

Passing of Resolution by Circulation by Directors

The term "resolution" has not been specifically defined under the Companies Act 2013 ("Act"). The "resolution" refers to formal decision of a meeting on a particular item placed before the meeting. Generally, resolutions are passed at a meeting but the Act also permits passing of resolutions by directors by circulation. Except for certain specified matters, Board resolution may be passed by circulation in all the matters.

Requirements for passing of resolution by circulation:

The relevant provisions in this regard are provided in section 175 of the Act read with relevant Rules under the Act and Secretarial Standards. As per the said provisions, for passing of the resolution by circulation, the draft of the said resolution along with necessary papers are required to be circulated to all the directors, including interested directors, of the company at their addresses registered with the company either through hand delivery or by registered post or by courier or by email or by any other recognised electronic means. If the majority of the directors who are entitled to vote on the resolution give their approval then the said resolution shall be deemed to have been duly passed at a duly convened meeting of the board and have equal authority. However, if not less than one-third of the total number of directors requires that a resolution under circulation must be decided at a meeting, the chairperson shall put the resolution for consideration at a meeting of the Board.



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The aforesaid section 175 of the Act is reproduced hereunder for ready reference:

“175. Passing of resolution by circulation.- (1) No resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation unless the resolution has been circulated in the draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be, at their addresses registered with the company in India by hand delivery or by post or by courier, or through such electronic means as may be prescribed and has been approved by a majority of the directors or members, who are entitled to vote on the resolution:

Provided that, where not less than one-third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board.

(2) A resolution under sub-section (1) shall be noted at a subsequent meeting of the Board or the committee thereof, as the case may be, and made part of the minutes of such meeting.”

It may be noted in addition to compliance with the provisions of the Act, section 118(10) of the Act requires that every company shall also observe secretarial standards related to general and board meetings as issued by the Institute of Company Secretaries of India and approved by the Central Government. Hence, the requirements relating to passing of resolution by circulation as laid down under the Secretarial Standard-1 shall also to be complied with.

Secretarial Standard on Meetings of the Board of Directors (SS-1)

The requirements laid down under the provision of section 175 of the Act has also been included under SS-1. SS-1 also provides for some additional requirements which are discussed below:

- Proof of sending and delivery of the draft of the Resolution and the necessary papers shall be maintained by the company for such period as decided by the Board, which shall not be less than three (3) years from the date of the meeting.

- A note setting out the details of the proposed resolution along with all the material facts that enable the Directors to understand the meeting, scope and implications of the proposal, the nature of concern, if any, of any director in the proposal, which the director had earlier disclosed shall be circulated along with the resolution. It is pertinent to note that the note shall also indicate how a director shall signify assent or dissent to the proposed resolution and the date by which the director shall respond which shall not be more than seven (7) days from the date of circulation. In case the draft resolution is sent by speed post or by registered post or courier than an additional two (2) days shall be added for the service of the draft resolution. An interested Director shall not be entitled to vote.
- Each resolution shall be separately explained and decision of the directors shall be sought for each resolution separately. Also, every resolution shall carry a serial number.
- If the Articles of Association of the company provides for any special majority or the affirmative vote of any particular Director(s) then the resolution shall be passed only with the assent of such special majority or such affirmative vote.

Effective date of passing of the resolution by circulation

The resolution, if passed, shall be deemed to have been passed on the earlier of:

- (a) the last date specified for signifying assent or dissent by the Directors; or
- (b) the date on which assent has been received from the required majority, provided that on that date the number of Directors, who have not yet responded on the resolution under circulation, along with the Directors who have expressed their desire that the resolution under circulation be decided at a board meeting, shall not be one third or more of the total number of directors; and

shall be effective from that date, if no other effective date is specified in the resolution.

It is important to note that in case the director does not append a date of signing the circulation resolution then the date of receipt by the company of the signed resolution shall be taken as the date of signing. Also, in case the Director does not responds on or before the last date specified for signifying assent or dissent then it shall be presumed that the Director has abstained from voting.

Recording and Validity

The resolution passed by circulation shall be noted at a subsequent board meeting and the text thereof with dissent or abstention, if any, shall be recorded in the minutes of the subsequent meeting. It may be noted, passing of resolution by circulation shall not dispense with the requirement for the Board to meet at the specified frequency as per provisions of the Act.

Negative list

As per section 179(3) of the Act read with Companies (Meeting of Board and its Powers) Rules, 2015, there are a few specified resolutions which can be passed at meetings of the Board only. It means that the said resolutions can not be passed by circulation. The following are the resolutions which can not be passed by circulation:

- (a) To make calls on shareholders in respect of money unpaid on their shares.
- (b) To authorize buy-back of securities.
- (c) To issue securities, including debentures, whether in or outside India.
- (d) To borrow monies.
- (e) To invest the funds of the company.
- (f) To grant loans or give guarantee or provide security in respect of loans.
- (g) To approve financial statement and the Board's report.
- (h) To diversify the business of the company.
- (i) To approve amalgamation, merger or reconstruction.
- (j) To take over a company or acquire a controlling or substantial stake in another company.
- (k) To make political contributions.
- (l) To appoint or remove key managerial personnel (KMP).
- (m) To appoint internal auditors and secretarial auditor.

In addition to the above businesses, SS-1 also provides for an illustrative list of items which shall not be passed by circulation and shall be placed before the Board at its meeting which *inter-alia* includes the following:

- Considering the Compliance Certificate to ensure compliance with the provisions of all the laws applicable to the company.
- Purchase and sale of material tangible/intangible assets not in the ordinary course of business.
- Approve payment to Director for loss of office.
- Sale of subsidiaries.

Further, as per SS-1, an additional list of items has been provided in case of listed companies which are mentioned below:

- Approving Annual operating plans and budgets.
- Capital budgets and any updates.
- Information on remuneration of KMP.
- Show cause, demand, prosecution notices and penalty notices which are materially important.
- Fatal or serious accidents, dangerous occurrences, any material effluent, or pollution problems.
- Any material default in financial obligations to and by the company or substantial non-payment of goods sold by the company.
- Any issue, which involves possible public or product liability claims of substantial nature, including any judgement or order which, may have passed strictures on the conduct of the company or taken an adverse view regarding another enterprise that can have negative implications on the company.
- Details of any joint venture or collaboration agreement.

Transactions that involve substantial payment towards goodwill, brand equity, or intellectual property.

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