



RECENT AMENDMENTS TO PRIVATE PLACEMENT OF SECURITIES & MANAGERIAL REMUNERATION

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I. AMENDMENTS TO PRIVATE PLACEMENT PROCESS

Private placement of securities is anti-thesis to public issue of securities. Private placement helps a company to elicit interest from prospective investors in investing in the shares of the company. Private Placement is process driven. Vide Notification dated 07th August, 2018, the Ministry of Corporate Affairs (MCA) has notified a new Section 42 (forming part of Companies (Amendment) Act, 2017 in substitution of the existing one in the Companies Act, 2013 (the Act) and also replaced Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 (the Rules). It can be stated that the new Section 42 and the new Rule 14 contain certain new provisions which appear to be based on experience from the working of previous provisions. The amendments are significant and the provisions are applicable to both public and private companies.

The following are the major ingredients of the amended Private Placement (PP) process:

Liberalisation on offer limits

PP can be made to only select group of persons as identified by the Board. The number of persons so identified should not exceed 200 persons in the aggregate (per type of security) in a financial year. Limit of 200 persons is applicable to each kind of security (say equity shares, preference shares, debt securities). Offer or invitation to Qualified Institutional Buyers (QIB) or employees under ESOP have been excluded from the said limit. Further, the said limit on offer is not applicable to a NBFC or a housing finance company, if they are compliant while making such offers as per regulations made by RBI or NHB, as the case may be, if such regulators have not prescribed similar regulations, then the restriction on the limit.

Improved Disclosure

Shareholders' resolution is essential for PP and the notice convening the general meeting of members shall contain specified information including objects of the issue, justification of the price, identity of the valuer of shares, amount intended to be raised, contribution made by promoters or directors either as part of the offer or separately and other material terms. This helps the prospective investors to take a reasoned decision to decide on their investment in the offeror. A private placement cum application form (Form PAS-4) is prescribed through which offer needs to be made. The private placement document has been revised requiring additional information like audited financial information for the past three years, relevant date for arriving the valuation such that the date is at least 30 days prior to the general meeting date, class of persons to whom offer is proposed to be made, pre-issue and post-issue shareholding pattern. Further no person other than the person to whom the offer is addressed will be allowed to apply.

Non-Convertible Debenture (NCD) issues made easy

No shareholder resolution is required if the proposed NCD will be within the borrowing powers of the Board of Directors as per Section 180(1)(c) of the Act. This cuts down time for the Board of Directors to decide and make PP of NCDs especially for Banks and NBFCs. Thus shareholders' approval for issue of NCDs will be required only if the size of the issue exceeds the borrowing powers of the Board (including the enlargement provided by the company).

Filing of Resolution

The Rules make it mandatory for the company proposing a PP to file the board resolution (for NCDs) or shareholders special resolution prior to issue of offer document namely private placement cum application form. The filing of resolution as stated is mandatory also for a private company making PP.

Minimum allotment size

The substituted new Rule has dispensed with the requirement of minimum investment size of Rs.20,000/- in face value of the securities. Hence now companies are free to prescribe minimum investment size based on the size of the offer.

Record of PP offers

While a company is required is required to maintain a complete list of PP offers made in the prescribed format (Form PAS-5), there is no need now to file the same with the Registrar of Companies.

Utilisation of funds made conditional

A company cannot utilise the funds raised under PP and kept in a separate bank account unless filing of the return of allotment (in Form PAS-3) with the Registrar of Companies is completed. The time limit for filing of the return of allotment now is reduced to 15 days as against 30 days earlier, from the date of allotment.

II. AMENDMENTS TO PROVISIONS RELATING TO MANAGERIAL REMUNERATION

One of the last bastions where the MCA had retained the approval power has been done away with, with the notification of amendments to Section 197 of the Act and also of Schedule V to the Act. Ergo public companies are free to decide the payment of remuneration to their managerial persons over and above the overall limit of 11% of the net profit under the Act, if the shareholders approve the same. The only power that the MCA now retains is in the realm of managerial appointments, where, the proposed appointment is not in compliance with Part I of Schedule V of the Act.

The key amendments to the provisions relating to appointment and payment of remuneration to managerial persons are:

- Appointment of a managerial person who has attained the age of 75 years is possible despite the failure of the special resolution, if the votes cast in favour of the resolution is more than the votes cast against the resolution and MCA (on an application by the company) is satisfied that the appointment is most beneficial for the company.
- Where payment of remuneration to one managerial person is more than 5% of the net profit or such payment is more than 10% if there are more than one managerial person, then approval of members by means of a special resolution would suffice. Where such a company has defaulted on its financial obligations due to banks or financial institutions or to NCD holders or any other secured creditor, then such a company will have to seek prior approval of such creditor(s) concerned before seeking members' approval.
- Approval of MCA has also been dispensed for payment of managerial remuneration in respect of a company having no profits or inadequate profits, over and above the limits of yearly remuneration on the basis of effective capital provided under Section II of Part II of Schedule V, if approval of members by means of special resolution is accorded. Prior approval of banks or financial institutions or NCD holders or any other secured creditor will be required, prior to approval of members, if a company has defaulted in any of its financial obligations.
- If any remuneration is drawn by a director in excess of limits without the approval of the members, then such sums paid in excess shall be refunded to the company within two years or such period less than two years as decided by the company. Hence seeking approval of MCA is also dispensed with for such refunds.
- The statutory auditor of a public company is obligated in his report under Section 143 to make a statement as to whether the remuneration paid by the company to its directors is in accordance of the provisions of Section 197 read with Schedule V. It appears that remuneration paid to a Manager, even if the same is not in compliance with the said provisions need not be reported.
- Applications for seeking approval of MCA pending as on 12th September, 2018 under Section 197 shall abate and companies have been provided one year from the said date to seek the necessary approvals, as per the amended provisions.

Ease of doing business, removal of bureaucratic controls, delegation of powers to members who are rightful owners of the company are the flavour of these amendments!

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