

Note

Highlights of Companies Rules 2013 on compromise and arrangement



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September 20, 2013

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Note

The Companies Act, 2013 (the Act) has already been enacted as Act no. 18 of 2013 after getting green signal from the Hon'ble President on August 29, 2013 and 98 sections of the Act have already been enforced by the MCA. However, a bigger part of the law depends on the rules to be notified in this regard by the MCA.

The MCA had placed on its portal, the draft rules (first set) for public comments on September 6, 2013¹ and draft forms under such rules inviting comments till October 8, 2013. As a further step and as continuation of its speedy actions, the Ministry has now uploaded second set of draft rules on its portal on September 20, 2013² which is open for public comments till October 19, 2013.

Chapter XV comprising of Section 230 to 240 of the Companies Act, 2013 (the Act) deals with compromise, arrangements and amalgamations. This note deals with the draft rules specified for chapter XV on 'Compromise and Arrangement' (the Rules) and provides a quick snapshot on the same. The Rules are more or less based on the Companies Court Rules, 1959.

Forms prescribed

Form No.	Particulars
Form 15.1	For making application to NCLT for an order directing calling of meetings
Form 15.2	
Form 15.3	
Form 15.4	Format in which notice is to be sent to CG, RBI and other regulatory authorities
Form 15.5	Format for advertisement of notice calling meeting
Form 15.6	Filing of report by chairperson on result of meeting
Form 15.7	Filing grievances by aggrieved shareholder with respect to takeover offers of unlisted companies
Form 15.8	Filing of second and final petition for approval of scheme of compromise or arrangement
Form 15.9	Form for order of NCLT approving the scheme of compromise or arrangement
Form 15.10	Form for order of NCLT approving the

¹ The first set of draft Rules are available on the MCA portal at: <http://14.140.191.91/>

² The second set of draft Rules are available on the MCA portal at: <http://ncbfeedback.mca.gov.in/>

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	scheme of merger, demerger or reconstruction
Form 15.11	Filing of statement with RoC during pendency of scheme under section 232(7)
Form 15.12	Form for filing declaration of solvency by small/holding-sub subsidiary companies under section 233
Form 15.13	Form for filing scheme of arrangement to CG, ROC and OL by small/holding-sub subsidiary company under section 233
Form 15.14	Form for issuing confirmation order by CG u/s 233
Form 15.15	Form for filing confirmation order received from CG u/s 233
Form 15.16	Form for sending notices to dissenting shareholders by the transferee company u/s 235 to acquire their shares
Form 15.17	

Manner and form of application to National Company Law Tribunal for calling meetings

Section 230 (1) of the Act requires making of an application by the company or member or creditor or liquidator (if company is in liquidation) to the National Company Law Tribunal (NCLT) for an order directing calling of a meeting of members or creditors.

The Rules have now specified **Form 15.1** for making such application along with such documents as may be prescribed in the said Form. Upon hearing, the NCLT will pass an order fixing the time, date, quorum, manner of circulation of notice etc. It is to be noted that Rule 15.1 (2) has empowered the NCLT to decide the class of creditors and/or of members whose meeting or meetings have to be held for considering the proposed compromise or arrangement.

Filing of Creditors Responsibility Statement in a scheme of corporate debt restructuring

Section 130 (2)(a)(ii) of the Act allows filing of corporate debt restructuring scheme, if consented by at least 75% secured creditors in value and requires, along with other prescribed documents, filing of a creditors responsibility statement by the creditors.

The Rules have specified the format for filing of such statement by the creditors. The said statement is required to be signed by all consenting secured creditors and is to be filed in **Form 15.2**.



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Sending of notices to members or creditors

On the direction of the NCLT, the notice calling meeting of members/creditors is to be sent along with a statement in accordance with section 230(3) of the Act.

Earlier, the scheme of arrangement was required to accompany the notice however, the Rules have now prescribed the detailed contents of such statement to be sent along with the notice. Sending of notices may not be an easy task now!

The statement will require, along with necessary details in relation to holding of meeting as to time, date and place:

- a) details of company specifying, inter-alia, the name, addresses of promoters, directors and KMPs and details of change of name, registered office, objects in last 5 years;
- b) relationship between the parties to the scheme if there are more than 2 companies involved in a scheme [*whether associate, holding or subsidiary*];
- c) names of directors and details of voting on the resolution of board approving the scheme [*names of directors to be disclosed who voted for and against the resolution and also those who have not voted or were not present*];
- d) brief detail on proposed scheme including valuation report, fairness opinion of registered valuer, amounts due to unsecured creditors the security available to the creditors thereon [*the Rules are not clear whether the valuation report is also to be attached to the statement*];
- e) disclosure of nature and extent of interest, and also the impact of the scheme on such interest of promoters, directors, KMPs and even of non-promoter members, depositors, debenture/deposit trustees, creditors, promoters, directors and KMPs of holding, subsidiary or associate companies [*this is an investor friendly step of MCA but require lot of attention on part of company*];
- f) details of pending proceedings against company, directors, promoters or KMPs [*to be noted that not only the company, details of pending proceedings of directors, promoters and KMPs of the company are also required now and thus calling for a big exercise in case of big companies*];
- g) Details of shareholding of KMPs, directors, promoters as on date of the statement and any change therein in last six months. Not only the change, the companies are now required to disclose the date and price at which such change took place [*disclosure of sale/purchase price of shares during last six months by promoters, directors and KMPs calls for transparency*];
- h) Declaration that scheme is in best interest of all of its stakeholders particularly non-promoter members and minority shareholders [*another attachment in the statement however, the Rules do not specify as to who will sign such declaration. Thus anyone as authorised by board of the company may sign*]



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The explanation clarifies that the above disclosure in the statement is required to be made in respect of all such companies which are party to the scheme.

It is pertinent to note that under the Companies Act, 1956 (1956 Act) companies proposing scheme were used to send notices to members/creditors however, Rule 15.3 (2) clarifies that, unless so directed by the NCLT, the Chairman appointed for the meetings by the NCLT shall be sending such notices to all members/creditors. The notice period has also been extended to 4 weeks as compared to prior requirement of 21 clear days notice under the 1956 Act. In terms with Rule 15.6, the statement under section 230 (3) along with scheme shall be made available to member/creditor, free of charge, within 1 day of requisition, if so requested by a member/creditor.

As prescribed by Rule 15.7, the chairperson is required to submit an affidavit at least 7 days before the meeting date stating the compliance of order of NCLT with regard to sending of notices.

Sending of notices to governmental authorities or regulators

A new requirement laid down in section 230 (5) of the Act requires sending of notices to RBI, CG, SEBI, CCI, RoC, stock exchanges and other regulators who are likely to be affected by the scheme.

Rule 15.4 has prescribed the format for sending such notices which will be in **Form 15.4** and requires such notices to be sent immediately after sending notices to members/creditors. Under the said section, these regulatory authorities have given a period of 30 days to make any representation before the NCLT. The Rules now require submitting of such representation to chairperson of the meeting also within 30 days of receipt of such representation.

Objection(s) to the scheme

Proviso to Section 230(4) empowers members holding at least 10% of shareholding or creditors holding 5% of total debts to raise objections to the scheme.

Rule 15.8 states that such objections can be sent to the chairman of the meeting within 1 month of receipt of notice by the eligible member/creditor. It is to be noted that notices are to be sent at least 1 month before the meeting. Accordingly, written objections can be filed by the eligible member seven on date of meeting.

Objections to a scheme of an unlisted company involving takeover can be objected by any stakeholder or shareholder by filing a petition with NCLT in **Form 15.7**. Such petition is also required to be advertised in accordance with NCLT Rules.

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Rules for schemes of unlisted companies involving 'takeovers'

This chapter XV covers arrangements in form of takeovers also. Takeovers of listed companies are governed by SEBI Takeover Code, now, for the first time, the Act will govern the takeovers included in any scheme of arrangement or compromise of an unlisted company. Rule 15 (11) (8) of the draft Rules specifically mentions that unlisted companies are either required to comply with other provisions relating to applying to NCLT and calling of general meetings or with takeover rules. Will this mean that listed companies are required to comply with the whole section along with these takeover rules? If this is so, it will be a huge cost to listed companies as in addition such companies are also required to comply with SEBI Takeover Code.

Accordingly, for an unlisted company, 'takeover' would mean where either control or at least 50% of share capital of the company has been acquired under a scheme of arrangement or compromise. However, the conditions as mentioned in the Rules with respect to takeover offers apply to all companies, listed and unlisted, both.

The person making an offer under these provisions shall be required to enter into a memorandum of understanding (MOU) or agreement and such agreement is also required to be attached to the notice calling meeting. Immediately after sending the notice, the MOU or agreement will also be sent to creditors, deposit holders etc and to stock exchanges (if the company is listed) and is required to be published in two newspapers, one in English and one in vernacular language having wide circulation. Such agreement or MOU is also required to be placed on website of the company, if any.

Such takeover shall be at a price: a) determined by registered valuer; and b) approved by shareholders of the company. Such scheme will also require: a) specific approval of other regulator if the company is being regulated under any special act also; and b) where any term loan is subsisting, approval of concerned banks or PFIs is also required prior to passing of any resolution approving the scheme.

The dissenting shareholder has given an opportunity to exit at least at a price determined by the registered valuer.

Filing of final petition for approval of scheme of compromise or arrangement

After approval of scheme by members, creditors etc, the same is required to be filed for approval of NCLT in **Form 15.8** within 7 days of filing of report by the chairman. The final date of hearing as fixed by NCLT is required to be published at least 10 days before the hearing date in same newspapers in which the notice calling meeting was published, except where so otherwise directed by the NCLT. Once satisfied, the NCLT will pass its order approving the scheme, with or without



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modification, in **Form 15.9**. The NCLT may also order for any proceedings or enquiry, if so deem fit by it.

Filing of scheme of mergers and amalgamations

Section 232 of the Act lays down a separate set of procedure for schemes involving mergers, demergers or reconstructions. However, NCLT may direct the applicability of provisions relating to calling of meetings, sending notices, raising objections, manner of votes etc specified for schemes of compromise to apply to schemes of merger/demerger/reconstruction also. An order approving such schemes shall be passed by NCLT in **Form 15.10**.

Amalgamation of sick companies

Rule 15.24 empowers the NCLT to approve a scheme of amalgamation if it is satisfied that such amalgamation is economically and strategically viable for the amalgamated company and such resultant company will remain financially sound even after such amalgamation.

Scheme of arrangements of small or holding subsidiary companies

Section 233 provides for merger or amalgamations of small or holding-subsubsidiary companies. Rules have specified that wholly owned subsidiaries would mean such companies in which the whole beneficial shareholding is with the holding company. A declaration of solvency is to be filed by all companies involved in such scheme in **Form 15.12** along with prescribed fee. After getting approval from members/creditors, the scheme is required to be filed in **Form 15.13** with Central Government, RoC and official liquidator of the place where the registered office of the company is situated for their comments. However, Rules have not clarified what would happen if the companies involved in such scheme are from two different states. Will this mean that the scheme will be required to file with both the RoC and official liquidators within jurisdiction of which the registered office of the companies are situated?

Once satisfied, the Central Government shall issue its confirmation in **Form 15.14** and such confirmation order is required to be filed in **Form 15.15** with the RoCs having jurisdiction over transferor and transferee companies. The transferee company will have to pay the fee on the revised share capital as specified by Rule 15.26.

Acquisition of shares of minor/dissenting shareholders

The Company is required to send notice to such minor or dissenting shareholders in **Form 15.16** at their last known address. The offer price will be calculated: a) in case of listed companies- in accordance with SEBI Regulations and on the basis of valuation report of registered valuer; b) in case of unlisted and private companies-



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highest price paid by acquirer in last 12 months and on the basis of valuation report of registered valuer.

Compromise or arrangement includes demerger

Rule 15.31 has explicitly described “demerger” which should not only be in accordance with Section 2 (19AA) of the Income Tax Act, 1961 but the resulting company should also allot shares to the shareholders of the demerged company on a proportionate basis.

Under draft Rule No. 15.3(2) accounting standard shall be prescribed for demergers and till that time accounting treatment shall be as under Section 2 (19AA) of the Income Tax Act, 1961. Presently, it was decided by the Delhi High Court in a scheme of arrangement between *Sony India Private Limited and Sony India Software Centre Private Limited*³, it was held that Accounting Standard 14 is not applicable to any case of demerger.

The draft rules also lay down the accounting treatment of assets and liabilities in the books of the demerged company and resulting company. Additionally, the company’s auditor has to give a certificate that the accounting treatment is in conformity with accounting standard under section 133 of the Act, 2013.

Fee for making appeals

The Rule 15.32 prescribes fee of Rs. 10,000.00 to be paid in case of appeal to the Appellate Tribunal against the Tribunal’s order. The Central Government has been empowered to review the fee after every 3 years and amend it by way of a notification.

Applicability of National Company Law Tribunal Rules, 2013

In case the rules do not specifically provide for any matter, National Company Law Tribunal Rules, 2013 shall apply.

³ <http://indiankanoon.in/doc/174404168/> . See also Gallops Realty (P.) Ltd., In re (GUJ.) [2010] 97 SCL 93.



Note

Also see our other related write-ups:

- Article on 'MCA notifies 98 sections w.e.f September 12, 2013- An analysis' at https://india-financing.com/MCA_notifies_98_sections_of_Companies_Act_2013_wef_September_12_2013_an_analysis.pdf
- Article on 'Transition from 1956 Act to 2013 Act: You need to act NOW' at https://india-financing.com/Transitioning_from_1956_Act_to_2013_Act_You_Need_to_Act_NOW.pdf
- Presentation on Companies Act, 2013 at <https://india-financing.com/component/content/article.html?id=279>
- Article on 'Companies Bill: From Rule of Law to the Law of Rules' at [https://india-financing.com/Companies_Bill_from_the_Rule_of_Law_to_the_Law_of_Rules%20\(1\).pdf](https://india-financing.com/Companies_Bill_from_the_Rule_of_Law_to_the_Law_of_Rules%20(1).pdf)
- Article on 'Corporate Social Responsibilities- One of the major highlights of Companies Bill, 2012' at https://india-financing.com/Companies_Bill_2012_Corporate_Social_Responsibilities.pdf
- All other articles on Companies Bill, 2012 at <https://india-financing.com/component/content/article/281.html>
- Other articles on corporate laws at <https://india-financing.com/staff-publications-corporate-law.html>
- Our other staff publications at <https://india-financing.com/staff-publications.html>