

Article

Relaxation in filing of PAS 4 private placement to existing members -Companies (Share Capital and Debentures) Amendment Rules, 2015



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March 20, 2015

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The Ministry of Corporate Affairs (MCA) vide Companies (Share Capital and Debentures) Amendment Rules, 2015¹ (the Amendment Rules) dated March 18, 2015 has provided a little relief to the companies in the event of making private placement to *existing members*.

The Amendment Rules

Rule 13 (1) has been amended to insert the first proviso as:

*"Provided that in case of any **preferential offer made by a company to one or more existing members only**, the provisions of sub-rule (1) and proviso to sub-rule (3) of rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014 shall not apply."*

[emphasis supplied]

Existing provisions

Provisions of Rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014

Sub-rule 1 provides for making of offer through PAS-4 in the event a company makes an offer or invitation to subscribe to securities through issue of a private placement under section 42 (1)

Sub-rule 3 provides that the company shall maintain a complete record of private placement offers in Form **PAS-5**. The proviso requires that copy of such record in PAS 5 along with the private placement offer letter in Form **PAS-4** shall be filed with the Registrar.

Combined reading of the above Rules provides that in the event of a company making private placement it shall have to file PAS 4², i.e. the offer letter detailing the information required to be given by the companies mandatorily in the event of private placements. Further, this had to be filed alongwith PAS 5 in terms of Rule 3. It is to be noted that the requirement of filing PAS 5 arises from section 42 (7).

¹ http://mca.gov.in/Ministry/pdf/Chapter4_Rules_19032015.pdf

² http://mca.gov.in/MCA21/dca/downloadforms/eformTemplates/NCA/Form_PAS-4.pdf



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The Analysis

In case a company make private placement to *existing members*, it shall not be required to issue PAS 4, i.e. the Company will not be required to issue an offer letter as detailed under PAS 4. Since, the requirement of PAS 4 is done away with, therefore, requirement of filing the same with PAS 5 and has consequentially been omitted.

It to be kept in mind that the non- requirement of PAS 4 and consequent filing is not in case of every private placement but only where a company makes preferential issue to existing members, is when the requirement is done away with.

One may now argue that why will a company then at all opt for private placement and stand opt for rights issue u/s 62 (1) (a). Well the thin line of difference remains still. While I may make a rights issue but in that case the offer shall have to be made to all the existing members which is not the case when a company makes preferential issue to existing members. Hence, for this selective offer amongst the existing members, the Company shall observe the requirements of section 42 and its allied rules except issuing PAS 4.

Does it mean that offer letter will not be issued at all? Sure enough no. The requirement of detailed offer letter under PAS 4 has been done away with but surely the company should issue an offer letter for such private placements as well.

Filing requirements in PAS 3

It is to be also noted that while filing return of allotment in PAS 3, companies use to attach PAS 4 as well. The same will not be required now in case of private placement to existing members.

Further, MCA had on or around March 10, 2015 introduced PAS 6 for filing of offer letter in case of Private Placement. As on date the form is not available on the MCA Portal³, therefore, PAS 4 will not be required in that case as well.

³ As can be viewed on MCA portal at 4.45 pm on March 19, 2015: http://mca.gov.in/MinistryV2/Download_eForm_choose.html



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Effective date

As per sub-rule (2) of Rule 1 to these Amendment Rules, they are to come into force on the date of publication in Official Gazette. Since, the same is not yet done, it can be said that the same is not yet effective. Hence, currently, the companies will have to continue with filing of PAS 4 even in case of preferential issue to existing members.

Our take

At the first blush, the expectation was that MCA will again goof up somewhere but may be for the first time we can sense something sensible from this amendment. This change, once notified will be a fresh air to the companies making private placements especially NBFCs as it will not only reduce the cumbersome and in a way impractical job of drafting the detailed offer letter, to the existing members but eliminate the unnecessary filing requirements too.

Anomaly but remains!

MCA has introduced the above amendment by way of amendment to Rule 13 in Companies (Share Capital and Debentures) Rules, 2014, which is to be read with section 62 of the Act. The essence of the amendment should have been by way of also amending Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014. The said rules pertain to section 42 while the Share Capital and Debenture rules pertain to section 62 and only section 42 (2). If one were to do a private placement then one would refer to Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 which do not provide for any such exemption in case of allotment to existing members only. Further, if one has to at all make a preferential issue to existing members, Rule 14 would actually be redundant as the only Rule Company will follow will be Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014 read with section 62.

Its better too be late than never is what we can comment upon for our MCA. Well, now we need to wait for the gazette publication so as to implement the provisions. We hope that MCA will not in its usual manner just replace the contents with the gazette notification by backdating!



Filing of PAS 4 done away with for private placement to existing members

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