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Analysing MCA's framework for conducting members' meetings through audio-visual means



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Under the Companies Act, 2013 (the Act), there is a provision for conducting board meeting through video-conferencing (VC) or other audio-visual means (OAVM). However, there is no provision under the Act that allows conducting of members meeting through VC or OAVM. In view of current extra-ordinary circumstances due to the pandemic caused by COVID-19 that requires social distancing, MCA has issued a framework for conducting members' meeting through VC or OAVM. This article is an analysis of the framework and some practical issues that companies will come across while implementing the said provisions.

Applicability: Through this Circular, MCA has primarily discouraged companies to conduct extra-ordinary general meetings during Covid-19. And then MCA has stated that “*in case of holding an EGM by a company is considered unavoidable, the following procedure needs to be adopted for conducting such a meeting or before June 30, 2020, in addition to any other requirement provided in the Act or Rule*”. The Circular is divided into 2 parts:

- (i) *Companies that are required to provide the facility of e-voting* i.e. every company which has listed its equity shares on recognised stock exchange and every company having not less than 1,000 members. However, Nidhi companies and listed SMEs shall not be required to provide the facility to vote by electronic means;
- (ii) *Companies that are not required to provide the facility of e-voting* i.e. private companies and unlisted public companies with members less than 1,000 members.

Highlights of the Circular and some practical challenges:

- (i) The provisions are applicable to only extra-ordinary general meeting (EGM) and not annual general meeting. Therefore, a company shall conduct an annual general meeting after the lockdown is lifted. From the perspective of timeline compliance, this would be quite critical for companies with the FY ending December 2019;
- (ii) Companies would be required to prepare the transcript of the entire EGM i.e. overall sequence of events. The same is applicable for public companies (listed and unlisted). The recorded transcript shall be available on the company website (if any). However, the provisions with respect to transcript is not applicable to private companies;
- (iii) Private and public companies, both, shall ensure that the convenience of different persons positioned in different time zones shall be considered. This would be quite difficult for companies where the shareholders are present in different countries. This would result in the meeting being conducted at an odd-time;
- (iv) MCA has directed two-way teleconferencing or webex for ease of participation of members. In case of public companies, two-way teleconferencing facility would be difficult to implement and not cost-effective, as well;
- (v) Interestingly, for all companies, the participation is based on first-cum-first-served basis. However, such restriction would not apply to 'large shareholder' i.e. holding 2% of shareholding (such concept has defined for the first time), promoters, institutional investors,

directors, KMP, Chairperson of Audit Committee, Chairperson of Nomination and Remuneration Committee, Chairperson of Stakeholders Relationship Committee, auditors, etc. Technically, the companies would be required to make different arrangement of login for such persons and then allowing 500/1000 members to participate in such EGM;

- (vi) Where electronic voting is mandatory, the company shall provide the same in accordance with the provisions of Rule 20 of the Companies (Management and Administration) Rules, 2014;
- (vii) Considering the fact that all the members of the company will be attending the EGM electronically (i.e. VC or OAVM), the requirement of members being 'personally present' is out of question. Therefore, the MCA has clarified in the circular that attendance of members through VC or OAVM shall be counted for the purpose of quorum. However, the quorum provisions with respect to the minimum number of members is not changed i.e. in case of public companies – 5 members present, if number of members is not more than 1,000, 15 members present, if number of members is more than 1,000 but less than 5,000, 30 members present, if number of members is more than 5,000. In case of private companies – quorum shall be 2;
- (viii) MCA Circular clarifies w.r.t. voting in the EGM i.e. the member who has not casted their vote on resolutions through remote e-voting shall be eligible to vote in the EGM. This would be technically difficult to count the voting at the meeting. The Chairman or scrutinizer would be required to cross-verify the members that have voted at the EGM and members voted remotely;
- (ix) According to the MCA Circular, the process for election of Chairman for the EGM depends upon the members present at the meeting i.e. if members present are less than 50, then the Chairman is appointed in accordance with section 104 of the Act. And if the member present at the EGM are more than 50, then the Chairman shall be appointed by a poll conducted through electronic voting system during the meeting. i.e. generally, in the case of listed companies, it will be compulsory to have a system of 'electronic voting

during the meeting' for members attending electronically (i.e. VC or OAVM). In case of private companies, it will be necessary to conduct a poll. This mandatory agenda item of electing the Chairman for the EGM would consume a lot of time before discussing the agenda for the meeting. The provision in the Circular w.r.t. the appointment Chairman for the meeting directly conflicts with the provision in the Act. Conducting poll in meeting conducted through VC and OAVM would be quite challenging at this stage.

- (x) Considering the fact that the EGM is conducted electronically, the requirement of appointment of proxy is dispensed with. However, representatives of members are allowed to attend and vote at the meeting;
- (xi) MCA mandates independent director and auditor to attend the said EGM. At the same time, it encourages institutional investors to attend and vote at the EGM;
- (xii) MCA mandates companies to make necessary disclosures in the notice of the meeting about the overall framework (as discussed above);
- (xiii) The resolutions passed under the said framework shall be filed with the Registrar of Companies within 60 days of the meeting. Generally, the resolutions are filed with the Registrar within 30 days from the date of the meeting. However, considering the COVID-19 situation, the resolution shall now be filed with 60 days of the EGM;
- (xiv) In the last part of the Circular, MCA directs that *“all other compliances associated with the provisions relating to general meeting viz making disclosures, inspection of related documents by members, or authorizations for voting by body corporate etc. as provided in the Act and the articles of association of the company are made through electronic mode.”* Inspection of documents at the general meeting through electronic mode would be a complex exercise. MCA ought to have directed companies to make elaborate disclosures and declaration than providing through electronic mode.

For public listed companies, it would be a challenging task as the companies are required to comply with the other provisions of the Companies Act and SEBI Listing Regulations. Such listed companies would either prefer to obtain shareholders' approval either through postal ballot and electronic voting or at an EGM conducted after June 30, 2020 (i.e. post lock-down). The decision making of such companies would be largely affected in such cases. Also, conducting an EGM in accordance with the said MCA circular for closely-held private companies, wholly-owned subsidiary companies, joint-venture companies would be quite easy and, in some cases, it would just be a procedural formality.