

Chapter 3 Prospectus and Allotment of Securities

Form	Section No	Purpose
PAS - 1	27	Advt. providing details of notice of SR for varying terms of contracts referred to in Prospectus or Objects for which Prospectus was issued
PAS - 2	31	Information Memorandum
PAS - 3	39 & 42	Return of allotment of securities
PAS - 4	42	Private placements offer cum application letter
PAS - 5	42	Record of Private placement offers
PAS - 6	29	Unlisted Public company to file with RoC within 60 days of each half year

Sec No.	Section Name
23	Public Offer and Private Placement
24	Power of Securities and Exchange Board to Regulate Issue and Transfer of Securities, etc.
25	Document Containing Offer of Securities for Sale to be Deemed Prospectus
26	Matters to be Stated in Prospectus
27	Variation in Terms of Contract or Objects in Prospectus
28	Offer of Sale of Shares by Certain Members of Company
29	Public Offer of Securities to be in Dematerialised Form
30	Advertisement of Prospectus
31	Shelf Prospectus
32	Red Herring Prospectus
33	Issue of Application Forms for Securities
34	Criminal Liability for Misstatements in Prospectus
35	Civil Liability for Misstatements in Prospectus
36	Punishment for Fraudulently Inducing Persons to Invest Money
37	Action by Affected Persons
38	Punishment for Personation for Acquisition, etc., of Securities
39	Allotment of Securities by Company
40	Securities to be Dealt with in Stock Exchanges
41	Global Depository Receipt
42	Offer or Invitation for Subscription of Securities on Private Placement

Overview

This Chapter is divided in two parts:

Part I - Provisions relating to issue of securities through **Public Offer** (Sec 23 - 41)

Part II - Provisions relating to issue of securities through **Private Placement** (Sec 42)

Section 23 - Public Offer (PO) and Private Placement (PP)

1. **Public** co. may issue securities:

through prospectus
to public (PO)

Private
Placement

Right issue and Bonus issue as per this Act (and SEBI
in case of listed co./co. intending to get listed)

2. **Private** co. may issue securities:

~~through prospectus~~
~~to public~~

Private
Placement

Right issue and Bonus issue as per this Act (and SEBI
in case of listed co./co. intending to get listed)

Note - Public offer includes IPO, FPO and OFS

3. Notified class of public companies can issue securities for the purpose of listing on stock exchanges in permissible **foreign jurisdiction**. (Overseas direct listing)

Important Definitions:

• **Securities** [Sec 2(81)] - As defined in Section 2(h) of SCRA, 1956.

Security is a wider term and includes - shares, bonds, debentures, derivatives, units of collective investment scheme, security receipts, units of mutual fund, government securities, etc.

Note - Security shall **not include** units of Unit Linked Insurance Policy (**ULIP**)

• **Prospectus** [Sec 2(70)] - Any **document** described or issued as a prospectus and includes:

i. Red Herring Prospectus (**RHP**) as per Sec 32 and

ii. Shelf Prospectus (**SP**) as per sec 31

iii. Notice, circular, advt. /other **doc inviting offers** from public for subscription or purchase of any securities of BC.

Section 24: Power of SEBI to regulate issue and transfer of securities:

SEBI is empowered to regulate issue and transfer of securities or non-payment of dividend by **listed companies** or companies **intending to get listed** on Recognised Stock Exchange (RSE) in India.

Section 25 - Document Containing Offer of Securities for Sale to be Deemed Prospectus

Company

Issue House

Document =
Deemed Prospectus

Public at large

Meaning - Where a **company (A)** allots or agrees to allot any securities of the co. (A) with a **view** that those securities shall be **offered for sale** to **public**, any **document** by which the offer for sale to the public is made shall, **for all purposes**, be **deemed** to be a **prospectus**.

Effect of deeming provision-

1. Law relating to **content** of prospectus and **liabilities** u/s 34,35 shall apply
2. Person making offer were person named as director in the co.

Presumptions: Unless the contrary is proved, it shall be **evidence** that an allotment of securities was made with a view to the securities being offered for sale to the public if it is shown:

- a. that offer for sale to the public was made **within 6m** after the allotment or agreement to allot; or
- b. that at the **date** when **offer** was made, **whole consideration** had **not been received** by the co.

In addition to matter stated u/s 26, following **additional matter** is to be included in the document:

- a. Net amt. of **consideration** received/to be received by the co.
- b. **time** and place at which contract for allotment of said securities may be inspected

Signature of document:

In case of co. - 2 directors; In case of Partners - At least $\frac{1}{2}$ of Partners

SEBI v Kunnamkulam Paper Mills Ltd:

Where a **rights issue** is made to **existing** members with a right to renounce in favour of others, if the number of such others exceeds 50, it also becomes a **deemed prospectus**.



Section 26 - Matters to be Stated in Prospectus



Dated and Signed

Copy to RoC for Registration

Signed by dir./ proposed dir.

RoC not to register unless consent in writing of all person named received

1. Every prospectus issued by/on behalf of public co. shall be **dated** and **signed**.

Prospectus shall **state information** and **set out** such **reports** on financial information as specified by SEBI + CG. Unless specified by SEBI, the regulations already made by SEBI shall apply.

Prospectus to include:

- a. **declaration** about **compliance** with this Act, and
 - b. **statement** that nothing in prospectus is contrary to this Act, SEBI and SCRA.
2. Nothing u/ss (1) shall apply to the issue of prospectus/form of application for:
 - a. Issue of shares or debentures to **existing** members or DH, whether or not there is right to renounce u/s 62(1)
 - b. Issue of shares or debentures which are **uniform** with shares or debentures **previously issued and are currently quoted on RSE**.
 3. Provision of 26(1) shall apply to prospectus or form of application issued on formation of co. or subsequently.

Explanation - **Date** indicated in prospectus shall be **deemed** to be the date of **publication**.

4. File prospectus with RoC: No prospectus shall be issued unless, on or before its publication, a copy thereof has been **delivered to RoC** for filing, **signed** by:
- every person who is named therein as a **director** or **proposed director** of the co. or
 - by his duly authorised **attorney**.
5. Prospectus shall not include a statement purporting to be made by expert, unless:
- expert is a person who is **not engaged/interested** in formation/promotion/mgt. of co., **and**
 - has given his **written consent** to the issue of the prospectus and has **not withdrawn** such consent before filing of such prospectus with RoC and a **statement** to that effect shall be included in the prospectus.
- Read definition of Expert - Sec 2(38) [Chapter 1]
6. Every prospectus shall, on the **face** of it,;
- (a) state that a copy has been **delivered** to RoC u/ss (4); **and**
 - (b) specify **docs attached** to the copy so delivered
8. Prospectus **not valid** if issued **more than 90 days** after date of delivery of copy thereof to RoC
9. Issue of prospectus in contravention of this section - Co. and every person who is knowingly a party - **Rs. 50,000 to Rs. 3 lakhs**



Section 27 - Variation in Terms of Contract or Objects in Prospectus

Co. shall not vary the **terms of a contract** referred to in the prospectus or objects for which the prospectus was issued, except with:

- a. Prior approval by way of **special resolution** in GM **and**:
- b. prescribed **details** of such resolution shall be:
 - published in **newspapers** (English + vernacular which is in circulation at place where **RO is situated**) **and**
 - placed on the **website** of the company, if any, indicating the **justification** for such change;
- c. Amt so raised **cannot be used** for buying, trading or otherwise dealing in **Eq.** shares of listed cos.
- d. the **dissenting shareholders** shall be given an **exit offer** by the promoters and controlling shareholders in accordance with regulations to be specified by the **SEBI**.



Rule 7 of The Companies (Prospectus and Allotment of Securities) Rules, 2014:

1. **SR** u/s 27 shall be passed through **Postal Ballot**. Notice of proposed SR to contain following info:

Original purpose/ object	total money raised	money utilised for stated objects	extent (%) of achievement of proposed obj.
unutilised amount	particulars of the proposed variation	reason and justification for variation	risk factors pertaining to the new objects
proposed time limit within which the proposed varied objects would be achieved			other relevant info

2. Advertisement of the notice - **Form PAS-1** (published simultaneously with dispatch of notice)
3. Place notice on **website** of co.
4. The dissenting shareholders shall be given an exit offer by the promoters and controlling shareholders in accordance with regulations to be specified by the SEBI. (repeated in rule)



Section 28 - Offer of Sale of Shares by Certain Members of Company

1. Authorise the co.
 - Where certain members (indv./BC) of a co. propose in consultation with BoD
 - To offer **whole/part** of their holding to public
 - the members shall then collectively **authorize** the co. to take necessary action for OFS and
 - then they shall **reimburse** the company of all expense incurred.
2. Document by which such OFS is made to public shall be deemed to be a prospectus issued by the company and all provisions related to content and mis-statement shall apply.



Rule 8: Exception to certain matters

The following provision of this chapter shall not be applicable in case of OFS:

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

Note: Prospectus to disclose name of the person(s)/entity **bearing cost** of making the OFS + reasons.



Section 29 - Public Offer of Securities to be in Dematerialized Form (Demat Form)

1. Notwithstanding anything contained in any other provisions of this Act:
 - a. every company making **public offer**; and
 - b. such other class or classes of public companies as may be **prescribed**,
 shall **issue** the securities only in **dematerialised** form by complying with the provisions of the Depositories Act, 1996 and the regulations made thereunder.



Rule 9 of Companies (Prospectus and Allotment of Securities) Rules, 2014:

The promoters of every **public company** making a public offer of **any convertible securities** may hold such securities **only** in demat form.

Provided that the **entire holding** of convertible securities of the co. **by promoters** held in **physical** form (up to the **date of IPO**) shall be **converted** into demat form before such offer is made.

Example - Vijay Shekhar sharma OFS in Paytm - Has to be in demat form first

2. In case of prescribed class of **unlisted** companies, the securities shall be held or transferred only in **Demat form** in the manner laid down in the Depositories Act, 1996 and regulations made thereunder.



Rule 9A of Companies (Prospectus and Allotment of Securities) Rules, 2014:

Issue of securities in demat form by UNLISTED Public Company (UPC):

1. Every UPC shall:
 - a. **Issue** securities in demat form, and
 - b. **Facilitate** dematerialisation of all existing sec. as per the Depository Act, 1996 and regulations made thereunder.
2. For **UPC** intending to make **offer** for:

issue of securities

buyback

issue of bonus shares

right shares

shall ensure that, **before** making such offer, **entire holding of** securities of:

promoter

directors

KMPs

has been **dematerialized** as per the Depository Act, 1996 and regulations made thereunder
3. On or after 2nd October 2018, every **holder** of securities of UPC:
 - a. who intends to transfer such securities, shall get such sec. dematerialised before transfer
 - b. who **subscribe** to any sec. of UPC - Ensure existing securities are held in demat form.
4. Every UPC shall:
 - a. **Facilitate** dematerialisation of existing securities by making necessary application to Depository (as defined u/s 2(1)(e) of the Depository Act), and
 - b. Secure International security Identification Number (**ISIN**) for each type of securities,
 - c. **Inform** existing security holder about such facility.
5. Every UPC shall ensure:
 - a. **Timely payment of fees** to Depository, Registrar to Issue & Share Transfer Agent (DRS) as per the respective agreement
 - b. It maintains **security deposit** of **>=2 years** of fees with DRS as per agreement
 - c. **Complies** with regulations of SEBI or Depository w.r.t, dematerialisation of shares
6. No UPC which has **defaulted** in above payment, shall make offer of issue of any securities or buyback or bonus/right issue **till payment** to DRS has been made.
7. Provision of Depositories Act, SEBI (Depositories and Participants) Regulations, 2018 and SEBI (RTI and STA) Regulations, 1993 - Apply **Mutatis Mutandis**

8. Every UPC shall submit **Form PAS-6 + Fees** with ROC within **60 days** of conclusion of each half year (FY). Such form shall be **certified by a CA/CS/CMA** in practice

8A. Any **diff.** b/w issued capital and capital in demat form - Co to bring to **notice** of Depository

9. **Grievances** of securities holders of UPC - File with **IEPF Authority**. IEPF authority shall initiate action against DRS after consultation with SEBI

10. This rule shall N.A. to an UPC which is - Nidhi company, Government company or a Wholly owned subsidiary of a Government company.

3. Any company, other than above, **may** convert its securities into demat form **or** issue its securities in **physical form as per** provisions of **this Act** or Depositories Act, 1996 and regulations.



Section 30 - Advertisement of Prospectus

3

Where an **advertisement** of prospectus of a co. is published in any manner, it is necessary to specify therein the contents of MoA as regards to:

Objects

Liability

Amount of SC
of Co. (ASC)

names of the
signatories

No. of shares
subscribed by them

Capital
Structure



Section 31 - Shelf Prospectus (SP)

4 5

Meaning

- SP 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.

Provision:

- Any class(es) of cos., as the **SEBI** may provide by regulations in this behalf, may file SP **with RoC**
- at the **stage** of the **first offer** of securities included therein
- which shall indicate the period of **validity** of such prospectus, **not exceeding 1 year**
- validity shall **commence** from date of **opening of first offer** of securities under that prospectus,
- w.r.t., second/subsequent offer of such securities issued, **no further prospectus** is required.

Information Memorandum (IM): (Form PAS-2)



- Within **1 month prior** to second/subsequent offer., co. to file IM with RoC
- IM to contain material facts relating to:

New **charges**
created

Changes in **financial position** of co. between
previous offer and subsequent offer

Other changes as
prescribed

Intimation of Changes:

- Where a co. has received **applications** for the allotment of securities along with **advance payments** of subscription before making of any such change.
- Co. to **intimate** such changes to applicant.
- If they desire to **withdraw** application - **Refund** payment **within 15 days** of subscription

Note: **IM** together with **shelf prospectus** shall be deemed to be **prospectus**.



Section 32 - Red Herring Prospectus (RHP)

20

Meaning - Prospectus which does not include complete particulars of quantum/price of securities included therein.

1. Co. proposing to make an offer of securities **may** issue a RHP prior to prospectus
2. RHP to be filed with **RoC** at **least 3 days** prior to opening of subscription list and the offer
3. RHP to have **same obligation** as prospectus.
Variation b/w RHP and prospectus to be **highlighted** as variation in prospectus
4. Upon **closing** of offer - **Prospectus (not RHP)** stating therein the **total capital** raised and **closing price** and any other details as are not included in RHP shall be filed with the **RoC** and the **SEBI**.

Read section 2(1) - Abridged prospectus.



Section 33 - Issue of Application Forms for Securities

6

1. Every form of application for purchase of any securities of a co. shall be accompanied by an **abridged prospectus**.

This sub-section shall N.A. if it is shown that the form of application was issued in connection with:

- a. a bona fide invitation to a person to enter into an **underwriting agreement** w.r.t. such sec.; or
 - b. in relation to securities which were **not offered to the public** (Example - Private placement)
 - c. where offer is made to **existing members** of the company
2. 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.
 3. Default in this section - Co. liable for **Rs. 50,000** for each default

Self-Notes!

Section 34 and Section 35 - Liability for Misstatement

7 9 10

Note: A contract of shares in a co. is a contract of *Uberrimae fides (Latin)*, which means 'utmost good faith'. The legal doctrine of *Uberrimae fides* provides that all parties to contract must deal in **good faith**, making a **full declaration** of all material facts. The intending purchasers of shares are entitled to true and correct disclosures of all the facts in the prospectus.

Section 34 - Criminal Liability

If prospectus includes any statement - **untrue** or **misleading**, every person who **authorizes** the issue of such prospectus shall be liable under section **447**.

Section N.A. if a person **proves** that:

- such statement/omission was **immaterial** or
- that he had **RGTB** that statement was **true** or the inclusion or omission was **necessary**.

Section 35 - Civil LiabilityApplicability:

- Where a person has **subscribed** for securities of a co +
- **Acting** on any **statement** included/omitted in prospectus which is misleading, and
- has **sustained loss** or damage as a consequence thereof

Person Liable: Company and every person who is:

- Director** at the time of issue of prospectus or authorized himself to be named as director
- Agreed to become **director** in future
- Promotor** of co.
- Authorized** the issue of prospectus
- Expert** u/s 26(5)

Above person shall be liable to pay **compensation** to every person who has sustained such loss or damage.

No person shall be liable if he **proves** that:

- Having consent to become director, **withdrew** the consent and prospectus was issued w/o consent.
- Prospectus issued **w/o knowledge** or consent + on becoming aware gave **reasonable public notice**
- Such statement was made on basis of **expert's report** + such statement was true and **fair representation** of expert's statement + such person had RGTB that expert is **competent** + expert has given **consent** + not withdrawn consent.

If proven that prospectus issued with intent to defraud - every person u/ss (1) shall be **personally responsible** - **without any limitation** of liability

8 Peek Vs. Gurney (not covered in ICAI material but was included in past paper question)

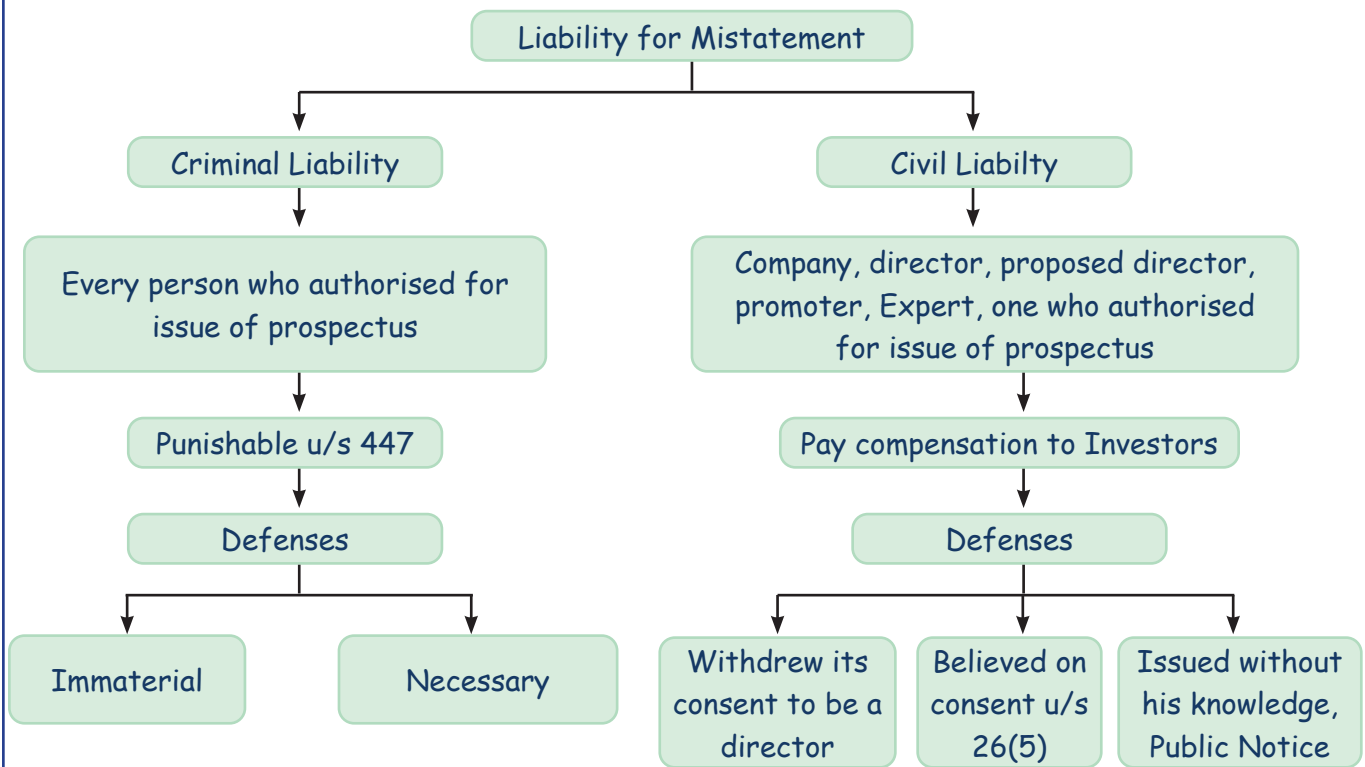
The remedy u/s 35 by way of damage will not be available to a person if he has not purchased the shares on the basis of prospectus. (for example, a person bought shares from open market, in such case, it can't be said that he relied on the information of prospectus and hence, no remedy available)

Remedies for misrepresentation in Prospectus under Indian Contract Act:

Rights	Rescission of contract	Damages
When to seek?	Where a person has subscribed to shares on basis of prospectus containing misleading statement	Person acted on a statement which is fraudulent and sustained damages
Effect	Contract to purchase shares becomes voidable at option of purchaser	
Exception	<ul style="list-style-type: none"> ➤ Right not available to subsequent purchaser from market ➤ Subscriber to MoA cannot seek relief. 	



Summary of Liability



Sec 447: Punishment for Fraud

Without prejudice to any liability including repayment of any debt under this Act or any other law in force, any person guilty of fraud shall be liable as follows:

Amount involved in the fraud	At least Lower of:		Less than Lower of:
	a. Rs. 10 lakhs b. 1% of T/O		a. Rs. 10 lakhs b. 1% of T/O
Whether public interest involved?	No	Yes	No
Jail	6m - 10 years	3 years - 10 years	Upto 5 years
And/or	AND	AND	OR
Fine	Up to 3x amt involved	Up to 3x amt involved	Upto Rs. 50 lakhs or both

Fraud bole toh?:

Act

Omission

Concealment of Fact

Abuse of position

Committed with:

Intent to **decieve**Gain undue **advantage****Injure** interest. of co/SH/crs/others

whether or not there is a wrongful gain/loss.



Sec 36: Punishment for Fraudulently Inducing Persons to Invest Money

Any person who:

- either knowingly/recklessly makes any **statement**, promise or forecast
- which is **false**, deceptive/misleading or
- deliberately **conceals** any material fact,
- to induce another person to enter into any **agreement**:

for **Subscribing**,
Acquiring, Disposing or
Underwriting securities

the purpose of which is to
secure a **profit** to any of the
parties from such securities

for obtaining **credit**
facilities from any bank or
financial institution

shall be liable for action **u/s 447**.



Section 37: Action by Affected Persons

A **suit** may be filed, or **any other action** may be taken u/s 34,35 or 36 by any person, group of persons or any association of persons **affected by any misleading** statement or the inclusion or omission of any matter in the prospectus.

Note - If Mr. M had purchased the shares based on statement in the prospectus, only Mr. M can initiate a suit against the co. and not Mr. X (to whom shares are transferred post allotment)



Allotment means appropriation of previously un-appropriated capital of the company.

[Issue of Prospectus - Invitation to offer; Receiving Application - Offer; Allotment - Acceptance]



Section 39: Allotment of Securities by Company

11-12

1. Co. can allot share to public only when:
 - a. amount stated in prospectus as **min. amount** has been **subscribed and**
 - b. **sums payable on application** have been **paid** to and received by co. by **cheque**/other instrument.
2. Application money shall not be **<5%** of **nominal amt.** of securities (or **other** amt. specified by SEBI)
3. If **stated min. amount** has **not been subscribed and** application money is **not received** within **30 days /other period by SEBI** from date of issue of prospectus - **Return** amount in **pres. time & manner**

 **Rule 11 of Cos (Prospectus and Allotment of Securities) Rules, 2014 - Refund of Appln Money:**


a. If min. amt not subscribed + Application money not received within prescribed time - Application money to be **repaid within 15 days** from close of issue.

If **not repaid** - **Directors** who are OID - Jointly & severally liable to repay with **intt. @15% p.a.**

b. Refund shall be **credited** only to the **bank account from which the subscription was remitted.**

4. When a co. having SC makes any allotment of sec.- File with RoC - **Return of allotment (Form PAS-3)**

 **Rule 12 - Return of Allotment:**

- a. Return of allotment to be filed in **Form PAS - 3** within **30 days** of **allotment** of securities. 
- b. Along with the Return of allotment, **attach** - List of **allottees** stating name, address, occupation and no. of securities allotted.

In case of issue of:	Attach to Form PAS-3:
Securities (not being bonus shares) allotted as fully or partly paid up for consideration other than cash	<ul style="list-style-type: none"> ➤ A copy of contract duly stamped together with any contract of sale if relating to a property or an asset, or a contract for services or other consideration. ➤ If such above contract is not reduced to writing, complete particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing ➤ A report of registered valuer w.r.t. valuation of the consideration to be attached
Bonus securities	Copy of resolution passed in GM authorizing such issue
Shares u/s 62(1)(c) by co. other than listed co.	Valuation report of registered valuer

5. Default u/ss (3) and (4) - Co. and its OID - **Liable - Rs. 1,000/day or Rs. 1 lakh WEL** for each default

 **Section 40: Securities to be Dealt with in Stock Exchanges**

 13  14  15

1. Before Public Offer - Co. to make an **application** to one or more RSE(s) and obtain **permission** for securities to be dealt with in such RSE.
2. Where prospectus states application u/ss (1) has been made - Also **state** the **name(s)** of RSE in which the securities **shall be dealt with.**
3. Application money shall be kept in a **separate bank account** in a **scheduled bank** + **Not to be utilised** for any purpose other than:
 - a. **Adjustment** against allotment - If sec. have been permitted to be dealt with on RSE
 - b. **Repayment** within the time specified by SEBI - If co. is unable to allot securities

4. 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**.

5. Default in complying with this section:

	Company	OID
Minimum	Rs. 5 lakhs	Rs. 50,000
Maximum	Rs. 50 lakhs	Rs. 3 lakhs

6. Co. may pay **commission** to any person w.r.t, subscription to its sec. subject to conditions **prescribed**.

16



Rule 13 of Companies (Prospectus and Allotment of Sec) Rules, 2014 - Payment of Commission:

Commission can be paid subject to following conditions:

- Such payments to be **authorized by AOA**
- Comm. may be paid out of (a) **Proceeds** of issue, or (b) **Profit** of co., or both
- Rate of comm.

In case of sec. issue being:	Commission shall NOT exceed
Shares	Lower of: a. 5% of price of share issue or b. Rate auth by AOA
Debentures	Lower of: a. 2.5% of price at which debenture issued or b. Rate auth. by AoA

d. Prospectus to disclose:

name of
underwriters

rate and amount of
commission payable to u/w

no. of **sec. underwritten** or
subsc. by u/w

- No commission to be paid if securities are **not issued to public**.
- Copy of contract for payment of comm. - File with **RoC** along with prospectus for registration

Concept clarity check:

- A Ltd. applies in BSE and NSE for obtaining permission prior to IPO. Of them, NSE rejected the application and BSE approved such application. Can A Ltd. issue IPO? - **No. All the RSE where application has been made has to approve such application**
- Can underwriting commission be paid in kind (say, in forms of flats) - **Yes, there is no such restriction in law that commission has to be paid only in cash.**



Section 41: Global Depository Receipt (DR):

A co. may, after passing a **SR** in its **GM**, issue depository receipts in any foreign country in prescribed manner.



Steps to issue DR (as per Rule 4):

- BoD intending to issue DR shall pass a **resolutions** authorizing company to do so. (Board resolution)

2. Co. shall take prior approval of SH by a **SR** at GM.
Note - **SR** passed u/s 62 for issue of shares underlying DR shall be deemed SR for section 41.
3. DR shall be issued by an **overseas depository bank (ODB)** appointed by the company and underlying shares shall be kept in custody of **domestic custodian bank**.
4. Comply with scheme and guidelines of **RBI** in this regard.
5. Co. shall **appoint merchant banker** or practicing CA, CS or cost accountant to oversee all compliances w.r.t. DR. Such a **compliance report** shall be placed in **BoD meeting** held immediately after closure of all formalities.

Additional Points:

1. DRs can be issued by **public offering** or **private placement** in line with jurisdiction rules, and traded on local platforms.
2. DRs can be based on **new or existing** shares, as per CG or RBI conditions.
3. Underlying shares allocated to **overseas depository** & against such shares, DRs issued by such Overseas Depository Bank.
4. DR holders can be company **members**, **vote** after **DR-to-share conversion**, per Scheme and Act.
5. Overseas depository **votes** for DR holders until conversion.



Section 42: Private Placement (PP)



Definition:

- "Private placement" means any **offer or invitation** to subscribe
- to a **select group of persons** by a company (other than by way of public offer)
- through **private placement offer-cum-application ("PPOCA")**, which
- satisfies the conditions specified in this section.

Provision:

1. Subject to this section, a company may make private placement (PP) of securities
2. Private placement:
 - PP to be made only to **select** group of person **identified by BoD** ("Identified Persons" (IPs)).
 - No. of IPs shall not exceed **50 or higher no.** prescribed (**200 members in aggregate** in FY)
 - Above limit of 200 **not** to include - QIBs and employees being offered securities under ESOP u/s 62 [N.A. - NBFC and HFC if Regulation by RBI/NHB complied with)

Explanation- It is hereby clarified that restrictions of 200 members would be reckoned individually for **each kind of security** that is equity share, preference share or debenture.



Rule 14: Private Placement:

The proposal to make PP has to be previously approved by SH of co. by a **SR** for each such PP.

ES annexed to notice for SH approval shall made following **disclosure**:

- 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** (incl. premium, if any) at which offer/invitation is 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

Provided that this sub-rule shall not apply (i.e., SR not required) in case of offer for NCD if amount raised \leq **Limit** u/s 180(1)(C) and in such case, **BoD resoln** is adequate.

Provided also that, if amount raised **exceed limit** u/s 180(1)(c) - It shall be sufficient if co. passes a previous **SR** only **once in a year** for all such offers during the year.

Provided also that: In case of offer to **QIBs**, if co. passes **previous SR only in a year** for all such allotments during the year

Provided also that **no offer** or invitation of any securities under this rule shall be made **to a body corporate incorporated** in, or a national of, a **country which shares a land border** with India, unless such body corporate have **obtained** Government approval under FEM (Non-debt Instruments) Rules, 2019 & such approval is attached with PPOCA.". [**Amendment**]

3. Co. making PP shall issue **PPOCA** in Form **PAS-4** to IPs whose **names** and **addresses** are recorded by co. in prescribed manner.
Note - PPOs shall NOT carry right of renunciation.

Note: Deemed Public Offer:

- If a co. makes an **offer** to allot **securities to > prescribed no. of IPs**,
- the same shall be **deemed** to be an **offer to public** and
- shall accordingly be **governed** by the provisions of Part I of this Chapter
- irrespective of whether or not the **payment** for securities has been received or
- whether the company intends to **list** its securities or not on any RSE in or outside India

4. Mode of payment of subscription money:

IPs willing to **subscribe** to PP issue shall **apply** in the PP and application issued to such person along with **subscription money** paid either by **cheque/DD** or other banking channel & **not by cash**.

Application money not to be utilized unless **allotment** made and **return** of allotment filed with RoC.

5. Prohibition on Fresh offer:

No fresh offer unless:

- a. allotments w.r.t, any **offer** or **invitation** made earlier have been **completed** or
- b. that offer or invitation has been **withdrawn** or **abandoned** by the co.

Concept clarity check:

The prohibition **applies for different kind of securities** also i.e., if PP of Equity is yet to finish, you cannot start PP of debentures also unless PP of equity is completed or withdrawn.

6. Allotment:

- Co. shall **allot** its securities **within 60 days** from receipt of **application money**
- If co. fails to allot securities in 60 days - Repay same within 15 days from expiry of 60 days
- If co. fails to repay - It shall be liable to repay that money + Intt. @ 12% p.a. from expiry of 60th day (read again, from which day?)

Application money shall be kept in a separate bank account in a scheduled bank + Not to be utilized for any purpose other than:

- a. Adjustment against allotment
- b. Repayment - If co. unable to allot sec.

7. Co. making PP shall NOT 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. Return of Allotment to be filed with RoC within 15 days from allotment date**

Co. making PP to **file** with RoC a "Return of Allotment" in **Form PAS-3 within 15 days** from the date of the allotment. (Incl. a complete list of all **allottees**, with their full **names, addresses**, no. of sec. allotted, etc.)

Rule 14: Private Placement (Continued)



Return of allotment in Form PAS - 3 shall include the following details:

- the full name, address, permanent Account Number and E-mail ID of such security holder;
- the class of security held;
- the date of allotment of security ;
- no. of securities held, nominal value and amount paid on such securities; and particulars of consideration received if entire securities were issued for consideration other than cash.

9. Default in filing Return of allotment u/ss (8) - Co., its promoters and directors - Fine Rs. 1,000/ day for each default upto Rs. 25 lakhs**10. If co. makes PP in contravention of this section - Company, its promoters and directors - Fine which may extend to **amount raised** through the PP or **Rs. 2 crores**, whichever is **lower**, and the **company** shall also **refund** all monies **with interest (12%)** within **30 days** of order imposing the penalty.**

"Qualified Institutional Buyer" means the QIB as defined in SEBI (ICDR) Regulations, 2009.

 Rule 14: Private Placement (Continued)

- PP offer cum application letter shall be 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 e-mode, within 30 days of recording the name of such person u/s 42(3). 
- Co. to maintain complete record of PP offers in Form PAS-5 
- Co. shall issue PP offer only after relevant SR/BR filed with RoC

Note - Any offer or invitation which is not in compliance with the provision of Sec 42 shall be treated as public offer and relevant provisions shall apply accordingly.

—————→... The End ...←—————