PASSING OF BOARD RESOLUTION BY CIRCULATION UNDER SECTION 289 OF THE COMPANIES ACT, 1956

PREAMBLE:

Section 289 states that whatever act is required to be done by the Board, unless the same is specifically required to be done by calling a meeting of the Board (for example under section 292) can be done by the directors by passing a resolution by circulation. But it should be remembered that as a matter of routine all business of a company other than those which are required to be done only at a meeting of the Board should not be carried on by passing a resolution by circulation. Passing of resolution by circulation should be resorted to only in regard to urgent matters which cannot wait till the next meeting of the Board of Directors.

The passing of resolution by circulation does not, however, dispense with the need for holding a meeting once at least in three months as required by section 258 of the Companies Act.

There are following Acts and Regulations deal with passing of resolution by circulation:

- Section 289 of the Companies Act, 1956
- Regulation 81 of Schedule I of Table A of the Companies Act, 1956
- Secretarial Standard

SECTION 289:

As per section 289, no resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, unless the circulation has been circulated in draft together with the necessary papers, if any, to all the directors, or to all the members of the committee, then in India, not being less in number than the quorum fixed for the meeting of the Board or a committee, and to all other directors or members at their usual address in India, and has been approved by such of the directors as are then in India, or by majority of such of them, as are entitled to vote on the resolution.

REGULATION 81 OF SCHEDULE I-TABLE A:

Save as otherwise expressly provided in the Act, 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 a meeting of the Board or committee, shall be as valid and effectual as if it had been passed at a meeting of the Board or committee, duly convened and held.

CS Ajay Mishra

SECRETARIAL STANDARD ON RESOLUTION PASSED BY CIRCULATION:

Paragraphs 6.1 to 6.4 of Secretarial Standard provides that a resolution proposed to be passed by circulation should be sent in draft together with necessary papers, individually to all the directors that the draft resolution to be passed by circulation and the necessary papers should be circulated by hand or by post, or by facsimile, or by e-mail or by any other electronic mode, that should be deemed to have been passed on the date on which it is signed and dated as approved by all the directors then in India, being not less than the quorum or on the date on which it is approved by the majority of the Directors entitled to vote on the resolution whichever is earlier and that resolution sent for passing by circulation should be noted along with the decision thereof at the next meeting of the Board and recorded in the minutes of such meeting.

REQUIREMENTS FOR PASSING OF RESOLUTIONS BY CIRCULATIONS:

Following is the procedure for passing of a resolution by the Board or by a Committee of directors by circulation:

1. Please check the Company's Articles of Association regarding quorum for the meeting of the Board.
2. Verify the current residential address in India of the Indian directors and usual address in India of directors living abroad from the Register of Directors.
3. Please check whether the resolution can be passed under this section and in urgent nature which cannot wait till the next meeting.
4. Draft of the resolution together with necessary paper, if any, should be circulated to all the directors or to all the members of the committee then in India in duplicate. "Necessary Papers" would refer to those papers or documents which would explain the purpose of the resolution and the urgency for passing it by circulation. A brief note explaining the resolution has to be sent along with the draft resolution.
5. The number of directors in India to whom the draft circular resolution is sent should not be less than the quorum fixed for meetings of the Board or Committee as the case may be or two directors whichever is higher. {Section 287(2)}
6. The draft of the resolutions should be circulated to all the directors or members of the committee who are away from India at their usual address in India. If these directors have furnished their foreign address to the company, the text of the circular resolution should be sent to their foreign address also.
7. The text of the resolution should be approved by all the directors as are then in India who are entitled to vote on the resolution and their number should not be less than the quorum fixed for the Board/Committee meeting.

CS Ajay Mishra

8. If the text of the resolution is not approved by all the directors in India who are entitled to vote on the resolution, it should be approved by a majority of the directors in India and abroad, who are entitled to vote on the resolution.

WHEN DOES A CIRCULAR RESOLUTION BECOME EFFECTIVE:

The circular resolution may be sent by post to the directors for their approval or an officer of the company may personally take the papers to each director in India, entitled to vote on the resolution and get his approval.

The circular resolution is effective on the latest date on which all the directors then in India entitled to vote on the resolution approved the resolution. In case the resolution is not approved by all the directors in India and it is approved by some directors in India and by some directors living abroad, the latest date on which majority of directors approved the resolution is to be taken as the date of the passing the resolution.

ILLUSTRATIONS UNDER SECTION 289:

The provisions of section 289 can be explained by a few illustrations given below:

1. The Board of directors of public company consists of eight directors, four of the directors are in India and remaining four directors are living abroad. The company has sent a draft of the resolution and other necessary papers to all four directors in India and to the remaining four directors abroad at their usual address in India.

   Option I: Three of the directors in India and two of the directors abroad have approved the resolution. One director in India has not approved the resolution. The circular resolution is duly passed because a majority of directors (In India and abroad), i.e five directors, have approved the resolution.

   Option II: Four of the directors in India have approved the resolution. Four directors abroad have not approved the resolution. The circular resolution is duly passed by directors required for quorum in India.

2. The Board of a public company consists of seven directors. Three of the directors are in India and the remaining four directors are living abroad. The company has sent a draft of the resolution and other necessary papers to all three directors in India and the remaining four directors abroad at their usual address in India. All the three

CS Ajay Mishra

directors in India have been approved the circular resolution. The circular resolution is duly passed.

3. There are eight directors on the Board of a Private Company, which is neither a subsidiary nor a holding company of a public company. All the directors reside in India. Four of the directors are interested in the arrangement proposed in the circular resolution. The Company has sent the draft of the circular resolution to all the directors. Six of the directors, of whom four director are interested directors, approve the circular resolution. The circular resolution is passed because it is approved by a majority of directors who are entitled to vote. In the case of an Independent Private Company interested directors are not debarred from voting.
4. There are six directors on the Board of the Public Company. One of the Directors is living abroad and the remaining five directors are in India. One of the directors in India is interest in resolution. The company has sent the draft resolution to all five directors in India and to the directors living abroad at his usual address in India. The interested director did not return the draft circulation resolution. The remaining four directors in India have approved the draft resolution. The resolution is duly passed because it is approved by majority of director entitled to vote on the resolution.

CONFIRMATION OF THE CIRCULATION RESOLUTION IN NEXT BOARD MEETING:

There is no specific provision in the Act which requires that the circular resolution should be confirmed/ recorded by the Board at the nest Board Meeting. However, as a good corporate practice, the resolutions of the directors passed by circulation should be recorded at the next Board Meeting to ensure their authenticity. While recording the minutes of the Board Meeting, it must be ensured that the whole of the resolution passed by circulation find place in the minutes of the Board meeting.

MATTERS TO BE CONSIDERED BY THE BOARD NOT BY CIRCULATION:

There are specific provisions in the Act which shall always be considered at Board meeting and accorded approval by resolution and not by resolution passed by circulations.

Sr. No.	Section	Items
1	58A	The text of advertisement for inviting and accepting deposits by public company
2	262	Filling of casual vacancies among directors
3	292	a) Making call on shareholders in respect of money remaining uncalled; b) To authorize buy-back under the first proviso to clause (b) of sub-section (2) of section 77A; c) Issuance of debentures;

CS Ajay Mishra

		d) Borrowing money otherwise than on debentures; e) Investing Funds of the company; f) Making loans to others.
4	297	Approval of contracts
5	299	Where any director is interested in a contract directly or indirectly, the disclosure of his/her interest
6	293A	Propose to make Political contribution
7	301	The Register of Interested Contracts shall be placed before the meeting for signature.
8	308	The notice from director regarding his shareholding or change thereon
9	316	Approval to the appointment of Managing Director who is already Managing Director in other company
10	372A	There are two circumstances where the matters are required to be decided at Board Meeting: (i) Where the aggregate of the loans and investments so far made and the amount of guarantee or security so far provided along with loan, investment and guarantee/security proposed to be made or given exceed the limit specified in section 372A. (ii) No loan or investment or guarantee/security covered under this section can be made or given unless the resolution it is passed at a meeting of the Board with the consent of all directors present.
11	386	Approval to the appointment of Manager who is already Manager in other company

MATTERS GENERALLY PLACED BEFORE THE BOARD MEETING:

In addition to the items referred to above, there are various other matters which are considered by the Board at Board Meeting are given below:

Sr. No.	Items
1	Appointment of Director, Managing Director and Whole time Director
2	Appointment of Auditors in casual vacancy caused otherwise than by resignation
3	Issuance of Shares
4	Allotment of Shares and Debentures
5	Consideration of Annual Accounts
6	Approval of Interim Dividend and recommendation of final dividend
7	Capitalization of reserves and issuance of bonus shares
8	Inter-corporate loans and providing security and guarantee
9	Appointment of sole selling/buying agents

CS Ajay Mishra

MATTERS CAN BE APPROVED BY CIRCULATION:

An illustrative list of matters which can be approved by passing circular resolutions is given below:

Sr. No.	Items
1	Appointing Additional Director in case of urgency
2	Appointing Alternate Director in case of urgency
3	Appointing an Auditor in case of casual vacancy caused by death of Auditors
4	Appointing First Auditor of the company within one month from Incorporation
5	Appointment of Cast Auditor
6	Opening a Current Account for the Company with Bank
7	Changing the Registered Office within the same town or city
8	Convening an EGM on requisition of certain members
9	Engaging a Practicing Company Secretary to issue Compliance Certificate
10	Authorizing the printing of share certificates
11	Authorising the Company Secretary fo file siites in civil court on certain matters
12	Authorising an officer of the company to sign declaration forms
13	Authorisation for affixing Common Seal to a documents which have already approved at Board Meeting
14	Authorisation to Managing Director to fix the date of closure of Register of Members
15	Fixing Record Date
16	Changing the Rate of Interest payable on fixed deposits
17	Authorising an officer to makes application for telephone and internet connection
18	Nominating a director as occupier of a factory
19	Appointing a representative of the Company to represent the company in General Meeting of any other company
20	Fixing the date and time of an adjourned general meeting in case the adjourn journal meeting is not desired to be held in the next week on the same day
21	Approving transmission of shares before Right Issue
22	Authorising contribution to National Defense Fund
23	Appointment of whole time company secretary
24	Authorisation of the Boar to keep Company's books of account at a place other than the registered office of the company
25	Authorising an officer to make application for Service tax and Sales Tax Registration

All matter other than those which requires shareholders' approval as given in section 293 and other sections and matters which require approval of the CLB/Tribunal, Regional Director or Central Government can be passed by the directors or Committee thereof by circular resolution.

CS Ajay Mishra

DRAFT LETTER FOR PASSING OF RESOLUTION BY CIRCULATION:

Date:

To,

Mr./Ms …………..
DIN…………..
Indian Address……

Sub: ……………………………………………….

Dear Sir/Madam

It is proposed to pass the resolution on the above mention subject. This cannot wait till the next meeting of the Board of Directors. Accordingly I am sending herewith the following resolution, in duplicate, which is intended to be passed as a resolution by circulation as provided in section 289 of the Companies Act, 1956 for your kind approval.

Resolution No……

"RESOLVED THAT……………………………………………"
[Set out the resolution intended to be passed]

Please Tick (√)

For	Against

……………
Signature

You are requested to return the duly signed duplicate copy of the same after indicating your assent or dissent to the proposal under your signatures at the registered address of the company at your early convenience.

For…………………….Ltd/Pvt. Ltd.

CS Ajay Mishra

(**NOTE:** This information is given for the limited purpose of bringing awareness about the subject matter for readers.)

THANK YOU

****

CS Ajay Mishra