



THE INSTITUTE OF
Company Secretaries of India

भारतीय कम्पनी सचिव संस्थान

IN PURSUIT OF PROFESSIONAL EXCELLENCE

Statutory body under an Act of Parliament



MCA/2018

23rd August, 2018

Shri Anurag Agrawal
Joint Secretary
Ministry of Corporate Affairs
Shastri Bhawan,
New Delhi - 110 001



Subject: Practical issues and difficulties faced by stakeholders

Respected Sir,

Greetings of the day !!!

This is in continuation to the meeting held with your goodself on August 16, 2018. As you are kindly aware, the Institute of Company Secretaries of India has always pioneered the cause of good governance, the implementation of the law in true letter and spirit while keeping in sight the best interests of all stakeholders.

While the Act and the rules made thereunder are being amended regularly to strengthen the regulatory framework and provide necessary support to stakeholders, various issues arise from time to time in the corporate arena. Understanding the same, ICSI deemed it fit to compile all such issues and suggest possible solutions which shall be in the best interest of compliance and spirit of law and shall also go a long way in facilitating ease of doing business in India.

We would like to present the following compilation and possible solutions for discussion, understanding and effective implementation:

I. Name Availability - Bringing rejection to minimal:

Under the current set of Rules governing name approvals and its implementation from the regulatory perspective, various difficulties are being faced by stakeholders. The main cause and reason behind these difficulties is interpretation and usage of following discretionary powers exercised by MCA officials while approving/ rejecting name availability application.

Use of Discretionary power:

Rule 8 of Companies (Incorporation) Rules, 2014 deals with 'Undesirable Names':

(2) (a) The name shall be considered undesirable, if-

(i) the proposed name is identical with or too nearly resembles the name of a limited liability partnership,

(xvi) the name is only a general one, like Cotton Textile Mills Ltd. or Silk Manufacturing Ltd., and not Lakshmi Silk Manufacturing Co. Ltd;

In order to achieve the objectives of compliance as well as good governance while keeping in view the goals of ease of doing business, and further to bring harmonisation in usage of discretionary powers, it is proposed the "guiding principles" for approval/ rejection of names by the MCA officials be implemented.

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After careful examination of rules, trends in rejection of names, past practices and other economical and social issues around name availability, the Institute has developed a set of guiding principles for name approval/rejection. The said principles if adopted will, while recognising the intention of law and upholding the purpose of discretionary powers of MCA Officials bring about harmonisation in decision making process by reducing human elements and personal judgements.

We, therefore, request you to kindly examine and adopt the proposed "Guiding Principles for name availability" and further ensure its effective implementation at all levels.

In order to provide a justification for implementation of such guiding principles, we have examined various cases reported to us and its grounds for rejection. The same are placed at Annexure-A to this application for your ready reference.

The following 'Guiding Principles' could be followed while considering the applications relating to name approval:

- (a) Company and LLP name availability guidelines should be similar.
- (b) All name rejection criterias to be applied, at the first instance itself. it has been observed that too general criteria and similarity with existing name and similarity with trade mark options are interchangibly used to reject name at first stage and then at second stage.

While considering the applications for name availability and applying the rejection reason 'the name is too general', liberal approach in favour of business to be adopted as in the changing context, there is no word which is 'general' in nature. Any noun/ pronoun now becomes adjective and business are conveniently using the as prefix in their names. Hence identification of what is "general" and otherwise is required. The words like sun, water, sky, ocean, tree if used a prefix then it should be allowed if other words in the name are making the proposed name unique from existing name. The prefix containing activity like milkoccean, dairyocean may be allowed since they are unique and not general

- (c) Name already approved should not be rejected if applied again; (we also suggest to reintroduce the renewal of name facility)
- (d) While applying the rejection reason as "Name is closely resembling with an existing company", the following should be considered:
 - i. 'Two words' checking principle to be followed. Presently, the names are rejected with a similarity of one word (prefix).
Example: Raj Industries and Raj Engineering should be allowed. The name proposal Raj Industrial Services with Raj Industrial Products may be rejected since the same is not falling in two words criteria. It is to be noted that two words criteria is not to be applied when proposed name has only prefix and no words indicating activities.
 - ii. Name without having the word indicative of activity should not be rejected on the basis of first word similarity.
Example: The application is rejected for 'Sunshine Limited' as it resembles with 'Sunshine Trade Ltd.'. Since in the existing name of company, the word 'Trade' is differentiator, it should not be rejected.



- iii. Name of holding company should be made available to subsidiary for formation of subsidiary with single word differentiator. The problem is faced by companies desirous of incorporating wholly owned subsidiary companies with common word from Promoter Company's name, even after submitting NOC.
- iv. Use of words like "International", "Global", "Enterprise", "India", and "Industry" should be recognized as differentiator from the existing names.
- v. 'Coined words' should not be separated and checked for resemblance. Coined words should be respected without looking for its meaning. For example, words like Oceanking, oceanwater to be checked as 'coined words' and not to be separated since the very intention of designing coined word is to produce a substantive differentiator for the proposed company.
- vi. While matching with existing Trademark (TM)/ Service mark (SM):
 - a) there is a need to check specific activity within the class, since TM/SM class has several different activities;
 - b) the status of trademark should be checked whether the application is abandoned/pending/in-objection/suspended, etc. Only live TM/SM should be considered for checking similarity;
 - c) Trademark is associated with product and need not be a name of the company. Hence, only 'word marks' and 'defensive marks' to be adhered to and not on the basis of 'product' or 'service marks'.
 - d) Labels containing picture and words registered as TM/SM should not be matched for similarity since they do not grant any exclusive protection to carve out words. Hence, the wordmarks only to be consider for checking name similarity.
 - e) The noun, pronouns and verbs are disclaimed while granting registration for TM/SM, the said disclaimer does not give any protection to registered user. Hence, MCA while granting name should not provide protection and should not use the said TM as basis.
 - f) To limit verification of applied name with the registered TM, only and only if the name applied contain the exact and entire words of registered TM (This means that rejection should be only if the name is found to be exactly similar to a word mark registered).

In addition to above we make the following suggestions:

(i) Revision in RUN e-form

Further, at present, the trademark classification is very broad and the correct classification of proposed activity is difficult to be ascertained by the officers dealing with the RUN application.

Therefore, it is suggested that in the RUN form, applicant may be asked to provide exact description of goods/services intend to undertake under the proposed name. For this purpose, as suggested NIC Code, 2008 (4 digit) to be used.

This exact classification will be useful to determine what the exact activity is and then it could be compare with registered Trade mark/ service mark to identify similarity.

The NIC-4 digits will also solve issues of verification of main objects at the time of incorporation of a company. The memorandum of association of a company then could only specify codes and its description.



If this proposal is accepted this will bring harmonization in IDRA and Companies Act.

(ii) Expanding the period of name reservation

Formation of section 8 companies, after getting the name approval takes longer time since it has to pass through the stages of securing license and then incorporation.

Hence in order to avoid the hassles of re-applying for the name during the process of incorporation in expiration of its validity, we propose to keep such name reserved for a period of 60 days. For other companies we propose to re-activate the facility of renewal of name by making an application for a further period of 20 days before the expiry of first 20 days.

II. Difficulties in Incorporation process:

(a) For the **Registered Office Proof**, a copy of sale deed/ leave and license agreements is being demanded. Since the said property agreements carry certain confidential information of the owner including consideration paid, etc., it would be hazardous if the same are subsequently made available in public domain. In order to protect the confidentiality, it is proposed that in place of copies of agreements, index II/ 7/12 extract/Property Tax Receipt/Electricity bill/water connection bill may be demanded.

(b) Incorporation of a company with more number of subscribers:

Typically in joint ventures, the companies are proposed to be incorporated with more than 7 subscribers. The current SPICe form provides for a maximum of 7 subscribers. It would be very difficult to justify the limit on number of subscribers to the promoters when the law does not prohibit the formation of a company with more than minimum subscribers. Hence, in the interest of ease of doing business and quicker formation of a company, a facility can be provided to add more subscribers in the SPICe form.

III. Practical difficulties relating to E-form DIR 3 KYC:

i. Self-attestation of documents:

It is kindly submitted that Government of India under its own initiative of administrative reforms has introduced the concept of 'self attestation of various documents. Hence, we propose to make the requirement of providing notarized/ apostile copies of proofs optional. The self attested copies proofs could be accepted with a certification from practicing professional/ Company Secretary of the company facilitating the director for compliance of DIN KYC requirements.

ii. Common Address Proofs to be allowed:

Issue: In Incorporation Rules, Bank Statement and Mobile Bills are allowed as address proofs. However, these are not permissible in DIN Rules.

It is proposed that Proofs of Address permitted under Incorporation Rules or DIN Rules should also be permitted as proofs of address for DIR 3 KYC. Further, clarity is



also required about the period for which the proof of address will remain valid, i.e., not older than 2 months in case of resident and some months in case of non-resident director.

iii. *DIR 6 and DIR KYC both are for updating the database of directors:*

With two separate forms being used for updating the database, the same is leading to duplication in filing and hence becoming burdensome for corporates and professionals. It is suggested that any variation of information provided in original DIN application and current DIN KYC, need not be reported through DIR 6. The compliance of KYC with current information will automatically update the registry details of the director. The same needs to be implemented immediately and to be clarified properly through FAQ.

iv. *Directors of Indian origin with foreign nationality:*

Directors of Indian origin who hold nationality and passport of other country are provided with overseas citizenship cards (OCI) by Government of India. There are certain other regulations prevailing in Goa and Puducherry which allow certain Indian nationals to hold Portuguese/French nationality and passport. Such OCI directors and specific directors are freely allowed to stay and undertake business or occupation in India. It has been observed in many cases that such directors do not hold any permanent address in the foreign country (as per their nationality status). Currently, DIN KYC form is setup on the basis of nationality of a director and it does not allow a foreign national to provide Indian address as permanent address. This compulsion is creating a hardship for such directors and it would be impossible for them to do the KYC compliance before due date.

Hence, it is proposed that the form DIN KYC should be altered to consider the basis of residential status of director. A director who is resident but holding nationality of a country other than India should be asked to do the compliances applicable to resident director.

v. *Status of compliance of KYC on MCA21 portal:*

A facility could be provided to verify the status of each DIN on MCA portal stating whether such DIN is in compliance of KYC or not. This will avoid duplication of KYC process for a director by more than one company or professional.

IV. Director Identification number – easy availability:

Currently the facility of formation of LLP with new promoters by applying for DIN is disabled. In order to secure the DIN, they are required to first follow the process of taking directorship in company. Since the applicability and purpose of Companies Act & LLP Act is altogether different, the MCA process could not make it compulsory to secure directorship first and then become a DP in LLP. In view of this, we propose to immediately put in place the process similar to SPICE for information of LLP.

In addition to this, we also suggest to immediately put in place the system of applying for DIN without creating any linkage to proposed directorship. In this regard, it is to be noted that amended SEBI LODR Regulations are making it mandatory for top 500/1000 listed companies to have independent director/ women independent directors on their board.



MCA is also in a process of prescribing qualifications and examination and other criteria for independent directors and also planning to introduce maintenance of data bank for independent directors.

This is likely to sum up the requirement of ready availability of independent directors. Such directors may not and need not be directors in the existing companies and hence may not hold DIN. It would also be difficult to place the name of ID in the data bank unless they hold valid DIN.

In view of the above, there is a need to reactivate the form and process for getting the DIN without following the route of passing a resolution in the company for proposed directorship. The current provisions of law do not support this process.

V. Commencement of process of KYC for companies:

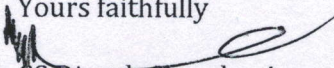
This finds reference in the notice provided on MCA PORTAL regarding proposal to initiate the process of KYC for companies from October, 2018.

In view of the current directors' KYC compliances, busy annual filing season and sustainability of MCA portal; we strongly propose not to commence the process of company KYC process till the end of December, 2018.

The above issues if taken into account shall provide much needed relief to the stakeholders. We shall be happy to provide any further information or clarification that may be desired in this regard.

Thanking you

Yours faithfully


CS Dinesh Chandra Arora
Secretary, ICSI



REJECTED CASES

1. In the following instance, the coined word 'IQRANAS' is separated and rejected on the basis of resembling.

"IQRANAS ENGINEERING (OPC) PRIVATE LIMITED" on 17/04/2017 vide SRN: G41063181. The word "IQRANAS" was coined from the name of his daughter's name "IQRA" and Son's name "ANAS". However rejected stating the reason:

"Proposed name is nearly resembling with the name of the existing company/LLP "IQS ENGINEERING PRIVATE LIMITED and RANA ENGINEERING COMPANY PRIVATE LIMITED ". Hence, not considerable as per the provisions of section 4(2) of the Companies Act, 2013. Please resubmit with fresh names" why this

2. In the following instance, Name Application through Reserve Unique Name (RUN) application vide SRN No. G96614268 with two alternatives namely:

- (a) DAIRYOCEAN FOODS PRIVATE LIMITED
- (b) DAIRYOCEAN MILK AND MILK PRODUCTS PRIVATE LIMITED

But the name rejected with reply 'both names are too general' hence not considerable in view of provisions of Rule 8(2)(b)(xvi) of Companies (Incorporation) Rules, 2014, kindly add suitable prefix.

Whereas coined word of above applied names i.e. DAIRYOCEAN is proposed to use as single word and having valid meaning as 'Ocean of Dairy and Dairy Products'.

3. In case of Infrastructure and Construction Companies, we used to take the name with word Infracon / Realinfra / Realcon / Infratech means so many combinations of the word related to the activity but those names are now rejected, please incorporate a suitable example..... In my opinion these names should be made available. Add this in coined words
4. The name from the word "NATURE", its general word how it can be made under the trade mark, mean Water, Land, Earth, Nature, Air can't be under the trademark, so on that basis how the name can be rejected and the meaning of word is totally different even some of the words are same, these types of example should be incorporated. Covered in TM
5. The name started from "You and Me" and then the activity has been rejected that word You is trade mark..... COVERED IN TM
6. Multitrade and Tradelink / Business and Vyapaar treated to be different when it was not through RUN / CRC also while searching the name in RUN it should show that these are similar or identical so it should not be allowed to submit the Form. ADD THIS ABOVE AT APPROPRIATE PLACE
7. Patel and Patil are similar but totally different yet being rejected.