio Investors have been reduced as an attempt to attract more FPIs.
- Entry Routes have been streamlined and simplified as an attempt to boost the waddled financial market of India.
- Three categories of FPI the in previous regime have been reduced to two.
- Category I includes more authentic and reliable sources like governments, government-related funds, university funds, pension funds and appropriately regulated funds originating from entities in Financial Action Task Force (FATF) member countries.
- FPI Category II shall include all investors who are not eligible under FPI Category I.
- FPIs registered under Category II are not allowed to deal in participatory notes (PNs).

It is anticipated that Category II investors shall attract higher tax obligations in comparison to Category I as well as be subjected to stricter scrutiny for the fulfilment of compliance and other requirements under these regulations. Investment funds willing to seek Category I registration now mandatorily need to belong from FATF jurisdictions which leave funds registered in Tax Havens like Cayman and Mauritius in a dilemma.

However, the regulations provide for two exceptions in which even funds registered in non-FATF jurisdiction may be eligible for Category I registration –

a. The fund is managed by an investment manager from the FATF jurisdiction and is already registered as a Category I FPI, or

b. A single investor in the said fund holds 75 percent of it and belongs to an FATF jurisdiction country.

The nature of such exceptions is such that it can easily be misused as a workaround leaving the intent of such regulation unsatisfied. Further, relaxations have been made by the removal of a maximum cap on shareholding of individual investors and removal of a minimum number of investors required. FPIs can now also indulge in an off-market transfer of securities it was earlier barred from like rights entitlements, delisted or suspended securities.

CCI'S Halloween Trick for Body Corporates

Divyadeep Manu, Associate

The Competition Commission of India ("CCI") vide its notification dated October 30, 2019, amended the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations"),

[4] https://www.sebi.gov.in/legal/regulations/sep-2019/securities-and-exchange-board-of-india-foreign-portfolio-investors-regulations-2019_44436.html

whereby the fee for filing notice required for seeking premerger approval from the watchdog has been enhanced.

The amendment brings in changes in Regulation 11 of the Combination Regulations, wherein:

i. fee for filing form I, specified in Schedule II of the Combination Regulations has been enhanced from INR 15,00,000 (approx. USD 21,100) to INR 20,00,000 (approx. 28,100) only; and

ii. fee for filing the notice in form II, as specified in schedule II of the Combination Regulations has been increased from INR 50,00,000 (approx. USD 70,133) to INR 65,00,000 (approx. 91,173) only.

However, body corporates has been exempted in instances where the parties to the combination have filed notice in form I and the CCI for forming a prima facie opinion, to check whether the combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market, directs the parties to the combination to file notice in form II along with prescribed fees, in such cases the fees already paid along with form I shall be adjusted while paying the fee prescribed with form II for providing information.

- **Delhi Court Judgement on Disqualification of Directors under Section 164(2) of the Companies Act, 2013**

  - ***Raghav Gaind, Associate***

According to Section 164(2) of the Companies Act, 2013 ("Act"), the directors of any company will be disqualified for a period of 5 years if the companies in which such persons are director, have failed to file the financial returns for 3 consecutive years. On account of the provisions of the Act, numerous petitions were filed with various courts where the disqualified directors have challenged the following:

• Directions from the court to use their Digital Signature Certificates (DSC) and Director Identification Number (DIN).

• Disqualification of the directors is an arbitrary decision made by the government.

• The directors cannot be disqualified from acting as directors of the companies which have not defaulted.

• Section 164 of the Act cannot be applied retrospectively. Further, Section 164(2) of the Act disqualifies the appointment/ re-appointment of the directors but does not demit the office as directors.

The Delhi Court, while dealing with the retrospective applicability of section 164(2) of the Act, held that the retrospective application does not have any adverse effect as non-filing of the annual returns was also prohibited in the Companies Act, 1956. Therefore, the court held that the provisions of Section 164(2) of the Act shall be applied prospectively. However, the penalty under section 164(2) would not extend to defaults committed prior to 01.04.2014