# MCA AMENDS IN FORM SH-4 & PAS -4

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## INTRODUCTION

In tandem with the changes introduced under the Press note 3 of 2020(https://dpiit.gov.in/sites/default/files/pn3_2020.pdf), the Ministry of Corporate Affairs ("MCA") issued 2 (two) contemporaneous notifications dated May 4, 2022 and May 5, 2022 ("Notifications") to revise Form SH-4 under the Companies (Share Capital and Debentures) Rules, 2014 ("SCD Rules") and Form PAS-4 under the Companies (Prospectus and Allotment of Securities) Rules, 2014 ("Prospectus Rules") respectively.

**1. Amendment to Form SH-4:**

In accordance with Section 56 of the Companies Act, 2013 ("CA, 2013") and Rule 11(1) of the SCD Rules, an instrument for transfer of securities held in physical form, executed between the transferor and transferee must be in Form SH-4. Proviso 1 to the Rule 6(a) of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ("NDI Rules") entails that any entity of a country which shares land border with India ("Bordering Nations") or a beneficial owner of an investment into India who is situated in or a citizen of any Bordering Nation is allowed to invest in India only with the prior approval of the Indian Government.

The modification introduced in Form SH-4 is the insertion of a declaration vis-à-vis the applicability of NDI Rules to the intended transfer of securities. To such effect, the transferee executing the instrument of the transfer will be required to declare either of the following in Form SH-4:

> *a) The transferee is not required to obtain the Government approval under NDI Rules prior to the transfer of shares; or*
>
> *b) The transferee is required to obtain the Government approval under the NDI Rules prior to transfer of shares and the same has been obtained and is enclosed herewith.*

In terms of the aforesaid declaration, the parties executing the share transfer instrument to which the NDI Rules apply shall be compelled to seek prior Government approval if the transferee is from a Bordering Nation. Further, the companies will be allowed to acknowledge and accept only those share transfer forms which are in conformity with the NDI Rules.

**2. Amendments to Prospectus Rules and Form PAS-4:**

Pursuant to Section 42 of the CA, 2013 and Rule 14(1) of the Prospectus Rules, a company is required to make an offer or invitation for subscription to securities through private placement, subject to a special resolution passed in the shareholders' meeting of the company approving such proposal. By the May 5, 2022 Notification, MCA has now introduced the fifth proviso to Rule 14(1) of the Prospectus Rules whereby, companies are prohibited from making an offer or invitation of any securities under the Prospectus Rules to a body corporate incorporated in, or a national of, a Bordering Nation. Notwithstanding the foregoing, the Notification does carve out an exception permitting offering of securities to such body corporate or national, as the case may be, who has obtained Government approval as mandated under the NDI Rules. Further, the approval so obtained from the Indian Government must be enclosed with Form PAS-4.

In light of the foregoing, Form PAS-4 is also revised to enable the companies to select either of the following under Part B of the Annexure to the form:

> *a) The applicant is not required to obtain the Government approval under NDI Rules prior to subscription of shares; or*
>
> *b) The applicant is required to obtain the Government approval under NDI Rules prior to subscription of shares and the same has been obtained, and is enclosed herewith.*

Upon the conjoint reading of the amendments, it can be said that the companies are bound to adhere to the NDI Rules while offering shares or securities under the Prospectus Rules. In addition to the foregoing, any false declaration under the aforementioned forms may attract the provision of Section 448 of the CA, 2013, subsequently attracting the penalty prescribed for fraud under Section 447 of the CA, 2013.

**CONCLUSION**

MCA has ensured that compliance irregularities are eliminated and adherence to the NDI Rules and Press Note 3 of 2020 can be ascertained with the declarations required. With the advent of the Notifications, it can be gathered that Government is undertaking significant steps to ensure alignment of provisions under various laws and further its aim of creating a watertight regime for the companies to be "all-compliant."