



**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

Shri KVR Murty
Joint Secretary
Ministry of Corporate Affairs
Shastri Bhawan
New Delhi - 110 001



23rd August, 2018

Subject: Practical issues and difficulties faced by stakeholders and proposals to make suitable amendments in relevant rules

Respected Sir,

Greetings of the day !!!

This has reference to our meeting Shri Anurag Agarwal, Joint Secretary, MCA on August 16, 2018 on the subject mentioned hereinabove.

Sir, the Institute of Company Secretaries of India has always championed the implementation of the provisions of the law in true letter and spirit so as to promote and pursue good corporate governance. At the same time it has always held an empathetic view towards the concerns of the stakeholders.

While the Act and the rules made thereunder are being amended to strengthen the regulatory framework and provide necessary support to stakeholders, various issues evolve 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. The same are placed as under:

I. Name Availability – Bringing rejection to minimal:

- We understand that MCA is in a process of rationalisation of name availability rules. Furthermore, we have examined the draft rules and various suggestions have already been placed before the Ministry vide our letter dated June 03, 2018.

During our last meeting, we have proposed adoption of following "Guiding principles for name availability". The same have been reproduced hereinbelow for 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 first instance. It has been observed that too general criteria and similarity with existing name and similarity with trade mark options are interchangbily used to reject name at first stage and then at second stage.

Vision

"To be a global leader in promoting good corporate governance"

Motto

सत्यं वद। धर्मं चर। इष्टं कुरु। तृप्तये। ब्रह्मेणैव ह्यु त्रेह वद।

Mission

"To develop high calibre professionals facilitating good corporate governance"

Connect with ICSI



<https://www.facebook.com/ICSI>



https://twitter.com/ICSI_CS



<https://www.linkedin.com/in/the-institute-of-company-secretaries-of-india-icsi-a5899a102/>

ICSI-Noida Office C-36 & 37, Sector-62, NOIDA (U.P.) 201 309

tel 0120- 4522 000 fax +91-120-4264 443, 4264 445 email info@icsi.edu

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 milkocean, 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. 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 have been 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).

With a view to achieve ease of doing business and to bring rationality and harmonisation in proposed name availability rules, we request you to kindly consider adoption of these guiding principles in new name availability rules.

II. Surrender of Director Identification Number (DIN) and DIR-5

- i. Rule 11 of the Companies (Appointment and Qualification of Directors) Rules, 2014 allows surrender of DIN by the directors along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN.

However, there is a category of directors who have used DIN earlier but currently are not holding any directorship or are designated partners in LLP and have no plans to hold such positions in further. Hence, they do no wish to continue holding the DIN. Such directors on providing specific declaration to that effect may be allowed to surrender their DIN, without following the process of KYC.

- ii. On filing of DIR 12 by the company for death of director with death certificate, MCA should also deactivate his DIN. The company or the relatives of directors should not be asked to separately comply with the DIR 5 process.

III. Extension request for filing of E-Form DIR-3 KYC for the DIN allotted on or before 31st March, 2018

The newly inserted rule 12A (MCA notification number G.S.R. 615(E) dated 5th July, 2018) requires every individual who has already been allotted a Director Identification Number (DIN) as at 31st March, 2018, shall submit e-form DIR-3 KYC.

In this regard, ICSI welcomes the MCA initiative to extend the last date of filing DIR-3 KYC without any filing fees upto 15/09/2018 from 31/08/2018. The fees of ₹5,000/- shall be applicable & payable on all delayed filings w.e.f. 16/09/2018. [Companies (Registration Offices and Fees) Fourth Amendment Rules, 2018].



However, we wish to reiterate that there are certain practical difficulties which are explained hereunder requiring further extension of the last date of filing this form without additional fee:

- i. Initiation of KYC process mandatorily requires every director to possess digital signature. Procurement of DSC is again a time consuming process. In addition to above the process of collection of various proofs and their attestation takes several days.
- ii. The form DIR 3 KYC is changing versions too frequently.

In view of the above, it is proposed to extend the date of submission to KYC at least by **two more months**.

IV. Newspaper advertisement for shifting of registered office of companies

This is in continuation with our earlier letter dated March 19th, 2018

Issue: In the process of Shifting of Registered office from one State or Union Territory to another state under rule 30 of Companies (Incorporation) Rules, 2014 there is a requirement to publish an advertisement in a newspaper having **widest** circulation. The interpretation of term 'widest circulation' by the regional directors on the basis of paper circulation numbers requires the companies to publish the advertisement with costly newspapers. It is to be noted that such newspapers though carry the tag of widest circulation on the basis of number, need not hold popularity or reach to the readers. This interpretation is defeating the purpose of publication of advertisement and its readability and reach to general public. Further, the compliance of this requirement is putting a financial burden on many companies including small companies.

Representation: To provide comfort to stakeholders and more so promote ease of doing business, the erstwhile rules requiring advertisement to be published "in a vernacular newspaper in the principal vernacular language in the district in which the registered office of the company is situated, and in English in an English newspaper circulating in that district" may be reinforced immediately. The proposal if accepted shall require suitable amendment in Rule 30 of Companies (Incorporation) Rules, 2014.

V. Companies (Significant Beneficial Owners) Rules, 2018 and compliance thereof:

Issue: In terms of the Companies (Significant Beneficial Owners) Rules, 2018, every significant beneficial owner is required to file a declaration in Form No. BEN-1 to the company in which he holds the significant beneficial ownership on the date of commencement of these rules within ninety days from such commencement and within thirty days in case of any change in his significant beneficial ownership. Accordingly the last date for the same falls in the second week of September, 2018.

In this regard, we have received several queries seeking clarity on applicability of rules and procedure for compliances.



It is further observed that;

- i. Due to complex layers and subsidiaries in case of foreign companies or companies outside India, the Indian legal teams of such companies are finding it difficult to trace the ultimate beneficial owner within the given span of time,
- ii. Forms under these rules have not yet been notified; and
- iii. Proper guidance and assistance to the corporates as well as the professionals engaged in this activity is not available.

Representation: In view of the above, we suggest extending the applicability of these rules starting from January, 2019. In the meanwhile, we request you to kindly notify the forms and roll out an all-inclusive FAQ for the same. We also propose to hold webinars jointly with MCA in order to provide and guidance and support to all stakeholders on this issue and in the interest of due compliance.

VI. Request for allowing the KMP to file his resignation to Registrar

A representation in this regard has already been made to MoS (as per his directions in the meeting) vide letter dated March 20, 2018.

Section 170(2) read with rule 18 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that a return containing the specified particulars and documents of the key managerial personnel shall be filed with the Registrar in DIR-12 within thirty days of the change.

In this regard, representations have been received from members conveying that the companies are violating the aforesaid provisions and not filing the return in Form DIR-12 with the Registrar on resignation of KMPs (specifically Company Secretary) as required under the provisions of the Companies Act, 2013.

Apart from this, practically, pending the filing of resignation of first referred company, intimation of appointment in another company through MCA portal is also difficult.

In this regard, we suggest to make necessary amendment in rules and to modify the MCA system in order to capture, the resignation of a KMP through DIR-11 [Which is presently available only to the directors in terms of section 168 read with rule 16 of the Companies (Appointment of Directors) Rules, 2014] for CS and other KMPs.

VII. Removal of name of Companies from Register of Companies u/s 248 – Reg.

The process detailed under Rule 4 of the Companies (Removal of Name of Companies from the Register of Companies) Rules, 2014 provides that an application for removal of name of the company shall be made in Form STK-2 and shall be accompanied by the following:

- a no objection certificate from appropriate Regulatory Authority concerned;
- indemnity bond duly notarised by every director in Form STK-3;
- a statement of accounts containing assets and liabilities of the company made up to a day, not more than thirty days before the date of application and certified by a Chartered Accountant;



- an affidavit in Form STK-4 by every director of the company;
- a copy of the special resolution duly certified by each of the directors of the company or consent of seventy five per cent of the members of the company in terms of paid up share capital as on the date of application;
- a statement regarding pending litigations, if any, involving the company.

The aforesaid list of documents accompanying the Form STK-2 does not include the proof of filing of accounts and requisite annual forms under the provisions of the Act.

However, some of the Registrars are insisting that the pendency of annual filings may be made good prior to making an application for strike-off or removal of name of the company from the Register of Companies under section 248 of the Act.

The provisions of section 248 have been brought into existence to provide companies with hassle free exit, while this ambiguity and the requisition of forms for annual filing on the part of Registrars is defeating the purpose.

In light of the above, we request you to kindly advise the Registrars to insist on the only compliances that are provided in the Act and the relevant Rules.

The above representation, 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