

# PROCEDURE TO ISSUE UNSECURED COMPULSORILY CONVERTIBLE DEBENTURES BY A PRIVATE COMPANY

63

*{Section 71 read with section 42 of the Act and read with Rule 18 of the Companies  
(Share Capital and Debentures) Rules, 2014 and Rule 14 of the Companies  
(Prospectus and Allotment of Securities) 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 42, 56, 62, 71, 72, 117, 173, 179, 247 and 403 |
| The Companies (Acceptance of Deposits) Rules, 2014                 | Rule 2(1)(c)(ix)  |
| The Companies (Share Capital and Debentures) Rules, 2014           | Rules 13, 18 and 19                                     |
| The Companies (Prospectus and Allotment of Securities) Rules, 2014 | Rules 12 and 14   |
| The Companies (Management and Administration) Rules, 2014          | Rules 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<br>PAS-3<br>DPT-3                                |
| Forms to be kept as a record                                       | PAS-4 and PAS-5   |

## Significant Relevant Approvals and Requirements

- ❖ Board resolution
- ❖ Special resolution
- ❖ Debentures are not carrying any voting rights
- ❖ Debentures are compulsorily convertible into shares of the company within a period of 10 years

- ❖ Offer or invitation to subscribe or issue of unsecured compulsorily convertible debentures 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
- ❖ 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

### **63.1 PROCEDURE WITH CHECK POINTS**

| S. No. | Particulars  |
|--------|--|
| 1.     | <p>Ensure that—</p> <ul style="list-style-type: none"> <li>• the articles of association authorise for issue of debentures through private placement, and, if not, then first alter the articles of association to include the provisions for issue of debentures through private placement.</li> <li>• a private company shall issue compulsory convertible debentures only through private placement basis as section 2(67) of the Act prohibits a company to issue any invitation to public to subscribe its securities.</li> <li>• the offer of issue of securities under section 42(2) and (3) of the Act shall be permitted with the previous approval of shareholders by special resolution for each offer <i>{Rule 14(1) of the Companies (Prospectus and Allotment of Securities) Rules, 2014}</i>.</li> <li>• no fresh offer or invitation for private placement under section 42 of the Act 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 <i>{Section 42(5) of the Act}</i>.</li> <li>• the debentures are compulsorily convertible into shares of the company within a period of 10 (ten) years as in case they are not compulsorily convertible into shares within a period of 10 (ten) years, they will be considered as Deposits <i>{Rule 2(1)(c)(ix) of the Companies (Acceptance of Deposits) Rules, 2014}</i>.</li> <li>• the debentures are not carrying any voting rights <i>{Section 71(2) of the Act}</i>.</li> <li>• the company shall not release any advertisements, or utilise any media, marketing or distribution channels or agents to inform the public at large about such issue through private placement <i>{Section 42(7) of the Act}</i>.</li> <li>• the company must open a separate bank account as monies received on application 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 <i>{Proviso to section 42(6) of the Act}</i>.</li> </ul> |

| 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-1 (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 companies provisions a 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> |
| 1.     | 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).  |
| 2.     | 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 Appointment and Qualification of Directors) Rule, 2014.   |
| 3.     | Form created in writing, on or before appointment, from the appointed director as Form 208-3 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 164 of the Companies Appointment and Qualification of <u>Directors</u> ) Rule, 2014.  |
| 4.     | The particulars of first directors to be integrated with Form SPICe-1 (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 \(in 2 vols.\)](#)