

MEHTA&MEHTA

Legal & Advisory Services



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Article On
“Compliance for Maintaining Documents in E-Form
under Companies Act, 2013”



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Section 120 of Companies Act, 2013 – “Maintenance and inspection of documents in electronic form”

Any document, record, register, minutes, etc. are required or allowed by the company to be inspected or copies to be given in electronic form shall be maintained as prescribed in The Companies (Management and Administration) Rules, 2014.

The Companies (Management and Administration) Rules, 2014

Following are the Rules under The Companies (Management and Administration) Rules, 2014 for maintenance and inspection of document in electronic form:

Rule 27 – “Maintenance and inspection of document in electronic form”

Under this Rule, every listed entity or an entity having not less than one thousand shareholders, debenture holders and other security holders, may maintain the records as required to be maintained in electronic form under the Act or the rules made there under.

In existing companies, the data shall be converted from physical mode to electronic mode within six months from the date of notification of provisions under section 120 of the Act.

The records in electronic form shall be maintained as the Board of directors of the company deems fit, if:

- (a) the records maintained shall be in the same formats and in accordance with all other requirements as provided in the Act or the rules made there under;
- (b) the information required under the provisions of the Act or its rules should be “**adequately**” recorded for future reference;

The legal meaning of “**adequately**” is “**reasonably sufficient**” as per legal dictionary and according to the Information Technology, “**adequately**” means “satisfactory or acceptable in quality or quantity of the data”

(c) the records must be capable of being “**readable**”, “**retrievable**” and “**reproducible**” in printed form;

The legal meaning of “**readable**” is “**legible or easy to read**” and according to the Information Technology, “**readable**” means “**a human readable medium or human-readable format that is a representation of data or information that can be naturally read by humans.**”

The legal meaning of “**retrievable**” is “**recover or regain**” and according to the Information Technology, “**retrievable**” means “**the ease with which an information can be found or retrieved using the information system specifically a search engine or information retrievable system.**”

The legal meaning of “**reproducible**” is “**able to be showed, done or made again**” and according to the Information Technology, “**regenerated or remade**”

(d) the records are required to be dated and “**signed digitally**” wherever it is required under the provisions of the Act or its rules;

The legal meaning of “**digital signature**” is

“**A mark or sign made by an individual on an instrument or document to signify knowledge, approval, acceptance, or an obligation.**

For example, be typewritten, engraved, or stamped” and according to the Information Technology, “**digital signature**” means “**The authentication of any electronic record by a subscriber by means of an electronic method**”

(e) the records, once dated and signed digitally, shall not be capable of being “**edited**” or “**altered**”;

The legal meaning of “**edited**” is “**to make changes to a text, deciding what will be removed and what will be kept in, in order to prepare it for being printed**” and according to the Information Technology, “**edited**” means “**Technical editing involves reviewing text written on a technical topic, identifying usage errors and ensuring adherence to a style guide**”

The legal meaning of “**altered**” means “**changed or re-organise**” and according to the Information Technology, “**altered**” means “**re-type or re-phrase the data as required**”

- (f) the records shall be capable of being updated as per the provisions of the Act or its rules and the date of updating shall be capable of being recorded on every updating.

For the purpose of this rule, the term **“records”** means **“any register, index, agreement, memorandum, minutes or any other document required by the Act or the rules made there under to be kept by a company”**

According to the Information Technology, the term **“records”** means **“Electronic records, also often referred as digital records, are those records that are generated with and used by information technology devices.”**

Rule 28 – “Security of records maintained in electronic form”

(1) the Board of the company may decide whether the Managing Director, Company Secretary or any other director or officer of the company shall be responsible for maintenance and security of electronic records.

(2) The person so responsible for the maintenance and security of electronic records shall with reference to Section 7 of Information Technology Act, 2000 -

(a) provide adequate protection against unauthorized access, alteration or tampering of records;

Thus, for such purpose, the authorized person shall have a unique password set to get access to such records. The unique password shall be provided only to the authorized person and the responsible IT person who shall have in case such records get locked by way of any alteration or tampering of such records.

(b) ensure against loss of the records as a result of damage to, or failure of the media on which the records are maintained;

(c) ensure that the signatory of electronic records shall not repudiate the signed record as not genuine;

The authorized signatory for electronic records does not repudiate or reject the signed record stating as it is not genuine, as once an authorized signatory signs the records, he/she shall not reject the same as once such records are signed they shall not be altered or edited as per Rule 27 (2)(e). In this case, the signatory has signed on the matter that was final, thereby no further change, alter or edit shall be done on the same.

(d) ensure the computer systems, software and hardware are adequately secured and validated to ensure their accuracy, reliability and consistent intended performance;

(e) ensure the computer systems can discern invalid and altered records;

The legal meaning of “**discern**” is “**to identify, recognize or understand something that is not clear**”

(f) ensure that records are accurate, accessible and capable of being reproduced for reference later;

(g) ensure that the records are at all times capable of being retrieved to a readable and printable form;

(h) ensure that the records are kept in a “**non-rewriteable and non-erasable**” format like pdf. version or some other version which cannot be altered or tampered,

The legal and technical meaning of “**non-rewritable and non-erasable**” is “**the data that cannot be re-written or erased from the matter that was originally written or erased**”

It means, if the records are not in pdf (Portable Document Format) form, can be converted to word and could be tampered and reconverted in pdf. by any person responsible for such moral turpitude;

(i) ensure that at least one backup taken at a periodicity i.e. every alternate day, are kept of the updated records kept in an electronic form. Every backup is authenticated, dated and signed and such backups shall be securely kept at such places as may be decided by the Board;

Thus, the backup of records kept in electronic form shall be copied in hard-drives by the IT professionals to keep the records safe and less handy to any possible person for tampering.

(j) limit the access to record to managing director, company secretary or any other director or officer or persons performing work of the company as may be authorized by the Board in this behalf;

(k) ensure that any reproduction of non-electronic original records in electronic form is complete, authentic, true and legible when retrieved,

For the purpose of this clause, if any incomplete records are produced further, the company shall have to face the loss for such negligence;

(l) arrange and index the records in a way that permits easy location, access and retrieval of any particular record;

It means, that the records in electronic form shall be arranged properly by maintaining index with relevant page numbers pertaining to the topic for easy reference to the required matter.

(m) take necessary steps to ensure security, integrity and confidentiality of records.

Rule 29 – “Inspection and copies of records maintained in electronic form”

Where the records are maintained in electronic form in a company, any duty under the Act or its Rules to make those records available for inspection or provide copies in whole or in part of such records, shall be construed as clear and easy reproduction of the whole or part thereof, as the case may be on payment of not exceeding ten rupees per page.

Thus, the records also include minutes which may be recorded in electronic mode or physical mode as explained under the Secretarial Standards – 5.

Rule 30 – “Penalty”



In case any default is made in compliance with any of the provisions of this rule, the company and every officers or such other person who is in default shall be punishable with fine which may extend to five thousand rupees and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first during which such contravention continues.

Maintenance of Minutes under Secretarial Standards – 5 of Companies Act, 2013



Please Note: The SS – 5 is yet to be effective and hence, the below clauses shall be made applicable only when it is effective.

Definitions under SS-5

“Electronic Mode” means electronic medium of communication including videoconferencing or other audio-visual means, e-voting, e-mail or other electronic communication facility and/or record-keeping, as may be applicable.

“Maintenance” means keeping Minutes either in physical or Electronic Mode, as may be permitted under any law for the time being in force, and includes the making of appropriate entries therein, the authentication of such entries and the preservation of such physical or electronic records.

“Meeting” means any Meeting, duly convened, constituted and held.

“Minutes” or “Minutes Book” means Minutes or Minutes Book maintained in physical or in electronic form.

Unless the context otherwise requires, words and expressions used and not defined herein should have the meaning respectively assigned to them under the Act.

Clause 1 of SS – 5 further explains “Maintenance”

1.1 Minutes should be recorded in books maintained for that purpose.

Minutes of the Board Meetings, if maintained in loose-leaf form, should be bound periodically depending on the size and volume, coinciding with the financial year(s) of the company. Minutes of other Meetings, if maintained in loose-leaf form, should be bound periodically depending on the size and volume. There should be proper locking device to ensure security and proper control to prevent removal or manipulation of the loose leaves.

1.2 A distinct Minutes Book should be maintained for each type of Meeting.

Resolutions passed by postal ballot should be recorded in the Minute books of General Meetings as if it has been deemed to be passed in the general meeting.

1.3 Minutes may also be maintained in electronic form in such manner as prescribed under the Act.

Every listed company or a company having not less than one thousand shareholders, debenture holders and other security holders, should however maintain its Minutes in electronic form in such manner as decided by the Board. The Managing Director or Secretary or any other Director or Officer of the company as the Board may decide shall be responsible for the maintenance and security of Minutes in electronic form.

From the above, we can derive that the minutes may also be maintained in electronic form or as per the provisions of the Act or the rules made there under.

Whether the compulsion to maintain minutes in electronic form is not specified.

Hence, if the entity maintains the records in electronic mode, it shall also maintain minutes in the same manner, i.e. electronic form.

Illustration

Generally certain companies provide records in electronic form do not affix the digital signatures on such records, as the records are maintained by someone and the Company Secretary reviews them and takes the print of such reviewed records to the authorized signatory for the signatures.

In such cases, the records are neither maintained in electronic form nor in physical form, thereby, making it practically invalid.

To validate the records, they must be maintained either in physical form with physical signatures of the authorized signatories or if in electronic form shall have digital signatures of the authorized signatories affixed.

The entity is therefore, required to choose only one method of maintenance of its records, it shall not maintain partly in physical and rest in electronic mode.

Where the entity maintains records in physical format, it must be in a bound manner and shall be maintained date wise or any other way as decided by the Board of such an entity.

Section 7 of The Information Technology Act, 2000



Retention of electronic records –

If any law provides that the documents, records or information are retained for specific period then, the requirement shall be deemed to be satisfied if such documents, records or information are retained in electronic form, if -

- (a) the information contained therein remains adequately accessible so as to be usable for a subsequent reference;
- (b) the electronic record must be retained in the format in which it would be originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received;
- (c) The information which identifies the original destination, date and time should be available in electronic mode if, the information which is automatically generated only for the purpose of electronic record for dispatching and receiving, this clause shall not apply.

This section shall not be applicable to any law that expressly provides for retention of documents, records or information in electronic form.

Need for Security



Filing records electronically may not be as secured as sending them via mail or post. Especially for such companies who employ an outside or third party service to do the electronic filing for them, as the company shall be providing identifiable information that the service may keep on file for a long period of time. This means that more individuals can have access to the information.

To make the data secured, the IT professionals shall be hired to maintain, retain and sustain the authentic data as is, in a secured mode. Such IT professionals or programmers who would be able to read and understand or replace programming language to any human readable language for the authorized persons only.

Computers read commands from a machine language written in binary, i.e., long strings of zeros and ones. While computers can read this language efficiently, most human programmers cannot. That is why the IT professional or programmers work in a programming language they can understand, which are then translated to the machine language the computer can understand.

Conclusion

Hence, practically it would not be possible for any company to maintain the records in electronic form simultaneously by complying with the Section 120 of Companies Act, 2013 read with Rule 27, Rule 28, Rule 29 and Rule 30 of the Companies (Management and Administration) Rules, 2014 and also Section 7 of Information Technology Act, 2000.

Any record dated and signed by the authorized signatory can be served as a conclusive evidence for the company at the time of a suit or trial under any court of law and therefore, it needs to be maintained in one particular format throughout the life of the company.

It is therefore difficult to maintain the records in electronic form as compliance of all the aforesaid provisions may not be humanly possible.

*Thank
You*