



Postal Ballot Under Companies Act, 2013 & Listing Agreement

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In the Indian scenario, postal ballot is a relatively a new concept which was introduced in the Companies Act, 1956 by insertion of a new Section, namely Section 192A through an amendment made to the said Act in year 2001. The Companies Act, 1956 contained no definition of postal ballot. However, the explanation given in Section 192A states that *“for the purpose of this section, “postal ballot” includes voting by electronic mode”*.

Companies Act, 2013 also provides for transaction of business by means of postal ballot but there are some changes in the provisions relating to postal ballot as compared to what was provided in the Companies Act, 1956. Further, the listing agreement also contains some stipulation regarding this.

In this article, an attempt has been made to highlight the provisions relating to postal ballot as contained in the Companies Act, 2013, the rules made there under and the Listing Agreement.

DEFINITION OF POSTAL BALLOT

The Companies Act, 1956 did not define the term postal ballot. However, it is defined under the Companies Act, 2013.

Section 2(65) of the Companies Act, 2013 defines postal ballot as below:

“postal ballot” means voting by post or through any electronic mode;

Even though the above definition is not very cleared, it gives a fair idea about the meaning of postal ballot and also provides clarity that the Companies Act, 2013 has recognized the medium of e-voting for the purpose of postal ballot

APPLICABILITY OF POSTAL BALLOT

Provisions regarding postal ballot are primarily contained in Section 110 of the Act read with Rule 22 of Companies (Management and Administration) Rules, 2014.

In respect of certain items of business to be transacted by certain companies, the Act mandates that the approval of members has to be sought only by means of a postal ballot. Thus the mandatory applicability needs to be understood from two angles; one from the angle of nature of item of business to be transacted and secondly from the point of view of class of the company. We list below both the dimensions as under:

Class of Companies for whom postal ballot is mandatory:

Except a One Person Company and other companies having upto 200 members, all other companies shall transact the items of business listed below only by means of voting through a postal ballot.

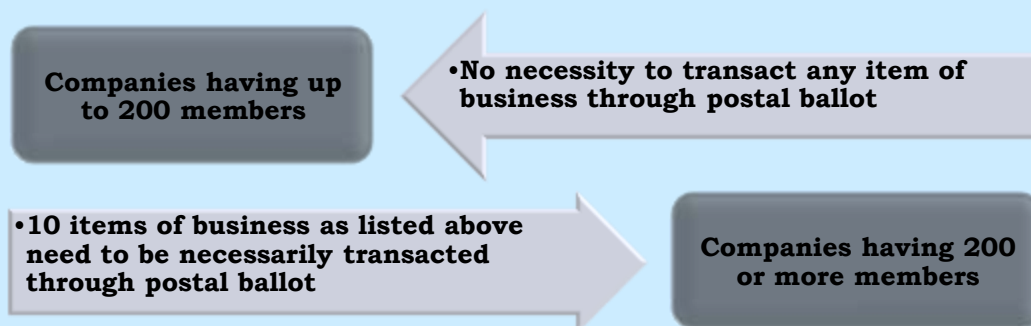
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- *The views expressed are personal views of the author and do not necessarily reflect those of the Institute.*



Items of business which need to be mandatorily transacted through postal ballot:

- (a) alteration of the objects clause of the memorandum and in the case of a company in existence immediately before the commencement of the Act, alteration of the main objects of the memorandum;
- (b) alteration of articles of association in relation to insertion or removal of provisions which, under sub-section (68) of section 2, are required to be included in the articles of a company in order to constitute it a private company;
- (c) change in the place of registered office outside the local limits of any city, town or village as specified in sub-section (5) of section 12;
- (d) change in the objects for which a company has raised money from public through prospectus and still has any unutilized amount out of the money so raised under sub-section (8) of section 13;
- (e) issue of shares with differential rights as to voting or dividend or otherwise under sub-clause (ii) of clause (a) of section 43;
- (f) variation in the rights attached to a class of shares or debentures or other securities as specified under section 48;
- (g) buy-back of shares by a company under sub-section (1) of section 68;
- (h) election of a director under section 151 of the Act;
- (i) sale of the whole or substantially the whole of an undertaking of a company as specified under sub-clause (a) of sub-section (1) of section 180;
- (j) giving loans or extending guarantee or providing security in excess of the limit specified under sub-section (3) of section 186

The mandatory applicability of postal ballot can be illustrated as under





List of items of business which cannot be transacted through postal ballot

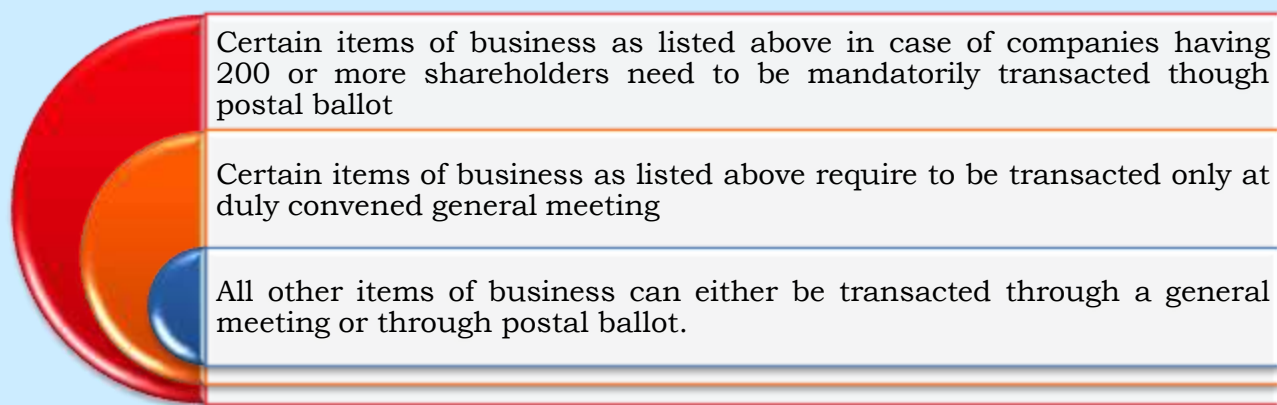
The Act also specifies certain items of business which cannot be transacted by means of postal ballot, i.e. which should be transacted only in a duly convened meeting of the members. These are –

- All items of business which are deemed as Ordinary Business at an Annual General Meeting, i.e.
 - (i) the consideration of financial statements and the reports of the Board of Directors and auditors;
 - (ii) the declaration of any dividend;
 - (iii) the appointment of directors in place of those retiring;
 - (iv) the appointment of, and the fixing of the remuneration of, the auditors;
- Any business in respect of which directors or auditors have a right to be heard at any meeting, like removal of a director or auditor etc.

All other items of business other than the aforementioned businesses can be transacted through postal ballot, instead of transacting such business at a general meeting.

If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

The position with regards to transaction of business through postal ballot/general meeting can be summarized as under:



METHOD OF VOTING THROUGH POSTAL BALLOT

The definition of postal ballot states that postal ballot means voting by post or through any electronic means. This means that a postal ballot exercise recognizes both methods of voting i.e. physical voting through post and e-voting through electronic means.



What is E-Voting?

“Voting by electronic means” or “electronic voting system” means a ‘secured system’ based process of display of electronic ballots, recording of votes of the members and the number of votes polled in favour or against, such that the entire voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralized server with adequate ‘cyber security’ [Rule 20 of companies (Management and Administration Rules), 2014]

Applicability of E-voting Process for Postal Ballot

Section 108 of the Act read with Rule 20 of Companies (Management and Administration) Rules, 2014 which provides for voting by electronic means states that certain companies have to mandatorily provide e-voting facility in case of voting at a general meeting. The said section is silent about postal ballot.

Section 110 of the Act read with Rule 20 of Companies (Management and Administration) Rules, 2014, which contains provisions dealing with postal ballot, also does not contain any clear stipulation regarding mandatory requirement of voting through electronic means in case of a postal ballot except that it is stated in Rule 20 that *“The provisions of rule 20 regarding voting by electronic means shall apply, as far as applicable, mutatis mutandis to this rule in respect of the voting by electronic means.”*

Clause 35B of the listing agreement as amended vide SEBI Circular No. CFD/POLICY CELL/2/2014, dated 17-4-2014 provides that **e-voting is mandatory in respect of all shareholders' resolutions, to be passed at General Meetings or through postal ballot. This means that in case of listed companies, e-voting facility needs to be necessarily provided both in case of convening a general meeting physically as well as resolutions passed through postal ballot process.**

As per MCA Circular No. 20/2014 dated 17.06.2014, MCA has clarified that it has been decided not to treat provisions relating to e-voting, as contained in the Companies Act, 2013, mandatory till 31.12.2014. However, SEBI has clarified that for listed companies, SEBI provisions will prevail which means e-voting will remain mandatory for listed companies effective 1-10-2014 in respect of all resolutions to be passed either at a general meeting or through postal ballot.

Recent judgement of Bombay High Court on Postal Ballot and E-Voting

The Honourable Bombay High Court in the matter of scheme of amalgamation between Wadala Commodities Limited with Godrej Industries Limited has passed a judgment on postal ballot and e-voting. The Court has observed that postal ballot and e-voting is an additional facility and cannot have the effect of dispensing with the general meeting at all. The question raised in this case was “whether in view of the provisions of Section 110 of the Companies Act, 2013 (“the 2013 Act”) and SEBI Circular dated 21st May 2013, a resolution for approval of a Scheme of Amalgamation can be passed by a majority of the equity shareholders casting their votes by postal ballot, which includes voting by electronic means, in complete substitution of an actual meeting?”

The Honourable High Court while passing its order has observed that - no meeting is required and that the shareholder must cast his vote only on the basis of the information that has been sent to him by post or email seems to me to be completely contrary to the legislative intent and spirit of the express terms of the SEBI circular and amended Listing Agreement’s Clauses 35B and 49.

The result of this discussion is :

- All provisions for compulsory voting by postal ballot and by electronic voting to the exclusion of an actual meeting cannot and do not apply to court-convened meetings. At such meetings, provision must be made for postal ballots



and electronic voting, in addition to an actual meeting. Electronic voting must also be made available at the venue of the meeting.

- The effect, interpretation and implication of the provisions of the Companies Act, 2013 and the relevant SEBI circulars and notifications, to the extent that they mandate a compulsory or even optional conduct of certain items of business by postal ballot (which includes electronic voting) to the exclusion of an actual meeting are matters that require a fuller consideration. The Central Government, through the Additional Solicitor General, and SEBI will both need to be heard. The Company Registrar shall send an authenticated copy of this order to both the learned Additional Solicitor General and to SEBI requesting them to appear before the Court when this matter is next taken up for a consideration of this issue. On a prima-facie view that the elimination of all shareholder participation at an actual meeting is anathema to some of the most vital of shareholders' rights, it is strongly recommended that till this issue is fully heard and decided, no authority or any company should insist upon such a postal-ballot-only meeting to the exclusion of an actual meeting.

Summary of Method of Voting in case of Postal Ballot

Listed Companies

- E-voting - Mandatory
- Voting through postal ballot paper - Mandatory

Unlisted Companies

- E-voting - Optional
- Voting through postal ballot paper - Mandatory

PROCEDURE FOR CONDUCTING POSTAL BALLOT

1. Passing of Board resolution for the purpose of approval of draft notice of postal ballot and other related documents and appointment of scrutinizer and appointment of agency to provide e-voting platform in case e-voting facility is being provided.
2. Printing of Postal ballot notice and postal ballot form and other related documents for dispatch to those shareholders to whom documents have to be sent by physical means.
3. Completion of dispatch of postal ballot notice and related documents to all shareholders. As per Rule 20(2), the notice shall be sent either (a) by Registered Post or speed post, or (b) through electronic means like registered e-mail id or (c) through courier service for facilitating the communication of the assent or dissent of the shareholder to the resolution.
4. The Share holders are required to give their assent or dissent in writing within a period of 30 days from the date of dispatch of the notice. The assent or dissent received after thirty days from the date of issue of notice shall be treated as if reply from the member has not been received.
5. Posting of the notice of postal ballot on the website of the company forthwith after the notice is sent to the members and such notice shall remain on such website till the last date for receipt of the postal ballots from the members.

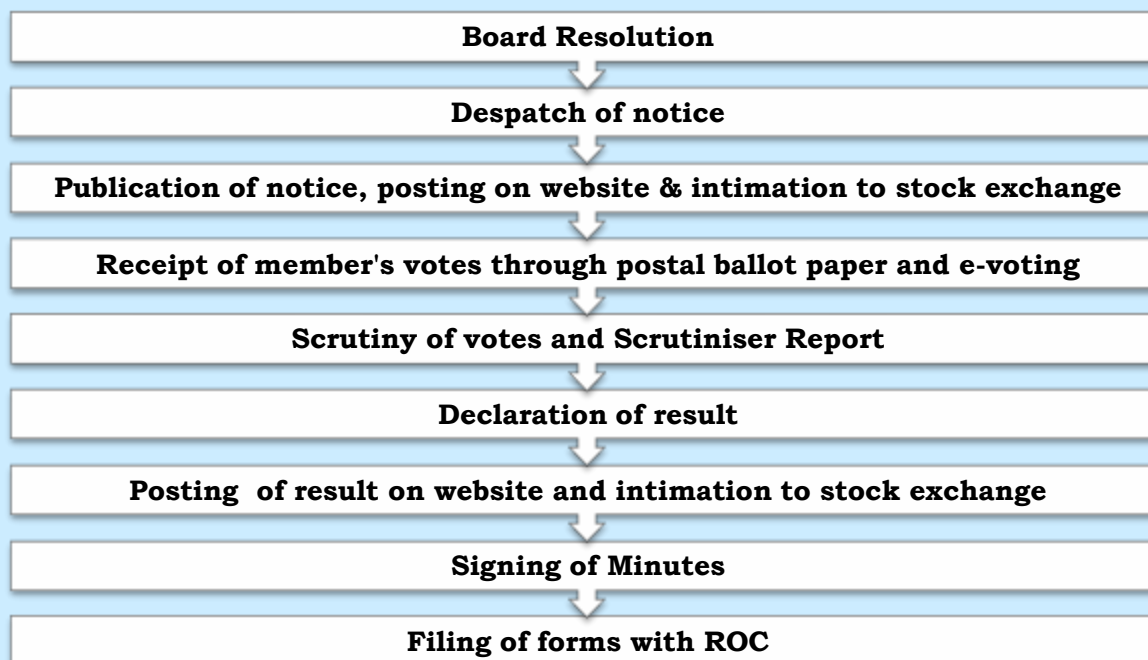


6. Intimating the stock exchanges where the securities of the company are listed regarding completion of dispatch of postal ballot notices.
7. Publication of an advertisement at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of 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 ballot papers and specifying therein, inter alia, the following matters, namely:-
 - statement to the effect that the business is to be transacted by postal ballot which includes voting by electronic means;
 - the date of completion of dispatch of notices;
 - the date of commencement of voting;
 - the date of end of voting;
 - the statement that any postal ballot received from the member beyond the said date will not be valid and voting whether by post or by electronic means shall not be allowed beyond the said date;
 - a statement to the effect that members, who have not received postal ballot forms may apply to the company and obtain a duplicate thereof; and
 - contact details of the person responsible to address the grievances connected with the voting by postal ballot including voting by electronic means.
8. Postal ballot received back from the shareholders shall be kept in the safe custody of the scrutinizer and after the receipt of assent or dissent of the shareholder in writing on a postal ballot, no person shall deface or destroy the ballot paper or declare the identity of the shareholder.
9. On closure of the voting period, the scrutinizer shall assess the result of the voting, both through physical ballot papers and through e-voting and shall maintain a register either manually or electronically to record the assent or dissent received, mentioning the particulars of name, address, folio number or client ID of the shareholder, number of shares held by them, nominal value of such shares, whether the shares have differential voting rights, if any, details of postal ballots which are received in defaced or mutilated form and postal ballot forms which are invalid.
10. The scrutinizer shall submit his report as soon as possible after the last date of receipt of postal ballots but not later than seven days thereof.
11. The results shall be declared by placing it, along with the scrutinizer's report, on the website of the company.
12. Intimating stock exchange where the securities of the company are listed regarding result of postal ballot.
13. If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.
14. The postal ballot and all other papers relating to postal ballot including voting by electronic means, shall be under the safe custody of the scrutinizer till the chairman considers, approves and signs the minutes and thereafter, the scrutinizer shall return the ballot papers and other related papers or register to the company who shall preserve such ballot papers and other related papers or register safely.



15. The minutes of resolutions passed through postal ballot have to be recorded and maintained as per the requirements specified in Section 118 and 119 of the Act read with the Rules made there under.
16. Relevant forms need to be filed with the Registrar of Companies for intimating passing of resolutions by the members as applicable.

PROCEDURE OF POSTAL BALLOT AT A GLANCE



The postal ballot provisions prescribed under the Companies Act, 2013 seem to be in line with the other efforts made by the legislature towards enhancement of stakeholder participation and activism. In respect of certain items of business for which member's approval is required, the Act mandates that the approval has to be sought only by means of a postal ballot whereas for certain items of business where an opportunity of being heard has to be given to either a director or auditor it has been prescribed to transact those business only in a duly convened general meeting. The listing agreement further mandates that in respect of all share holders resolution, whether to be passed through postal ballot or a general meeting, e-voting facility has to be mandatorily provided.