

Private Placement of Securities under Company Law

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Articles explains Brief Introduction and Purpose of Private Placement of Securities, Statutory Provisions for Private Placement of Securities, Number of Persons to whom the offer shall be made, Private Placement Offer-cum-Application, Authorization by prior Shareholder's Approval, Subscription of Securities, Mode of payment of Subscription Money, Separate Bank Account with Scheduled Bank, Time Limit for Allotment of Securities, Why Offer should not be advertised, Filing of Return for Private Placement and Procedure for Private Placement.

1. Brief Introduction and Purpose of Private Placement of Securities:

A Company shall need to raise funds for purpose of setting up of projects or new venture / expansion of the existing business or for funding the working capital requirements. The Company has the option to raise funds either by way of raising debt funds such as loan from Banks / Financial Institutions / Non-Banking Finance Companies or by way of issue of Debentures or Bonds, or further issue of Share Capital. It will depend on current financial position of the company to choose, whether to raise further funds by way of debt funding or by way of share capital, after taking into consideration its internal financial dynamics.

Part II of the Chapter III of the **Companies Act, 2013**, deals with the Private Placement. A private placement is a capital raising event that involves the sale of securities to a relatively small number of selected group of persons (Investors).

A private placement is different from a public issue in which securities are made available for sale on the open market to any type of investor.

Private Placement of Securities

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2. Statutory Provisions for Private Placement of Securities:

The provisions of Section 42 of the Companies Act, 2013, as amended by **Companies (Amendment) Act, 2017** read with the Rule 14 of the **Companies (Prospectus and Allotment of Securities) Rules, 2014** deal with the issue of securities by way of Private Placement. The Private Placement means any offer of securities or invitation to subscribe securities to a select group of persons (herein referred to as “**identified persons**”), by way of issue of securities, then only the proposed issue shall be considered as Private Placement.

3. Number of Persons to whom the offer shall be made:

A Private Placement shall be made only to Identified Persons not exceed fifty or such higher number as may be prescribed [200* persons in aggregate has been prescribed] excluding the Qualified Institutional Buyers (QIBs) and employees of the company being offered securities under a scheme of ESOP, in a financial year subject to the prescribed conditions.

**The limit of 200 in aggregate shall be reckoned individually for each kind of security viz. equity share, preference share and debentures etc.*

Note: If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, same shall be deemed to be an offer to the public.

4. Private Placement Offer-cum-Application:

A private placement offer cum application form shall be in the form of an application in **Form PAS-4**, which should be serial numbered and addressed to the person to whom the offer is made and sent to him, either in written or in electronic mode, within 30 days of recording their name.

The Company shall maintain a complete record of such offers in **Form PAS-5**. [Rule 14(4)]

5. Authorization by prior Shareholder's Approval:

A Company shall make any offer or invitation, to subscribe the securities through private placement unless the same has been previously approved by shareholders of the Company, by a Special Resolution, for **each of the offers or invitations***. The notice calling Extra-Ordinary General Meeting of the shareholders must contain an explanatory statement bearing the particulars of offer, date of passing Board resolution, kinds of securities offered and its price, basis or justification for the price, name and address of valuer who performed valuation, amount which the company intends to raise, material terms of raising such securities, proposed time schedule, purpose or objects of offer, contribution being made by the promoters or directors.

**In case of offer or invitation for non-convertible debentures, where the proposed amount to be raised through such offer or invitation exceed the limit as specified in Section 180(1)(c), it shall be sufficient if the Company passes a previous special resolution only once in the year for all the offers or invitations for such debentures during the year. [Rule 14(1)]*

6. Subscription of Securities:

Every person to whom Private Placement offer has been made and who is willing to subscribe to the shares of the Company may do so by filling the application form attached with the offer cum application letter alongwith subscription money.

Note: *Fresh offer or invitation for Private Placement shall not be made unless any previous offer or invitation has been completed or withdrawn or abandoned by the Company. [Section 42(5)].*

7. Mode of payment of Subscription Money:

Subscription money can be paid in any of the following modes:

- (i) By Cheque or
- (ii) By Demand draft or
- (iii) By other banking channels except cash. [Section 42(4)]

8. Separate Bank Account with Scheduled Bank:

Monies received must be kept in a separate bank account and shall not be utilized for any purpose other than:

- (a) For adjustment against allotment of securities or

(b) Repayment of monies where the company is unable to allot securities

After completion of allotment process, the Company will be allowed to move the funds in regular Bank account used for day to day transactions.

Note: Utilization of Money:

*Company cannot utilize the funds so raised from a Private Placement unless it has allotted shares to the subscribers and it has filed a return of allotment with the Registrar of Companies in **Form PAS-3**.*

9. Time Limit for Allotment of Securities :

A Company making an offer or invitation under this section shall allot its securities within 60 days from the date of receipt of application money. In case the Company is not able to allot the securities within 60 days, the Company shall refund the application money to the subscribers within 15 days from the expiry of 60 days and if Company fails to repay applications money, it shall be repaid with interest at 12% p.a from the expiry of 60th day. [Section 42(6)]

Note: *In case the application money is not refunded within 15 days of completion of 60 days, then amount pending for refund shall be treated as Public Deposit under Section 73 of the Companies Act, 2013.*

10. Offer should not be advertised:

No Company shall release any public advertisements or any media, marketing or distribution channels or agents to inform the public at large about such an offer.

11. Filing of Return:

A Company shall file with the Registrar a return of allotment in **Form PAS-3** within 15 days* from the date of allotment, along with complete list of all allottees.

**Before the Companies (Amendment) Act, 2017, the date of filing of return of allotment was 30 days which was reduced to 15 days as per amended Section 42(8) of the Act.*

12. Procedure for Private Placement:

Following procedure should be followed by the Company intending to issue securities under Private Placement:

Convene the meeting of the Board of Directors of the Company, to approve the followings;

– Issue of securities by way Private Placement Basis.

- Finalization and Identification of persons (Identified person).
- Number of securities to be issued.
- Take note of the Valuation Report and decided the price of security.
- Draft offer letter in Form PAS-4.
- Approve the notice of calling for Extra-Ordinary General Meeting of the shareholders of the Company to take members approval.
- Opening of a separate Bank Account for keeping the application money received.

File **Form MGT-14** within 30 days of passing the Board Resolution for issue of securities as per Section 117 & 179(3)(c).

Note: *A private Company is not required to file Form MGT-14, except in case of offer or invitation of non-convertible debentures and the amount of the proposed issue does not exceed the limits as specified under the Section 180 of the Companies Act, 2013.*

Convene Extra-Ordinary General Meeting for the followings purpose:

- Pass Special Resolution to approve Private Placement.
- Approve the Offer Letter to be sent to the Identified Persons.

File **Form MGT-14** with ROC within 30 days of passing the Special Resolution approving the Private Placement.

Send Offer cum Application Letters in **Form PAS-4** to Identified Persons within 30 days of recording the names of the identified persons. Such Offer cum Application Letters can be sent in electronic mode (emails) or by post.

Prepare the complete record of private placement offer in Form PAS-5.

Receiving application money in a Separate Bank Account with Scheduled Bank within the offer period as mentioned in the Offer cum Application Letter.

After Closure of Offer Period call a Board Meeting and pass Resolution for allotment of securities and issue securities certificate.

File the return of allotment in **Form PAS-3** within 15 days from the date of the allotment made i.e. After passing Board Resolution for allotment of securities.

Make sure the securities are allotted within 60 days of the receipt of Application money by the Company.

Within 30 days of issue of securities certificates, the Company shall pay stamp duty as per the respective Stamp Act of the State.

The Company will be allowed to utilize the money raised through Private Placement only after Return of Allotment in Form PAS-3 is filed with the Registrar of Companies.

The Company should update its Registrar of Members in case of issue of share or Registrar of Debenture holders or Securities holders, in case of any other security.

Conclusion:

Through this brief article we have tried to cover mostly all the aspects of the subject. Any observations, comments and views are most welcome. This article is for informative and knowledge sharing purposes only.

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