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SS – 2 : Analysis of E-Voting Provisions

- The notification of the Secretarial Standards in the Official Gazette has been one of the most significant achievements of the ICSI. The provisions relating to e-voting and remote e-voting have been analyzed here and the aspects discussed include the applicability, contents of notice of meeting, agenda items to be approved by the Board of Directors, provisions relating to conduct of e-voting and provisions relating to Scrutiniser's Report and declaration of results.

INTRODUCTION

The drafting of the Secretarial Standards, MCA's approval under section 118(10) of the Companies Act, 2013 and their notification in Official Gazette have been very important and significant events for the Institute of Company Secretaries of India ('ICSI'). It is a matter of pride for every CS, as the Secretarial Standards, which were earlier adopted voluntarily by India Inc., have now received the desired statutory recognition. To add further to our pride, India is the first and the only country to adopt the Secretarial Standards.

SS-1 relates to Meetings of the Board of the Directors and SS-2 relates to the General Meetings. The provisions of Electronic Voting ('e-voting') and remote e-voting as laid down in SS – 2 have been explained in this article and the enhanced role of the Company Secretary has also been brought to light.

IMPORTANCE OF SECRETARIAL STANDARDS

Secretarial Standards assist / supplement (and not supplant) in

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implementation of the extant company law regulation. Wherever there are operational issues in practical implementation of the company law provision, i.e. where there is no precise solution in Companies Act or Rules, the Secretarial Standards provide adequate guidance to corporates and professionals – for ensuring compliance. The Secretarial Standards reduce the ambiguity in law and adopt the best practices of industry. For quite a few years, the adoption of the Secretarial Standards was voluntary but now due





➤ The broad objective of Secretarial Standard – 2 is to ensure that members of a company receive the Notice of the meeting within prescribed time, the Notice of the general meeting contains particulars required by a member for deciding whether or not to vote for / against the resolution, members have proper opportunity to attend the general meeting, vote with or without attending the meeting physically either for / against the resolution, proper counting of the votes for the purpose of declaration of the voting results, the conduct of general meeting in a fair manner, and the proceedings at the meeting are recorded in the minutes of the meeting.

to the new provisions in the Companies Act, 2013, the Secretarial Standards have got the much required statutory sanctity.

Secretarial Standards do not form parallel / conflicting regulatory framework, but they ensure smooth compliance of the regulatory framework. Also, in the notified Secretarial Standards, there is a specific mention that it is in conformity with the Companies Act, 2013 and if on account of any subsequent change in the Act, the particular standard (or part thereof) becomes inconsistent, the provisions of Act shall prevail.

VALUE-ADDITION ROLE OF THE COMPANY SECRETARY

The role of the Company Secretary has been significantly enhanced and widened due to the introduction of the new Companies Act and now due to the notification of the Secretarial Standards.

Over a period of time, there has been substantial change in the way the Indian companies operate, due to change in regulatory requirements and governance norms, introduction of dynamic technology, stakeholders' awareness, comprehending the impact of non-financial issues on financial performance and sustainability. This is one of the reasons for introduction of Secretarial Standards in India by ICSI.

Company Secretary is the vital link between the top management

and rest of the organisation. Due to the statutory recognition of the SS-1 and SS-2, the overall responsibility of company secretary has significantly increased.

The Secretarial Standards prescribe the activities for good corporate conduct and practices, and Company Secretary in employment is required to establish an appropriate mechanism for its implementation in the organisation. Further, the Company Secretary in practice is under obligation to verify and report the good corporate conduct and practices in its report in Form No. MR-3. Since, the Secretarial Standards are applicable to all companies, the companies where company secretary is not appointed or where Secretarial Standard is not applicable, the practicing company secretary (who is appointed as consultant to the company) has to ensure successful implementation of the Secretarial Standards. Such implementation is something very unique to our profession and also the corporate world. The checklist for convening and conducting the Board Meetings and General Meetings will undergo significant change, when the implementation of the Standards commence from July 1, 2015.

OVERVIEW OF SECRETARIAL STANDARD – 2

The broad objective of Secretarial Standard – 2 is to ensure that members of a company receive the Notice of the meeting within prescribed time, the Notice of the general meeting contains particulars required by a member for deciding whether or not to vote for / against the resolution, members have proper opportunity to attend the general meeting, vote with or without attending the meeting physically either for / against the resolution, proper counting of the votes for the purpose of declaration of the voting results, the conduct of general meeting in a fair manner, and the proceedings at the meeting are recorded in the minutes of the meeting.

Therefore, SS – 2 covers all aspects relating to general meeting, i.e. contents of notice of general meeting to maintaining proper records of the minutes of the general meeting.





BASICS OF 'E-VOTING' PROVISIONS

The phrase 'voting by electronic means' is defined in the Companies (Management & Administration) Rules, 2014 and the SS – 2 as to include 'remote e-voting' and voting at the general meeting through an electronic voting system which may be the same as used for remote e-voting.

'Electronic voting system' means a secured system-based process of display of electronic ballots, recording votes of members and number of votes polled in favour / against in such a manner that the entire voting exercised by electronic means gets registered and counted in electronic registry.

The concept of 'remote e-voting' has been included by amending the Companies (Management & Administration) Rules, 2014. 'Remote e-voting' means the facility of casting votes by a member using an electronic voting system from a place other than venue of a general meeting. In spite of being the latest MCA amendments, the same has been immediately captured by the SSB and included in the Secretarial Standards.

APPLICABILITY OF E-VOTING

In accordance with the Companies (Management & Administration) Rules, 2014 (herein after referred to as 'Rules') and the SS – 2, following companies are under obligation to provide e-voting facility to its Members for exercising their voting rights:

- (1) Every company having its equity shares listed on recognized stock exchange (with an exception for the companies whose equity shares are listed on SME Exchange or on Institutional Trading Platform);
- (2) Companies having not less than 1,000 Members.

Therefore, unlisted public companies having more than 1,000 members and listed companies (irrespective of number of members) are under obligation to provide e-voting facility. The same applicability criteria extends to the voting through postal ballot.

NOTICE OF THE MEETING

Modes of sending notice of general meeting

The Rules prescribe the mode of sending notice of General Meeting for the companies providing facility of e-voting, which include: (i) registered post or (ii) speed post or (iii) courier or (iv) e-mail. The SS – 1 clarifies that 'ordinary post' shall not be the prescribed mode of sending notice of General Meeting.

Prescribed contents of the Notice of General Meeting

- (1) The Notice shall contain information about the procedure of remote e-voting / e-voting, availability of the facility and provide necessary information thereof to enable them to access it.
- (2) The Notice shall also state that company is providing remote e-voting / e-voting facility and that the business may be transacted through such voting, and clearly describe that remote e-voting procedure and the procedure of voting at General Meeting by members who do not vote by remote e-voting.
- (3) The Notice shall clearly specify date and time of commencement and end of remote e-voting. It shall also contain a statement that at the end of remote e-voting period, the facility shall forthwith be blocked.
- (4) The Notice shall include the contact details of the official responsible to address the grievances connected with voting by electronic means, shall also be part of notice.
- (5) It shall specify that any member, who has voted by remote e-voting, cannot vote at the general meeting.
- (6) The Notice shall also mention the mode of declaration of the results of e-voting, cut-off date as on which right of voting of members shall be reckoned and state that a person who is not a Member as on the cut-off date should treat the Notice for information purposes only.
- (7) The Notice of general meeting shall provide the details about the login ID and the process and manner for generating or receiving the password and for casting of vote in a secured manner.

Agenda items to be approved by the Board of Directors

In accordance with the Secretarial Standards – 2, the board of directors of the company is under obligation to approve the following business agenda for providing the e-voting facility:

- (1) Appointment of one or more scrutinisers for e-voting or the ballot process.
- (2) Appointment of an Agency.
- (3) Deciding the cut-off date for the purpose of reckoning the names of Members who are entitled to Voting Rights.
- (4) Authorising the Chairman or in his absence, any other Director to receive the scrutiniser's register, report on e-voting and other related papers with requisite details.

Such provision is not apparent in the Rules; however, for effective approval, Secretarial Standard – 2 provides for the necessary approval required from the Board of Directors. The above mentioned points are relevant for company secretaries / corporate



secretarial department of the companies for the purpose of preparing board meeting related documents (like: drafting notice, agenda and resolutions) by including the requisite content.

Provisions relating to conduct of voting, e-voting & quorum

Following provisions have been prescribed by the Secretarial Standards for the purpose of regulating and providing some detailed disclosures for the conduct of voting, e-voting & quorum:

- (1) Company providing e-voting facility to its members, shall also put every resolution to vote through ballot process at the meeting.
- (2) The company shall, at the meeting, put every resolution (except a resolution which has been put to Remote e-voting), to vote on a show of hands at the first instance, unless a poll is validly demanded.
- (3) Every company providing e-voting facility shall offer such facility to all Members, irrespective of whether they hold shares in physical form or in dematerialised form.
- (4) The facility for remote e-voting shall remain open for not less than 3 days. The voting period shall close at 5 P.M. on the day preceding the date of the General Meeting.
- (5) Members who have voted by remote e-voting have the right to attend the General Meeting. The presence of such members shall be counted for the purpose of quorum.
- (6) 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.

Provisions relating to Scrutiniser's Report & declaration of results

Following are the provisions provided in the Secretarial Standards, with respect to the provisions relating to Scrutiniser's Report & declaration of results:

- (1) Based on the scrutiniser's report received on remote e-voting and voting at the Meeting, the Chairman or any other Director so authorised shall countersign the scrutiniser's report and declare the result of the voting forthwith with details of the number of votes cast for and against the Resolution, invalid votes and whether the resolution has been carried or not.
- (2) The result of the voting, with details of the number of votes cast for and against the resolution, invalid votes and whether the resolution has been carried or not shall be displayed on the notice board of the company at its registered office, head office & the corporate office, if any. This provision

with respect to the display on notice board provided in the Secretarial Standard is in addition to displaying the same on company's website, if any, and of the Agency, immediately after declaration of results. The later part is provided in the Rules and the Secretarial Standard – 2 also.

- (3) The Resolution, if passed by a requisite majority, shall be deemed to have been passed on the date of the relevant General Meeting.
- (4) The scrutinisers' register, report and other related papers received from the scrutiniser(s) shall be kept in the custody of the Company Secretary or any other person authorized by the Board for this purpose.
- (5) For the resolutions passed by e-voting or postal ballot, a brief report on e-voting or postal ballot conducted including the resolution proposed, result of voting and the summary of the scrutiniser's report shall be recorded in the minutes book and signed by the Chairman (or in the event of death or inability of the Chairman, by any Director duly authorised by the Board for the purpose) within 30-days from the date passing of resolution by e-voting or postal ballot. This provision mentioned in Secretarial Standard – 2 and not in the rules, ensures logical and thorough compliance of the provisions.

Prohibition on resolution withdrawal & its modification

The Secretarial Standard state that the resolutions for items of business which are likely to affect the market price of the securities of the company shall not be withdrawn. However, in accordance with the Secretarial Standards and Rules under the Companies Act, any resolution proposed for consideration through e-voting shall not be withdrawn.

Secretarial Standard clarifies that no modification shall be made to any resolution which has already been put to vote by remote e-voting before the meeting.

CONCLUSION

The Secretarial Standards have not only covered aspects where there are no obvious and apparent provisions in the Companies Act and Rules made there under but also protected shareholders' fundamental right of voting following the governance principles. Such provisions in the Secretarial Standards have been incorporated after exhaustive discussion within the SSB about the practical issues faced by its members in conducting e-voting. One ought not term such provisions in Secretarial Standards as 'over-compliance' but should term it as the guidance provided by ICSI for ensuring smooth compliance. CS