

**CORPORATE
PROFESSIONALS**

**COMMENTS/RECOMMENDATIONS ON DRAFT UNLISTED PUBLIC
COMPANIES (PREFERENTIAL ALLOTMENT) RULES, 2011**

Reference:

The Ministry of Corporate Affairs vide its letter no 12/13/2011 dated 24th May 2011, has invited public comments/recommendation on draft Unlisted Public Companies (Preferential Allotment) Rules 2011 , which is set to replace the existing Unlisted Public Companies (Preferential Allotment) Rules 2003

Comments/Recommendations required on Draft Unlisted Public Companies (Preferential Allotment) Rules, 2011

In reference to the aforesaid, please find our suggestion & comments below:

S.No	Rule Concerned	Comments/Recommendations	Rationale behind Comments/Recommendations
1.	Definition	a) The term “Preferential Allotment” should include the words “and other financial instruments convertible into shares” after the words ‘includes issue of shares’. b) Further, the words “and issue of shares to the promoters and their relatives either in public issue or otherwise” be deleted	<ul style="list-style-type: none"> • Since the rules deals both with shares and convertible instruments, therefore convertible instruments shall also be covered in the definition. • Since preferential allotment means issue of on preferential basis or under private placement under section 81 (1A), therefore it covers all issues of shares others than right issues, therefore there is no specific need to mentioning shares allotted to promoters and their relatives
2.	Special Resolution	a) The requirement of approving the Offer Document , should not be applicable in case of allotment of shares to employee under ESOP. b) The requirement of validity of special resolution for 12 months will not hold in case of ESOP, therefore it should be applicable to it.	<ul style="list-style-type: none"> • The requirement of approving the Offer Document , should be applicable in case of allotment of shares to employee under ESOP, since the purpose is employee participation and not only raising of money. Moreover, the details in offer document , will also not serve the purpose of the issue.

		<p>c) The requirement of issues of Offer Document should only be applicable in case of companies having prescribed paid-up capital or networth.</p> <p>d) It is not clear, whether the offer document needs to be updated for each issues of shares under a single special resolution, where there is gap between two or more issues. Moreover it is also needs to be specified, upto which period the Offer Document shall be updated or remain valid.</p> <p>e) The concept of relevant date is required to be introduced w.r.t disclosure of relevant factors in offer document and pricing of relevant instrument</p>	<ul style="list-style-type: none"> • The requirement of validity of special resolution for 12 months will not hold in case of ESOP, since , ESOP plans are generally for 2-3 years and approval for allotment of shares under them , is taken for entire scheme and not for each allotment. • The following are reasons for Keeping a eligibility criteria for issuing the Offer Document <ul style="list-style-type: none"> ○ In view the content of the Offer Document, preparing and issuing the same prepared, in case allotment is made to only one person in a year or where the allotment is made for smaller amount. ○ Moreover, in many closed held companies, where there are only promoter shareholders and allotment is also proposed to be made to any promoter shareholder, issuing of Offer Document will not serve any purpose, when they themselves are at the helm of affairs.
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3.	Pricing	<p>a) In reference to clause 5 on pricing w.r.t. shares and convertible financial instruments, the pricing must be determined being either a fair value or value determined based on discounted free cash flow method certified by a Chartered Accountant or Merchant Banker.</p> <p>b) Pricing w.r.t. issuance for consideration other than cash also needs to be specifically laid down.</p>	<ul style="list-style-type: none"> In order to avoid vague pricing of issues, the issues of shares by way of preferential allotment shall not be less than the fair price arrived by way of NAV method or DFCF and shall be certified by CA .
4.	Other consideration for issue of shares	<p>a) Period of making allotment to be specified perhaps within 30 days of the closure of issue.</p> <p>b) The requirement of approval in case of issues of shares or convertible instrument for cumulative amount of Rs 5 cr or more, needs to be dispensed with.</p>	<ul style="list-style-type: none"> In order to encourage the usage of share application money as source of temporary funds, the rules should provided for maximum time , within which the share should be allotted against the share application money. The requirement of approval in case of issues of shares /convertible instruments in certain cases shall be dispensed with due to following <ul style="list-style-type: none"> Since the share or convertible instrument under preferential issues is issued with share holder's approval, therefore there is no need of any further approval. Moreover, approval of

			<p>Central Government is a time taking process and will might defeat the entire purpose of raising money.</p> <ul style="list-style-type: none"> ○ The language of clause is also unclear, whether it will cover all issues under one special resolution or under different special resolution. If it covers a single resolution, than there is no need of cumulative amount and in case it covers , various resolutions , than , it might not serve the purpose.
5.	Dematerialization of Securities	<p>a) Dematerialization of securities with reference to preferential allotment shall only be made compulsory for companies having a prescribed paid-up capital or networth</p>	<ul style="list-style-type: none"> ● NSDL allows dematerialization of companies only having a prescribed networth. ● Dematerialization of shares is a costly process and making it mandatory will create unnecessary financial burden on small companies
6.	Content of Offer Document	<p>a) As mentioned in point 12 of the disclosures in the offer document, the definition of the Group Companies needs to be clarified</p> <p>b) In respect of financial figures, the date upto which they shall be disclosed needs to be provided.</p> <p>c) In reference to point 21 of the disclosures, complete details for financial instruments issues for other than cash should also be</p>	<ul style="list-style-type: none"> ● Since we are proposing to get the pricing of shares should not be less than fair value certified by CA, than such fair value also needs to be disclosed. ● Utilization schedule needs to be disclosed to give better sense of utilization of money raised. ● Other points are self explanatory.

		<p>specified.</p> <p>d) Disclosure regarding change in control pursuant to proposed allotment to be added as a clause of letter of offer</p> <p>e) Utilization schedule of money raised, needs to be disclosed</p> <p>f) Fair price , as certified by a CA</p> <p>g) The points in letter of offer needs specific rescheduling based upon categories of information and repetition of information should be avoided</p>	
7.	Others	<p>The explanatory statement to the note of the proposed preferential issues shall contain the following information:</p> <p>a) the objects of the preferential issue/ private placement</p> <p>b) Utilization Schedule of money raised</p> <p>c) the proposal of the promoters, directors or key management personnel of the issuer to subscribe to the offer</p> <p>d) the shareholding pattern of the issuer before and after the preferential issue</p>	<ul style="list-style-type: none"> • Offer Document is voluminous document and therefore in order to provide the existing shareholders with summarized information it is necessary to provides the important information related to issues under the explanatory statement.

		<p>e) the time within which the preferential issue shall be completed</p> <p>f) whether the proposed allotment will entail any change in control of the company;</p> <p>g) Number of persons to whom similar private placements/ preferential allotments have already made during the year, in terms of number as well as amount.</p> <p>h) Fair Price of shares as certified by a CA</p>	
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For **Corporate Professionals**



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