

What Next After Successful Introduction of DIR-3 KYC to Weed Out Dummy/Non-Existent DIN Holders?



Introduction of DIR-3 KYC reform for verification of individual DIN holders has proved to be a major and successful exercise to weed out non-existent/dummy DIN holders/Directors. Ministry of Corporate Affairs (MCA) has served another ace by introducing for the first time, mandatory use of system generated One Time Password (OTP) received in the unique email id and Mobile number of individual DIN holders thus avoiding the indiscriminate use by certifying professionals of the same email id and contact details belonging to them while serving multiple DIN holders/clients. Let us analyse some of the probable reasons which prompted the introduction of DIR-3 KYC for Directors/DIN holders. Read on...

Obtaining of DINs Using Fake Papers and Certifications

Hitherto, any individual whether he is getting appointed or not in a Company/LLP can make an application for allotment of DIN duly signed by practicing professionals (CA/CS/CMA) or the Company Secretary in whole time employment/Director of the existing company. Analysis of such

DIN applications proved that 40 per cent of DINs/DPINs were obtained by unscrupulous people using the details of shell companies/LLPs.

Allotment of DIN and Need for insertion of System Validations

It is pertinent to mention that MCA has restricted (w.e.f. 26th January 2018) the allotment of DIN/DPIN only to Directors/Designated Partners who are getting appointed in Company/LLP thereby mandating the insertion of CIN/LLPIN apart from certification by the Director/KMP/Designated Partner of the said Company/LLP. Analysis of such DIN applications proved beyond reasonable doubt

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Consent to Act as Director

It is pertinent to draw attention to the provisions of Section 152 (5) of the Companies Act, 2013 'A person appointed as a director shall not act as a director unless he gives his consent to hold the office as director and such consent has been filed with the Registrar within thirty days of his appointment in such manner as may be prescribed:

Provided that in the case of appointment of an independent director in the general meeting, an explanatory statement for such appointment, annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfills the conditions specified in this Act for such an appointment.

Filing of Consent with the Company

Further, as per rule 8 of the Companies (Appointment of Directors) Rules, 2014 'every person who has been appointed to hold the office of a director shall on or before the appointment furnish to the company a consent in writing to act as such in Form DIR-2.'

Provided that the company shall, within thirty days of the appointment of a director, file such consent with the Registrar in Form DIR-12 along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014.'

Need for Conversion of Consent into An eForm

It has been observed that in some cases DIR-2 forms attached while filing DIR-12 do not contain even signatures of the Directors who are supposed to give their consent leading to doubts on their authenticity. To arrest such occurrence and to bridge the gaps between the communication of consent by the Director to the company and its

filing in DIR-12 by the company with the Registrar there is a need for converting DIR-2 into eform and get the same filed as linked form.

What Next? - Introduction of System Validations to Ensure Actual Appointment of Directors

To ensure that Directors to whom DINs would be allotted, are actually appointed in the said companies first, there is a need for the insertion of certain system validations:

- (i) *There shall be a clear vacancy on the Board before filing application for DIN allotment through the form.*
- (ii) *After DIN has been allotted through DIR-3 to an individual he has to be appointed first in the said company before he is appointed in any other company.*
- (iii) *Validation restricting/matching the 'DIN' with CIN in DIR-12 has to be inserted.*
- (iv) *Only a Director shall be the authorised signatory for signing DIR-3 seeking allotment of DIN. All other signatories viz. Company Secretary/Manager/CEO/CFO of the company be removed/deleted (from the drop down).*

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To ensure that Directors to whom DINs would be allotted, are actually appointed in the said companies first, there is a need for the insertion of certain system validations, like that there shall be a clear vacancy on the Board before filing application for DIN allotment through the form.

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Need to Define a 'Defaulting Company' under 6th Proviso to Rule 7

It is pertinent to mention that there exists a need to define clearly what constitutes a 'Defaulting Company' under the 6th proviso to rule 7 of the Companies (Registration Offices and Fees) Rules, 2014:

Manner and Conditions of Filing: *Every application, financial statement, prospectus, return, declaration, memorandum, articles, particulars of charges, or any other particulars or document or any notice, or any communication or intimation required to be filed or delivered or served under the Act and rules made thereunder, shall be*

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filed or delivered or served in computer readable electronic form, in portable document format (pdf) or in such other format as has been specified in any rule or form in respect of such application or form or document or declaration to the Registrar through the portal maintained by the Central Government on its web-site or through any other website notified by the Central Government:

Provided that where the documents are required to be filed on Non-Judicial Stamp Paper, the company shall submit such documents in the physical form, in addition to their submission in electronic form, unless the Central Government, by an order, does not require submission in physical form and proof of delivery of documents submitted in physical form shall be scanned and form part of attachment to the e-form.

Provided further that if stamp duty on such documents is paid electronically through the portal maintained by the Central Government or through any other website notified by the Central Government, then, the company shall not be required to make physical submission of such documents, in addition to their submission in the electronic form:

Provided also that in respect of certain documents filed under the Act which are not covered for payment of stamp duty through the portal of the Central Government, and stamp duty payable on such documents in the respective State is equal to or less than one hundred rupees, the company shall scan such stamped documents complete in all respects and shall file electronically for evidencing by the Registrar and shall not be required to submit such documents, except those which are required to be filed for compounding of offences or adjudication of penalties or applications to Central Government or Regional Director in the physical form separately:

Provided also that unless otherwise stated in any law for the time being in force, the company shall retain such documents duly stamped in original permanently for the documents relating to incorporation and matters incidental thereto, changes in any of the clauses of the Memorandum and Articles of Association and in other cases for a minimum period of eight years from the date of filing of the documents and shall be required to produce the same as and when the same is required for inspection and verification by the competent authority under any law for the time being in force:

Provided also that any correspondences (physically or electronically) and documents to be filed by any person shall contain name, designation, address, membership number or Director Identification

Number, as the case may be, of the person signing such document and make sure correctness thereof and in no case, correspondence, merely with signature and writing authorised signatory shall be acceptable.

Provided also that no request for recording any event based information or changes shall be accepted by the Registrar from such **defaulting companies**, unless they file their updated Balance Sheet and Profit and Loss Account and Annual Return with the Registrar of Companies except,-

- (i) Filing of order of Court or other authorities,
- (ii) Balance Sheet and Profit and Loss Account,
- (iii) Compounding application,
- (iv) Form for transfer of money to Investor Education and Protection Fund,
- (v) Application for removal of the Auditor and
- (vi) GNL-1 for making company active.

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It is pertinent to mention that the 'status of DIN' of a Director who is presently associated with the Company is checked at the stage of affixing DSC by the Authorised Signatory of the Company. If the status of a DIN is 'Deactivated due to non-filing of DIR-3 KYC' the form would not be permitted to be filed. However, the restriction has not been enforced (while filing AR/BS) against every Director who has not done his eKYC.

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Conclusion

It is pertinent to mention that the 'status of DIN' of a Director who is presently associated with the Company is checked at the stage of affixing DSC by the Authorised Signatory of the Company. If the status of a DIN is 'Deactivated due to non-filing of DIR-3 KYC' the form would not be permitted to be filed. However, the restriction has not been enforced (while filing AR/BS) against every Director who has not done his eKYC. Thus, there is a need to debate whether such a restriction should be imposed against every Director who is presently associated with the Company (for completion of DIR-3 KYC) while filing AR/BS? In authors' opinion, this restriction/validation would not only enable weeding out of dummy/non-existent Directors, but also prevent shell companies from escaping the strike off provisions by just complying with the filing of AR/BS without carrying on any business or operation for the prescribed period. ■