

## Postal Ballot (Sec 110)

### 1. Legislative background

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

“Clause 110. — This clause corresponds to section 192A of the Companies Act, 1956 and seeks to provide that the Central Government may declare items of business that can be transacted only by postal ballot and also in respect of any item of business other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting may also be transacted through postal ballot.”

In order to encourage larger participation by the shareholders in the decision making of the company, the concept of participating in the decision of general body through exercising their franchise by way of postal ballot was introduced.

### 2. Meaning of postal ballot

As defined in clause (65) of section 2, “Postal Ballot” means the casting of vote by a shareholder by postal or electronic mode. “Voting by postal ballot” has been defined in Secretarial Standard- 2 as voting by ballot, by post or by electronic means. Hence, postal ballot is an alternative means of voting on the proposed businesses.

In *Wadala Commodities Ltd., In re* [[2014] Com Cas 256 (Bom)] this initiative was lauded by the Court. “I must note that in principle the apparent legislative intent in providing for postal ballots and electronic voting is not only unexceptionable but entirely salutary: it is clearly directed toward greater inclusiveness and encouraging more shareholders to vote. It would seem, although this is anecdotal and there is no empirical data before me, that in many meetings, where postal ballot or electronic voting have not been provided, the attendance of members of shareholders and members attending is very low. Sometimes, this is because a shareholder has to travel a great distance to attend the meeting or because these meetings are held at inconvenient location. Shareholders are often dispersed throughout the country and find it difficult to attend such meetings in person.”

### 3. Certain matters to be transacted by means of postal ballot

Sub-section (1) of section 110 read with rule 22 (16) provides the list of matters which are required to be transacted only by way of postal ballot by companies having more than 200 members. The matters are as follows:

1. alteration of the objects clause of the memorandum and in the case of the company in existence immediately before the commencement of the Act, alteration of the main objects of the memorandum
2. alteration of articles of association in relation to insertion or removal of provisions which are required to be included in the articles of a company in order to constitute it a private company
3. change in place of registered office outside the local limits of any city, town or village.
4. change in objects for which a company has raised money from public through prospectus and still has any unutilised amount out of the money so raised

5. issue of shares with differential rights as to voting or dividend or otherwise
6. variation in the rights attached to a class of shares or debentures or other securities
7. buy-back of shares by a company
8. appointment of a director elected by small shareholders
9. sale of the whole or substantially the whole of an undertaking of a company or where the company owns more than one undertaking, of whole or substantially the whole of any of such undertakings
10. giving loans or extending guarantee or providing security in excess of the limit specified under sub-section (3) of section 186.

OPC and other companies having members up to 200 are not required to transact the above matters through postal ballot. Further, for deciding the number of members, members are defined in clause (55) of section 2 are required to be taken into account.

#### **4. Certain matters not to be transacted by means of postal ballot**

Sub-section (1) of section 110 empowers a company to transact any business other than the prescribed businesses through postal ballot. However, the following types of businesses are not to be transacted by way of postal ballot:

- i. Ordinary business
- ii. Any business in respect of which directors or auditor has a right to be heard at any meeting.

The list of ordinary businesses is given in sub-section (2) of section 102. The following businesses transacted at annual general meeting are to be treated as ordinary businesses:

- (a) the consideration of financial statements and the board's and auditors' reports;
- (b) the declaration of any dividend;
- (c) the appointment of directors in place of those retiring;
- (d) the appointment of, and the fixing of the remuneration of, the auditors.

However above ordinary business can be transacted through e-voting process.

The auditors have a right to be heard under sub-section (1) of section 140 (with respect to removal) and under section 146 (any matter concerning him as auditor). The directors have a right to be heard under sub-section (3) of section 169 before removal from office.

#### **5. Procedure of postal ballot**

Rule 22 read with para 16.3 of Secretarial Standard- 2 provides for the procedure to be followed by the company to pass resolutions by postal ballot. The board shall identify the businesses to be transacted through postal ballot and approve the notice of postal ballot. A company secretary or any director of the company may be authorised to conduct postal ballot process and sign and send the notice. A scrutiniser who may be a company secretary in practice, a chartered accountant in practice, a cost accountant in practice, an advocate or any other person of repute who is not in the employment of the company shall be appointed by the board after

taking his prior consent. An agency for e-voting, if necessary, shall be appointed. The board shall decide the record date for reckoning voting rights and ascertaining those members to whom the notice and postal ballot forms shall be sent.

The notice, together with the ballot forms shall be sent to the members. The reply of the members is to be received within 30 days from the date of issue of notice. The report of the scrutiniser shall be submitted not later than seven days from the last date of receipt of postal ballot receipts. Based on the scrutiniser's report, the chairman or any other director authorised by him shall declare the result of the postal ballot on the date, time and venue specified in the notice, with details of the number of votes cast for and against the resolution, invalid votes and the final result as to whether the resolution has been carried or not. Such result of the voting shall be displayed on the notice board of the company at its registered office and its head office as well as corporate office, if any, if such office is situated elsewhere, and also be placed on the website of the company.

The postal ballot forms, other related papers, register and scrutiniser's report received from the scrutiniser shall be kept in the custody of the Company Secretary or any other person authorised by the Board for this purpose.

## **6. Notice and postal ballot forms**

Para 16.4 of Secretarial Standard-2 provides for notice to be sent in case of postal ballot. The Notice shall be accompanied by the postal ballot form with the necessary instructions for filling, signing and returning the same. Such Notice shall be sent either by registered post or speed post, or by courier or by e-mail or by any other electronic means at the address registered with the company. Such notice needs to be placed on the website of the company, if any. Each item proposed to be passed through postal ballot shall be in the form of a resolution and shall be accompanied by an explanatory statement.

An advertisement containing prescribed details shall be published at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district, about having dispatched the Notice and the ballot papers.

Para 16.5 of the Secretarial Standard-2 provides for postal ballot forms. Such form shall contain instructions as to the manner in which the form is to be completed, assent or dissent is to be recorded and its return to the scrutiniser. It may contain multiple items of business to be transacted.

## **7. Applicability of the provisions of voting by electronic means**

Rule 22 (15) provides that the provisions of rule 20 will apply mutatis mutandis to this rule. Para 16.2 of Secretarial Standard-2 prescribes that every company having its equity shares listed on a recognized stock exchange other than companies whose equity shares are listed on SME Exchange or on the Institutional Trading Platform and other companies which are required to provide e-voting facility shall provide such facility to its members in respect of those items, which are required to

be transacted through postal ballot. Hence, for postal ballot of such companies, voting needs to be carried out by electronic means.

The Companies (Amendment) Bill, 2016 proposes to insert the following proviso:

“Provided that any item of business required to be transacted by means of postal ballot under clause (a), may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means under section 108, in the manner provided in that section”.

## 8. Effect of assent by requisite majority

The resolution, if passed by requisite majority, shall be deemed to have been passed on the last date specified by the company for receipt of duly completed postal ballot forms or e-voting as specified in para 16.6.3 of Secretarial Standard-2.

## 9. Applicability to court-convened meetings

It was held in *Wadala Commodities Ltd., In re* [[2014] Com Cas 256 (Bombay)] that “any SEBI circulars or guidelines or notifications that make electronic voting or postal ballot the exclusive method of voting on such schemes are clearly unlawful and contrary to the intent of Sections 230/232 of the 2013 Act and of Sections 391/394 of the 1956 Act. There is no question of matters at a Court-convened meeting being decided by postal ballot “instead” of at a general meeting; the postal ballot and electronic voting may be permitted or may even be required in addition to but not in replacement of an actual general meeting.”

## 10. Punishment and Compoundability

**10.1 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.

**10.2 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 rupees 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 30<sup>th</sup> September, 2016.*