Due to pandemic situation the companies are not able to hold the board meetings and few decisions of the board are so urgent that the same need to be considered urgently. The companies may also hold the Board meetings through video conferencing, however, in case of urgency, the board resolutions can be passed by way of resolution by circulation.

This note is an attempt to explain the necessary provisions of the Companies Act in relation to the passing of board resolution through circulation.

**List of matters which cannot be passed through a resolution by circulation**

1. **List of powers as per Section 179(3) read with Rule 8 of Companies (Meeting of Board & its Power) Rules, 2014**

1. to make calls on shareholders in respect of money unpaid on their shares;

2. to authorise buy-back of securities under section 68;

3. to issue securities, including debentures, whether in or outside India;

4. to borrow monies;

5. to invest the funds of the company;

6. to grant loans or give guarantee or provide security in respect of loans;

7. to approve financial statement and the Board’s report;

8. to diversify the business of the company;

9. to approve amalgamation, merger or reconstruction;

10. to take over a company or acquire a controlling or substantial stake in another company;

11. Any other matter which may be prescribed i.e. items prescribed in Rule 8 of Companies (Meeting of Board & its Powers) Rules, 2014, which are as follows:

(i) to make political contributions;

(ii) to appoint or remove key managerial personnel (KMP);

(iii) to appoint internal auditors and secretarial auditor.

1. **The Secretarial Standards (SS1) as prescribed by the Institute of Company Secretaries of India provides for illustrative list of items of business which *shall not be passed by circulation* and shall be placed before the Board at its Meeting (SS1-1.3.8)**

***I. General Business Items***

* Noting minutes of meetings of audit committee and other committees.
* Considering the compliance certificate to ensure compliance with the provisions of all the laws applicable on the company.
* Specifying the list of laws applicable specifically to the company.
* Approving financial statements and the board’s report. (Section 179)
* Appointment of secretarial auditors and internal auditors.

***II. Specific Items***

* Borrowing money otherwise than by issue of debentures.
* Investing the funds of the company.
* Granting loans or giving guarantee or providing security in respect of loans.
* Making political contributions.
* Making calls on shareholders in respect of money unpaid on their shares.
* Approving remuneration of the managing director, whole-time director and manager
* Appointment or removal of KMP.
* Appointment of a person as a managing director/manager in more than one company.
* In case of a public company, the appointment of Director(s) in casual vacancy subject to the provisions in the Articles of the company.
* According sanction for related party transactions which are not in the ordinary course of business or which are not on arm’s length basis.
* Sale of subsidiaries
* Purchase and sale of material tangible/intangible assets not in the ordinary course of business.
* Approving payment to the director for loss of office.
* Items arising out of separate meeting of the independent directors, if so decided by the independent directors.

Accordingly, if the item to be decided urgently is not enlisted above, the same can be passed through circulation by following the below mentioned procedure.

Section 175 (1) of the Companies Act, 2013 states the following provisions;

* + The resolution has to be circulated in draft, together with the necessary papers, if any,
  + The resolution has to be circulated to all the directors, or members of the committee, as the case may be,
  + The resolution has to be circulated at Directors’ 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
  + The resolution has to be approved by a majority of the directors or members, who are entitled to vote on the resolution

**Restriction**

If 1/3rd (one-third) of the total number of directors (or not less than 1/3rd of the total number of directors) of the company for the time being feel that or require that any such resolution under circulation must be decided at a meeting, the said resolution shall be required to be considered only at the duly convened Board meeting

**Process of confirmation of passing of resolution**

Provisions of Table F to the *Companies Act, 2013* (in case of company limited by shares), provides that a resolution in writing, signed by all the members of the Board, or of a committee thereof, for the time being entitled to receive Notice of the Board, or committee shall be valid or effective, as if it had been passed at the Meeting of the Board or committee duly convened or held.

As per this provision, where the resolution is signed by all the directors of the Board, the same can be treated to be passed at the Board Meeting.

Rule 5 of the Companies (Meeting of the Board and Its Powers) Rules, 2014 provides that, a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include E-mail or fax.

**Noting of Passed Resolution at the consequent Board meeting**

Where the resolution by circulation is passed by majority it is required to be noted in the subsequent meeting of the Board or the committee thereof, as the case may be, and made part of the minutes of such meeting (sec 175 (2)).

**Provisions of the Secretarial Standard (SS1)**

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| --- | --- |
| **1** | **Authority for circular resolution (6.1.)**  **Any one of the following can decide whether the item to be discussed through a resolution by circulation.**   * The Chairman of the Board or in his absence, * the Managing Director or in his absence, * any Director other than an Interested Director, |
| **2** | **Requirement of majority of 1/3rd of directors for circulation of a resolution (6.1.2)**  In case the 1/3rd (i.e. not less than one-third) of the total number of Directors for the time being require that the resolution under circulation should be decided at a Board Meeting, then the Chairman shall put the resolution for consideration at a meeting of the Board, instead of circulation of the same.  Calculation of the 1/3rd Number:  While calculating such 1/3rd number, the interested directors shall not be excluded for the purpose of determining the total number of directors. |
| **3** | **Procedure (6.2)**  (i) A resolution proposed to be passed by circulation shall be sent in draft, together with the necessary papers, individually to all the Directors including Interested Directors on the same day.  (ii) The draft of the resolution to be passed and the necessary papers shall be circulated amongst the Directors by hand, or by speed post or by registered post or by courier, or by e-mail or by any other recognized electronic means.  (iii) The draft of the resolution and the necessary papers shall be sent to the postal address or e-mail address registered by the Director with the company or in the absence of such details or any change thereto, any of the addresses appearing in the Director Identification Number (DIN) registration of the Director.  (iv) 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 years from the date of the meeting.  (v) Each business proposed to be passed by way of resolution by circulation shall be explained by a note setting out the details of the proposal, relevant material facts that will enable the Directors to understand the meaning, scope and implications of the proposal, the nature of concern or interest, if any, of any Director in the proposal, which the Director had earlier disclosed and the draft of the resolution proposed.  (vi) The note shall also indicate how a Director shall signify assent or dissent to the resolution proposed and the date by which the Director shall respond.  (vii) Each resolution shall be separately explained.  (viii) The decision of the Directors shall be sought for each resolution separately.  (ix) Not more than (7) seven days from the date of circulation of the draft of the resolution shall be given to the Directors to respond and the last date shall be computed accordingly.  (x) An additional two days shall be added for the service of the draft resolution, in case the same has been sent by the company by speed post or by registered post or by courier. |
| **4** | **Recording (6.4)**  Resolutions passed by circulation shall be noted at the subsequent meeting of the Board and the text thereof with dissent or abstention, if any, shall be recorded in the minutes of such meeting |
| **5** | **Validity (6.5)**  Passing of resolution by circulation shall be considered valid as if it had been passed at a duly convened meeting of the Board.  This shall not dispense with the requirement for the Board to meet at the specified frequency. |