Presents The Power of 30!

A web series of 30 episodes covering different areas of corporate, securities and financial laws for the corporate professionals across the country.
COPYRIGHT

• The presentation is a property of Vinod Kothari & Co.

• No part of it can be copied, reproduced or distributed in any manner, without explicit prior permission.

• In case of linking, please do give credit and full link
“PRIVATE PLACEMENT OF SECURITIES”

August 25, 2018

Vinita Nair
Vinod Kothari & Company

Kolkata
1006-1009 Krishna Building
224 AJC Bose Road
Kolkata – 700017
Phone:033-22811276/ 22813742/7715
E: corplaw@vinodkothari.com

New Delhi
A/11, Hauz Khas,
New Delhi 110016
Phone:011-41315340/
65515340
E: delhi@vinodkothari.com

Mumbai
403-406,
175 , Shreyas Chambers,
D.N. Road, Fort,
Mumbai – 400 001
Phone: 022 22614021 / 62370959
E: bombay@vinodkothari.com

www.vinodkothari.com
Email: info@vinodkothari.com / vinod@vinodkothari.com
PRIVATE PLACEMENTS- SEC 42

- **Meaning**: offer of securities to a select group of persons by a company (other than by way of public offer) through issue of a pvt. placement offer cum application letter

- Process of pvt. placements greatly tightened
  - Given to max 200 persons in a F.Y.
    - QIBs and employees to whom ESOP given not included
  - every offer of securities other than public, rights or bonus offer amounts to a pvt. placement and governed by the section.
  - 200 for each kind of security

- **Deemed public offer**:
  - to more than 200 persons in a F.Y. shall be deemed to be public offer
  - every pvt. placement not complying with the requirements of the section

- **Applicability**:
  - Pvt. + public cos.
DEFINITION OF QIBS

‘Qualified institutional buyer’ means:
(i) a mutual fund, venture capital fund[, Alternative Investment Fund]9 and foreign venture capital investor registered with the Board;
(ii) a foreign portfolio investor other than Category III foreign portfolio investor], registered with the Board;
(iii) a public financial institution as defined in section 4A of the Companies Act, 1956;
(iv) a scheduled commercial bank;
(v) a multilateral and bilateral development financial institution;
(vi) a state industrial development corporation;
(vii) an insurance company registered with the Insurance Regulatory and Development Authority;
(viii) a provident fund with minimum corpus of twenty five crore rupees;
(ix) a pension fund with minimum corpus of twenty five crore rupees;
(xi) insurance funds set up and managed by army, navy or air force of the Union of India;
(xii) insurance funds set up and managed by the Department of Posts, India;
(xiii) systemically important non-banking financial companies.
WHEN CAN IT BE A PRIVATE PLACEMENT?

- **Is it a public company?**
  - Yes
    - **Is it a public offer?**
      - No
        - **Is it a rights/bonus issue?**
          - Yes
            - **Is it in compliance of section 42?**
              - Yes
                - It can be a private placement
              - No
                - It is deemed to be a public offer and is not a private placement
            - No
              - **Is it to selected group?**
                - Yes
                  - It is a private placement
                - No
                  - It is to public generally and is not private placement
        - No
          - It is a private placement
  - No
    - It is a private company

- **Is it an NBFC/HFC?**
  - No
    - It is a private placement
  - Yes
    - **Is the number of investors > 200?**
      - Yes
        - It can be a private placement
      - No
        - **Is it to selected group?**
          - Yes
            - It is a private placement
          - No
            - It is deemed to be a public offer and is not a private placement
Kinds of security covered:

- Shares
- Debentures

Shares:
- Equity shares- Sec 42, 62
- Preference shares- Sec 42, 55

Debentures:
- CCDs – Sec 42, 71, 62
- NCDs – Sec 42, 71
  - If unsecured and unlisted then treated as deposits
- OCDs – Sec 42, 62, 71
  - If unsecured, then treated as deposits
- PCDs- Sec 42, 62, 71
  - If unsecured, then treated as deposits
Securities not covered:
- No negative list provided
- However, equity shares and convertible securities are governed both by
  - provisions of private placement (sec 42) ; and
  - preferential allotment (sec 62)
  - Every preferential issue is private placement but the reverse is not true.
QUICK SNAPSHOT OF THE CHANGES (1/2)

- Substitution of entire section

- To specifically provide for no renunciation rights in the PPOAL
  - Details of particulars of offer given in PAS-4 shall also be provided in explanatory statement to shareholders’ resolution

- Restriction on utilisation of application money unless allotment is made and return of allotment is filed
  - Debate over “unless” w.r.t administrative pt. of view
  - Liberal view taken to utilize money before filing in case the co. files PAS-3 within 15 days i.e. on time

- To enable companies to make more than one issue of securities at any time to the identified persons under this section.

- Filing of offer letter and record of private placement in e-Form GNL-2 dispensed with.
QUICK SNAPSHOT OF THE CHANGES (2/2)

- Time limit for filing return of allotment in PAS-3 reduced to 15 days from 30 days from the date
- Min. subscription amount of Rs. 20,000 per person dispensed with

- No issuance of PPOAL unless e-Form MGT-14 is filed for BR or SR
  - No exemption to private companies from the aforesaid filing
  - MCA exemption notification dated 5th June, 2015 stands nullified

- Failure to file the above form to make promoters and directors liable to a penalty for each default of 1000 rupees for each day subject to max. 25 lakhs.

- Penalty on promoters and directors for contravention of section 42 to be amended as amount raised through such offer or 2 crore, whichever is lower. (Earlier it was amount involved in the offer or 2 crore, higher)
PPOAL MADE EXHAUSTIVE (1/2)

**Earlier requirement:**
- Dt. of passing BR and SR
- Kinds of securities i.e. shares/ debt and class of securities
- Name and address of valuer performing valuation
- Amount intended to be raised
- Terms of raising securities
- Timeline of validity of offer

**New requirement- To provide the following additional details:**
- Any default in annual filing under the CA, 2013
- Total no. of shares or securities to be issued
- Basis on which the price has been arrived at along with report of the registered valuer
- Relevant date with reference to which the price has been arrived
  - RD= date atleast 30 days prior to the date of GM
- Class of persons to whom allotment is proposed to be made
- Intention of promoters, directors or KMP to subscribe to offer
  - NA in case of NCDs since there only 1 blanket SR is sufficient
- Proposed timeline to complete allotment
PPOAL MADE EXHAUSTIVE (2/2)

- Names of proposed allottees and the percentage of post pvt. placement capital that may be held by them
  - NA in case of NCDs
- Change in control, if any, consequent to pvt. placement
- No. of persons to whom allotment of pref. basis has already been made during the year, in terms of securities as well as price
- Justification for the allotment proposed to be made for consideration other than cash together with valuation report of the registered valuer
- Form PAS-4 to show the pre and post issue holding of various groups of entities like promoters/ non-promoters and their sub-categories
- Mode of payment for subscription
- Personal details of applicant to be filled in the Form
WIDER EXPLANATORY STATEMENT

Earlier requirement

- Basis or justification for the price (incl. premium, if any) at which offer is made

New requirement- Following additional details:

- Particulars of the offer including date of BR
- Kinds of securities offered and the price at which offered
- Basis or justification for the price (incl. premium, if any) at which offer is made
- Name and address of valuer performing valuation
- Amount intended to be raised
- Material terms of raising such securities, proposed time schedule, object of offer, contribution being made by promoters/directors, principal terms of assets charged as securities
BRIEF PROCEDURE FOR MAKING PRIVATE PLACEMENT (1/4)

The procedure would include compliance at the following 4 stages:
- Prior to issuance of PPOAL
- Issuance of PPOAL
- Post issuance of PPOAL
- Allotment of Securities

SR is required for every private placement
- Only exception is in case of NCDs where issuance may be done if within the limits of sec. 180 (1) (c)
- Exception in case of NBFCs is for the limit of 200
  - However, similar restrictions exist by way of RBI guidelines on private placement
Prior to and on issuance of PPOAL

1. BR u/s 179(3) for issue of securities to pre-identified persons and calling GM

2. Delegation of power to identify persons (in case of debentures), making and distributing offer letter & allotment

3. Filing of e-Form MGT-14 for approval under 179(3) (g) and recording names of identified persons in PAS-5

4. Call GM, pass SR. (no separate SR in case of NCDs if already within limits of 180(1)(c)

5. Filing of e-Form MGT-14 u/s 117(3)(a)

6. Delegated authority identifies persons (in case of debentures) to whom offer is to be made

7. Send PPOAL in Form PAS-4 within 30 days of recording names

8. Ensuring the number of persons to whom offer is made is not more than 200

9. Opening of separate bank account
BRIEF PROCEDURE OF PRIVATE PLACEMENT (3/4)

Post issuance of PPOAL

Subscription to be made by identified person

- Cheque
- DD
- Banking channels
- Not by cash

Payment from Bank account of the person subscribing

- Remit to separate bank account
- NA for issue in consideration other than cash

Record to be maintained

- Company will keep the record of the payment
BRIEF PROCEDURE OF PRIVATE PLACEMENT (4/4)

Allotment of securities

➢ To be made by the board or delegated authority
  ▪ Within 60 days from date of receipt of application money

➢ File e-Form PAS-3
  ▪ within 15 days of allotment

➢ Utilize money only after filing e-Form PAS-3
  ▪ Liberal view to utilize money even before filing PAS-3 in case the co. files PAS-3 within 15 days i.e. on time

➢ Issue share certificates/ debt certificates
  ▪ within 2 months from the date of allotment

➢ Enter in the register of members/ debt holders
  ▪ within 7 days of approval of the allotment of securities by board or delegated authority
COMPLIANCE W.R.T. NCDS

Process remains same except following:

- If within limits of 180(1)(c)
  - Co. must have obtained blanket shareholders’ approval u/s 180(1)(c)
  - Then only BR shall suffice for pvt. placement

- If exceeding limits of 180(1)(c)
  - 1 SR in 1 year shall suffice
  - 1 year to year and not 1 F.Y. to F.Y.
EXEMPTIONS

Part exemptions provided w.r.t calculation of limits of 200

- NBFCs registered with RBI
- HFCs registered with NHB
  - if they are complying with regulations made by RBI or NHB in respect of offer or invitation to be issued on pvt. placement basis
- At present the regulations prescribed for NCDs are as under:-
  - Guidelines on Private Placement of NCDs (maturity more than 1 year) by NBFCs.
  - Housing Finance Companies issuance of Non-Convertible Debentures on private placement basis (NHB) Directions, 2014
TWO FOLD PENAL PROVISIONS

- Failure to file PAS-3 on time
  - Promoters+ Directors+ Co.= Rs. 1000 each day - 25 lacs
- Failure to comply with Sec 42
  - Promoters + Directors + Co.
    - amount raised through pvt. placement or 2 crores, whichever is lower
    - Earlier higher of the two
    - to refund money with interest to the subscribers within 30 days of order of penalty
PRIVATE PLACEMENT OF NCDS BY NBFCs
PROVISIONS IN A NUTSHELL

➢ The provisions of Companies Act, 2013 and Rules framed thereunder shall be applicable wherever not contradictory

**Category A**
- Maximum subscription of below Rs. 1 crore per Investor
- Minimum subscription per Investor shall be Rs. 20,000
- NCDs can be issued to the maximum of 200 Subscribers for every Financial Year
- Subscription shall be fully Secured

**Category B**
- Minimum subscription of Rs. 1 crore and above per Investor
- Minimum subscription per Investor shall be Rs. 20,000
- No such Limit
- The option to create security in favour of subscriber lies with Issuer
## COMPARISON WITH ACT 2013 – 1/2

<table>
<thead>
<tr>
<th>Parameters</th>
<th>RBI Guidelines</th>
<th>Act, 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Minimum subscription per Investor</strong></td>
<td>Rs. 20,000</td>
<td>No such limit</td>
</tr>
<tr>
<td>Limit of subscribers</td>
<td>Category A: 200</td>
<td>200</td>
</tr>
<tr>
<td></td>
<td>Category B: No limit</td>
<td></td>
</tr>
<tr>
<td><strong>Security creation</strong></td>
<td>Category A: Mandatory</td>
<td>Mandatory, unless the unsecured debentures are being listed on stock exchange</td>
</tr>
<tr>
<td></td>
<td>Category B: Optional</td>
<td></td>
</tr>
<tr>
<td><strong>Meaning of Private Placement</strong></td>
<td>No such explanation</td>
<td>means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in Section 42.</td>
</tr>
<tr>
<td><strong>Amount to be secured</strong></td>
<td>Amount of Debentures</td>
<td>Amount of Debentures and interest</td>
</tr>
</tbody>
</table>
**COMPARISON WITH ACT 2013 – 2/2**

<table>
<thead>
<tr>
<th>Parameters</th>
<th>RBI Guidelines</th>
<th>Act, 2013</th>
</tr>
</thead>
</table>
| **Nature of Security to be created** | By the mortgage of any immovable property of the company; or by any other asset. | b) by way of a charge or mortgage shall be created in favour of the debenture trustee on-
|                                   |                                                                               | (i) any specific movable property of the company or its holding company or subsidiaries or associate companies or otherwise.; |
|                                   |                                                                               | (ii) any specific immovable property wherever situate, or any interest therein. |
|                                   |                                                                               | Provided that in case of a non-banking financial company, the charge or mortgage under sub-clause (i) may be created on any movable property |
| **Restriction on deployment of funds** | Own balance sheet and not to facilitate resource requests of group entities/ parent company / associates. (Not applicable to Core Investment Companies) | No such restriction specified |
| **Loan against security of debentures issued.** | NBFC shall not extend loans against the security of its own debentures (issued either by way of private placement or public issue) | No such restriction |
| **Applicability to Tax exempt Bonds** | Exempted                                                                      | No such Exemption                                                         |
PRIVATE PLACEMENT OF NCDS BY HFC
PROVISIONS IN A NUTSHELL

➢ The provisions of Companies Act, 2013 and Rules framed thereunder shall be applicable wherever not contradictory

Category A

- Maximum subscription of below Rs. 1 crore per Investor
- Minimum subscription per Investor shall be Rs. 20,000
- NCDs can be issued to the maximum of 200 Subscribers for every Financial Year
- Subscription shall be fully Secured

Category B

- Minimum subscription of Rs. 1 crore and above per Investor
- Minimum subscription per Investor shall be Rs. 20,000
- No such Limit
- The option to create security in favour of subscriber lies with Issuer
## COMPARISON WITH ACT 2013 – 1/3

<table>
<thead>
<tr>
<th>Parameters</th>
<th>NHB Directions</th>
<th>Act, 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum subscription per Investor</td>
<td>Rs. 20,000</td>
<td>No such limit</td>
</tr>
<tr>
<td>Limit of subscribers</td>
<td>Category A: 200</td>
<td>200</td>
</tr>
<tr>
<td></td>
<td>Category B: No limit</td>
<td></td>
</tr>
<tr>
<td>Security creation</td>
<td>Category A: Mandatory</td>
<td>Mandatory, unless the unsecured debentures</td>
</tr>
<tr>
<td></td>
<td>Category B: Optional</td>
<td>are being listed on stock exchange.</td>
</tr>
<tr>
<td>Meaning of Private Placement</td>
<td>means non-public offering of Non-</td>
<td>means any offer of securities or invitation to</td>
</tr>
<tr>
<td></td>
<td>Convertible Debentures (NCDs) by housing</td>
<td>subscribe securities to a select group of</td>
</tr>
<tr>
<td></td>
<td>finance companies to such number of</td>
<td>persons by a company (other than by way of</td>
</tr>
<tr>
<td></td>
<td>select subscribers and such subscription</td>
<td>public offer) through issue of a private</td>
</tr>
<tr>
<td></td>
<td>amounts, as may be specified by the</td>
<td>placement offer letter and which satisfies the</td>
</tr>
<tr>
<td></td>
<td>National Housing Bank, from time to</td>
<td>conditions specified in Section 42.</td>
</tr>
<tr>
<td></td>
<td>time</td>
<td></td>
</tr>
<tr>
<td>Amount to be secured</td>
<td>Amount of Debentures</td>
<td>Amount of Debentures and interest</td>
</tr>
<tr>
<td>Parameters</td>
<td>NHB Directions</td>
<td>Act, 2013</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Nature of Security to be created</td>
<td>By the mortgage of any immovable property of the company; or by any other asset.</td>
<td>b) by way of a charge or mortgage shall be created in favour of the debenture trustee on-</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(i) any specific movable property of the company or its holding company or subsidiaries or associate companies or otherwise.;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(ii) any specific immovable property wherever situate, or any interest therein.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Provided that in case of a non-banking financial company, the charge or mortgage under sub-clause (i) may be created on any movable property.</td>
</tr>
<tr>
<td>Restriction on deployment of funds</td>
<td>Own balance sheet and not to facilitate resource requests of group entities/parent company / associates.</td>
<td>No such restriction specified</td>
</tr>
<tr>
<td>Loan against security of debentures issued.</td>
<td>HFC shall not extend loans against the security of its own debentures (issued either by way of private placement or public issue)</td>
<td>No such restriction</td>
</tr>
<tr>
<td>Applicability to Tax exempt Bonds</td>
<td>Exempted</td>
<td>No such Exemption</td>
</tr>
</tbody>
</table>
### COMPARISON WITH ACT 2013 – 3/3

<table>
<thead>
<tr>
<th>Parameters</th>
<th>NHB Directions</th>
<th>Act, 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eligibility to issue</td>
<td>HFC with net owned fund of Rs. 10 crores</td>
<td>No such eligibility. Borrowing limit should be available.</td>
</tr>
<tr>
<td>Credit Rating requirement</td>
<td>Mandatory for issuer. HFC shall have minimum credit rating of moderate degree of safety regarding timely service of financial obligations. Should be current at the time of issuance.</td>
<td>No such requirement.</td>
</tr>
<tr>
<td>Timeline for completion of issuance</td>
<td>Shall be completed within a period of 30 days from the date on which the HFC opens the issue for subscription.</td>
<td>No specific provision for completion of process.</td>
</tr>
<tr>
<td>Offer document validity</td>
<td>Maximum period of 6 months from the date of the Board Resolution authorizing the issue.</td>
<td>No specific provision.</td>
</tr>
<tr>
<td>Auditor’s certificate requirement</td>
<td>The auditors of the housing finance company shall certify to the investors that all the eligibility conditions set forth in these directions for the issue of non-convertible debentures are met by the HFC.</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Appointment of Debenture Trustee</td>
<td>Mandatory for each issue.</td>
<td>Mandatory only in case of an offer or invitation to the public or to its members exceeding five hundred</td>
</tr>
<tr>
<td>Disclosure in Board Report</td>
<td>Mandatory in relation to unclaimed NCDs</td>
<td>No specific provision.</td>
</tr>
</tbody>
</table>
ELECTRONIC BOOK MECHANISM FOR ISSUANCE OF SECURITIES
ISSUANCE OF DEBT AND NCRPS UNDER EBM (1/2)

SEBI Circular-
- Dated 21st Apr, 2016 - repealed
- Subsequent circular on 5th Jan, 2018 effective from 1st Apr, 2018
- 16th Aug, 2018 - further clarifications

Applicability-
- Pvt. Placement of Debt and NCRPS under ILDS and NCRPS Reg
- Intended to be listed by any issuer

- **Limit prescribed in relation to applicability**-
  - Single issue- 200 cr or more (inc. green shoe option)
  - Shelf issue- multiple tranches, cumulatively amounts to 200 cr or more in a F.Y.
  - Subsequent issue- aggregate of all previous issues = 200 cr or more in a F.Y.
ISSUANCE OF DEBT AND NCRPS UNDER EBM (2/2)

- Optional Compliance-
  - Issuances within 200 cr in a F.Y. and intended to be listed
  - Debt securities as per ILDM Reg.
  - Commercial Paper
  - Certificate of Deposits

- Pvt. Placement Memorandum (PPM)-
  - To provide PPM and term sheet to EBP
    - 2 working days prior to start of issue opening date
    - Disclose the details of size of issue, bid opening and closing date and min. bid lot

- Eligibility to participate-
  - QIBs;
    - Excluded from the limit of 200 u/s 42;
    - Entitled to participate in all issuances on the particular exchange
  - Non-QIBs
COMPARISON B/W SEC 42 AND EBM

Pre-identified investors

- Sec 42 - identify investors
- EBM - bid open to all QIBs, any QIB may register and participate. In case of non-QIBs, only those who have been selected by issuer can participate.

Circulation of PPOAL

- Sec 42 - circulate of identified investors
- EBM - Uploading of PPOAL is deemed circulation to all QIBs
  - Accessible only to QIBs and those non-QIBS as intimated by issuer to EBP.
## READ OUR RELATED RESOURCES HERE

<table>
<thead>
<tr>
<th>Name of Article</th>
<th>Link</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revised, stringent private placement framework becomes effective: a step-by-step</td>
<td><a href="#">Click Here</a></td>
</tr>
<tr>
<td>guide to compliance by CS Vinita Nair</td>
<td></td>
</tr>
<tr>
<td>Revamping private placement mechanism – building it stringent !! By CS Megha</td>
<td><a href="#">Click Here</a></td>
</tr>
<tr>
<td>Saraf</td>
<td></td>
</tr>
<tr>
<td>Comparison and Mapping of Rule 14 of PAS Rules dealing with Private Placement</td>
<td><a href="#">Click Here</a></td>
</tr>
<tr>
<td>By CS Vinita Nair</td>
<td></td>
</tr>
<tr>
<td>PAS-3 for privately placed issuance: “Unless” v/s “until” by CS Vinita Nair</td>
<td><a href="#">Click Here</a></td>
</tr>
<tr>
<td>SEBI revisits EBP Mechanism for issuance of debt securities by CS Vinita Nair</td>
<td><a href="#">Click Here</a></td>
</tr>
<tr>
<td>and Chahat Jain</td>
<td></td>
</tr>
<tr>
<td>MCA set to place private placement rules By CS Vinita Nair</td>
<td><a href="#">Click Here</a></td>
</tr>
<tr>
<td>For other articles</td>
<td><a href="#">Click Here</a></td>
</tr>
</tbody>
</table>
Vinod Kothari & Co.,
- Based in Kolkata, Mumbai, Delhi

We are a team of consultants, advisors & qualified professionals having over 30 years of practice.

Our Organization’s Credo:

Focus on capabilities; opportunities shall follow