

Key changes in Private Placement of Securities as per Companies Amendment Act, 2017



Ministry of Corporate Affairs (MCA) vide notification dated 7th August, 2018 has notified Section 10 of Companies Amendment Act, 2017 effective from 7th August, 2018 which substitutes Section 42 of Companies Act, 2013 for Private Placement of Securities and Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 is also substituted accordingly. The key changes in Section 42 read with Rule 14 Companies (Prospectus and Allotment of Securities) Rules, 2014 are as follow:

1. A private placement shall be made only to a **select group of persons who have been identified by the Board** (“identified person”) whose number shall not exceed more than 50 or such higher number as may be prescribed in one Financial Year (currently as per Rule maximum number is 200 people) [this excludes QIB and employees who are offered securities under ESOP]. Rule 14(2) proviso reads that such restriction to 200 persons would be reckoned individually for each kind of security that is equity shares or preference shares or debenture. This provisions are not applicable to NBFC and Housing Finance Companies , provided they comply with specified regulations made by the RBI or the National Housing Bank.
2. Issue shall be through **Offer cum Application Letter (Form PAS-4)**, each Application to be serially numbered and addressed to the person to whom the offer is made . Application Form is incorporated as Part B of Form PAS-4 which is required to be filled by the Applicant. This offer **shall not carry any right of renunciation.** This provision was not specifically mentioned earlier either in the Section or in the Rule;

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3. The Company shall not utilize the monies raised through Private Placement unless **allotment of securities is made and the Return of Allotment is filed with RoC .** Maximum time given for filing return of allotment is 15 days from the date of allotment .
4. **Different class of securities can be issued simultaneously** subject to maximum number of identified person, the Company may at any time make more than one issue of securities. Earlier there was a restriction to have fresh offer unless the allotments with respect to any offer or invitation were completed or that offer or invitation was withdrawn or abandoned by the Company ;
5. The Company **need to allot securities in 60 days** from the date of receipt of application money or if it fails to do so it has to repay the application money in next 15 days after completion of 60 days and if it fails to repay also then such application money will be treated as Deposit and it will be liable to repay it with 12% interest p.a
6. The Company need to keep monies received on application **under a separate bank account in a scheduled bank** and can use these monies either for allotment of shares/ securities or repay the same if it fails to allot the shares/ securities
7. The Company cannot **publish or use media, marketing or distribution channels** or agents to inform public at large about such an issue. That means the Offer to be given to only identified persons.
8. The Company has to file Form PAS- 3 for **return of allotment within 15 days of allotment** instead of 30 days earlier;
9. The requirement of **value of Offer per person of Rs 20,000/- of face value is omitted** from the Rules.

10. As per Rule 14 (8) now a Company shall issue private placement offer cum application letter **only after the relevant Special Resolution approved by the members or the Resolution approved by the Board has been filed with Registrar of Company** (ROC).

Further, **private companies** shall file with ROC a copy of the Board Resolution or Special Resolution with respect to approval under section 179 (3) (c) for issue of securities.

Hence exemption provided to private companies under 5th June 2015 notification for filing e-form MGT-14 is withdrawn in relation to issue of securities through private placement.

11. The Company is required to maintain a complete record of private placement offers in Form PAS -5 , however **now PAS -5 is no more required to be filed with ROC** as the proviso to earlier Rule 14 (3) is omitted.
12. To avoid any money laundering activities, **the money for subscription of such offered securities need to be made from the bank account of the person subscribing it** and the Company shall keep the record of such bank account. If the shares are in joint names , money need to come from the Bank account of the person whose name appears first in the application. However this is not applicable if securities are offered for consideration other than cash.
13. If a Company defaults in filling e-Form PAS-3, the Promoters, the Company and its Directors shall be liable for **penalty of Rs. 1,000 per day till default continues** subject to maximum of Rs. 25 Lakh. Separate penal provision is included for default in filing e-Form PAS-3 ;

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14. In case of contravention of Section 42, penalty is now reduced to amount raised through private placement or Rs.2 Crores, **whichever is lower.**

15. Form PAS 4 is also modified under the Rules broadly as follow:

- (i) Form PAS 4 is Private Placement Offer Cum Application letter
- (ii) In Section 1 about General Information , the Company need to inform if there is any default in annual filing by the Company
- (iii) In Section 2 about Particular of Offer, the Company need to give financial position of the Company for the last three years and information added which are as per Rule 13 (2) (d) (iv) to (xii) of the Companies (Share Capital and Debentures) Rules, 2014 . These details are given in the explanatory statement while issuing preferential offer of shares, which are details about valuation of securities, basis on which valuation is arrived at. Relevant date of valuation, class of persons to whom the allotment is proposed, intention of promoters , directors or KMP to subscribe for offers, time line by when allotment will be made, change in control , justification for the allotment proposed for consideration other than cash etc. Interestingly, the Company is also required to inform details of significant and material orders passed by the Regulators, Courts and Tribunals impacting the going concern status of the Company and its future operations . The format of pre and post shareholding also need to be part of Offer
- (iv) In Section 3 mode of payment for subscription is added
- (v) In Section 4 Disclosure with regards to interest of Directors , litigations etc, no changes are made.
- (vi) Part B is added in PAS 4 adding details of the Applicant . This being Application Form also , the details are required to be filled by the Applicant like Name , address, phone number, email address, PAN Number and Bank Account Details.

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Conclusion: With complete substitution of section 42 of the Companies Act 2013 and modifications in Rules, now there is no renunciation allowed and hence the identified person can only subscribe the securities and that too the money for subscription to come from his Bank Account only. This brings more transparency and avoid any back door entry by other than identified person for whom the members have not given their approval. Further to bring clarity even the Private Limited Companies which are otherwise exempted to file Form for Issue of Shares under Private Placement, are now required to file relevant Form with the Registrar office. Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 now requires more details in explanatory statement for obtaining shareholders' approval. For ease of doing business, now the Company is allowed to make more than one issue of securities to such class of identified persons. Hence all in all, it's a welcome move which brings clarity, transparency and ease of doing business.

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