
Impact of Companies Act- 2013 & Rules on Private Placement of shares – Section- 42

PRIVATE PLACEMENT SHARES,

Section – 42 read with rule 14(1) of Companies

(Prospectus and Allotment of Securities) Rules, 2014

Any business cannot run without funds. In case of an incorporated company, initial capital always comes from subscribers to the memorandum. After that company can raise funds by Loans/borrowings or issue of securities. Hereafter I will discuss the way to raise funds by issue of securities.

In my earlier article I discussed how to issue share on right basis. In this article I will discuss the process of issue on share by private placement.

Private placement means: Any offer of securities or invitation to a selected 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 conditions specified in section-42.

Section 42 of the Companies Act, 2013 allows any company, whether private or public, to make private placement of securities through issue of a “Private Placement Offer Letter” (PPOL).

‘Private Placement’ can be said in consonance with the interpretation of the Supreme Court as “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 conditions specified in this section including the condition that the offer or invitation is made to not more than 200 persons (excluding QIB’s and employees offered securities under ESOP) in a financial year”. In a single invitation company can’t invite more than 50 persons for private placement.

A Private Company may issue its securities-

1. By way of right or bonus ; or
2. Through private placement or
3. Through Bonus issue of shares.

A Public Company may issue securities-

1. To public through prospectus i.e “Public Offer”.
2. Through private placement.
3. Through right or bonus issue.

CONDITIONS FOR PRIVATE PLACEMENT OF ISSUE OF SHARES

1. Maximum No. of persons to whom offer can be made:
 - An offer can be made under a Private Placement Offer Letter to not more than 200 people in a financial year not more than 50 people in an offer.
 - Not just the limitation of allotment to 200 people but even an invitation to subscribe can’t be made to more than 200 people.

- The 200 people limit excludes Qualified Institutional Buyers and Employees and the limit of 200 people is calculated individually for each kind of security.

If offer is made to more than 200 peoples:

If a company, whether listed or unlisted makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than 200 persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognized stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of Chapter III. [Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions of this Act, and the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 shall be required to be complied with]

1. Offer to be previously approved by Special Resolution: The proposed offer of securities or invitation to subscribe securities has been previously approved by the shareholders of the company, by a Special Resolution, for each of the Offer of Invitation.
2. Offer counted separately for each kind of security: The restriction under sub-clause (b) would be reckoned individually for each kind of security that is equity share, preference share or debenture.
3. No further offer till completion of earlier offer: The requirements or provision of sub-section (3) of Section-42 shall apply in respect of offer or invitation of each kind of security and no offer or invitation of another kind of security shall be made unless allotments with respect to offer or invitation made earlier in respect of any other kind of security in completed.
4. Separate Bank Account:
 - The payment for subscription should be through the **bank account of the person subscribing** to the securities.
 - The company should keep a record of the bank account from where such payments have been received.
 - No cash transaction is permitted.
 - The money so received shall be kept in a **separate bank account** of the company and utilized only for allotment (or repayment).
 1. Where jointly, the money from the bank account first person: That monies payable on subscription to securities to be held by joint holders shall be paid from the bank account of the person whose name appears first in the application.
 2. Minimum amount of offer for an individual: The value of the Offer per person shall not be less than INR 20,000 of '**face value**' of securities.
 3. Persons to whom offer will make: All offers shall be made only to those persons whose names are recorded by the company prior to the invitation to subscribe. Allotments can be made only to such persons addressed specifically to the persons whom the offer is made along with the Offer letter.
 4. No advertisement of offer: No company offering securities under this section shall release any public advertisements or utilize any media, marketing or distribution channels or agents to inform the public at large about such an offer.
 5. Condition for application form: The Company can allot share to only persons decided by Board of Directors. The company will issue application to such persons. The application form has to be numbered and **addressed specifically to the person** to whom the offer is made along with the Offer Letter. Allotments can be made only to such persons.
 6. Mode to issue offer letter: The offer letter shall be sent to persons, either in writing or in electronic mode.

7. Valuation report: **The price of the security has to be justified and the inference is that, it requires a valuation report by a Registered Valuer (can be a company secretary, chartered accountant or a cost accountant).**

8. Days in which share should be issued: Allotment has to be carried out within 60 days of receiving of money.

14. If not allotted within 60 days: If allotment is not made within 60 days then from the 75th day the monies have to be repaid. Failure to repay has a liability of **interest at 12%pa**. If there is a Foreign Direct Investment, RBI has provided for 180 days for allotment. It is not clear which regulation over-rides wrt timeline for allotment. [As per my view we should allot share within 60 days].

15. Non-compliance: If conditions of Section-42 read with rule 14(1) of Companies (Prospectus and Allotment of Securities) Rules, 2014 has not been complied with than that can lead to a penalty of INR 2 crores or the amount involved in the offer, whichever is higher.

16. Minimum gap between two offers. There is no condition in the Act or rule regarding minimum gap between two offers. A company can come with new offer after completion of earlier offer.

17. Maximum no. of offers in a Financial year: There is no condition in the Act or rule regarding maximum Number of Private Placement offers in a financial year. According to this company can come with private placement offer in a financial year any no. of times. But remember an offer can't be made more than 200 peoples in a financial year.

STEPS INVOLVED IN PRIVATE PLACEMENT

STEP-1

Call Meeting of Board Director:

- Issue Notice of Board Meeting to all the directors of company at least 7 days before the date of Board Meeting.
- Attach Agenda of Board Meeting along with Notice.

STEP-II

Hold the Board Meeting:

- Check the quorum of Board Meeting.
- Identify the person to whom you will issue shares.
- Prepare list of such persons.
- Prepare Draft offer letter under PAS-4.
- Pass Board Resolution for approval of offer letter.
- Issue Notice of General Meeting. (As per Section- 101(1) issue notice of General Meeting at least 21 days before General meeting).
- Notice shall specify place, date, day and the hour of the meeting and shall contain a statement on the business to be transact in the such meeting. [Section-101(2)]
- Authorize a director of company to issue notice of General Meeting.

STEP-III

Hold Extra Ordinary general Meeting:

- Check the quorum of Meeting.(Section-103).
- Present Offer Letter in PAS-4 before the members of the meeting.

- Pass Special Resolution for Private Placement of Shares. [For every such offer separate Special Resolution is required].

STEP-1V

Circulate Letter of Offer in form PAS-4:

- Offer letter shall be accompanied by an application form serially numbered and addressed specifically to the person to whom the offer is made.
- Offer Letter sent either in writing or electronic mode.
- Issue offer letter within 30 days of General Meeting/recording the name of such person.

STEP-V

File Form with Registrar:

- File MGT-14 with Registrar within 30 days of passing of Special Resolution.

Attachments:

- Notice of General Meeting along with Explanatory Statement.
- Certified True copy of Special Resolution.
- Minutes of General Meeting

STEP-VI

Open Separate Bank Account:

- The payment to be made for subscription to securities shall be made from the bank account of the person subscribing to such securities.
- The company shall keep the record of the Bank Account from where such payment for subscription has been received.

STEP-VII

File Form with Registrar:

- File GNL-2 with Registrar within 30 days of circulation of offer letter.

ATTACHMENTS:

- PAS-4 (Offer Letter).
- PAS-5 (Complete record of Private Placement).

STEP-VIII

Call Board Meeting after receiving of allotment of money.

- Issue Notice of Board Meeting to all the directors of company at least 7 days before the date of Board Meeting. [Section-173(3)]
- Attach Agenda of Board Meeting along with Notice.

STEP-IX

Hold the Board Meeting:

- Check the quorum of Board Meeting.

- Present List of Allottees before the Meeting.
- Pass Board Resolution for allotment of shares (within 60 days of receiving of money).
- Pass Resolution for issue of Share Certificate in same Meeting.
- Authorize to two directors and a authorize person to sign share certificate.

STEP-X

File form with ROC:

- File PAS-3 with Registrar of Company.

ATTACHMENTS:

- List of Allottees.
- Board Resolution for allotment of Shares.

STEP-XI

Issue Share Certificate:

- Issue Share Certificate in Form- SH-1 (As per Section-56 with in 2 (two) months from the date of allotment of shares.

Note:

- Special Resolution for Issued of Debenture : In case of Offer or invitation for non-convertible debenture, it shall be sufficient if the company pass a single Special Resolution of all the offers or invitation made for debenture during a year. No need to pass Resolution again and again for the Private Placement of Debenture in a year.
- Renounce of Right: Right to acquire Shares under private placement offer can't be renounce in favour of any other person. As per Rule-14sub-rule-1 proviso, No person other than the person so addressed in the application form shall be allowed to apply through such application form.
- All earlier offers completed: A company can't come with Private Placement offer until earlier offers are not completed.
- Securities: It is also to be noted that the provisions for private placement applies to the issue of "securities" and not "shares". Thus the new provisions have widened the scope and cover a whole host of instruments such as shares, bonds, debentures and other marketable securities etc.
- Date of private placement offer letter shall be deemed to be the date of circulation of private placement offer letter.

CONCLUSION

Since the requirements for raising the funds by way of private placement have been made more stringent, it will significantly increase the compliance burden on private companies looking to raise funds through private placement. It is also to be noted that as no specific exemption has been provided for private companies or small companies, it will lead to reduce flexibility available to private companies and the companies operated by closely held people for the raising funds. However, the better governance of all companies is expected which will lead to the transparency in the affairs of the Company and accountability of the directors.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.