

# **PROCEDURE FOR ISSUE OF EQUITY SHARES WITH DIFFERENTIAL RIGHTS THROUGH PRIVATE PLACEMENT OR PREFERENTIAL OFFER**

**57**

*{Section 43 read with section 42 and 62(1)(c) of the Act and  
Rule 4 of the Companies (Share Capital and Debentures), Rules, 2014}*

## **Synopsis**

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## **Relevant Sections, Rules and Forms at a Glance**

Particulars	Section(s), Rule(s) and Name of e-Form(s)
The Companies Act, 2013	Sections 39, 42, 43, 55, 62, 88, 110, 117, 118, 173, 179, 247 and 403
The Companies (Share Capital and Debentures) Rules, 2014	Rules 4, 5, 13 and 19
The Companies (Prospectus and Allotment of Securities) Rules, 2014	Rules 9A, 12 and 14
The Companies (Management and Administration) Rules, 2014	Rules 22 and 24
The Companies (Registration Offices and Fees) Rules, 2014	Rules 7, 8 and 12
Secretarial Standard-1 of ICSI	Clauses 3, 4, 5, 6, 7 and 8
Secretarial Standard-2 of ICSI	Clauses 1, 3, 4, 5, 6, 7 and 17
e-Forms to be filed	MGT-14 PAS-3
Forms to be kept as a record	PAS-4 and PAS-5

### **Significant Relevant Approvals and Requirements**

- ❖ Board resolution
- ❖ Ordinary resolution
- ❖ Voting power in respect of such shares shall not exceed 74% of total voting power.
- ❖ Company has not
  - defaulted in filing financial statements and annual returns for three financial years immediately preceding the financial year in which it is decided to issue shares with differential rights
  - subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due
  - defaulted in payment of the dividend on preference shares or repayment of any term loan from a public financial institution or State level financial institution or scheduled Bank or dues with respect to statutory payments relating to its employees to any authority or default in crediting the amount in Investor Education and Protection Fund to the Central Government Period of 5 years has expired from the end of financial year in which the default under rule 4(1)(g) was made good
  - has not been penalized by Court or Tribunal during the last 3 (three) years of any offence under the RBI Act, 1934, the SEBI Act, 1992, the SCR Act, 1956, the FEMA Act, 1999 or any other special Act, under which such companies being regulated by sectoral regulators
- ❖ Company shall not convert its existing equity share capital with voting rights into equity share capital carrying differential voting rights and vice-versa
- ❖ Holders of the equity shares with differential rights shall enjoy all other rights such as bonus shares, rights shares, etc., which the holders of equity shares are entitled to, subject to the differential rights with which such shares have been issued
- ❖ Offer or invitation to subscribe or issue of shares only to a select group of persons as identified by the Board and whose number except in case of Non-banking Financial Company and Housing Finance Companies, in a financial year, shall not exceed 200 in aggregate
- ❖ No fresh offer or invitation shall be made unless the allotments with respect to any offer or invitation made earlier have been completed
- ❖ Entire holding of securities of its promoters, directors, key managerial personnel has been dematerialised in case of unlisted public company, except Nidhi company, Government company or wholly owned subsidiary company
- ❖ Private placement offer letter-cum- application form shall be issued only after filing of relevant board resolution or special resolution with the jurisdictional Registrar of Companies
- ❖ Offer shall not carry any right of renunciation
- ❖ Not to release any advertisements, or utilise any media, marketing or distribution channels or agents to inform the public at large
- ❖ Issue price shall be decided on the basis of valuation report of a registered valuer
- ❖ Open a separate bank account to receive subscription money
- ❖ Not to use subscription money unless allotment is made, and the return of allotment is filed in PAS-3 with the Registrar of Companies

S. No.	Particulars
	<p>The subscribers, who are individuals in the Memorandum of Association (MOA) shall be deemed as first directors until the directors are duly appointed by the members in accordance with Section 152 of the Companies Act, 2013 and rules made thereunder (Section 152 of the Act).</p> <ul style="list-style-type: none"> <li>• Not the person intended/proposed to be appointed a director of a company has a valid Director Identification Number (DIN) under section 174 or any other number as may be prescribed under section 174 of the Companies Act, 2013, however, in case of first directors of a new company, the DIN up to 3 (three) persons can be obtained through incorporation with integrated form SPICe+ (INC-32) (Section 152 of the Act read with rule 152 of the Companies Incorporation Rules, 2014).</li> <li>• Not a total number of directors, at least one director has stayed in India for a total period of not less than 182 days during the financial year. Provided that in case of newly incorporated company, residential status shall be determined proportionately. However, it is not required in case the director is appointed by the Central Government or State Government (Section 152 of the Act).</li> <li>• A person, who is intended to be appointed, shall not be eligible for appointment, if he/she has any disqualification for appointment under section 164 of the Act (Section 164 of the Act read with company provisions of government company and regulations in COA 2012 about COA 2012).</li> <li>• A person proposed to be appointed as a director in a company other than a company registered under Section 8 (non-profit company) of the Companies Act, 2013 (Section 152 of the Act)             <ul style="list-style-type: none"> <li>- shall not hold office as a director including any alternate directorship in more than 20 companies including directorship in dormant companies.</li> <li>- shall not hold office in more than 10 public companies including the private companies which are holding or subsidiary of public company.</li> </ul> </li> </ul>
2.	In case of one person company, an individual being sole member is deemed to be the first director of the company, if the articles of association has not mentioned the names of first directors (Section 152 of the Act).
3.	Forms created in writing, on or before appointment, from the appointed director to act as director in the company as Form 208-2 (Part 2 of the Companies Incorporation and Qualification of Directors Rules, 2014).
4.	Forms in electronic in writing, on or before appointment, from the appointed director as Form 208-2 regarding that he/she is not disqualified under Section 164 of Companies Act, 2013, to act as a Director (Section 164 of the Act read with rule 17 of the Companies Incorporation and Qualification of <b>Directors</b> Rules, 2014).
5.	The particulars of first directors to be integrated with Form SPICe+ (INC-32) at the time of incorporation of company.

For the detailed procedure, please refer Company Law Procedures & Compliances by Dr. Sanjeev Gupta, 2nd edn, 2021. You can buy from your bookseller or online at [www.bharatlaws.com](http://www.bharatlaws.com)

**[COMPANY LAW Procedures & Compliances \(in 2 vols.\)](#)**