



Medha Srivastava
Partner



Neha Sahgal
Associate

**LISTING OF NON-
CONVERTIBLE DEBENTURES
BY A PRIVATE LIMITED
COMPANY ON A PRIVATE
PLACEMENT BASIS**

A. BACKGROUND AND SCOPE

Section 2(30) of the Companies Act, 2013 (“**Companies Act**”) defines a debenture as any instrument of a company which evidences a debt. The company may choose to either issue the debentures with an option to convert it, either wholly or partly, into equity or may choose to issue debentures with no option to convert, such that the debentures would strictly be the debt of the company and shall be redeemed at the end of the maturity period. The company may choose to issue debentures either through a public offering or through a private placement.

For the purposes of this article, we have laid down the compliances required vis-à-vis issuance of non-convertible debentures (“**NCD**”) on a private placement basis by a private limited company and its subsequent listing.

Private placement refers to any offer or invitation to subscribe or issue of securities to a select group of persons by a company (other than by way of public offer) through private placement offer-cum-application, which satisfies the conditions specified in the Companies Act and

rules made thereunder.¹ A company may issue securities on a private placement which may either be listed or unlisted. The issue of NCDs on a private placement basis and their subsequent listing is governed by the Companies Act, the Companies (Prospectus and Allotment of Securities) Rules, 2014 (as amended from time to time) and the Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008 (as amended from time to time) (“**SEBI ILDS Regulations**”). In the event a company proposes to list the NCDs, in addition to the applicable laws stated above, it will also have to comply with the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (“**SEBI LODR**”) and the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 (“**Insider Trading Regulations**”).

B. COMPLIANCES

I. Companies Act

1. Section 42 of the Companies Act read with Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 (“**PAS Rules**”) governs the private placement of NCDs.
2. The board of directors shall identify the persons to whom the company shall offer the NCDs and approve the terms of the issuance of the private placement.

¹ Section 42, Companies Act and Rule 14 of the PAS Rules.

3. The issuing company shall offer the NCDs only to a selected group of persons and shall issue the private placement offer and application in Form PAS-4 by passing a special resolution which has to be approved by the shareholders of the company. It is pertinent to mention that it shall be sufficient to pass a special resolution only once in a year for all the offers for the debentures during the year.
4. The explanatory statement that has to be annexed to the notice for the shareholder's approval shall include the following disclosures²:
 - a. particulars of the offer including date of passing of Board resolution;
 - b. kinds of securities offered and the price at which security is being offered;
 - c. basis or justification for the price (including premium, if any) at which the offer or invitation is being made;
 - d. name and address of valuer who performed valuation;
 - e. amount which the company intends to raise by way of such securities;
 - f. material terms of raising such securities, proposed time schedule, purposes or objects of offer, contribution being made by the promoters or directors either as part of the offer or separately in furtherance of objects; principle terms of assets charged as securities:

However, a board resolution under section 179(3)(c) of the Companies Act

shall be adequate in case of an offer of NCDs where the proposed amount offered doesn't exceed the limits specified in section 180(1)(c) of the Companies Act, i.e. the aggregate of its paid-up share capital, free reserves and securities premium.³

All private companies are required to either file the board resolution or the special resolution of the approval under section 179(3)(c) of the Companies Act with the Registrar of Companies ("ROC") in Form MGT-14.⁴ It is imperative to note that the company shall issue the private placement offer cum application letter only after the relevant special resolution or Board resolution has been filed with the ROC.

5. The company shall maintain a complete record of private placement offers in Form PAS-5.⁵
6. In the event the company is issuing secured NCDs, it shall also be required to pass a shareholder's resolution for creation of charge by way of a mortgage or hypothecation under Section 180(1)(a) of the Companies Act over the NCDs and a shareholder's resolution for borrowing sums of money which together with the sums already borrowed exceeds the aggregate paid up capital, free reserves and securities premium pursuant to Section 180(1)(c) of the Companies Act. Particulars for registration of the charges for NCDs will have to be filed with the Registrar of Companies in Form CHG-9, within 30 days from the date of creation of

² Rule 14(1) of the PAS Rules.

³ 1st Proviso, Rule 14(1) of the PAS Rules.

⁴ Rule 14(8) of the PAS Rules.

⁵ Rule 14(4) of the PAS Rules.

the charge.⁶ The company shall keep a register of charges at its registered office in Form CHG-7.⁷

7. A return of allotment of the NCDs shall be filed with the Registrar within 15 days of allotment in Form PAS-3 along with a complete list of all the debenture holders containing:

- a. the full name, address, Permanent Account Number and E-mail ID of such NCD holder;
- b. the class of security held;
- c. the date of allotment of NCD;
- d. the number of NCDs held, nominal value and the amount paid on such NCDs; and particulars of the consideration received if the NCDs were issued for consideration other than cash.

The company shall also maintain a register of debenture holders in Form MGT-2 for the NCDs.⁸

8. In addition to the rules associated with the private placement of NCDs, as enumerated in subparagraphs 1 to 7 of paragraph I above, the issuance of debentures is also governed by section 71 of the Companies Act read with Rule 18 of the Companies (Share Capital and Debentures) Rules, 2014. In the event the company is issuing secured debentures, it is required to appoint a debenture trustee prior to the issue of the private placement offer – cum – application letter and execute a debenture trust deed with the

debenture trustee within 60 days of the allotment of the debentures to protect the interests of the debenture holders.

9. In addition to the above, in case the company issues secured debentures, it shall adhere to the following compliances:

- a. The date of redemption of a secured NCD shall not exceed 10 years from the date of issue. However, the following classes of companies may issue secured NCDs for a period exceeding 10 years but not exceeding 30 years:
 - Companies engaged in setting up of infrastructure projects;
 - 'Infrastructure Finance Companies' as defined in Non-Banking Financial (Non-deposit accepting or holding) Companies Prudential Norms (Reserve Bank) Directions, 2007;
 - Infrastructure Debt Fund Non-Banking Financial Companies' as defined in Infrastructure Debt Fund Non-Banking Financial Companies (Reserve Bank) Directions, 2011;
 - Companies permitted by a Ministry or Department of the Central Government or by Reserve Bank of India or by the National Housing Bank or by any other statutory authority to issue debentures for a period exceeding 10 years.

⁶ Section 77 of the Companies Act read with Rule 3, Companies (Registration of Charges) Rules, 2014.

⁷ Section 85 of the Companies Act read with Rule 10, Companies (Registration of Charges) Rules, 2014.

⁸ Section 88 of the Companies Act read with Rule 4 of the Companies (Management and Administration) Rules, 2014.

- b. The debentures shall be secured by the creation of a charge on the properties or assets of the company or its subsidiaries or its holding company or its associate companies, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon.
- c. The security for the NCDs by way of a charge or mortgage shall be created in favour of the debenture trustee on:-
 - any specific movable property of the company or its holding company or subsidiaries or associate companies or otherwise
 - any specific immovable property wherever situate, or any interest therein.
- d. Listed Companies are not required to maintain a debenture redemption reserve in case of private placement. However, in case of unlisted companies, the adequacy of debenture redemption reserve shall be 10% of the value of the outstanding NCD;
- e. Listed as well as unlisted companies, privately placing the debentures, shall on or before 30th day of April in each year, invest or deposit a sum which shall not be less than 15% of the amount of its debentures maturing during that year, ending on 31st March of the next year in any one of the methods provided for in Rule 18(7)(b)(vi) of the Companies (Share Capital and Debentures) Rules, 2014.

available for payment of dividend and the amount credited to such account shall not be utilised by the company except for the redemption of debentures.

11. Section 2(52) of the Companies Act defines a 'listed company' to mean a company which has any of its securities listed on any recognized stock exchange. Section 2(81) of the Companies Act read with Section 2(h) of the Securities Contracts (Regulation) Act, 1956 defines "securities" to include debentures. Accordingly, in case NCDs are listed, the issuer will fall within the ambit of a listed company as per Section 2(52) of the Companies Act and will, therefore, have to comply with the requirements of a listed company as per the provisions of the Companies Act.

II. SEBI ILDS Regulations

1. The SEBI ILDS Regulations govern the listing of NCDs issued through public issue or on private placement basis on a recognized stock exchange.⁹ Chapter III of the SEBI ILDS Regulations lays down the listing requirements for the NCDs, including conditions for listing of debt securities on a private placement basis.
2. The issuing company, on disclosing its intention to seek listing of NCDs issued on a private placement basis shall forward the listing application along with disclosures as specified to the recognized stock exchange within 15 days from the date of allotment of the NCDs.¹⁰ The

10. Section 71(4) of the Companies Act requires a company issuing debentures to create a debenture redemption reserve account out of the profits of the company

⁹ Regulation 3(b) of the SEBI ILDS Regulations.

¹⁰ Regulation 19(3) of the SEBI ILDS Regulations.

issuing company will *inter alia* have to provide to the stock exchange¹¹:

- a. the charter documents of the company and the necessary resolutions for the allotment of the NCDs;
 - b. a copy of the last 3 years audited annual reports;
 - c. statements containing particulars of, dates of, and parties to all material contracts and agreements.;
 - d. copy of resolutions authorizing the borrowing;
 - e. an undertaking from the issuing company that all the necessary documents for the creation of the charge including the trust deed will be executed within the prescribed time frame and uploaded on the designated stock exchange website within 5 working days of the execution of the same.
3. For NCDs, which are proposed to be listed, the listing formalities will have to be completed within 20 days from the allotment date and for this purpose the final listing application and all required documents will have to be submitted to the exchanges, where the NCDs are proposed to be listed. In case of delay in listing of NCDs beyond 20 days from the deemed date of allotment, the issuing company shall pay penal interest of at least 1% p.a. over the coupon rate from the expiry of 30 days from the deemed date of

allotment till the listing of such NCDs to the investor.¹²

4. It is also relevant to note that in privately placed issuances which are thereafter listed, in case of default of interest and/or principal redemption on the due dates, additional interest of at least 2% per annum over the coupon rate shall be payable by the company for the defaulting period.¹³
5. The issuing company desirous of listing its NCDs on a recognized stock exchange shall execute a listing agreement with such stock exchange and follow the conditions of the listing agreement as provided for by the stock exchange where the NCDs are sought to be listed.¹⁴
6. The issuing company has to obtain a Credit Rating from at least one credit rating agency registered with the Securities and Exchange Board of India (“SEBI”).¹⁵ For any NCDs, which are proposed to be listed, it would be mandatory to appoint a rating agency for rating the NCDs. The credit rating obtained by the issuing company shall be reviewed periodically and the issuing company shall disclose any revision in the rating to the stock exchange(s) where the NCDs are listed and to the investors.¹⁶
7. The NCDs, which are being listed, have to be issued in dematerialised form.¹⁷ The issuing company shall make depository arrangements

¹¹ Schedule 1 of the SEBI ILDS Regulations.

¹² SEBI Circular no. SEBI/ HO/ MIRSD/ DOS3/CIR/P/2019/68 dated May 27, 2019 on “Enhanced Disclosure in case of Listed Debt Securities”.

¹³ SEBI Circular no. SEBI/ HO/ MIRSD/ DOS3/CIR/P/2019/68 dated May 27, 2019 on

“Enhanced Disclosure in case of Listed Debt Securities”.

¹⁴ Regulation 19A, 20(2) and 23(1) of the SEBI ILDS Regulations.

¹⁵ Regulation 20(1)(b) of the SEBI ILDS Regulations.

¹⁶ Regulation 23(2) and 23(3) of the SEBI ILDS Regulations.

¹⁷ Regulation 20(1)(c) of the SEBI ILDS Regulations.

with NSDL and CDSL for dematerialization of the NCDs.

8. The issuing company seeking to list its NCDs shall make the disclosures in a disclosure document accompanied by the latest annual report, on the website of the stock exchange where the NCDs are proposed to be listed.¹⁸ The issuing company shall also submit the following disclosures to the debenture trustee at the time of the allotment of the NCDs¹⁹:
 - a. the charter documents of the company and the necessary resolutions for the allotment of the NCDs;
 - b. a copy of the last 3 years audited annual reports;
 - c. statements containing particulars of, dates of, and parties to all material contracts and agreements. These disclosures will be made available on the websites of the stock exchanges;
 - d. latest audited/limited review half-yearly consolidated (wherever available) and standalone financial information (Profit & Loss statement, Balance Sheet and Cash Flow Statement) and auditor qualifications, if any;
 - e. an undertaking from the issuing company that till the redemption of the NCDs, the issuing company shall submit all the details mentioned in point (d.) above within the specified timelines for furnishing/publishing its

half-yearly/ annual result. Further, the Issuer shall within 180 days from the end of the financial year, submit a copy of the latest annual report to the Trustee.

9. The issuing company shall comply with the conditions in relation to the issue of International Securities Identification Number²⁰ including submitting a statement containing information pertaining to the issuance date, the maturity date and the amount outstanding to the recognized stock exchange, where its NCDs are listed, as well as to the depository exchanges shall be submitted half-yearly on the basis of the financial year i.e. latest by April 15 and October 15 of each financial year.²¹

III. SEBI LODR Regulations

1. The Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 detail the obligations of the issuer company while listing its NCDs. The SEBI LODR Regulations define a “listed entity” to mean an entity which has listed, on a recognized stock exchange(s), the designated securities issued by it, in accordance with the listing agreement entered into between the entity and the recognized stock exchange(s).

¹⁸ Regulation 21 of the SEBI ILDS Regulations.

¹⁹ Schedule 1 of the SEBI ILDS Regulations.

²⁰ Regulation 20B of the SEBI ILDS Regulations.

²¹ SEBI circular no. CIR/IMD/DF-1/ 67 /2017 dated June 30, 2017 on “Specifications related to International Securities Identification Number (ISINs) for debt securities issued under the SEBI (Issue and Listing of Debt Securities) Regulations,

2008” and SEBI circular no. CIR/DDHS/P/59/2018 dated March 28, 2018 on “Clarifications with respect to circular on “Specifications related to International Securities Identification Number (ISINs) for debt securities issued under the SEBI (Issue and Listing of Debt Securities) Regulations, 2008”.

2. The listed entity shall appoint a qualified company secretary as a compliance officer²² and appoint a share transfer agent or manage the share transfer facility in-house²³. However, in case of an in-house share facility, as and when the total number of securities of the listed entity exceeds one lakh, the listed entity shall either register with SEBI as a category II share transfer agent or appoint a Registrar to an issue and share transfer agent registered with SEBI. The listed entity shall submit a compliance certificate to the stock exchange, duly signed by the compliance officer and the authorised representative of the share transfer agent, wherever applicable, within one month of the end of each half of the financial year, certifying that all activities in relation to the share transfer facility are maintained by the Registrar to the NCD issue and the Share Transfer Agent.²⁴
3. The listed entity shall register itself on the SCORES platform or such other electronic platform or system of SEBI, as mandated from time to time, in order to handle investor complaints and file with the stock exchange on a quarterly basis, within 21 days from the end of each quarter, a statement giving the number of investor complainants pending and disposed.
4. Chapter V of the SEBI LODR Regulations lays down the obligations of the listed entity which has listed its NCDs on a recognized stock exchange in accordance with the SEBI ILDS Regulations.
5. The listed entity shall give a prior intimation to the stock exchange at least 11 working days before the date on and from which the interest on debentures and redemption amount of the NCDs shall be payable²⁵ and shall 'promptly inform'²⁶ the stock exchange any information that has a bearing on the performance of the listed entity, any price sensitive information or any action that can affect the redemption of the NCDs,²⁷ including disclosures as per Part B of Schedule III of the SEBI LODR Regulations.
6. The listed entity shall submit unaudited/audited financial results on a half-yearly basis within 45 days from the end of the half-year to the stock exchange as well as the debenture trustee with the following line items:
 - a. credit rating and change in credit rating (if any);
 - b. asset cover available;
 - c. debt-equity ratio;
 - d. previous due date for the repayment of principal of NCDs and whether the same has been paid or not; and,
 - e. debt service coverage ratio;
 - f. interest service coverage ratio;
 - g. debenture redemption reserve;
 - h. net worth;
 - i. net profit after tax;
 - j. earnings per share

The listed entity shall within 7 days from the date of the submission of the required information above submit to the stock exchange, a certificate signed by the

²² Regulation 6(1) of the SEBI LODR Regulations.

²³ Regulation 7 of the SEBI LODR Regulations.

²⁴ Regulation 7(3) of the SEBI LODR Regulations.

²⁵ Regulation 50(1) of the SEBI LODR Regulations.

²⁶ Explanation to Regulation 51(1) clarifies that 'promptly inform' implies that the stock exchange

must be informed as soon as practically possible and without any delay and that the information shall be given first to the stock exchange(s) before providing the same to any third party.

²⁷ Regulation 51(1) of the SEBI LODR Regulations.

Debenture Trustee²⁸ and shall submit to the stock exchange on a half-yearly basis along with the half-yearly financial results, a statement indicating material deviations in the use of the proceeds of the issue of NCDs from the objects stated in the offer document²⁹.

7. The annual report of the listed entity shall contain the following disclosures in addition to the ones specified in the Companies Act³⁰:

- a. Audited Financial Statements
- b. Cash Flow statement
- c. Auditors and Directors Report
- d. The name of the debenture trustees with full contact details
- e. Related Party Disclosures as per para A of Schedule V of the SEBI LODR Regulations.

8. The listed entity shall maintain 100% asset cover sufficient to discharge the principal amount at all times for the NCDs issued and disclose to the stock exchange in quarterly, half-yearly, year-to-date and annual financial statements, the extent and nature of security created and maintained.³¹

9. Each rating obtained by the listed entity with respect to NCDs shall be reviewed at least once a year by a credit rating agency registered with the SEBI.

10. The listed entity shall forward the following documents and intimations to the Debenture Trustees³²:

- a. Annual Report along with auditor's certificate in respect of utilization of funds raised;
- b. Resolution/Notices/Circulars relating to any new NCD issuance or any revision in the rating including any defaults;
- c. Half-yearly certificate for maintenance of 100% asset cover in respect of listed NCDs, by either a practising company secretary or a practising chartered accountant, along with the half-yearly financial result.

11. The listed entity shall submit a certificate to the stock exchange within 2 days of the interest or principal or both becoming due that it has made timely payment of interests or principal obligations or both in respect of the NCDs and shall provide an undertaking to the stock exchange on an annual basis stating that all documents and intimations required to be submitted to Debenture Trustees in terms of Trust Deed and SEBI ILDS Regulations have been complied with.

12. The listed entity shall not make material modification without prior approval of the stock exchange where the NCD are listed, to the structure of the NCDs in terms of coupon, conversion, redemption, or otherwise. The approval of the stock exchange shall be made only after the approval of the board of directors and the Debenture Trustee and after complying with the provisions of Companies Act including consent of the requisite majority of holders of NCDs.³³

²⁸ Regulation 52(5) of the SEBI LODR Regulations.

²⁹ Regulation 52(7) of the SEBI LODR Regulations.

³⁰ Regulation 53 of the SEBI LODR Regulations.

³¹ Regulation 54 of the SEBI LODR Regulations.

³² Regulation 56 of the SEBI LODR Regulations.

³³ Regulation 59 of the SEBI LODR Regulations.

13. The listed entity shall maintain a website which contains the following information about the listed entity³⁴:

- a. details of its business;
- b. financial information including a complete copy of the annual report;
- c. contact information of the designated officials of the listed entity who are responsible for assisting and handling investor grievances;
- d. email address for grievance redressal and other relevant details;
- e. name of the Debenture Trustees with full contact details;
- f. the information, report, notices, call letters, circulars, proceedings, etc. concerning the NCDs;
- g. all information and reports including compliance reports filed by the listed entity;
- h. information with respect to the following events:
 - default by the issuer to pay interest on or redemption amount;
 - failure to create a charge on the assets;
 - revision of the rating assigned to the NCDs.

IV. SEBI (Prohibition of Insider Trading) Regulations, 2015

1. The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 applies to all listed companies as well as to those unlisted companies whose securities are proposed to be listed. Each of such companies, upon listing of the NCDs, shall formulate a code of conduct for regulating,

monitoring and reporting of trading by insider³⁵ and a code of practices and procedures for fair disclosure of unpublished price sensitive information³⁶.

2. Each listed company (which will include any unlisted entity issuing NCDs on a private placement basis and listing them subsequently in accordance with applicable laws) shall identify and designate a compliance officer to administer the code of conduct and other requirements under these regulations.

3. Regulation 7 of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 provides that

- a. every promoter, member of the promoter group, key managerial personnel and director of the company, would have to disclose their holding of securities to the company within 30 days of the listing;
- b. every promoter, member of the promoter group, designated person and director of the company, shall disclose to the company the number of securities acquired or disposed of within 2 trading days of such transaction, if the value traded, whether in one transaction or a series of transactions, over any calendar quarter aggregates to a traded value in excess of Rs 10,00,000. The company shall notify the particulars of such trading to the stock exchange within 2 trading days of receipt of the disclosure or becoming aware of such information.

³⁴ Regulation 62(1) of the SEBI LODR Regulations.

³⁵ Regulation 9(1) of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.

³⁶ Regulation 8(1) of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.

C. CONCLUSION

Listing of NCDs by a private limited company brings the company within the ambit of a “listed entity”, thereby opening it to scrutiny by the market watchdog, SEBI and the various regulations formulated by it as described in this article. However, listed NCDs are a more attractive investment instrument for investors as they provide a higher interest rate, particularly secured NCDs. They are also liquid assets, inasmuch as an investor can sell them on the stock exchange or exercise a put/ call option, if permitted in accordance with the terms of the NCDs. Investments in NCDs adds diversification to the portfolio of an investor with income security. Some of these reasons compel private limited companies to list NCDs issued on a private placement basis. Such companies need to be aware of the many compliances and disclosures involved with listing of debt securities. Timely compliance and disclosures can ensure and retain investor confidence in the securities of such companies, and enable the company in future fundraising.



ATLAS LAW
P A R T N E R S