



# *Company Law Corner*

## Private Placement under The Companies Act, 2013

Private placement means any offer of securities or invitation to subscribe securities to a select group of persons by a company other than by way of public offer through issue of a private placement offer letter and which satisfies the specified conditions.

Section 42, in conjunction with Section 62 of the Companies Act, 2013 lays down the framework for private placement of securities. Section 42, read with Rule 14 of Companies (Prospectus and Allotment of Securities), Rules, 2014 governs the Private placement of Securities, However, Section 62 read with Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014, governs preferential allotment and provide that issue on preferential basis should also comply with conditions laid down in section 42.

The word 'securities' is defined in clause (81) of the Act as to mean 'securities' as defined under clause (h) of section 2 of the Securities Contract (Regulation) Act, 1956 and the definition cover the various types of Securities, Accordingly, it is necessary that the provisions of section 42 shall be read together with the provisions of such securities as provided in the Act, such as section 55 (Preference Shares), Section 62 (in case of Preferential allotment) and Section 71 (issue of Debentures) and the rules framed thereunder.

### Points for consideration in Private Placement of Securities:

#### Pre-conditions :

- No fresh offer or invitation under section 42 can be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company.
- An offer or invitation to subscribe to securities (other than the non-convertible debentures) through private placement cannot be made unless the proposal has been previously approved by the shareholders of the company, by a special resolution for each of the offers or invitations.
- In case of offer or invitation for non-convertible debentures, if the proposed amount to be raised through such offer or invitation does not exceed the limit as specified in clause (c) of sub section (1) of section 180 and in such cases relevant Board resolution under clause (c) of subsection (3) of section 179 would be adequate and if the limit exceeds than the previous special resolution for all the offers or invitations for such debentures during the year is required.

#### *Explanatory Statement*

- The explanatory statement annexed to the notice for shareholders' approval, shall contain the following disclosure :
  - particulars of the offer including date of passing of Board resolution;
  - kinds of securities offered and the price at which security is being offered;
  - basis or justification for the price (including premium, if any) at which the offer or invitation is being made;

- name and address of valuer who performed valuation;
- amount which the company intends to raise by way of such securities;
- material terms of raising such securities, proposed time schedule, purposes or objects of offer, contribution being made by the promoters or directors either as part of the offer or separately in furtherance of objects; principle terms of assets charged as securities:
- In case of private companies copy of the Board resolution or special resolution with respect to approval under clause (c) of subsection (3) of section 179 shall file with the Registrar [Form MGT-14 for Board or Special Resolution for approval obtained u/s 179(3)(c)].

### Offer Letter

- A company shall issue private placement offer cum application letter only after the relevant special resolution or Board resolution has been filed with the Registrar. [Form MGT-14 to be filed with the Registrar before issue of Letter of Offer]
- An offer or invitation to subscribe securities under private placement cannot be made to persons more than two hundred in the aggregate in a financial year and such restrictions would be reckoned individually for each kind of security that is equity share, preference share or debenture.
- Any offer or invitation made to qualified institutional buyers, or to employees of the company under a scheme of employees stock option as per provisions of clause (b) of sub-section (1) of section 62 shall not be considered while calculating the limit of two hundred persons.
- Private placement offer and application form to be issued only to identified persons, whose names and addresses are recorded by the company.
- The private placement offer cum application letter shall be in the form of an application in Form PAS-4 serially numbered and addressed specifically to the person to whom the offer is made and shall be sent to him, either in writing or in electronic mode, within thirty days of recording the name of such person.
- Private placement offer and application shall not carry any right of renunciation and no person other than the person so addressed in the private placement offer cum application letter is allowed to apply through such application form and any application not conforming same shall be treated as invalid.
- The company shall maintain a complete record of private placement offers in Form PAS-5.
- Every identified person willing to subscribe to the private placement issue need to apply in the private placement and application issued to such person alongwith subscription money paid either by cheque or demand draft or other banking channel and not by cash.
- The payment to be made for subscription to bank account of the person subscribing to keep the record of the bank account from where been received and in case of joint holders shall be paid from the bank account of the person whose name appears first in the application:
- A company may, at any time, make more than one issue of securities to such class of identified persons

- Release of any public advertisements or utilise any media, marketing or distribution channels or agents to inform the public at large about such an issue is not allowed.

### **Allotment**

- A company making an offer or invitation under section 42 is required to allot its securities within sixty days from the date of receipt of the application money for such securities.
- If the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the expiry of sixty days.
- If the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent per annum from the expiry of the sixtieth day.
- Monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than -
  - for adjustment against allotment of securities; or
  - for the repayment of monies where the company is unable to allot securities.
- Company shall not utilise monies raised through private placement unless allotment is made and the return of allotment is filed with the Registrar.
- A return of allotment of securities under section 42 need to be filed with the Registrar within fifteen days of allotment in Form PAS-3 including a complete list of all allottees, with their full names, addresses, number of securities allotted and such other information as prescribed.

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