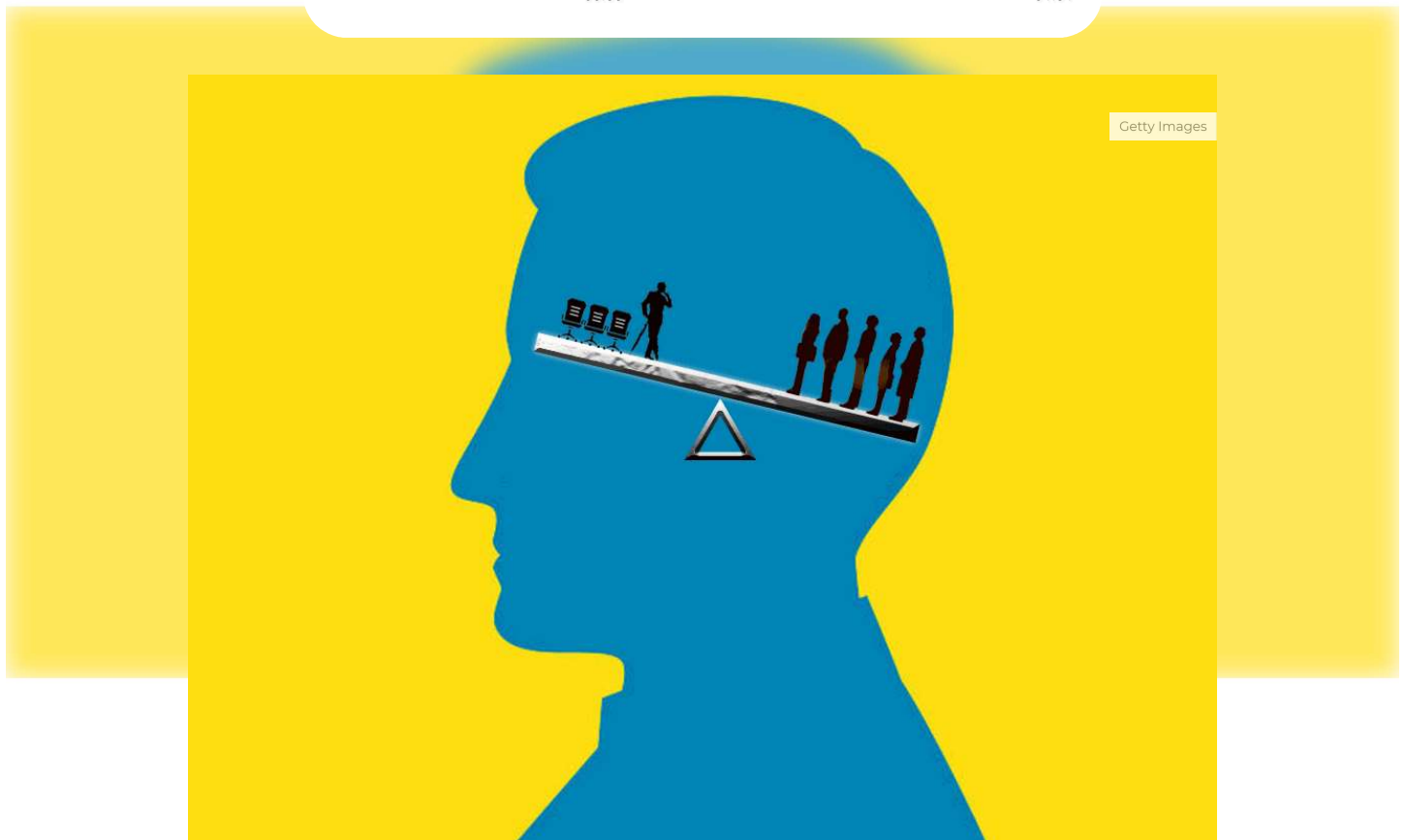


BOARD MATTERS

From Indian Oil to MMTC, PSUs suffer crores in fines for board vacancies, but can't fill up posts

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Concept: Sundaresha Subramanian; Muhabit ul haq

Synopsis

One year into its launch, PSUs are yet to use the independent directors' databank mandated by the Ministry of Corporate Affairs, leaving thousands of qualified candidates high and dry even as board positions lie vacant. While the exchanges have penalised the PSUs for non-compliance, a parallel database and processes of the Department of Public Enterprises are proving to be hurdles.

Dipankar Haldar is the executive director and company secretary of **Shipping Corporation of India** (SCI). Last month, Haldar received a letter from the National Stock Exchange (**NSE**) slapping the Mumbai-based public sector undertaking (**PSU**) with a fine of INR5.42 lakh for the quarter ended September 30. The move came after the company was found to be in violation of a **Sebi** regulation that stipulates a minimum number of **independent directors** on its board.

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In addition to the fine, NSE also warned that if the non-compliance continued, the “shareholding of the promoter in this entity as well as all other securities in its demat account” could be frozen. Further, the company also was staring at the possibility of being shifted to the Z category, meaning they have gaps in terms of compliance.

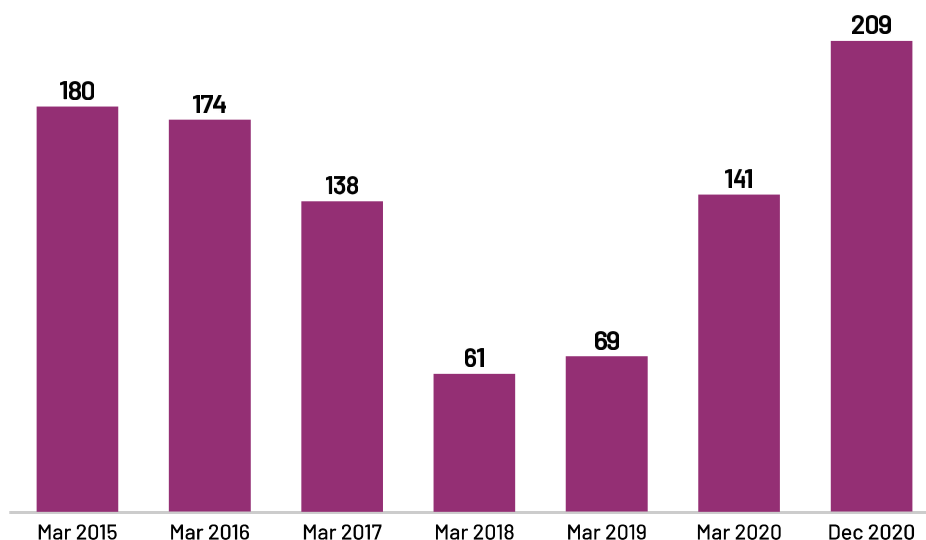
On November 25, Halдар wrote to the secretary of the Ministry of Shipping, the administrative ministry of SCI, asking it to expedite the process of appointing five independent directors, out of which one should be a woman independent director.

Only a week earlier, Halдар had written a similar letter to the ministry after a fine from **BSE** (formerly Bombay Stock Exchange). In fact, he has written several such letters to the ministry ever since the company turned non-compliant in March 2020. ET Prime has reviewed copies of these letters obtained through the Right to Information (RTI) by Gujarat-based advocate Nipun Singhvi.

However, Halдар’s requests have fallen on deaf ears.

Halдар and SCI are not alone. Compliance-department officials across several central PSUs have been writing to their respective ministries on filling up independent-director vacancies, but their pleas have evoked little response. The number of such vacancies has touched 209, the highest since the new companies act came into force in 2013. At least 14 PSUs have been slapped with fines totalling INR6.3 crore by the bourses.

Independent director vacancies in NSE-listed CPSEs



Figures as on March 31 for respective years and Dec11 2020

Source: primeinfobase.com

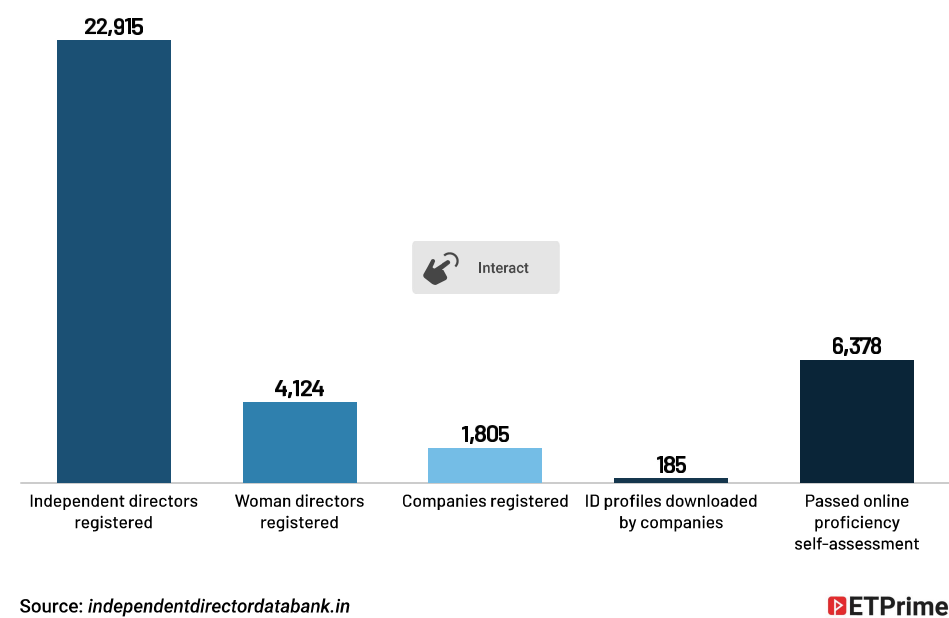
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RTI responses from nearly two dozen state-owned companies with board vacancies showed that stock exchanges have been slapping fines running into

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most of these PSUs under the central government’s control have continued to flout the important corporate-governance regulation. A turf war between the Department of Public Enterprises and Ministry of Corporate Affairs (MCA), which launched a new online database, has further queered the pitch.

ID databank statistics



Sorry state of compliance

Though the requirement of independent directors has been a part of the regulatory framework of listed companies since 2005, when Clause 49 was introduced in the listing guidelines to mandate it, the provision was incorporated in the new company law that came into force in 2013. The Securities and Exchange Board of India (Sebi) further reinforced this, converting its listing guidelines into the Listing Obligations and Disclosure Requirements (LODR) Regulations, 2015.

According to Regulation 17 of the LODR, independent directors should comprise at least half of the board of any company that has an executive chairman.

Explaining its vacancy position in an RTI response to Singhvi, **Indian Oil** Corporation says, “As of 19.11.2020, the board of the company has seven executive directors including the chairman, two non-executive government nominee directors (officials of Ministry of Petroleum and Natural Gas) and two independent directors (including one woman independent director). Thus, the number of vacancies of independent directors is seven.”

Going by this method, ET Prime analysed data provided by Prime Infobase for independent-director vacancies since 2013 for 53 central PSUs listed on the NSE. What emerged was a picture of appalling standards of governance and chronic non-compliance over the years.

Data shows that the number of vacancies as of December this year has touched a high of 209, trumping the previous high of 180 recorded at the end of fiscal year 2015.

Saga of non-compliance

Number of years	Number of companies	Names of companies
9	6	BEL, BHEL, CPL, MFL, NFL, HPCL
8	10	SCI, RCF, BEMIL, BPCL, CCI, ITI, MMTC, NLC, PFC, Powergrid
7	12	SJVN, REC, OIL, ONGC, NMDC, MOIL, MTNL, HMT, HCL, FCTL, EIL, GAIL
6	8	SAIL, NTPC, NHPC, MRPL, IOC, DCIL, CIL, BLC
5	3	HOC, KIOCL, Nalco
4	2	ITDC, NBCC
3	5	BDL, Cochin Shipyard, STC, Irco, RITES
2	5	HAL, IRCTC, Midhani, Hudco, MSTC
1	2	RVNL, Garden Reach

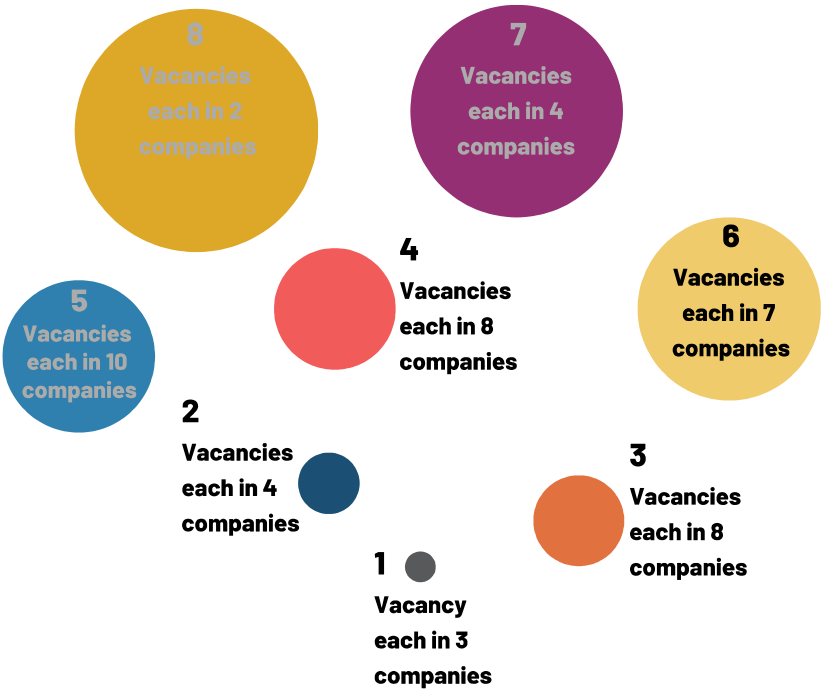
Note: Data relates to vacancies of independent directors

Source: ET Prime research

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ID vacancies as on December 11, 2020

Hover to see the names of the companies



Note: No vacancy in Balmer Lawrie; Dredging Corp.of India; Hindustan Copper; Hindustan Organic Chemicals; HMT

Source: primeinfobase.com

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While oil explorer ONGC and Bharat Electronics (BEL) topped the list with eight vacancies each, others such as Coal India, IOC, BPCL, Nalco, and NTPC had six or more positions of independent director vacant.

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Among the worst defaulters were BEL, BHEL, and NFL, in which half a dozen companies had reported vacancies for all the nine periods analysed since FY13. In all, 36 of the 53 companies analysed had vacant independent director positions for six or more of the nine periods analysed.

"The laws of the land should be applicable to everyone equally. There should not be any carve-out created for public sector enterprises either in selection, appointment, or performance evaluation of the independent directors."

— *Niraj Gupta, head of the School of Corporate Governance and Public policy, IICA*

The absence of adequate independent directors can result in decisions that may not be in the interests of the minority shareholders. Often, these PSUs are caught off guard in the market for want of quick and innovative actions. Lack of diversity can affect board-level thinking, limiting the PSUs' potential for innovation, says Vikas Jain, an Ahmedabad-based consultant and a member of the Western India regional council of the Institute of Chartered Accountants of India (ICAI).

These poor governance standards are often reflected in the share prices of the PSUs, which usually trade at a discount compared with their peers in the industry.

Regulatory response

Market regulator Sebi, which regulates corporate-governance matters of listed companies, says it does not have any information regarding the non-filling of independent vacancies in government companies. "The information is not maintained by Sebi in the normal course of regulation of the securities market. Hence the same is not available with Sebi."

Sebi seems to have delegated the monitoring entirely to the exchanges, which have been writing to the errant companies and warning them of the consequences of violating listing regulations.

Of late, both BSE and NSE have also been imposing penalties for such non-compliance. An analysis of RTI replies received from the companies showed that at least 14 companies have been levied penalties for several quarters now. Bharat Dynamics and National Fertilizers topped the penalties list with over INR75 lakh each, followed by Power Finance Corporation and NMDC.

Penalties levied by exchanges

PSU	Affiliated ministry	Amount (INR)
Bharat Dynamics	Defence	7,540,200
National Fertilisers	Fertiliser	7540200
PFC	Power	7,290,000
NMDC	Steel	6,546,640
MMTC	Commerce	6,440,000
BPCL	Petroleum and natural gas	5,770,200
REC	Power	4,727,080
KIOCL	Steel	4,213,780
IOC	Petroleum and natural gas	3,557,700
GAIL	Petroleum and natural gas	2,775,360
HPCL	Petroleum and natural gas	2,643,200
Mishra Dhatu Nigam	Defence	2,381,240
Shipping Corp. of India	Shipping	1,085,600
Cochi Shipyard	Heavy industries	460,200
Total		62,971,400

Source: RTI response by companies

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While both BSE and NSE have levied penalties and threatened freezing of promoter holding and placing them in the Z category, they have not been very strict in enforcing these measures.

Several of these companies say they have applied to the exchanges for waiver of these penalties. They argue that the appointment of directors is beyond their control and they have done their bit by writing to their ministries.

Though the NSE doesn't seem to have waived off the penalties, BSE has done for several companies despite their continuing non-compliance. A BSE spokesperson declined to comment on questions around such waivers, including the total amount waived and the rationale for such waiver. NSE spokespersons did not respond to the queries.

Developing database

In October 2019, the MCA notified the Companies (appointment and qualification of directors) Fifth Amendment Rules. According to these rules, which came to force on December 1, 2019, every individual who has been appointed as an independent director in a company as on December 1, 2019, is required to apply online to the Manesar-based Indian Institute of Corporate Affairs (IICA) for inclusion of his or her name in an online independent directors' databank within a period of three months. Those who wanted to get appointed as an independent director were also required to register.

Further, the rules provided for an online proficiency self-assessment test. Those registered in the data bank are required to pass the test with a score of 60%. This has to be done within one year from the date of inclusion of their name in the databank. Failing the exam means getting removed out of the databank. Board veterans and key managerial personnel with experience of 10 years' or

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Singhvi, who was a chartered accountant before turning to law, was among the early ones to register in the independent directors' databank. He also passed the online self-assessment test. For several months Singhvi has not got a call from any company showing interest in appointing him as an independent director, pushing him into seeking answers through RTI.

Singhvi is not alone. Over 22,000 professionals have registered themselves on the portal. Testimonials appreciating the databank on IICA's portal include those from a former army chief, retired civil servants, and former corporate executives, yet none of them seem to have received a call from PSUs.

"If professionals like us become board members, we can ask the right questions and make the meetings meaningful. The decision to make independent directors mandatory for all public companies under the company law was taken by the government with this objective. But it is shocking to find that the government companies are among the violators. If government itself does not follow its own rules, what can we say about private companies?" Singhvi asks.

Jain, who is also a registered member of the database, says, "Why can't the people from the databank be picked to fill in these vacancies? Otherwise, the confidence of those taking these exams will go for a toss." Jain is of the opinion that the process of appointing independent directors for all companies should be given to an independent body.

DPE vs. MCA?

Prior to the official databank coming into force, the department of public enterprises (DPE) under the Ministry of Heavy Industries had been maintaining its own database of non-official directors. The DPE followed its own criteria for enlisting candidates for ID positions in PSUs. Though this has become redundant with a more diverse database, DPE is still undecided. An e-mail seeking comments sent to the DPE secretary remained unanswered.

Criteria for consideration as independent director for PSUs

A.Criteria of experience

- *Retired government officials with a minimum of 10 years' experience at the joint-secretary level or above*
- *Persons who have retired as chairman and managing director or CEO of central public sector enterprises (CPSEs) and functional directors from Schedule A CPSEs*
- *Academicians/directors of institutes/heads of department and professors having more than 10 years' experience in teaching or research in the relevant domain, such as management, finance, marketing, technology, human resources, or law*
- *Professionals of repute having more than 15 years of domain experience in fields relevant to the company's area of operation.*

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profit-making and having an annual turnover of at least INR250 crore

- *Persons of eminence with proven track record from industry, business, agriculture, management*
- *Serving CEOs and directors of private companies listed on the stock exchanges may also be considered for appointment as part-time non-official directors on the boards of CPSEs in exceptional circumstances*

B.Criteria of educational qualification

A minimum graduate degree from a recognised university

C.Criteria of age

The age band should be between 45 years and 65 years (minimum/maximum limit); this could, however, be relaxed for eminent professionals, for reasons to be recorded, being limited to 70 years

D.Reappointment

Non-official directors will not be reappointed in the same CPSE after completing a maximum of two tenures, each tenure being for a period of three years.

E.Appointment in a number of CPSEs at the same time

One person will not be appointed as non-official director on the boards of more than three CPSEs at the same time

The proposals for appointment of non-official directors on the boards of CPSEs are initiated by the administrative ministries and departments concerned. The selection of non-official directors is made by the search committee. According to the DPE website, the present composition of the search committee is as under:

- *Secretary, Department of Personnel and Training (DoPT) is the chairman of the search committee.*
- *Secretary, DPE*
- *Secretary of the administrative ministry or department concerned*
- *Two non-official members, namely Pratima Dayal, retired IAS officer and former principal economist of the Asian Development Bank's India Resident Mission; and professor Ravichandran Narasimhan, former director of IIM Indore and now a professor at IIM Ahmedabad*

The administrative ministry or department concerned appoints the non-official directors on the basis of recommendations of the search committee after obtaining the approval of the competent authority. The recommendation of the department related Standing Committee of Industry to the effect that if persons from the categories of Scheduled Castes, Schedules Tribes, OBC and women categories come forward with the laid down criteria, they should be given preference, has also been communicated to all Ministries as the proposals for appointment of non-official Directors on the Boards of CPSEs are initiated by them.

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Officials in the ministry say the DPE secretary had written to the MCA seeking an exemption from applicability of the ID database for PSUs. The ground was that the DPE has its own six-step process for appointment of non-official directors. However, no official exemption has been granted till date.

Despite thousands of potential candidates and over 1,800 private companies registered in the databank, not a single PSU has registered.

Ideally, the nomination and remuneration committees formed by companies are best suited to pick independent directors who understand the industry dynamics and bring value to the board, say governance experts. But the DPE and the administrative ministries are unlikely to give up their say in the process.

Further, officials point out that the DPE database was created more for convenience and did not have any legal sanction. On the other hand, the MCA database has been provided for in the law.

They suggested that after sourcing potential candidates from the much larger and diverse pool available on the IICA databank, DPE can apply its own criteria to further filter the candidates.

Niraj Gupta, head of the School of Corporate Governance and Public policy, IICA, says, "The laws of the land should be applicable to everyone equally. There should not be any carve-out created for public sector enterprises either in selection, appointment, or performance evaluation of the independent directors."

Singhvi has opened a WhatsApp group of people who have registered on the databank and is eagerly waiting to know if any of them gets a call from a PSU. They, in turn, are waiting for the deadlock to break.

(Graphics by Sadhana Saxena)

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4 COMMENTS ON THIS STORY



deo mathews

2 days ago

The author has just talked to Mr.Singhvi it seems ! Where is the counter view on why PSUs have not been able to follow the needs. What are their struggles and issues they face to fill the vacancies ? Author seems not interested in that !



Russy Master

5 days ago

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When a PSU has to pay a fine, from whose pocket is that money going? Taxpayers pockets! Knowing PSUs, they couldn't be bothered with these paltry fines. The Chairman, Board of