PARTICIPATION AND VOTING IN BOARD MEETINGS BY ELECTRONIC MODE

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The Ministry of Corporate Affairs (the "**MCA**") has introduced, as a part of its '*Green Initiative in Corporate Governance*', some paperless compliances for companies. These provisions have been made pursuant to Sections 2, 4, 5, 13 and 81 of the Information Technology Act, 2000, dealing with legal recognition of electronic records (Section 4), legal recognition of electronic signatures (Section 5) and the manner of reckoning the time and place of dispatch and receipt of electronic records (Section 13).

Sections 285-290 of the Companies Act, 1956 (the "**Companies Act**") deal with meetings of the board of directors. Unlike in case of annual general meetings, there is no place of meeting prescribed for a meeting of the board of directors.

Historically, at the time when the Companies Act came into force, personal presence of at least two (2) persons was the only way envisaged to conduct and participate in a 'meeting'. However, the Companies Act does not specifically provide for *personal presence* of the directors in a board meeting. At the same time, the Companies Act does not explicitly recognize meetings of the board by means of tele-conference and video-conference.

Therefore, it was widely interpreted that a director could attend a meeting by means of a teleconference, but could not form part of the valid quorum required to hold the meeting and could not vote on maters deliberated therein. The then Department of Company Affairs, in 2002, recognized this lacuna in the law and proposed to make an amendment in the Companies Act to enable participation by electronic means.

The MCA has, in the regard, vide its circulars dated May 20, 2011 and bearing nos. 27 & 28 /2011, clarified and recognized –

(a) the dispatch and receipt of notices for shareholder and board meetings through electronic mode,
(b) the participation by directors in board meetings through electronic mode, and
(c) the participation by shareholders in general meetings through electronic mode,

subject to the company fulfilling certain requirements and procedures detailed as follows.

The MCA has clarified that '*electronic mode*' means video conference facility i.e. an audio-visual electronic communication facility which enables all persons participating in the meeting to communicate concurrently with each other without an intermediary, and to participate effectively in the meeting.

The chairman of the board of the company ("**Board**") and the secretary are obligated to maintain the integrity of the meeting via videoconferencing and to ensure proper videoconference equipment or facilities, preparing proper minutes of the meeting, ensuring the identity and authority of the participants, and ensuring that the participants' views are taken on board, with repetitions and

reiterations, as may be necessary, notwithstanding any interruption or garbling during such videoconferencing.

The MCA has prescribed certain requirements and procedures that have to be followed by a company to enable participation by directors in Board meetings. These are summarized as follows:

(a) Place of meeting:

- The place where the chairman of the Board or secretary is sitting during the meeting is to be taken as the place of the meeting.

- The statutory registers which are required to be placed in the Board meeting for compliance under the Companies Act (for eg. the register of share allotment where the business to be transacted at the meeting is allotment of shares) have to be placed before the chairman of the Board. The statutory registers are deemed to have been signed by the directors participating through electronic mode if they give their consent in the meeting.

(b) Notice:

- The notice of the meeting must inform the directors of the availability of conferencing facilities for participation and provide necessary information to enable the directors to access such facilities.

- The notice has to seek confirmation from the director on attendance of the meeting physically or through videoconferencing and shall contain contact numbers / email addresses of the secretary or designated officer to which such confirmation can be provided.

- In the absence of any such confirmation from a director, it is presumed that the director will attend in person.

(c) Attendance:

- Unlike in case of general meetings, the Companies Act does not specifically provide for *personal presence* of the directors in a board meeting. Therefore, attendance of a meeting by a director through use of video conference will now be counted for the purposes of quorum.

- The chairman or secretary has to make a roll call at the start of the scheduled meeting, at which every director has to identify himself / herself by stating (for the record) his / her full name, location and confirm that he / she can completely and clearly see and communicate with each of the other participants and ensure that no other person is attending the meeting through electronic mode.

- The chairman or secretary shall confirm the participation of the directors in the meeting who are not physically present and after the roll call, shall certify the existence of a quorum.

- Such roll calls have to be made at the conclusion of the meetings and at every re-commencement of the meeting after every break to ensure the presence of quorum throughout the meeting.

- Every director has to attend the meeting of the Board or a committee of directors personally (i.e. physically) at least *once* in a financial year.

(d) Voting and recording of decision:

- If a motion if objected to and there is a need to vote, the chairman or secretary is required to call the roll and note the vote of each director. Every director has to identify himself / herself prior to the vote.

- At the end of the meeting, the chairman of the meeting is required to announce the summary of all the decisions taken in that meeting, in respect of each agenda item and names of the directors who have consented or dissented to those decisions. This part of the meeting has to be video recorded.

- The company is required to preserve such video recordings for one (1) year from the date of conclusion of that meeting.

- Draft minutes of the meeting have to be circulated in soft copy not later than seven (7) days of the meeting for comments / clarifications from the directors who attended the meeting. This is required to dispel all doubts on the matters discussed and voted upon in the meeting.

- The minutes have to disclose the particulars of the directors who attended the meeting through electronic mode. The chairman has to also confirm in the minutes, the mode of attendance of every director of the company during the previous three meetings (physical or through electronic mode).

- No timelines have been prescribed for the directors to give their comments. The minutes have to be thereafter entered into the minute books as per Section 193 of the Companies Act.

The MCA has further clarified, vide its circular dated June 6, 2011 and bearing no. 35/2011, that it is not mandatory for a company to provide its directors, videoconferencing facilities to attend meetings. The MCA has placed no restrictions on the nature of the videoconferencing equipments or facilities that can be used during the meetings for participation purposes.

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