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**VIRTUAL COACHING CLASSES  
ORGANISED BY BOS, ICAI**

**INTERMEDIATE LEVEL  
PAPER 2: CORPORATE AND OTHER LAWS**

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# PROSPECTUS AND ALLOTMENT OF SECURITIES

Section 23 to Section 42 of Companies Act 2013 read with Companies  
(Prospectus and allotment of securities) Rules 2014



# PUBLIC OFFER OF SECURITIES TO BE IN DEMATERIALISED FORM

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**Responsibility of every holder of securities of an unlisted public company:** According to Rule 9A (3), every holder of securities of an unlisted public company:

- (a) who intends to transfer such securities on or after 2nd October, 2018, shall get such securities dematerialised before the transfer; or
- (b) who subscribes to any securities of an unlisted public company (whether by way of private placement or bonus shares or rights offer) on or after 2nd October, 2018

shall ensure that all his existing securities are held in dematerialized form before such subscription.



# PUBLIC OFFER OF SECURITIES TO BE IN DEMATERIALISED FORM

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**Obligations of every unlisted public company:** According to Rule 9A (5), every unlisted public company shall ensure that –

- (a) it makes timely payment of fees (admission as well as annual) to the depository and registrar to an issue and share transfer agent in accordance with the agreement executed between the parties;
- (b) it maintains security deposit, at all times, of not less than two years' fees with the depository and registrar to an issue and share transfer agent, in such form as may be agreed between the parties; and
- (c) it complies with the regulations or directions or guidelines or circulars, if any, issued by the Securities and Exchange Board or Depository from time to time with respect to dematerialisation of shares of unlisted public companies and matters incidental or related thereto.



# PUBLIC OFFER OF SECURITIES TO BE IN DEMATERIALISED FORM

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**Prohibition on defaulting unlisted public company:** Rule 9A (6) states that no unlisted public company which has defaulted in sub-rule (5) shall make offer of any securities or buyback its securities or issue any bonus or right shares till the payments to depositories or registrar to an issue and share transfer agent are made

**Application of certain provisions:** According to Rule 9A (7), except as provided in sub-rule (8), the provisions of the Depositories Act, 1996, the Securities and Exchange Board of India (Depositories and Participants) Regulations, 2018 and the Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 shall apply mutatis mutandis to dematerialisation of securities of unlisted public companies.



# PUBLIC OFFER OF SCEURTIES TO BE IN DEMATERIALISED FORM

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**Filing with the Registrar:** Rules 9A (8) prescribes that every unlisted public company governed by Rule 9A shall submit Form PAS-6 to the Registrar with such fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 within 60 days from the conclusion of each half year duly certified by a company secretary in practice or chartered accountant in practice.

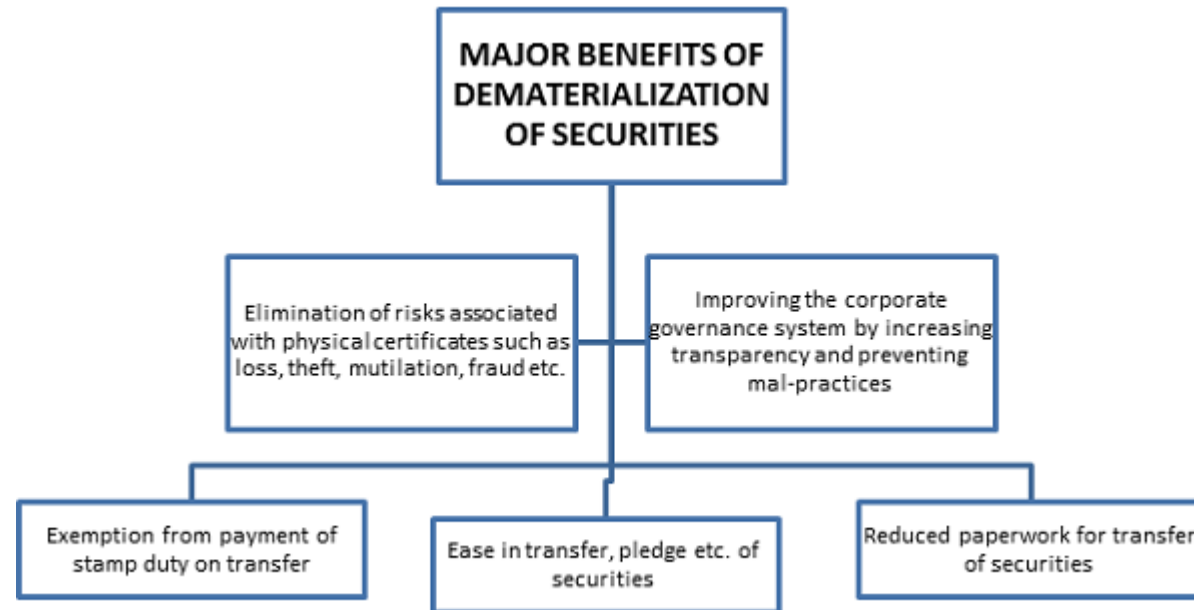
**Reporting of difference:** As per Rule 9A (8A), the company shall immediately bring to the notice of the depositories any difference observed in its issued capital and the capital held in dematerialised form.

**Grievances redressal mechanism:** According to Rule 9A (9), the grievances, if any, of security holders of unlisted public companies under Rule 9A shall be filed before the Investor Education and Protection Fund Authority (IEPF).



# PUBLIC OFFER OF SECURITIES TO BE IN DEMATERIALISED FORM

**Initiation of action by IEPF Authority:** Rule 9A (10) states that the Investor Education and Protection Fund Authority shall initiate any action against a depository or participant or registrar to an issue and share transfer agent after prior consultation with the Securities and Exchange Board of India.





# ADVERTISEMENT OF PROSPECTUS

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**Section 30** of the Companies Act 2013 contains the provisions regarding the advertisement of the prospectus. This section states that when in any manner the advertisement of a prospectus is published, it is mandatory to specify the contents of the memorandum of the company regarding

- the object,
- member's liabilities,
- amount of the company's share capital,
- signatories
- and the number of shares subscribed by them and
- the capital structure of the company





# VARIATION IN TERMS OF CONTRACT OR OBJECT IN PROSPECTUS

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Section 27 contains provisions relating to variation in terms of contract or objects in prospectus.

*Section 27 states as under:*

*(1) A company shall not, at any time, vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued, **except subject to the approval of, or except subject to an authority given by the company in general meeting by way of special resolution:***

*Provided that the details, as may be prescribed, of **the notice in respect of such resolution to shareholders, shall also be published in the newspapers (one in English and one in vernacular language) in the city where the registered office of the company is situated indicating clearly the justification for such variation:***



# VARIATION IN TERMS OF CONTRACT OR OBJECT IN PROSPECTUS

*Provided further that such company shall not use any amount raised by it through prospectus for buying, trading or otherwise dealing in equity shares of any other listed company.*

*(2) The dissenting shareholders being those shareholders who have not agreed to the proposal to vary the terms of contracts or objects referred to in the prospectus, shall be given an exit offer by promoters or controlling shareholders at such exit price, and in such manner and conditions as may be specified by the Securities and Exchange Board by making regulations in this behalf.*





# VARIATION IN TERMS OF CONTRACT OR OBJECT IN PROSPECTUS

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In respect of variation in terms of contracts referred to in the prospectus or objects for which prospectus was issued, *Rule 7 of the Companies (Prospectus and allotment of Securities) Rules, 2014, states as under:*

**Special Resolution to be passed through Postal Ballot and Contents of Notice:** According to Sub-rule (1), where the company has raised money from public through prospectus and has any unutilized amount out of the money so raised, it shall not vary the terms of contracts referred to in the prospectus or objects for which the prospectus was issued except by passing a special resolution through postal ballot and the notice of the proposed special resolution shall contain the following particulars, namely:—



# VARIATION IN TERMS OF CONTRACT OR OBJECT IN PROSPECTUS

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- (a) the original purpose or object of the Issue;
- (b) the total money raised;
- (c) the money utilised for the objects of the company stated in the prospectus;
- (d) the extent of achievement of proposed objects (that is fifty percent, sixty percent, etc.);
- (e) the unutilised amount out of the money so raised through prospectus,
- (f) the particulars of the proposed variation in the terms of contracts referred to in the prospectus or objects for which prospectus was issued;



# VARIATION IN TERMS OF CONTRACT OR OBJECT IN PROSPECTUS

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- (g) the reason and justification for seeking variation;
- (h) the proposed time limit within which the proposed varied objects would be achieved;
- (i) the clause-wise details as specified in sub-rule (3) of rule 3 as was required with respect to the originally proposed objects of the issue;
- (j) the risk factors pertaining to the new objects; and
- (k) the other relevant information which is necessary for the members to take an informed decision on the proposed resolution.



# VARIATION IN TERMS OF CONTRACT OR OBJECT IN PROSPECTUS

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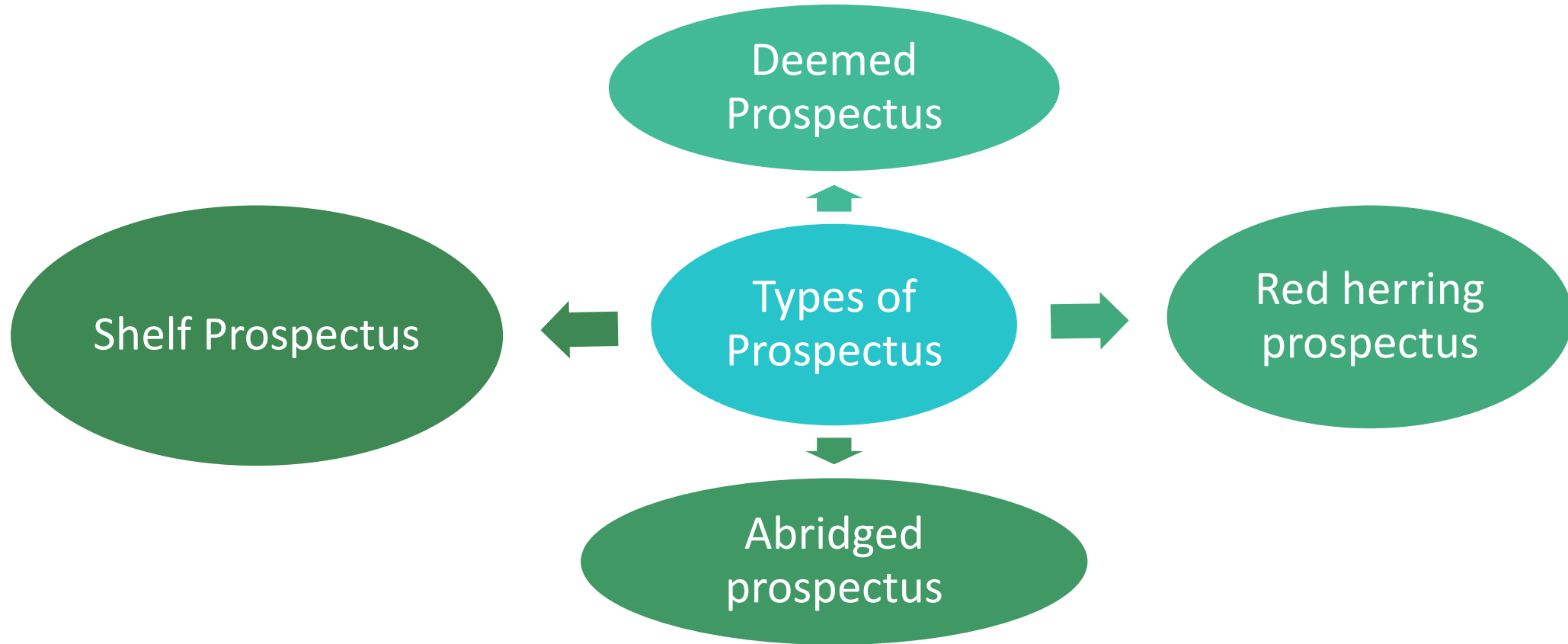
**Advertisement to be in Specified Form:** According to Sub-rule (2), the advertisement of the notice for getting the resolution passed for varying the terms of any contract referred to in the prospectus or altering the objects for which the prospectus was issued, **shall be in Form PAS-1** and such advertisement shall be published simultaneously with dispatch of Postal Ballot Notices to Shareholders.

**Placing of Notice on Web-site:** According to Sub-rule (3), the notice shall also be placed on the web-site of the company, if any.

**(2) Exit offer to dissenting shareholders:** The dissenting shareholders being those shareholders who have not agreed to the proposal to vary the terms of contracts or objects referred to in the prospectus, shall be given an exit offer by promoters or controlling shareholders at such exit price, and in such manner and conditions as may be specified by the Securities and Exchange Board by making regulations in this behalf. [Sub-section (2)]



# TYPES OF PROSPECTUS





# DEEMED PROSPECTUS

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*According to Section 25 where a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company*

*; and all enactments and rules of law as to the contents of prospectus and as to liability in respect of mis-statements, in and omissions from, prospectus, or otherwise relating to prospectus, shall apply with the modifications specified in sub-sections (3) and (4) and shall have effect accordingly, as if the securities had been offered to the public for subscription and as if persons accepting the offer in respect of any securities were subscribers for those securities, but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof. [Sub-section (1)]*





# DEEMED PROSPECTUS

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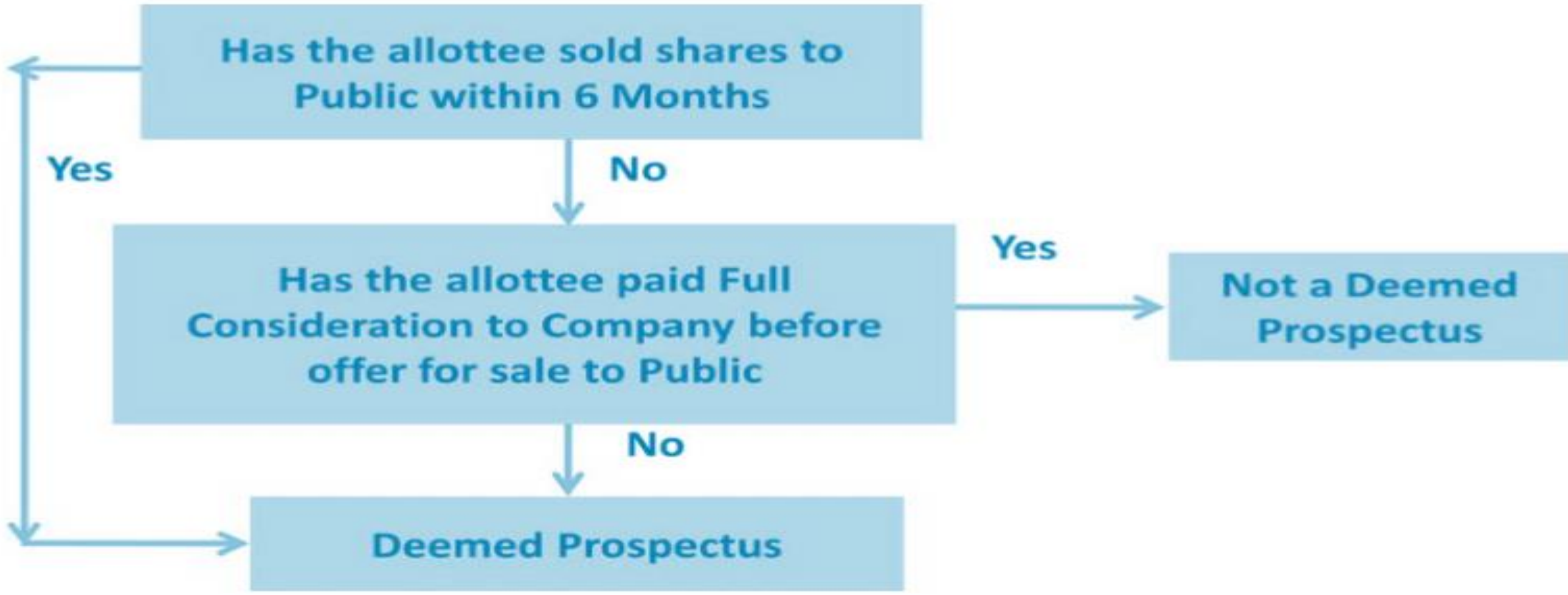
*(2) Securities offered for sale to the public: For the purposes of the Companies Act, 2013, it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, securities was made with a view to the securities being offered for sale to the public if it is shown—*

*(a) that an offer of the securities or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or*

*(b) that at the date when the offer was made, the whole consideration to be received by the company in respect of the securities had not been received by it.  
[Sub-section (2)]*



# DEEMED PROSPECTUS [ SECTION 25]





# DEEMED PROSPECTUS [ SECTION 25]

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## Effect of deemed Prospectus:

- all enactments and rules of law as to the contents of prospectus shall apply.
- all enactments and rules of law as to liability in respect of mis-statements, in and omissions from, prospectus, or otherwise relating to prospectus, shall apply
- It shall be deemed that the persons by whom the offer to the public is made were named in the prospectus as the directors of the Company.
- Thus, there is no dilution of liability for the persons making the offer which is in addition to liability of the company whose securities are offered for sale



# DEEMED PROSPECTUS [ SECTION 25]

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## Contents of deemed Prospectus

- a. Content specified in s.26
- b. the net amount of the consideration received or to be received by the company in respect of the securities to which the offer relates; and
- c. the time and place at which the contract where under the said securities have been or are to be allotted may be inspected

**Signing of deemed Prospectus:** if the offer for sale to the public is made by a company or a firm

- Company- 2 directors
- Firm- at least one half of the partners of the firms



# SHELF PROSPECTUS [Section 31]

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**“Shelf prospectus”** means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus. The only caveat is to supplement the shelf prospectus by an “information memorandum” containing key updates or changes

Max Validity of a shelf prospectus is -1 year



# SHELF PROSPECTUS [Section 31]

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**Filing of shelf prospectus with registrar:** According to section 31, **any class or classes of companies**, as the Securities and Exchange Board may provide by regulations in this behalf, may file a shelf prospectus with the Registrar at the stage of

- (i) the first offer of securities included therein, which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under that prospectus, and
- (ii) In respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required.



# SHELF PROSPECTUS [Section 31]

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**Filing of information memorandum with the shelf prospectus:** A company filing a shelf prospectus shall be required to file an **information memorandum** containing **all material facts** relating to **new charges created, changes in the financial position of the company** as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer of securities and such other changes as may be prescribed, with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus.



# SHELF PROSPECTUS [Section 31]

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It is provided that where a company or any other person has received applications for the allotment of securities along with advance payments of subscription before the making of any such change, the company or other person shall intimate the changes to such applicants and if they express a desire to withdraw their application, the company or other person shall refund all the monies received as subscription within fifteen days thereof. [Sub-section (2) and Proviso]

**According to Rule 10 of the Companies (Prospectus and Allotment of securities) Rules, 2014**, the information memorandum shall be prepared in Form PAS-2 and filed with the Registrar along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 *within one month prior to the issue of a second or subsequent offer of securities under the shelf prospectus.*

**Memorandum together with the shelf prospectus shall be deemed to be a prospectus:** Where an information memorandum is filed, every time an offer of securities is made under sub-section (2), such memorandum together with the shelf prospectus shall be deemed to be a prospectus





# RED HERRING PROSPECTUS[ S. 32]

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It is a prospectus which **does not include complete particulars** of the quantum or price of the securities included therein.

A company proposing to make an offer of securities may issue a red herring prospectus **prior to the issue of a prospectus**.

A company proposing to issue a red herring prospectus shall **file it with the Registrar at least three days prior to the opening of the subscription list** and the offer.

A red herring prospectus shall carry the **same obligations as are applicable to a prospectus** and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus



# RED HERRING PROSPECTUS[ S. 32]

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Upon the closing of the offer of securities under this section, the prospectus stating therein the total capital raised, whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board.



# ABRIDGED PROSPECTUS

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The term **'Abridged Prospectus'** has been defined by **Section 2 (1)**.

According to it, 'Abridged Prospectus' means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf. In fact, 'Abridged Prospectus' is a summarised form of actual prospectus.

Section 33 of the Act provides that no form of application for the purchase of any of the securities of a company shall be issued unless such form is accompanied by an abridged prospectus.

A copy of the prospectus shall, on a request being made by any person before the closing of the subscription list and the offer, be furnished to him.

Nothing aforesaid shall apply if it is shown that the form of application was issued— (a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to such securities; or (b) in relation to securities which were not offered to the public.

The penal provisions provide that a company which makes any default in complying with the provisions shall be liable to a penalty of fifty thousand rupees for each default



# OFFER FOR SALE [SECTION 28]

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Section 28 contains the provisions which regulate the offer for sale of securities by certain members of company. These provisions are stated as under:

**(1) Offering of shares to public by certain members permitted:** Where certain members of a company propose, in consultation with the Board of Directors to offer, in accordance with the provisions of any law for the time being in force, whole or part of their holding of shares to the public, they may do so in accordance with such procedure as may be prescribed. [Sub-section (1)].

**(2) Document offering sale to public is deemed to be a prospectus:** Any document by which the offer of sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company and all laws and rules made thereunder as to the contents of the prospectus and as to liability in respect of mis-statements in and omission from prospectus or otherwise relating to prospectus shall apply as if this is a prospectus issued by the company. [Sub-section (2)]



# OFFER FOR SALE [SECTION 28]

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**(3) Collective Authorisation and reimbursement of expenses to company:** The members, whether individuals or bodies corporate or both, whose shares are proposed to be offered to the public, shall collectively authorise the company, whose shares are offered for sale to the public, to take all actions in respect of offer of sale for and on their behalf and they shall reimburse the company all expenses incurred by it on this matter. [Sub-section (3)].

As regards offer of sale of shares by certain members of the company Rule 8 of the Companies (Prospectus and Allotment of Securities) Rules, 2014, contains guiding provisions which are stated as under:



# OFFER FOR SALE [SECTION 28]

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**Exceptions to certain Matters:** According to Rule 8 (1), the provisions of Part I of Chapter III namely “Prospectus and Allotment of Securities” and rules made thereunder shall be applicable to an offer of sale referred to in section 28 except for the following, namely:-

- (a) the provisions relating to minimum subscription;
- (b) the provisions for minimum application value;
- (c) the provisions requiring any statement to be made by the Board of directors in respect of the utilization of money; and
- (d) any other provision or information which cannot be compiled or gathered by the offeror, with detailed justifications for not being able to comply with such provisions.



# OFFER FOR SALE [SECTION 28]

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**Disclosure:** As per Rules 8 (2), the prospectus issued under section 28 shall disclose the name of the person or persons or entity bearing the cost of making the offer of sale along with reasons.

# SECURITIES TO BE DEALT WITH IN STOCK EXCHANGES [SECTION 40]

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Section 40 contains following provisions in respect of securities which are to be dealt with in the recognised stock exchanges.

**(1) Filing of an application with recognised stock exchange:** Every company making public offer shall, before making such offer, make an application to one or more recognised stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges.

**(2) Prospectus to state name of stock exchange:** Where a prospectus states that an application has been made, such prospectus shall also state the name or names of the stock exchange in which the securities shall be dealt with.



# SECURITIES TO BE DEALT WITH IN STOCK EXCHANGES [SECTION 40]

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**(3) Maintaining of separate bank account:** All monies received on application from the public for subscription to the securities shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—

- (a) for adjustment against allotment of securities where the securities have been permitted to be dealt with in the stock exchange or stock exchanges specified in the prospectus; or
- (b) for the repayment of monies within the time specified by the Securities and Exchange Board, received from applicants in pursuance of the prospectus, where the company is for any other reason unable to allot securities.
- **(4) Condition purporting to waive compliance shall be void:** Any condition purporting to require or bind any applicant for securities to waive compliance with any of the requirements of this section shall be void.

# SECURITIES TO BE DEALT WITH IN STOCK EXCHANGES [SECTION 40]

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**Penalty for default:** If a default is made in complying with the provisions of this section, both the company and the officer of the company shall be punishable as under:

## Company:

- with minimum fine of five lakh rupees and maximum of fifty lakh rupees

## Defaulting officer:

- with imprisonment upto one year, or
- with minimum fine of fifty thousand rupees and maximum of three lakh rupees, or
- with both.

# SECURITIES TO BE DEALT WITH IN STOCK EXCHANGES [SECTION 40]

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**Underwriting** an issue of shares or debentures involves entering into contract with a person known as underwriter, who may be an individual, partnership or company, undertaking that in the event of the shares or debentures not being subscribed by the public or only a part of it being subscribed, he shall take up the balance.

‘Underwriter’ means a person who engages in the business of underwriting of an issue of securities of a body corporate. The underwriters, for providing this service to the issuing companies charge a commission generally calculated at an agreed specified rate on the issue price of whole of the shares or debentures under written. Such a commission is called underwriting commission which is payable on the whole of shares or debentures underwritten even if the public takes up all the shares or debentures offered.

In an English case, the learned Judge defined underwriting as **“an agreement entered into before the shares are brought before the public that in the event of the public not taking up the whole of them or the number mentioned in the agreement, the underwriter will, for an agreed commission take an allotment of such part of the shares as the public has not applied for”**.

# SECURITIES TO BE DEALT WITH IN STOCK EXCHANGES [SECTION 40]

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**Underwriting Commission:** Section 40(6) allows any company to pay commission to any person for his subscribing or agreeing to subscribe to its securities subject to the prescribed conditions.

Rule 13 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 prescribes the following conditions for the payment of commission:

- (a) the payment of such commission shall be authorized in the company's articles of association;
- (b) the commission may be paid out of proceeds of the issue or the profit of the company or both;
- (c) Rate of commission:

# SECURITIES TO BE DEALT WITH IN STOCK EXCHANGES [SECTION 40]

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## Rate for underwriting commission:

**in case of shares**

- shall not exceed 5% of the price at which the shares are issued, or
- a rate authorised by the articles,
- whichever is less

**in case of debentures**

- shall not exceed 2.5% of the price at which the debentures are issued, or
- as specified in the company's articles,
- whichever is less

# SECURITIES TO BE DEALT WITH IN STOCK EXCHANGES [SECTION 40]

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**(d) Disclosure of the particulars in prospectus:** The prospectus of the company shall disclose the following particulars –

- (i) the name of the underwriters;
- (ii) the rate and amount of the commission payable to the underwriter; and
- (iii) the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.

**(e) When no commission is to be paid:** There shall not be paid commission to any underwriter on securities which are not offered to the public for subscription;

**(f) Copy of payment of commission to be delivered to Registrar:** A copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

# SECURITIES TO BE DEALT WITH IN STOCK EXCHANGES [SECTION 40]

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## **Example:**

A public limited company which wanted to raise funds through public issue of shares had applied for listing of its shares in three recognised Stock Exchanges. However, only two exchanges had given permission for listing. Can the company proceed with the public offer?

## **Example:**

The Board of Directors of a company decide to pay 5% of the issue price of shares as underwriting commission to the underwriters. However, the Articles of Association of the company permit only 3% commission. The Board of Directors further decide to pay the commission out of the proceeds of the share capital. Are the decisions taken by the Board of Directors valid under the Companies Act, 2013?

# ALLOTMENT OF SECURITIES BY THE COMPANY

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Allotment of shares is an appropriation of a certain number of shares to an applicant and distribution of shares among those who have submitted written application.

**(1) Receipt of Minimum Amount is a must:** No allotment of any securities of a company offered to the public for subscription shall be made unless **the amount stated in the prospectus as the minimum amount has been subscribed** and the sums payable on application for the amount so stated have been paid to and received by the company by cheque or other instrument.

**(2) Quantum of Amount Payable on Application:** The amount payable on application on every security shall not be less than five per cent of the nominal amount of the security or such other percentage or amount, as may be specified by the Securities and Exchange Board by making regulations in this behalf.



# ALLOTMENT OF SECURITIES BY THE COMPANY

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**(3) Consequences if minimum amount is not subscribed:** If the stated minimum amount has not been subscribed and the sum payable on application is **not received within a period of thirty days** from the date of issue of the prospectus, or such other period as may be specified by the Securities and Exchange Board, the amount received under sub-section (1) shall be returned within such time and manner as may be prescribed.

**(4) Refund of Application Money:** Rule 11 (1) of the PAS Rules mentions that if the stated minimum amount has not been subscribed and the sum payable on application is not received within the period specified therein, then the **application money shall be repaid within a period of fifteen days from the closure** of the issue and if any such money is not so repaid within such period, **the directors of the company who are officers in default shall jointly and severally be liable to repay that money with interest at the rate of fifteen percent per annum**

# ALLOTMENT OF SECURITIES BY THE COMPANY

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**Which Account to be used for Refund:** According to Rule 11 (2), the application money to be refunded shall be credited only to the bank account from which the subscription was remitted.

**(4) Return of Allotment:** Whenever a company having a share capital makes any allotment of securities, it shall file with the Registrar a return of allotment in such manner as may be prescribed.

**Time Limit for filing Return of Allotment:** According to Rule 12 (1) of PAS Rules, whenever a company having a share capital makes any allotment of its securities, the company shall, within thirty days thereafter, file with the Registrar a return of allotment in Form PAS-3, along with the fee as specified in the Companies (Registration Offices and Fees) Rules, 2014.

# ALLOTMENT OF SECURITIES BY THE COMPANY

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**Details to be attached with PAS-3:** Rule 12 (2) states that there shall be attached to the Form PAS-3 a **list of allottees stating their names, address, occupation, if any, and number of securities allotted to each of the allottees** and the list shall be certified by the signatory of the Form PAS-3 as being complete and correct as per the records of the company.

**Attachments with PAS-3 when Securities are issued for consideration other than cash:** According to Rule 12 (3), in the case of *securities (not being bonus shares) allotted as fully or partly paid up for consideration other than cash*, there shall **be attached to the Form PAS-3 a copy of the contract, duly stamped, pursuant to which the securities have been allotted together with any contract of sale if relating to a property or an asset, or a contract for services or other consideration**

# ALLOTMENT OF SECURITIES BY THE COMPANY

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**Attachments with PAS-3 when Contract is not Reduced to Writing:** Rule 12 (4) states that where a contract referred to in sub-rule (3) is not reduced to writing, the company shall furnish along with the Form PAS-3 **complete particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing and those particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1899** (2 of 1899), and the Registrar may, as a condition of filing the particulars, require that the stamp duty payable thereon be adjudicated under section 31 of the Indian Stamp Act, 1899

**Attachment of Report of a Registered Valuer:** According to Rule 12 (5), a report of a registered valuer in respect of valuation of the consideration shall also be attached along with the contract as mentioned in sub-rule (3) and sub-rule (4)..

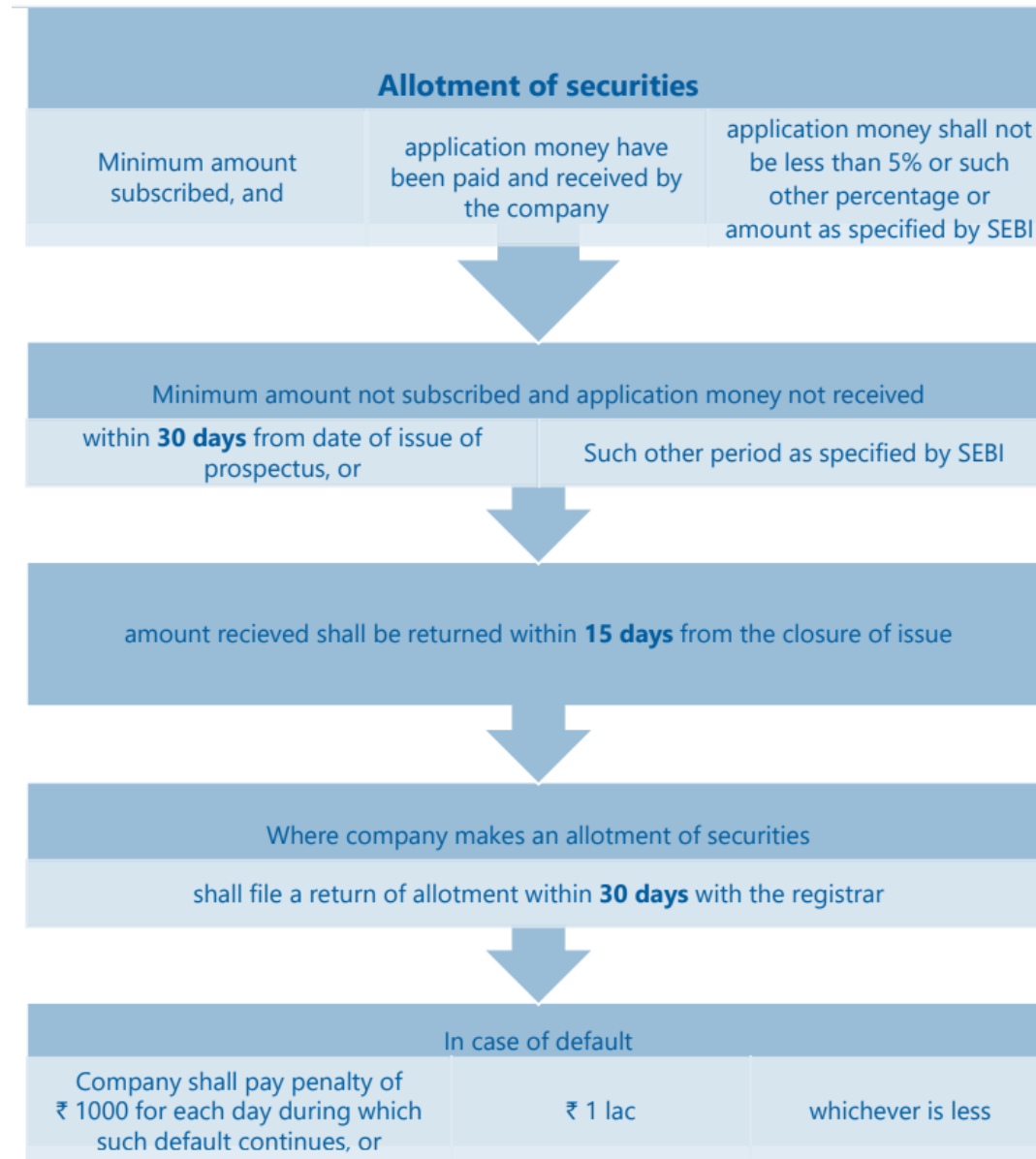
# ALLOTMENT OF SECURITIES BY THE COMPANY

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**Attachment of Resolution in case of Bonus Shares:** Rule 12 (6) states that in the case of issue of bonus shares, a copy of the resolution passed in the general meeting authorizing the issue of such shares shall be attached to the Form PAS-3.

**Attachment of Valuation Report of the Registered Valuer when shares have been issued in pursuance of Section 62 (1) (c):** Rule 12 (7) states that in case the shares have been issued in pursuance of clause (c) of sub-section (1) of section 62 by a company other than a listed company whose equity shares or convertible preference shares are listed on any recognised stock exchange, there shall be attached to Form PAS-3, the valuation report of the registered valuer.

**(5) Punishment for Default:** In case of any default under sub-section (3) or sub-section (4), the company and its officer who is in default shall be liable to a penalty, for each default, of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.



# ALLOTMENT OF SECURITIES BY THE COMPANY

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Once securities are issued and subscribed for, these needs to be allotted according to the conditions given below:

- ♦ Minimum subscription to be received within 30 days of issue of prospectus. In case minimum subscription is not received, the issue is considered as failed. To take care of such an eventuality, the merchant bankers in case of public offer resort to underwriting, suitable pricing, bringing in anchor investors etc., among other things. In case of a failed issue, the entire issue proceeds need to be refunded along with applicable interest.
- ♦ Application money need to be minimum 5% of the nominal amount and such amount must be sufficient to cover the minimum amount stated in the prospectus.
- ♦ Return of allotment needs to be filed with the ROC within the specified time after the allotment of securities.

# ALLOTMENT OF SECURITIES BY THE COMPANY

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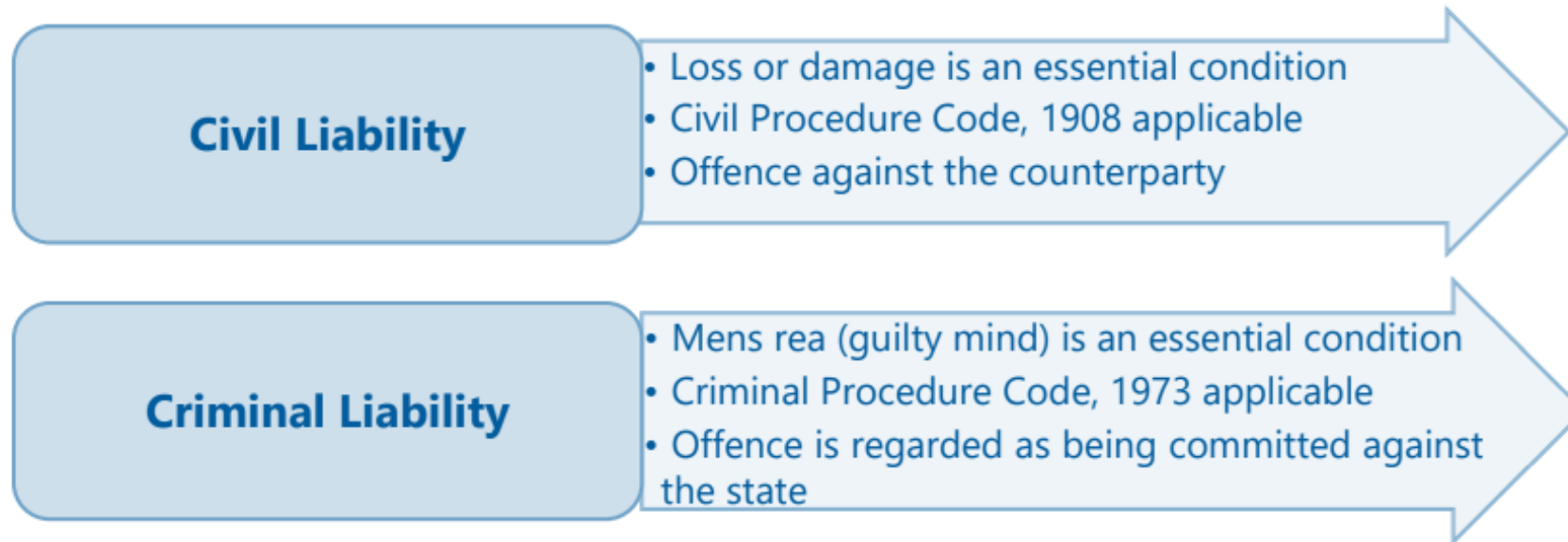
Example: After having received 80% of the minimum subscription as stated in the prospectus, Raksha Detective Instruments Limited, before finalisation of the allotment, withdrew 50% of the said amount from the bank for the purchase of certain assets. Thereafter, it started allotting the shares to the subscribers. Rashmi, one of the subscribers, was allotted 1000 equity shares. She, however, refused to accept the allotment on the ground that such allotment was violative of the provisions of the Companies Act, 2013.



# LIABILITY FOR MISSTATEMENT IN PROSPECTUS

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Mis-statement is the act of stating something that is false or not accurate. It could either be due to commission or omission or both.





# CRIMINAL LIABILITY FOR MISSTATEMENT IN PROSPECTUS[ SECTION 34]

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Section 34 fastens criminal liability for mis-statements in prospectus.

Where a prospectus, issued, circulated or distributed, includes any **statement which is untrue or misleading, every person who has authorised the issue of such prospectus** shall be held **guilty for fraud** involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower punishable with imprisonment and fine under section 447.



# PUNISHMENT FOR FRAUD[ S. 447]

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Section 447 provides the penalty for fraud :

- any person who is found to **be guilty of fraud involving an amount of at least ten lakh rupees or one per cent of the turnover of the company**, whichever is lower shall be punishable **with imprisonment for a term which shall not be less than six months but which may extend to ten years** and shall also be liable **to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.**
- where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.
- where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.

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**Fraud**: The term 'fraud' in relation to affairs of a company or any body corporate, includes-

- ♦ any act,
- ♦ omission,
- ♦ concealment of any fact, or
- ♦ abuse of position committed by any person, or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;

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**Defense:** nothing in this section shall apply to a person if he proves that **such statement or omission was immaterial** or that **he had reasonable grounds to believe**, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.



# CIVIL LIABILITY FOR MIS STATEMENT IN PROSPECTUS[ SECTION 35]

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Section 35 makes the following persons liable to pay compensation for loss or damage sustained by reason of mis-statement/untrue statement or inclusion or omission of any matter in the prospectus:-

- 1. Every person who is a director of the company at the time of issue of prospectus;
- 2. Every person who has authorized himself to be named and is named in the prospectus as a director [proposed directors];
- 3. Every person who is a promoter of the company;
- 4. Every person who has authorized the issue of the prospectus; and
- 5. Every person who is named in the prospectus as an expert.



# CIVIL LIABILITY FOR MIS STATEMENT IN PROSPECTUS[ SECTION 35]

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**Exemptions from the liability:** No person shall be liable for the mis-statement, where such person proves that—

- **1. Withdrawn his consent before the issue of prospectus-** Where a person having consented to become a director of the company, withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
- **2. Prospectus issued without his knowledge/ consent-** Where the prospectus was issued without the knowledge or consent of a person, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge



# CIVIL LIABILITY FOR MIS STATEMENT IN PROSPECTUS[ SECTION 35]

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3. As regards **every misleading statement** purported to be made **by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert**, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the report or valuation; and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe, that the person making the statement was competent to make it and that the said person had given the consent required by section 26 to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment there under



# CIVIL LIABILITY FOR MIS STATEMENT IN PROSPECTUS[ SECTION 35]

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**Liability on defraud**: Where it is proved that a **prospectus has been issued with intent to defraud** the applicants for the securities of a company or any other person or for any fraudulent purpose, **every person referred to in subsection (1) shall 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**

# LIABILITY FOR MISSTATEMENT



# LIABILITY FOR MISSTATEMENT

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**Example 5:** An allottee of shares in a company brought action against a director in respect of false statements made in the prospectus. The director contended that the statements were prepared by the promoters and he simply relied on them. Is the director liable under the circumstances?

Answer: Yes, the Director shall be held liable for the false statements made in the prospectus under sections 34 and 35 of the Companies Act, 2013. Whereas section 34 imposes a criminal punishment on every person who authorises the issue of such prospectus, section 35 more particularly includes a director of the company in the imposition of liability for such mis-statements. Certain situations when a director will not incur any liability for mis-statements in a prospectus are covered under exceptions provided by Section 35 (2) but no such exception specifies that relying on the statements prepared the promoters of the company is a valid ground for a director to escape liability for mis-statement.

# LIABILITY FOR MISSTATEMENT

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Example 6: All the statements contained in a prospectus issued by a company were literally true. It was also stated in the prospectus that the company had paid dividends for a number of years but there was no disclosure regarding the fact that the dividends were paid out of realised capital profits and not out of trading profits. An allottee of shares wants to avoid the contract on the ground that the prospectus was false in material particulars.

Answer: The non-disclosure of the fact that dividends were paid out of capital profits is a concealment of material fact as a company is normally required to distribute dividend only from trading or revenue profits and under exceptional circumstances it can pay dividend out of capital profits. Hence, a material misrepresentation has been made. Accordingly, in the given case the allottee can avoid the contract of allotment of shares.

# PUNISHMENT FOR FRAUDULENTLY INDUCING PERSONS TO INVEST MONEY

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**Section 36 prescribes punishment for fraudulently inducing persons to invest money.**

*Any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into, or to offer to enter into,- (a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting securities; or*

*(b) any agreement, the purpose or the pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities; or*

*(c) any agreement for, or with a view to obtaining credit facilities from any bank or financial institution,*

*shall be liable for action under section 447.*

# CLASS ACTION SUITS [Section 37]

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Class action suit is for a group of people filing a suit against a defendant who has caused common harm to the entire group or class.

In the case of class action suit, the class or the group of people filing the case need not be present in the court and can be represented by one petitioner. The benefit of these type of suits is that if several people have been injured by one defendant, each of the injured person need not file a case separately but all of the people can file one single case together against the defendant.

**Example** : M applies for equity shares of a company on the basis of a prospectus which contains mis-statement. The shares are allotted to him, who afterwards transfers them to N. Whether N can bring an action for a rescission on the ground of mis-statement under section 37 of the Companies Act, 2013?

# PRIVATE PLACEMENT

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## Private Placement

A private placement is a way of raising capital that involves the issue of securities to a relatively small number of select investors.

A private placement is different from a public issue in which securities are made available for issue or sale on the open market to any type of investor.

# ISSUE OF SHARES ON PRIVATE PLACEMENT BASIS

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According to Section 42, following provisions are applicable when shares are issued on private placement basis. They are also supplemented by Rule 149 the Companies (Prospectus and Allotment of Securities) Rules, 2014 [PAS Rules].

**(1) Applicability:** A company may, subject to the provisions of section 42, make a private placement of securities.

**(2) Offer to be made only to a Select Group of Persons:** A private placement shall be made only to a **select group of persons** who have been identified by the Board (herein referred to as "identified persons"), whose **number shall not exceed fifty** or such higher number as may be prescribed [**excluding the qualified institutional buyers and employees of the company being offered securities** under a scheme of employees stock option in terms of provisions of clause (b) of sub-section (1) of section 62], in a financial year subject to such conditions as may be prescribed.



# ISSUE OF SHARES ON PRIVATE PLACEMENT BASIS

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According to **Rule 14 (2) of the PAS Rules**, an offer or invitation to subscribe securities under private placement shall not be made to persons **more than two hundred in the aggregate in a financial year**.

It is provided that **any offer or invitation made to qualified institutional buyers, or to employees of the company** under a scheme of employees' stock option as per provisions of clause (b) of sub-section (1) of section 62 shall not be considered while calculating the limit of two hundred persons.

As per Explanation given in this Rule, it is clarified that the restrictions aforesaid would be reckoned individually for each kind of security that is equity share, preference share or debenture.

# ISSUE OF SHARES ON PRIVATE PLACEMENT BASIS

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**Non-applicability of Sub-rule (2):** The provisions of sub-rule (2) shall not be applicable to –

- (a) non-banking financial companies (NBFCs) which are registered with the Reserve Bank of India; and (
- b) housing finance companies (HFCs) which are registered with the National Housing Bank.

if they are complying with regulations made by the Reserve Bank of India or the National Housing Bank in respect of offer or invitation to be issued on private placement basis. It is provided that such companies shall comply with sub-rule (2) in case the Reserve Bank of India or the National Housing Bank have not specified similar regulations.

# ISSUE OF SHARES ON PRIVATE PLACEMENT BASIS

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**(3) Manner of Issuing Private Placement Offer and Application:** A company making private placement shall issue private placement offer and application in such form and manner as may be prescribed to identified persons, whose names and addresses are recorded by the company in such manner as may be prescribed. It is provided that the private placement offer and application shall not carry any right of renunciation.

**‘Private Placement’:** As per Explanation I, the term "private placement" means 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 section 42.

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# ISSUE OF SHARES ON PRIVATE PLACEMENT BASIS

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**Meaning of ‘Qualified Institutional Buyer’:** As per Explanation II, the term "qualified institutional buyer" means the qualified institutional buyer as defined in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, as amended from time to time, made under the Securities and Exchange Board of India Act, 1992.

**When a Private Placement shall be deemed to be an Offer to the Public:** *Explanation III*, if a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, **the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of Chapter III.**

# ISSUE OF SHARES ON PRIVATE PLACEMENT BASIS

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**Requirement of Special resolution:** : According to Rule 14 (1) of the PAS Rules, for the purposes of sub-section (2) and sub-section (3) of section 42, a company shall not make an offer or invitation to subscribe to securities through private placement **unless the proposal has been previously approved by the shareholders of the company, by a special resolution for each of the offers or invitations.**

In the explanatory statement annexed to the notice for shareholders' approval, the following disclosure shall be made:-

- (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;

# ISSUE OF SHARES ON PRIVATE PLACEMENT BASIS

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(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.

# ISSUE OF SHARES ON PRIVATE PLACEMENT BASIS

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As per the second Proviso to Rule 14 (1), sub-rule (1) shall not apply in case of offer or invitation for non-convertible debentures, where the proposed amount to be raised through such offer or invitation does not exceed the limit as specified in clause (c) of sub section (1) of section 180 and in such cases relevant Board resolution under clause (c) of sub-section (3) of section 179 would be adequate

As per the third Proviso to Rule 14 (1), in case of offer or invitation for nonconvertible debentures, where the proposed amount to be raised through such offer or invitation exceeds the limit as specified in clause (c) of sub-section (1) of section 180, it shall be sufficient if the company passes a previous special resolution only once in a year for all the offers or invitations for such debentures during the year.

# ISSUE OF SHARES ON PRIVATE PLACEMENT BASIS

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As per the fourth proviso to Rule 14(1), in case of offer or invitation of any securities to qualified institutional buyers, it shall be sufficient if the company passes a previous special resolution only in a year for all the allotments to such buyers during the year.

**Applicable Application Form:** According to Rule 14 (3) of the PAS Rules, a private placement offer cum application letter shall be in the form of an application in Form PAS-4 serially numbered and addressed specifically to the person to whom the offer is made and shall be sent to him, either in writing or in electronic mode, within thirty days of recording the name of such person pursuant to section 42 (3).



# ISSUE OF SHARES ON PRIVATE PLACEMENT BASIS

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It is provided that no person other than the person so addressed in the private placement offer cum application letter shall be allowed to apply through such application form and any application not conforming to this condition shall be treated as invalid.

**Maintaining of Complete Record:** According to Rule 14 (4) of the PAS Rules, the company shall maintain a complete record of private placement offers in Form PAS-5.

**Timing of issue of private placement offer cum application letter:** According to Rule 14 (8) of the PAS Rules, a company shall issue private placement offer cum application letter only after the relevant special resolution or Board resolution has been filed in the Registry. It is provided that private companies shall file with the Registry copy of the Board resolution or special resolution with respect to approval under clause (c) of subsection (3) of section 179.

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**(4) Manner of Subscribing to the Private Placement Issue:** Every identified person willing to subscribe to the private placement issue shall apply in the private placement and application issued to such person along with subscription money paid either by cheque or demand draft or other banking channel and not by cash. It is provided that a company shall not utilise monies raised through private placement unless allotment is made and the return of allotment is filed with the Registrar in accordance with sub-section (8) of Section 42.

**Utilisation of Bank account:** Supplementing the above sub-section (4), Rule 14 (5) of the PAS Rules provides that the payment to be made for subscription to securities shall be made from the bank account of the person subscribing to such securities and the company shall keep the record of the bank account from where such payment for subscription has been received

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In case of joint holders, it is provided<sup>10</sup> that monies payable on subscription to securities to be held by joint holders shall be paid from the bank account of the person whose name appears first in the application. It is further provided that the provisions of sub-rule (5) shall not apply in case of issue of shares for consideration other than cash.

**(5) Limit on Fresh Offer:** No fresh offer or invitation under this section shall be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company. It is provided that subject to the maximum number of identified persons under sub-section (2) of section 42, a company may, at any time, make more than one issue of securities to such class of identified persons as may be prescribed.

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**(6) Time Limit for Allotment of Securities:** A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the expiry of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent per annum from the expiry of the sixtieth day.

It is provided that the monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—

- (a) for adjustment against allotment of securities; or
- (b) for the repayment of monies where the company is unable to allot securities.

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**(7) Prohibition on Public Advertisement:** No company issuing securities under this section shall release any public advertisements or utilise any media, marketing or distribution channels or agents to inform the public at large about such an issue.

**(8) Filing of Return of Allotment:** A company making any allotment of securities under this section, shall file with the Registrar **a return of allotment within fifteen days from the date of the allotment in** such manner as may be prescribed, including a complete list of all allottees, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed.

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Rule 14 (6) of the PAS Rules states that a return of allotment of securities under section 42 shall be filed with the Registrar **within fifteen days** of allotment in **Form PAS-3** and with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 **along with a complete list of all the allottees containing-**

- (i) the full name, address, Permanent Account Number and E-mail ID of such security holder;
- (ii) the class of security held;
- (iii) the date of allotment of security;
- (iv) the number of securities held, nominal value and amount paid on such securities, and particulars of consideration received if the securities were issued for consideration other than cash.

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**(9) Default in Filing the Return of Allotment:** If a company defaults in filing the return of allotment within the period prescribed under sub-section (8), **the company, its promoters and directors shall be liable to a penalty for each default of one thousand rupees for each day during which such default continues but not exceeding twenty-five lakh rupees.**

**(10) Punishment for Contravening the Private Placement Provisions:** Subject to sub-section (11), if a company makes an offer or accepts monies in contravention of section 42, the company, its promoters and directors shall be liable for a penalty which may extend to the amount raised through the private placement or two crore rupees, whichever is lower, and the company shall also refund all monies with interest as specified in sub-section (6) to subscribers within a period of thirty days of the order imposing the penalty.

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**(11) Deemed Public Offer:** Notwithstanding anything contained in sub-section (9) and sub-section (10), any private placement issue not made in compliance of the provisions of sub-section (2) shall be deemed to be a public offer and all the provisions of this Act and the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 shall be applicable.





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**THANK YOU**