

# Note

## Postal Ballot process- a primer

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Vinod Kothari & Company  
November 20, 2012

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### Note

Section 192A of the Companies Act, 1956 (the Act) relates to ‘Passing of Resolutions by Postal Ballot’ which was inserted by the Companies (Amendment) Act, 2000.

For greater clarity, the Ministry of Corporate Affairs (“MCA”) in its notification vide G.S.R 337 (E) dated May 10, 2001 in exercise of its powers conferred u/s 192A read with Section 642 of the Act promulgated the *Companies (Passing of the Resolution by Postal Ballot) Rules, 2001* (“Rules”) . This was later replaced by a notification vide G.S.R. 419 (E) dated May 30, 2011.

#### Applicability:

The provisions of Section 192A are applicable to only a **listed company**. Thus, the Rules are also applicable only to a listed company. However, in case any other type of company wants to opt for voting by postal ballot it can do so keeping the Rules as a benchmark.

#### Businesses to be transacted:

The businesses in which the resolution shall be passed compulsorily through postal ballot by a listed company are reproduced below:

- i. alteration in the Object Clause of Memorandum;
- ii. alteration of Articles of Associations in relation to insertion of provisions defining private company;
- iii. buy-back of own shares by the company under sub-section (1) of section 77A;
- iv. issue of shares with differential voting rights as to voting or dividend or otherwise under sub-clause (ii) of clause (a) of section 86;
- v. change in place of Registered Office outside local limits of any city, town or village as specified in sub-section (2) of section 146;
- vi. sale of whole or substantially the whole of undertaking of a company as specified under sub-clause (a) of sub-section (1) of section 293;
- vii. giving loans or extending guarantee or providing security in excess of the limit prescribed under sub-section (1) of section 372A;
- viii. election of a director under proviso to sub-section (1) of section 252 of the Act
- ix. variation in the rights attached to a class of shares or debentures or other securities as specified under section 106

The items referred to above are *not exhaustive in nature* i.e. a listed company is free to transact other business also through postal ballot. However, this cannot override the other provisions of the Act. Certain businesses have to be compulsorily transacted in a properly convened general meeting of the company being:

- i. the consideration of the accounts, balance-sheet and the reports of the Board of Directors and auditors
- ii. the declaration of a dividend



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- iii. the appointment of directors in the place of those retiring
- iv. the appointment of, and the fixing of the remuneration of, the auditors
- v. items in respect of which directors/ auditors have a right to be heard at the meeting (when there is a notice for their removal)

#### **Businesses to be transacted through postal ballot according to Guidance Note on Passing of Resolutions by Postal Ballot (“Guidance Note”)**

The Guidance Note by ICSI prescribes that, apart from the business provided in the Rules, the following shall also be transacted through postal ballot:

- i. Investment by way of acquisition, subscription, purchase or otherwise of the securities of any other body corporate in excess of the limits in Section 372(1) of the Act.
- ii. Leases or creation of mortgages and charges by companies, where such mortgages or charge confers on the other party right to take over the business of the undertaking in specified circumstances. [sec 292]

Apart from this, the following shall also be transacted through postal ballot:

<b>Applicable Regulations</b>	<b>Provision</b>
Clause 6 of the SEBI (Issue of Sweat Equity) Regulations, 2002	In case sweat equity shares is offered to promoters of a company, voting through postal ballot can also be adopted.
Clause 8 of SEBI (Delisting of Equity Shares) Regulations, 2009	If company opts to delist its shares voluntarily and provides an exit opportunity, then it needs to take prior approval of its shareholders through postal ballot. The Special Resolution in this case shall be taken to be passed only if the vote for the resolution by the public shareholders is two times the vote cast against it
Securities And Exchange Board Of India (Issue of Capital and Disclosure Requirements) Regulations, 2009	The following shall be transacted through postal ballot: a. Consent of 75% of the holders of convertible debt instruments approving the rollover of non-convertible portion of partly convertible debt instruments without any change in interest, whose value exceeds fifty lakh rupees (Regulation 21).



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	<p>b. Postal ballot is also required for SME related matters.</p>
Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011	<p>The following are prescribed:</p> <ul style="list-style-type: none"><li>a. Acquisition of shares of a target company pursuant to scheme of Corporate Debt Restructuring scheme of the Reserve Bank of India, provided that if the scheme is approved through postal ballot, then it shall be exempt from the requirement of making an open offer (Regulation 10).</li><li>b. Increase in voting rights in target company pursuant to buy back if the shareholders vote through postal ballot (Regulation 10).</li><li>c. In case of death or some other exigency of any director during the period of competing offers, then the vacancy can be filled subject to approval of shareholders through postal ballot (Regulation 24).</li><li>d. If the target company or its subsidiary is required to alienate its assets despite the same being not mentioned in the detailed public statement, the same has to be consented to by the shareholders through postal ballot and the notice for the same should contain reasons for the same (Regulation 25).</li><li>e. During the offer period, the target company, unless approval of shareholders is granted through postal ballot, not affect any material borrowings, alienate any material assets, among others (Regulation 26).</li></ul>

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The following is the sequence of events to be followed for transacting through postal ballot:

Particulars	Time frame
<p>Draft Notice u/s 192A.</p> <p>The Notice shall consist of the following:</p> <ol style="list-style-type: none"> <li>a) Whether the company is providing voting through postal ballot or through e-mode, if the company is opting for e-voting, then the process and manner provided by the agency shall be clearly mentioned.</li> <li>b) The resolution proposed to be passed in full along with whether it is an Ordinary/ Special Resolution.</li> <li>c) Instructions containing the following, <i>inter alia</i>: <ul style="list-style-type: none"> <li>• Unsigned postal ballot forms shall be rejected</li> <li>• Last date in clear terms for receipt of postal ballot forms.</li> <li>• Shareholder can request for duplicate postal ballot form and the same should reach the company duly filled up by the last date.</li> <li>• Cut off date for reckoning the voting rights on the paid up value of shares registered in the name of the shareholder.</li> </ul> </li> <li>d) Explanatory Statement u/s 173(2)</li> </ol>	NA
<p><i>The Rules 2011 clearly specify that notice can be sent through Registered AD or through any other secured mode of posting as provided by the Department of Post. With the discontinuance of “Under Certificate of Posting”, these are the only possible methods of sending notices to shareholders u/s 53 of the Act. Alternatively, companies also have the option of opting for electronic mode of sending notices, which is yet to become a comprehensive alternative as most shareholders do not have the requisite infrastructure or acumen for the same.</i></p>	
Obtain consent of the scrutinizer	NA
Intimate the Stock Exchange of the date of BM along with the agenda	Atleast 7 days before the date of BM
<p>Convene a BM and pass a resolution containing the following necessarily:</p> <ol style="list-style-type: none"> <li>1. Approve draft resolution</li> <li>2. Authorize scrutinizer</li> <li>3. Approve <a href="#">List of items to be contained in the calendar of events</a></li> <li>4. Authorize MD/WTD and CS to complete all postal ballot related process, including affixing of DSC as required</li> </ol>	NA

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Also decide on the record date.	
<p><b>Note:</b></p> <ul style="list-style-type: none"> <li>• <i>It has been seen that certain companies pass resolution in this behalf over a period of time. Companies treat the Board Resolution to be passed only after the Chairman and the Secretary are authorized to take care of the proceedings and calendar of events is decided. This creates problem in deciding on the actual date of passing the BR. It is thus suggested that, in the BM in which MD and CS are authorized, the entire resolution be passed again so as to avoid any confusion in the dating of the resolution in the postal ballot form</i></li> <li>• <i>Companies can also pass resolution through a circular resolution and adopt the same in the next BM. The date on the form in this case would be the date of passing of the circular resolution.</i></li> </ul>	
Inform the Stock Exchange about the proceedings of the BM and consent granted	Within 15 minutes of the end of the BM.
File Form 61 with RoC and attach: 1. Certified true copy of BR 2. Calendar of events	Within 7 days of holding of BM
Print notice, postal ballot forms and arrange for self addressed envelopes	This depends on the number of shareholders of the company. Should not take more than 2 weeks.
Arrange for dispatch of notices	Should be completed within 2-3 days
Obtain a certificate of posting from the post office for records purpose However since the Rules, 2011 talk about secured mode of posting other than regd post so in our opinion either regd post/speed post will be considered secured mode of posting	Within 2-3 days of dispatch.
Issue notice in a newspaper circulated throughout India in English and in the vernacular language of the State containing the following details: 1. Date of completion of dispatch of notice 2. Date of commencement of voting through postal ballot or by e-voting ( <i>should be the same as above</i> ) 3. Date of end of voting through postal ballot or e-mode ( <i>within 30 days of the dispatch</i> ) 4. Postal ballot received beyond the said date shall not be valid.	Within a day or two after the completion of dispatch

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<p>5. Members may apply for a duplicate in case of non-receipt of the postal ballot.</p> <p>6. Date of declaration of result.</p>	
<p><i>By allowing postal ballot process to be also conducted in the electronic form, it is no longer strictly postal. However, the decision to allow e-voting through postal ballot has been welcomed by the industry as it is cost effective.</i></p>	
<p>Obtain the list of shareholders along with their folio no.s and specimen signature for the purpose of scrutiny from the RTA</p>	<p>Anytime in the interim</p>
<p>Last date for receipt of notice</p>	<p>30 days from the date of dispatch of notice.</p>
<p>Ensure to mention clearly the serial no and date of receipt on the ballots.</p>	<p>1. This is to be done as and when the postal ballots are received. Separate register to be maintained for this purpose.</p> <p>2. Also clearly make note of the postal ballots received after the last date.</p>
<p>Hand over the postal ballots to the Scrutinizer along with the list of shareholders, folio no.s and specimen signature.</p>	<p>In a day or two of the after the last date of completion of the receipt of the ballots</p>
<p>The Scrutinizer to maintain a register containing the following details:</p> <ol style="list-style-type: none"> <li>1. Consent or otherwise received</li> <li>2. Name of the shareholder</li> <li>3. Address</li> <li>4. Folio no.</li> <li>5. Number of share and nominal value of shares</li> <li>6. Whether shares have voting, differential or non-voting rights</li> <li>7. Postal ballots received in defaced or mutilated form</li> <li>8. Postal ballots rejected because of some discrepancy like signature mis match.</li> </ol> <p>Report to be submitted to the Chairman of the company.</p>	<p>To be submitted within 2-3 days of the handing over of the postal ballots.</p>
<ol style="list-style-type: none"> <li>1. Result to be announced at the Registered Office of the company prominently on the Notice Board.</li> <li>2. Stock Exchange to be also intimated along with details as specified under Clause 35A</li> </ol>	<p>The day after receiving Scrutinizer's Report.</p>

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<i>The date of passing of the resolution shall be the date on which the Chairman declares the result.</i>	
Place an advertisement in a newspaper declaring the result	Within 1-2 days of declaration of the result
File Form 23 with the ROC and attach the Report.	Within 30 days of passing of the resolution
Place the result in the next BM for the Board to take note of the same.	Next BM.
Handing over of the postal ballot papers by the Scrutinizer to the Chairman	After signing of the Minutes.
The next annual report of the company shall contain the following details: 1. Whether any special resolution passed last year through postal ballot – details of voting pattern 2. Person who conducted the postal ballot exercise	NA

### List of items to be contained in the calendar of events

1. Holding of BM for according consent by the Board
2. Date of appointment of scrutinizer
3. Filing of Form 61
4. Date of dispatch of notice of meeting
5. Date of completion of dispatch of notice
6. Date of advertisement in newspaper
7. Last date for receipt of postal ballot papers
8. Date of declaration of result
9. Date of filing of result with ROC in Form 23.