

Resolutions requiring special notice (Sec 115)

1. Legislative background

The notes on clauses to the Companies Bill, 2011 read as follows:

“Clause 115.— This clause corresponds to section 190 of the Companies Act, 1956 and seeks to provide that where a special notice is required of any resolution, notice of the intention to move such resolution is to be given by such number of members holding not less than one per cent. of total voting power or holding shares on which an aggregate sum of not less than one lakh rupees has been paid-up in such manner as may be prescribed.”

2. Resolution requiring special notice

Section 115 read with rule 23 of Companies (Management and Administration) Rules, 2014 deals with resolutions requiring special notice. Resolutions requiring special notice and special resolutions are different from each other. The former is a procedure preceding the presentation of resolution proposed by certain members for approval of members at general meeting while the latter is a type of resolution passed under section 114 of the Act. The resolution for which special notice is required may or may not be a special resolution. In general all matters in respect of which a special notice is required under the Act are ordinary resolutions.

The instances which require a special notice under the provisions of the Act are as follows:

- a) Under sub-section (4) of section 140 for appointing a person other than a retiring auditor or providing expressly that the retiring auditor shall not be reappointed.
- b) Under sub-section (2) and (5) of section 169 to remove a director and to appoint somebody in place of director so removed in the same meeting.

Further, the articles may provide for additional matters which may require special notice.

3. Notice by the requisite number of members

Where a special notice is so required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than one per cent of total voting power or holding shares on which the aggregate sum of not less than five lakh rupees has been paid-up on the date of notice. For calculating the amount paid-up on shares, only paid-up face value on shares is to be counted.

Such notice is required to be sent by members to the company not earlier than three months but at least 14 days before the date of the meeting at which the resolution is to be moved. Such period shall exclude the day on which the notice is given and the day of the meeting.

While analyzing the right of the members, it was held in *Pedley v. Inland waterways Association Ltd.* [(1977) 1 All ER 209 : 1978 Tax LR 2218 (Ch D)]. as quoted in *Ernakulam Financiers and Kuries Private Limited v. Joseph Chandy And Ors* 1998

93 CompCas 275 CLB] that “(English) Section 142 merely conferred on the members of a company the right to receive notice in the manner provided for by that section of any resolution of which special notice was required and had already been duly given, and which was to form part of the agenda to be dealt with at the relevant meeting. Section 142 did not confer on an individual member the right to compel the inclusion of a resolution in the agenda of a company meeting and the phrase in Section 142 beginning: ‘and the company shall give its members notice’ was merely part of the machinery designed to ensure that members generally, as well as the director or auditor concerned, had at least 21 days’ notice of any resolution of which special notice was required. Therefore, unless a single member was able to rely on (English) Section 140 or a provision in the articles of association of a particular company the member had no right to compel the inclusion of such a resolution in the agenda.”

4. Obligation of the company

The company is required to immediately after receipt of the notice, give its members notice of the resolution at least seven days before the meeting, exclusive of the day of dispatch of notice and day of the meeting. Such notice is required to be given in the same manner as a notice of any general meeting.

Where it is not practicable to give the notice in such manner to the members, the notice shall be published in English language in English newspaper and in vernacular language in a vernacular newspaper which have wide circulation in the State where the registered office of the company is situated. Further, such notice shall also be posted on the website, if any, of the company. The notice shall be published at least seven days before the meeting, exclusive of the day of publication of the notice and day of the meeting.

5. Punishment and Compoundability

5.1 Contravention of section: This section does not prescribe any penal provision for contravention of the section. Hence, section 450 of the Act will be applicable. Accordingly, the punishment for contravention, the company and every officer of the company who is in default shall be punishable with a fine upto Rs. 10,000, where the contravention is a continuing one then the fine shall be rupees 1,000 for every day of contravention.

5.2 Contravention of rules: As per rule 30 of Companies (Management and Administration) Rules, 2014 contravention of rules made under this section, the company and every officer of the company who is in default are punishable with a fine upto Rs.5,000, where the contravention is a continuing one then the fine shall be Rs. 500 for every day of contravention. The offenses committed under this section and rule are compoundable under section 441 of the Act.

Contents of Geeta Saar, as extracted from ICSI Premier on Company Law, is as per notified law as on 30th September, 2016.