



***Private Circulation Only**

Newsletter for August, 2018
By Amita Desai & Co.



We love to serve and add value to business of our clients



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Greetings and a warm welcome to our August Month's edition of Newsletter!

We are pleased to share our Newsletter for the month of August 2018. The newsletter covers the updates / amendments of Ministry of Corporate Affairs (MCA), Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI) and Insolvency & Bankruptcy Board of India (IBBI).

The Newsletter is part of our knowledge sharing initiative. Efforts have been made to share notifications and circular issued by regulatory authorities during the month in concise and in simplified manner.

We have tried to provide an analysis on Section 42 of Companies Act, 2013 (Private Placement of Securities) as amended by Companies Amendment Act, 2017.

We appreciate your support and are so happy to have you as a reader.

With warmest thanks,
Amita Desai & Team



Desai & Co

A. COMMENCEMENT OF AMENDED SECTION 42 AND RULE 14 OF COMPANIES (PROSPECTUS AND ALLOTMENT OF SECURITIES) SECOND AMENDMENT RULES, 2018:

MCA vide its Notification dated August 07, 2018 has notified Section 10 of the Companies Amendment Act, 2017 (CAA 2017) which is **Section 42 of Companies Act, 2013 (Issue of Shares on Private Placement Basis)**.

Section 42 of Companies Act, 2013 is substituted by CAA 2017 and with the commencement of amended Section 42, Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 is also substituted

For detailed analysis of key changes in the Section 42 and Rule 14 please refer our Article of the Month segment in this Newsletter.

- The Link of the above notification of Section is as under:
http://www.mca.gov.in/Ministry/pdf/CommencementNoti07_08082018.pdf
- The Link of the above notification of Rule is as under:
http://www.mca.gov.in/Ministry/pdf/RuleProspectusSecurities07_08082018.pdf

B. COMPANIES (APPOINTMENT AND QUALIFICATION OF DIRECTORS) FIFTH AMENDMENT RULES, 2018:

MCA vide its notification dated August 21, 2018 has made amendment in Rule 12A of the Companies (Appointment and Qualification of Directors) Rules, 2014.

With the aforesaid notification the proviso to Rule 12A is amended and deadline of submission of e-Form DIR-3 KYC is extended from August 31, 2018 to September 15, 2018.

Also format of e-Form DIR-3 KYC has been substituted.

Note: e-Form DIR-3 KYC has been revised from August 23, 2018 so it is advisable to check the latest version before filing.

- The link of the above notification is as under:
http://www.mca.gov.in/Ministry/pdf/AppointmentQualificationRule21_22082018.pdf

C. COMPANIES (REGISTRATION OFFICE AND FEES) FOURTH AMENDMENT RULES, 2018:

MCA vide its notification dated August 21, 2018 in the Annexure under head VII of the Companies (Registration Office and Fees) Rules, 2014 substituted the following note for filling of e-Form DIR-3 KYC:

“For the current financial (2018-2019), no fee shall be chargeable till the 15th September, 2018 and fee of Rs.5000 shall be payable on or after the 16th September, 2018”.

It means no fees will be chargeable for filling of e-Form DIR-3 KYC on or before the extended due date i.e September 15, 2018 and after that fees of Rs.5000 will be levied.

- The link of the above notification is as under:

http://www.mca.gov.in/Ministry/pdf/CoRegistrationRule21_22083018.pdf

D. REPORT OF THE COMMITTEE TO REVIEW THE OFFENCES UNDER THE COMPANIES ACT, 2013:

MCA has released the report of the Committee to review the offences under the Companies Act, 2013.

The report has presented a detailed reasoning along with the recommendations of the Committee on the need to review the existing regulatory mechanism in order to foster a better corporate compliance environment.

The key recommendations of the Committee are Restructuring of Corporate Offences are for relieving Special Courts from adjudicating routine offences, De-clogging the National Company Law Tribunal, corporate compliance and corporate governance.

The Committee, in public interest, examined certain other provisions of the Companies Act, 2013 which have a large bearing on strengthening corporate governance standards as well as transparency and probity of the corporate in the country. However, in respect of offences having serious implications, no change has been suggested.

- The link of the report of the Committee to review the offences under the Companies Act, 2013 is as under:

http://www.mca.gov.in/Ministry/pdf/ReportCommittee_28082018.pdf

RBI UPDATES:

A. ENTITY MASTER:

- RBI has issued an alert relating to A.P. Dir Series Circular No.30 dated June 7, 2018, the reporting in Single Master Form (SMF) in the Foreign Investment Reporting and Management System (FIRMS) application which is made available to the public from September 01, 2018
- Accordingly, any reporting from September 01, 2018, has to be done on FIRMS portal through SMF only.
- The Link of the updated User Manual for Entity Master is as under:
<https://rbi.org.in/Scripts/femaview.aspx?femaid=64>

B. FIRMS APPLICATION :

- RBI in the First Bi-monthly Monetary Policy Review dated April 05, 2018 announced that, with the objective of integrating the extant reporting structures of various types of foreign investment in India, it will introduce a SMF subsuming all the existing reports. In order to implement this announcement, RBI has introduced FIRMS Application which provides online reporting platform for reporting of foreign investment in India in SMF. FEMA 20(R) prescribes for the reporting of foreign investment in India through various returns.
- FIRMS portal provides a one stop shop, 24*7 online reporting facility for the applicant.
- SMF is a master form which provides for the reporting of 9 forms for foreign investment viz., FC-GPR, FC-TRS, LLP-I, LLP-II, CN, DRR, ESOP, DI, InVi. With effect from September 1, 2018, only 5 forms viz., FC-GPR., FC-TRS, LLP-1, LLP-II and CN are made available. Other 4 forms viz., ESOP, DI, DRR and InVi would be made available subsequently
- FIRMS was made online in 2 phases :
 - (1) Entity Master was made available online for data entry between June 28, 2018 & July 20, 2018
 - (2) SMF made available with effect from September 01, 2018
- A Company that wants to report its foreign investment henceforth is required to authorize a person [Business User (BU)] who shall report for the transaction in SMF at FIRMS. A BU can use his login credentials only for the entity that has authorized him to report the transactions. If the person wants to act as a BU for another entity, he must register himself separately.
- At the time of registration, BU has to select the IFSC code of the bank which would approve the e-KYC of him. This would ensure that only genuine logins are made available in the FIRMS application. All e-KYC would be verified by the Authorized Dealer (AD) banks. Every BU has to be e-KYC verified before any reporting can be made in the Single Master Form by him.
- The Link of the above updated User Manual for FIRMS application is as under:
<https://rbi.org.in/Scripts/femaview.aspx?femaid=65>

SEBI UPDATES:

A. ENHANCED MONITORING OF QUALIFIED REGISTRARS TO AN ISSUE AND SHARE TRANSFER AGENTS:

SEBI vide Circular No. SEBI/HO/MIRSD/DoP/CIR/P/2018/ 119 dated August 10, 2018, issued a circular stating Registrars and Share Transfer Agents to comply with enhanced monitoring requirements through implementation of internal policy framework and periodic reporting on key risk areas, data security measures, business continuity, governance structures, measures for enhanced investor services, service standards, grievance redressal, insurance against risks, etc.

- SEBI has asked market intermediaries including the RTAs servicing more than 2crore folios – referred as Qualified RTAs (QRTAs) to formulate and implement a comprehensive policy framework approved by the board of directors, which includes the following aspects:
 - Risk Management Policy;
 - Business Continuity Plan;
 - Manner of keeping records;
 - Wind-down Plan;
 - Data Access and Data Protection Policy;
 - Ensuring Integrity of Operations;
 - Scalable infrastructure;
 - Board of Directors (BoD) / Committees of BoD of QRTAs;
 - Investor Services and Service Standards; and
 - Insurance against Risks
- QRTAs shall formulate and implement the policy framework and comply with the directive within six months from the date of the circular. The first compliance with these guidelines shall be submitted within 30 days from the end of six months period.
- The compliance report of the enhanced reporting norms will have to be submitted to SEBI duly reviewed by the BoDs of QRTAs, within 60 days of expiry of each calendar quarter.
- It is to be noted that this enhanced reporting shall be done in addition to the half-yearly periodic reporting done by RTAs as prescribed by SEBI vide circular dated July 05, 2012 on "Review of Regulatory Compliance and Periodic Reporting.

The link of this above circular is as under:

https://www.sebi.gov.in/legal/circulars/aug-2018/enhanced-monitoring-of-qualified-registrars-to-an-issue-and-share-transfer-agents_39945.html

B. ELECTRONIC BOOK MECHANISM FOR ISSUANCE OF SECURITIES ON PRIVATE PLACEMENT BASIS – CLARIFICATIONS:

- SEBI issued a Circular No SEBI/HO/DDHS/CIR/P/2018/122 dated August 16, 2018 on Electronic Book Platform (EBP Platform) for private placement of securities.
- To further rationalize and ease the process of issuance of securities on EBP Platform and in consultation with the market participants, it has been decided to provide following additional facilities:
 - a) Closed bidding: In addition to the current system of open bidding, closed bidding shall also be permitted on EBP Platform subject to the issuer disclosing the mode of bidding in the PPM/IM. Under closed bidding, there shall be no real time dissemination of bids on the EBP Platform.
 - b) Multiple yield allotment: An issuer can choose either uniform yield or multiple yield allotment, provided the same is disclosed in the PPM/IM.
 - c) Multiple bids by an investor: Investors are now permitted to place multiple bids in an issue.
 - d) Allotment on yield-time priority basis: Allotment to the bidders shall be done on the basis of "Yield-time priority". Thus, allotment shall be done first on "yield priority" basis, however, where two or more bids are at the same yield, then the allotment shall be done on "time-priority" basis. Further, if two or more bids have the same yield and time, then allotment shall be done on "pro-rata" basis.
 - e) Pay – in of funds through escrow bank account: In addition to the current process of pay-in of funds through clearing corporation of Stock Exchanges, the pay-in of funds towards an issue on EBP shall also be permitted through escrow bank account of an issuer. An issuer, in its PPM/IM, shall disclose the manner of funds pay-in so chosen and details thereof. The process of pay-in of funds by investors and pay-out to issuer can be done on either T+1 or T+2 day, where T day is the issue day, and the same shall be disclosed by issuer in PPM/IM.
 - f) Depositories to act as EBP: In addition to the Stock Exchanges, Depositories can also act as EBP.
- The contents of this circular will come in effect from October 01, 2018.

The Link for the above circular is as under:

<https://www.sebi.gov.in/legal/circulars/aug-2018/electronic-book-mechanism-for-issuance-of-securities-on-private-placement-basis-clarifications-40007.html>

C. STREAMLINING THE PROCESS OF PUBLIC ISSUE UNDER CERTAIN REGULATIONS OF SEBI:

SEBI vide Circular No. CIR/DDHS/P/ 121/2018 dated August 16, 2018 issued a circular for streamlining the process of public issue under various regulations including,

- SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (SEBI ILDS);
 - SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 (SEBI NCRPS);
 - SEBI (Public Offer and Listing of Securitized Debt Instruments) Regulations, 2008 (SEBI SDI); and
 - SEBI (Issue and Listing of Debt Securities by Municipalities) Regulations, 2015 (SEBI ILDM)
- In order to make the existing process of issuance of debt securities, NCRPS and SDI easier, simpler and cost effective for both issuers and investors under the SEBI ILDS, SEBI ILDM, SEBI NCRPS and SEBI SDI regulations respectively, it has been decided to reduce the time taken for listing after the closure of the issue to 6 working days as against the present requirement of 12 working days.
- Therefore, the Self-Certified Syndicate Banks (SCSBs), stock exchanges, depositories and intermediaries will now have to co-ordinate with one another to ensure completion of listing of debt securities, NCRPS, SDI and commencement of trading by T+6.
- The Circular states the role of SCSBs and intermediaries which includes:
- a) To provide an acknowledgement to the investor on receipt of the application;
 - b) For applications submitted by investors to SCSB: SCSB shall capture and upload details in the electronic bidding system and block the funds available in the bank account specified in the form.
- For applications submitted by investors to other intermediaries: The intermediary shall capture and upload details in the electronic bidding system; and
- c) The SCSBs or intermediaries shall provide guidance to their investors on making applications in public issues and are advised to take necessary steps to ensure compliance with this circular.
- The Circular also states the role of Stock Exchanges which includes:
- a) Firstly, to validate the electronic bid details with depository's records;
 - b) Stock Exchange shall allow modification of selected fields viz. DP ID/Client ID or Pan ID, Bank Code and Location Code in the bid details already uploaded on a daily basis upto timeline as has been specified; and
 - c) Stock Exchange shall develop systems to facilitate the Investors to view their status of their public applications and allotments.
- This will be applicable for all public issues of debt securities, NCRPS and SDI opening on or after October 01, 2018.

➤ **Indicative timeline schedule for various activities as follows:**

SR No	DETAILS OF ACTIVITIES	DUE DATE (WORKING DAY*)
1	Issue Closes	T (Issue closing date)
	<p>a) Stock exchange(s) shall allow modification of selected fields (till 01:00 PM) in the bid details already uploaded.</p> <p>b) Registrar to get the electronic bid details from the stock exchanges by end of the day.</p> <p>c) SCSBs to continue / begin blocking of funds.</p> <p>d) Designated branches of SCSBs may not accept schedule and applications after T+1 day.</p> <p>e) Registrar to give bid file received from stock exchanges containing the application number and amount to all the SCSBs who may use this file for validation/ reconciliation at their end.</p>	T+1
	<p>a) Issuer, merchant banker and registrar to submit relevant documents to the stock exchange(s) except listing application, allotment details and demat credit and refund details for the purpose of listing permission.</p> <p>b) SCSBs to send confirmation of funds blocked (Final Certificate) to the registrar by end of the day.</p> <p>c) Registrar shall reconcile the compiled data received from the stock exchange(s) and all SCSBs (hereinafter referred to as the “reconciled data”).</p> <p>d) Registrar to undertake “Technical Rejection” test based on electronic bid details and prepare list of technical rejection cases</p>	T+2
	<p>a) Finalization of technical rejection and minutes of the meeting between issuer, lead manager, registrar.</p> <p>b) Registrar shall finalize the basis of allotment and submit it to the designated stock exchange for approval.</p> <p>c) Designated Stock Exchange to approve the basis of allotment.</p> <p>d) Registrar to prepare funds transfer schedule based on approved basis of allotment.</p> <p>e) Registrar and merchant banker to issue funds transfer instructions to SCSBs.</p>	T+3
	<p>a) SCSBs to credit the funds in public issue account of the issuer and confirm the same.</p> <p>b) Issuer shall make the allotment.</p> <p>c) Registrar/Issuer to initiate corporate action for credit of debt securities, NCRPS, SDI to successful allottees.</p> <p>d) Issuer and registrar to file allotment details with designated stock exchange(s) and confirm all formalities are complete except demat credit.</p> <p>e) Registrar to send bank-wise data of allottees, amount due on debt securities, NCRPS, SDI allotted, if any, and balance amount to be unblocked to SCSBs.</p>	T+4

	<p>a) Registrar to receive confirmation of demat credit from depositories.</p> <p>b) Issuer and registrar to file confirmation of demat credit and issuance of instructions to unblock ASBA funds, as applicable, with stock exchange(s).</p> <p>c) The lead manager(s) shall ensure that the allotment, credit of dematerialised debt securities, NCRPS, SDI and refund or unblocking of application monies, as may be applicable, are done electronically.</p> <p>d) Issuer to make a listing application to stock exchange(s) and stock exchange(s) to give listing and trading permission.</p> <p>e) Stock exchange(s) to issue commencement of trading notice.</p>	T+5
	Trading commences	T+6
<p>*Working days shall be all trading days of stock exchanges excluding Sundays and bank holidays in Mumbai</p>		

➤ The link of this circular is as under:

<https://www.sebi.gov.in/legal/circulars/aug-2018/streamlining-the-process-of-public-issue-under-the-sebi-issue-and-listing-of-debt-securities-regulations-2008-sebi-issue-and-listing-of-non-convertible-redeemable-preference-shares-regulations-40004.html>

D. KNOW YOUR CLIENT (KYC) REQUIREMENTS FOR FOREIGN PORTFOLIO INVESTORS (FPIs) AMENDMENT:

SEBI issued a Circular No. IMD/FPIC/CIR/P/2018/124 dated August 21, 2018 on Know Your Client (KYC) Requirements for Foreign Portfolio Investors (FPIs) referring it to all the FPIs through their Designated Depository Participants (DDPs), Custodian of Securities, all recognized Stock Exchange, the Depositories (NSDL and CDSL), Stock Brokers through Recognized Stock Exchanges, Depository Participants through Depositories, Mutual Funds, Association of Mutual Funds in India, Portfolio Managers, KYC Registrations Agencies (KRAs), and Alternative Investment Funds (AIFs).

SEBI has prescribed the following timelines in the said Circular:

- The existing FPIs are required to provide the list of beneficial owners (BO) in the format prescribed within 6 months from the date of the circular,
- The existing FPI are required to change their structure or close their existing position in Indian securities market within 6 months from the date of the circular.
- The existing FPIs or their investors identified on basis of threshold for identification of BO in accordance with Rule 9 of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005 who do not conform to the requirements prescribed at para 2(d) of the aforesaid circular, were required to ensure compliance within 6 months of the date of the circular.
- In respect to the exempted documents to be provided during investigations / enquiry, the existing FPIs are required to provide the documents specified therein within 6 months from the date of the circular.

- All existing FPIs whose clubbed in investment in equity shares of a company is in breach of the provisions of Regulation 21(&) of SEBI (FPIs) Regulations, 2014 are required to ensure compliance within 6 months from the date of the circular.
- The above listed timelines are hereby extended to December 31, 2018.
- The Link for the above circular is as under:

<https://www.sebi.gov.in/legal/circulars/aug-2018/amendment-to-sebi-circular-no-cir-imd-fpic-cir-p-2018-64-dated-april-10-2018-on-know-your-client-requirements-for-foreign-portfolio-investors-fpis-40065.html>

E. EXTENSION OF TRADING HOURS OF SECURITIES LENDING AND BORROWING (SLB) SEGMENT:

SEBI vide Circular No. SEBI/CIR/MRD/DoP-1/P/125/2018 dated August 24, 2018 issued Circular regarding extension of Trading hours of Securities Lending and Borrowing (SLB) Segment.

- With a view to facilitate physical settlement of equity derivatives contracts, it has been decided to permit Stock Exchanges to set their trading hours in the SLB Segment, subject to the condition which includes:

(a) The **trading hours are between 9 AM and 5 PM;** and

(b) The Exchange/Clearing Corporation has in place risk management system and infrastructure commensurate to the trading hours.

- The link of this circular is as under:

https://www.sebi.gov.in/legal/circulars/aug-2018/extension-of-trading-hours-of-securities-lending-and-borrowing-slb-segment_40091.html

IBBI UPDATES:

A. THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI)

Ministry of Finance vide its notification dated on 10th August, 2018 notifies the said clause of IBBI (Insolvency and Bankrupt Board of India) for the following specified income arising to the board such as

1. Grants-in-aid received from Central Government;
2. Fees received under the Insolvency and Bankruptcy Code, 2016;
3. Fines collected under the Insolvency and Bankruptcy Code, 2016
4. Interest income accrued on (1), (2) and (3) above.

The above notification shall be subject to the condition that IBBI

1. shall not engage in any commercial activity;
2. activities and the nature of the specified income shall remain unchanged throughout the financial years; and
3. Shall file return of income in accordance with the provision of clause (g) of sub- section (4C) of section 139 of the Income- tax, 1961.

B. Circular

IBBI issued a Circular dated August 10, 2018, in connection with the notice for the Committee of Creditors under section 24 (3) (a) of the Insolvency and Bankruptcy Code, 2016 (Code) read with regulation 21 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The Code confers certain privilege on financial creditors as reasoned by the Bankruptcy Law Reforms Committee i.e. (“Committee”):

- Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it
- Committee reasoned that members of creditors committee to have the
 - a) Capability to assess viability.
 - b) Willingness to modify terms of existing liabilities in negotiations.
- Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take risk of postponing payments for better future prospects for the entity.
- Committee concluded that, for the process to be rapid and efficient, the code will provide that the creditors committee should be restricted to only the financial creditors.

As members of the committee of creditors (CoC), the financial creditors discharge several critical responsibilities, including invitation, receipt, consideration and approval of resolution plans under the code. Their conduct has serious implications for continued business of a corporate debtor and consequently on the economy. The Hon’ble Adjudicating Authority has expressed concern about their conduct in a few matters.

- In the matter of SBJ Exports & Mfg. Pvt. Ltd. Vs. BCC Fuba India Ltd. (CP-659/2016), vide order dated 7th June, 2018. The Hon’ble Adjudicating Authority has observed as follows:
 - a) An unenviable situation has been created by the CoC members.
 - b) Despite the Resolution Professional apprised the CoC that the 180 days is to be expire on 12.02.2018 and sanction be granted for moving an application for extension of the period before the Adjudicating Authority.
 - c) The CoC has behaved the way we have recorded in the preceding paras.
 - d) It is further observed that: “A strange phenomena has developed as far as functioning of the CoC is concerned. In a number of cases it has been seen that the members of the CoC are nominated by banks (financial creditor) without giving them the authority to take the decision on the spot which act as a blockage in the time bound process contemplated by Code. Like such speed breakers & roadblocks causes obstacles to achieve the speedy disposal of CIR process.”
 - e) The Hon’ble Adjudicating Authority directed the resolution professional to bring this order to the notice of the CoC so that appropriate steps are taken.
 - f) The Hon’ble Adjudicating Authority directed to send this order to IBC for taking suitable action in respect of the conduct of the members of the CoC in the present matter as well in the day to day functioning of the members of the CoC members.

- In the matter of Jindal Saxena Financial Services Pvt. Ltd. Vs. Mayfair Capital Private Limited (C.P. No. (IB)-84(PB)/2017), the Hon'ble Adjudicating Authority noted as follows:
 - a) There were 4 financial creditors who attended the first meeting of the CoC.
 - b) In the meeting, the CoC did not approve appointment of interim professional (IRP) as resolution professional (RP) since 2 of the 4 financial creditors, having aggregate voting rights of 77.97% required internal approvals from their competent authorities.
 - c) The Hon'ble Adjudicating Authority observed: "that the financial creditors/banks must send only those representative who are competent to take decision on the spot. The wastage of time causes delay and also allows depletion of value which need to be contained. The IRP/RP must in the communication address to the banks/ financial creditors that only competent members should be authorized to take decision and shall also be nominated on the CoC.
 - d) Likewise, IBBI shall take a call on this issue and frame appropriate regulations.
- Section 24 (3) (a) of the Code requires the resolution professional to give notice of each meeting of the CoC to members of the CoC and other person. Regulation 21 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 specifies the content of the notice for meeting of the CoC.
- IRP/RP as the case may be, is directed that he shall, in every notice of the meeting of the CoC and any other communication addressed to the Financial Creditors, other than creditors under section 21 (6A) (b), requires that they must be represented in the CoC or in any meeting of the CoC by such person who are competent and authorized to take decision on the spot and without deferring the decision for the reason of any internal approval from the financial creditors.
- The above Circular is issued in exercise of the power conferred under Section 196(1)(aa) read with 196(1)(g) of the IBC, 2016.

C. THE INSOLVENCY AND BANKRUPTCY CODE (SECOND AMENDMENT) ACT, 2018

- The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 received president assent on August 17, 2018. The article on the ordinance has been circulated in our June 2018 Newsletter as article of the month for June, 2018. The link for the above News letter is as under:

<http://www.amitadesai.com/uploads/Newsletter%20for%20the%20Month%20of%20June%202018.pdf>

- The link for Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 dated 17th August 2018 is as under:

[http://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%2020182018-08-18%2018:40:34.pdf](http://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%2020182018-08-18%2018:40:34.pdf)

D. Case Laws under Insolvency and Bankruptcy Board of India (IBBI)

State Bank of India (Appellant) Vs Mr.V. Ramkrishnan & M/s. Veasons Energy Systems Private Limited (Respondent)

Fact of the case:

1. Mr.V. Ramkrishnan("The Director") was the Director and the Promoter of M/s. Veasons Energy Systems Private Limited("The Company") and has given personal guarantee to State Bank of India by mortgaging his personal asset as Collateral Securities for the facilities availed by the company.
2. State Bank of India("The Bank") invoked its right under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (The "SARFAESI Act, 2002") against the director u/s 13(2) of the SARFAESI Act, for a recovery of Rs. **61,13,28,785.45/-** on 4th August, 2015.
3. The notice of bank was challenged by the company before the Hon'ble High Court of Madras, which was dismissed with costs on 17th November, 2016. Thereafter the bank issued a possession notice dated 18th November,2016 u/s 13(4) of SARFAESI Act and took a symbolic possession of the secured assets.
4. After having failed to get relief from the Hon'ble High Court of Madras the company invoked section 10 of the the Insolvency and Bankruptcy Code, 2016 ("The IBC") which was admitted, order of of 'Moratorium' was passed and an 'Interim Resolution Professional' was appointed. Even after the Moratorium period the bank continued to take measure under SARFAESI Act and proceeded with the sale of the property of the director.
5. Being aggrieved the Director filed an application before the Adjudicating Authority (National Company Law Tribunal), Chennai for stay of proceeding under SARFAESI Act including the sale of property.

Negotiation/ Argument:

1. The learned counsel of the appellant submits that the order of "Moratorium" will not affect the assets of the Personal Guarantor .
2. The learned counsel of the Respondent, says that in view of ection 14(1)(b) & Section 31(1) of the IBC code the appellant (State Bank of India) cannot proceed even against the personal Guarantor .
3. IBC Code, 2016 is in three parts. Part I relates to Preliminary including the definition , Part II relates to Insolvency Resolution and Liquidation for corporate and Part III relates to Insolvency Resolution and Bankruptcy for Individual and partnership Firms.
4. As mentioned in part II Insolvency Resolution Insolvency Resolution' and 'Liquidation Proceedings' can be initiated only against the 'Corporate Persons' and not against an individual, including 'Personal Guarantor', as defined under Section 5(22) of the IBC Code, 2016.

5. Part III relates to 'Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms', including a person who is 'Personal Guarantor'. For the said reason, in a case where proceeding has been initiated against the 'Corporate Debtor', if simultaneous proceeding is to be initiated against the 'Personal Guarantor' for bankruptcy proceedings, an application relating to the 'Insolvency Resolution or Bankruptcy' of a 'Personal Guarantor' of such 'Corporate Debtor' require to be filed before the same Adjudicating Authority (National Company Law Tribunal). As mentioned in Section 60 (2)(3) of IBC Code, 2016.
6. Therefore, a 'Financial Creditor', (State Bank of India), if intends to proceed against the 'Personal Guarantor' of the 'Corporate Debtor', he may file an application relating to 'Bankruptcy' of the 'Personal Guarantor' before the same Adjudicating Authority.

Decision:

1. The adjudicating authority by order dated 18th September, 2017 observed that "Moratorium" prohibit transferring, encumbering, alienating or disposing of by the corporate debtor any of its asset or any legal right or beneficial interest therein.
2. Also in view of the provision of IBC , Section 140 of the Indian Contract Act, 1872 & the decision of the Hon'ble High Court of Madras the Adjudicating Authority allowed the Interlocutory Application preferred by the 'Personal Guarantor', and restrained the Appellant- State Bank of India ('Financial Creditor') from proceeding against the 'Personal Guarantor' till the period of 'Moratorium' is over.
3. Section 14 of the IBC empowers the Adjudicating Authority to declare 'Moratorium' for prohibiting the Stay of all the suits proceeding going before any court/ tribunal etc. Also as mentioned in Section 31(1) " if the Adjudicating Authority is Satisfied that the resolution plan if approved by committee of creditors under section 30(4) it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan."
4. From the aforesaid provisions, it is clear that 'Resolution Plan' if approved by the 'Committee of Creditors' under sub-section (4) of Section 30 and if the same meets the requirements as referred to in sub-section (2) of Section 30 and once approved by the 'Adjudicating Authority' is not only binding on the 'Corporate Debtor', but also on its employees, members, creditors, guarantors and other stakeholders involved in the 'Resolution Plan', including the 'Personal Guarantor'.
5. In view of the aforesaid provisions, we hold that the 'Moratorium' will not only be applicable to the property of the 'Corporate Debtor' but also on the 'Personal Guarantor'.

ARTICLE ON PRIVATE PLACEMENT OF SECURITIES

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;
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 (along with the list of proposed allottees) 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;

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.

Applicability of Sections 42 read with Section 62 and Section 55:

When an unlisted public company or a private company plans to issue securities(Equity, Preference Shares or Debentures) it needs to refer following Section or Rules:

- a. Section 42 read with Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 (**Rule 14**);
- b. Section 62 read with Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014 (**Rule 13**);
- c. Section 55 read with Rule 9 & 10 of the Companies (Share Capital and Debentures) Rules, 2014 (**Rule 9 & 10**)

FAQ: which of the above provisions will apply to the following?

Q.1 Offer of Equity Shares to the **existing members** on a pro- rata basis:

A.1 As the Offer is made to the existing shareholder, **Section 62(1)(a)** will be applicable (Right Issue).

Q.2 Offer of Equity Shares to a **single investor who is not an existing member**:

A.2 As the Offer is to single investor **Section 62(1)(c) and Section 42 with Rule 13 and Rule 14** will be applicable. As section 62(1)(c) refers compliance of Chapter III. Section 42 is also required to be complied with as Rule 13 states that Section 42 is required to be complied with.

Q.3 Offer of Equity Shares to a **group of persons who are not existing members**:

A.3 As the Offer is to group of persons (Identified Persons) Section 42 read with Rule 14 and Section 62(1)(c) read with Rule 13 will apply.

Q.4 Offer of **Non-convertible Unsecured Debentures** to a single investor/a group of two or more persons;

A.4 As the Offer is of **Non-convertible** Unsecured Debentures Section 42 read with Rule 14 will only apply.

Q.5 Offer of **Non-convertible Secured Debentures** to a single investor/a group of two or more persons.

A.5 As the Offer is of **Non-convertible** Secured Debentures Section 42 read with Rule 14 will only apply.

Q.6 Offer of **Optionally Fully Convertible Debentures** to a single investor/a group of two or more persons:

A.6 In case of Offer of Optionally Fully Convertible Debentures, Section 62 read with Rule 13 along with Section 42 read with Rule 14 will apply.

Q.7 Offer of **Optionally Partly Convertible Debentures** to a single investor/a group of two or more persons:

A.7 In case of Offer of Optionally Partly Convertible Debentures, Section 62 read with Rule 13 along with Section 42 read with Rule 14 will apply.

Q.8 Offer of **Fully Compulsorily Convertible Debentures** to a single investor/a group of two or more persons:

A.8 In case of Offer of Fully Compulsorily Convertible Debentures, Section 62 read with Rule 13 and Section 42 read with Rule 14 will apply.

Q.9 Offer of **Partly Compulsorily Convertible Debentures** to a single investor/a group of two or more persons:

A.9 In case of Offer of Partly Compulsorily Convertible Debentures, Section 62 read with Rule 13 along with Section 42 read with Rule 14 will apply.

Q.10 Offer of **Redeemable Preference Shares** to a single investor/a group of two or more persons:

A.10 In case of Offer of Redeemable Preference Shares, Section 55 read with Rule 9 & 10 will be applicable along with Section 42 read with Rule 14 will apply.

Q.11 Offer of **Fully Convertible Preference Shares** to a single investor/a group of two or more persons:

A.11 In case of Offer of Fully Convertible Preference Shares, Section 55 read with Rule 9 & 10 will be applicable along with Section 62 read with Rule 13 will apply.

Q.12 Offer of **Warrants** to any person other than existing shareholder.

A.12 Warrants are convertible into equity and as per explanation (ii) of Rule 13 (1) the “expression shares or other securities” includes securities which are convertible and Warrants are considered as convertible securities and hence in case of Offer of Warrants, Section 62 read with Rule 13 and Section 42 read with Rule 14 will apply.

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 only can subscribe the securities and that too the money for subscription to come from his Bank Account only. This brings more transparency and avoids any back door entry by other than identified person for whom the members have not given their approval. Further the Private Limited Company which is otherwise exempted to file Form MGT 14 for Issue of Shares are now required to file Form MGT 14 with the Registrar office for offer of securities under Private Placement. 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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INSPIRATIONAL QUOTE



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