

Companies Act, 2013

Presentation to ICSI Chapter, New Delhi

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August 29, 2014

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Public Offer & Private Placement

- By Public Company (*Section 23 (1)*)
 - Public offer through prospectus (*Part I Chapter III*)
 - Private Placement (*Section 42 - Part II Chapter III, Section 62(1)(c), Rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014 and Rule 13 of Companies (Share Capital and Debentures) Rules, 2014*)
 - Rights Issue (*Section 62(1)(a)*)
 - Bonus Issue (*Section 63 & Rule 14 of Companies (Share Capital and Debentures) Rules, 2014*)

Public Offer & Private Placement

- By Private Company (*Section 23 (2)*)
 - Private Placement (*Section 42 - Part II Chapter III, Section 62(1)(c), Rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014 and Rule 13 of Companies (Share Capital and Debentures) Rules, 2014*)
 - Rights Issue (*Section 62(1)(a)*)
 - Bonus Issue (*Section 63 & Rule 14 of Companies (Share Capital and Debentures) Rules, 2014*)

Share Capital & Debentures

Kinds of Securities

- Equity Share Capital (*Section 43*)
 - With voting rights
 - With differential rights as to dividend, voting or otherwise (*Rule 4 of the Companies (Share Capital and Debentures) Rules, 2014*)
- Preference Share Capital (*Section 43*)
 - Redeemable Preference Shares can exceed 20 years and up to 30 years for specified infrastructure projects (Refer Schedule VI) (*Section 55 and Rule 9 of Companies (Share Capital and Debentures) Rules, 2014*)
 - Convertible Preference Shares - Optionally or Compulsorily Convertible
- Debentures
 - Non-Convertible Unsecured Debentures
 - Non-Convertible Secured Debentures
 - Convertible Debentures - Optionally Convertible or Compulsorily Convertible

Shares with Differential Rights

- Private and public companies have to comply with DVR rules (*Section 43*)
- New DVR rules are more stringent than existing DVR rules:
 - Track record of distributable profits in last 3 FYs - means companies with less than 3 years of existence cannot issue DVRs
 - No default in filing financial statements for the last 5 FYs
 - No default in (i) redemption of preference shares, matured deposits or debentures, (ii) repayment of term loans of scheduled banks and PFIs, (iii) payment of interest or declared dividend, and (iv) employee statutory payments
 - DVR shares cannot exceed 26% of the total equity share capital including DVRs
 - Company not been penalised by a court or Tribunal in last 3 years of any offence under the RBI Act, SEBI Act, SCRA, FEMA Act or any special act
- What happens to the existing DVRs before April 1, 2014?

Preference Shares

- Can be for upto 30 years for infrastructure projects provided prescribed % of shares are annually redeemed at the preference shareholders' option (*Section 55(2) First proviso*)
- Premium on RPS only payable out of profits (and not securities premium a/c) for some companies (*Section 55(2) (d)*)
- Provision for issue of new RPS to redeem earlier RPS in case of failure to redeem or pay dividend - consent of NCLT & 75% (by value) of preference shareholders needed (*Section 55(3)*)
- Rules suggest:
 - special resolution needed in a general meeting for issue
 - no subsisting default in dividend payment or redemption
 - AOA to set out provisions on (i) priority, (ii) participation in surplus dividend or assets, (iii) cumulative or not, (iv) conversion rights, (v) voting rights, (vi) redemption
- Distinction between cumulative and non-cumulative preference shares w.r.t voting rights removed - all kinds of preference shares entitled to vote on all matters if dividend remains unpaid for 2 years

Debentures

Issue of Secured Debentures

(Section 71 and Rule 18 of the Companies (Share Capital and Debentures) Rules, 2014)

- The period of redemption cannot exceed 10 years except in a company engaged in the setting up of infrastructure projects for which the maximum period is 30 years
- Security by creation of charge on the properties or assets of the company, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon
- Appointment of debenture trustee

Creation of Debenture Redemption Reserve

- Created out of profits of the company available for distribution of dividend
- DRR equivalent to at least 50% of the amount raised through debenture
- Each year on or before April 30, invest or deposit, not less than 15% of the amount of debentures maturing during the year ending on March 31 of the next year in certain prescribed methods
- The remaining invested or deposited shall not at any time fall below 15% of the amount of the debentures maturing during the year ending on March 31 of that year

Share Capital & Debentures

- Voting rights in respect of preference shares - no distinction between cumulative and non-cumulative preference shares (*Section 47*)
- Bonus issuance specifically provided - certain conditions imposed - cannot be issued from revaluation reserve and in lieu of dividend (*Section 63*) - Offer once made cannot be withdrawn *Rule 14 of Companies (Share Capital and Debentures) Rules, 2014*)
- Prohibition of issue of shares at discount - issue at discount to be void (*Section 53*)
- Issue of sweat equity shares permitted (*Section 54 & Rule 8 of Companies (Share Capital and Debentures) Rules, 2014*)
- Preferential issue value to be determined by registered valuer (*Section 62 and Rule 13 of Companies (Share Capital and Debentures) Rules, 2014*)
- Specific mention of issue of convertible debentures subject to shareholders' resolution (*Section 71*)

Share Capital & Debentures

- In Private Placement monies payable shall be paid through cheque or demand draft of other banking channels but not by cash (*Section 42 (5)*)
- Allotment of Securities within 60 days from the date of receipt of application money (*Section 42 (6)*)
- Money received on application shall be kept in a separate bank account and shall not be utilised for any purpose except (*Section 42 (6)*)
 - For adjustment against allotment of securities
 - For repayment of monies where the company is unable to allot securities
- Certificate for the allotted securities to be issued
 - Within 2 months from the date of allotment of shares
 - Within 6 months from the date of allotment of debentures

Process of Private Placement

- New issuances by private companies to be either (i) rights or bonus issues, or (ii) private placement (*Section 23(2)*)
- Private placement defined (*Section 42(2) Explanation II*)
 - any offer of securities/ invitation to subscribe to securities to a select group of persons through issue of a private placement offer letter
 - offer/ invitation to persons not exceeding 200 in a financial year + prescribed conditions
- Issue of equity instruments now have to comply with private placement norms and preferential allotment norms!
- Rules define “Preferential Offer” to mean:
 - Issue of equity shares or convertible securities
 - To any select person or group on a preferential basis
 - Excludes public issue, rights issue, ESOP, ESPS, sweat equity, bonus, DRs issued outside India or foreign securities

Process of Private Placement

- Private placement limit does not include QIBs and ESOPs (*Section 42(2)*)
- Rules prescribe:
 - 200 person limit
 - The value of the offer or invitation per person must be with an investment size of not less than INR 20,000 of the face value of the securities - Very Tricky Issue!
 - Above 2 conditions not applicable to NBFCs and HFCs if RBI / NHB have prescribed regulations and they are compliant with them
 - Special resolution to issue all securities required for each offer

Process of Private Placement

- Preferential issue price to be determined by registered valuer (*Section 62(1)(c)*)
 - Rules state that valuer can choose amongst multiple valuation methods, depending on the purpose of valuation, such as NAV method, market price method, PECV method, DCF method, weighted average method etc.
 - Rules state that conversion price also has to be determined beforehand on the basis of the registered valuer report - *Is the flexibility on conversion formula gone?*
 - What is the correct process now specially for PE investors? Posing implementation challenges

Confusing Private Placement Process!

- Complete record of all offerees to be maintained (*Section 42(7)*)
 - Name of offeree to be recorded prior to invitation to subscribe
 - Rules - letter of offer and application form to be sent within 30 days of such recording
- Private placement details to be filed with ROC (*Section 42(7)*)
- Allotment within 60 days failing which money to be refunded with 15 days; interest on delay in refund (*Section 42(6)*)
 - *Does not tie in with FDI policy?*
- No fresh offer unless earlier offer completed/ withdrawn (*Section 42(3)*)
- Non-compliance with private placement norms - deemed to be a public offer (*Section 42(4)*)
- Penalty - Company, promoters and directors liable, penalty is amount involved in offer or Rs. 2 crores, whichever is higher. Company has to refund all monies to subscribers within 30 days of order (*Section 42(10)*)

Are you my subsidiary?



- Test of subsidiary is exercise or control of > 50% of the total share capital instead of > 50% equity share capital (s. 2(87))
- So an investor holding CCPs of a greater amount than equity shareholders may become the holding company of its portfolio entity?
- PE investors not registered as companies under 2013 Act also covered?
- 50% test can be satisfied directly or together with other subsidiaries (s. 2(87))
- Holding of CCDs does not trigger the provision
- Whether foreign holding companies included? Section 4(7) gone!

Prospectus

- Document containing offer of securities for sale to the public to be deemed prospectus (*Section 25*) - only public company can issue prospectus
- Matters to be stated in prospectus (*Section 26*)
- Variation in the terms of contract or objects in prospectus (*Section 27*) - Possible only with the approval of shareholders by way of a special resolution, the dissenting shareholders to be given exit by the promoter or controlling shareholder at exit price
- Offer of sale to the public through prospectus (*Section 28*)
- Public offer of securities to be in dematerialise form (*Section 29*)
- Shelf Prospectus (*Section 31*)
- Red Herring Prospectus (*Section 32*)

Prospectus

- Issue of application forms for securities accompanied by an abridged prospectus (*Section 33*)
- Criminal liability for mis-statements in prospectus (*Section 34*) - Same punishment as for fraud under Section 447
- Civil liability for mis-statements in prospectus (*Section 35*) - Liable to pay compensation to every person who has sustained loss or damage acting on any statement included or omitted in the prospectus
- Where prospectus is issued with intent to defraud the applicants for the securities or any other person or for any fraudulent purpose, persons referred to in Section 35(1) will be personally responsible without any limitation of liability for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus (*Section 35(3)*)
- Punishment for fraudulently inducing persons to invest money (*Section 36*) - punishment under Section 447

Prospectus

- No allotment of securities if the amount stated in the prospectus as the minimum subscription and the sums payable on application have been paid to and received by the company (*Section 39 (1)*)
- If the minimum subscription or the amount payable on application is not received within 30 days from the date of the issue of prospectus, the entire amount received has to be refunded (*Section 39 (2)*)
- Securities to be dealt in stock exchanges (*Section 40*)

Questions?



jsa

Thank You

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