

**PROCEDURE TO ISSUE SECURED NON-
CONVERTIBLE DEBENTURES THROUGH
PRIVATE PLACEMENT BY UNLISTED
PUBLIC LIMITED COMPANY WITHIN THE
BORROWING LIMIT OF THE BOARD**

(Amount not exceeding aggregate of paid-up share capital, free reserves and securities premium together with amount already borrowed)

{Sections 71 and 77 read with sections 179(3)(c) and (d) and section 42 of the Act and also 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

| | | |
|------|------------------------------|------|
| 66.1 | Procedure | 1287 |
| 66.2 | Forms to be Filed | 1298 |
| 66.3 | List of Documents Required | 1299 |
| 66.4 | List of Information Required | 1301 |

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, 77, 78, 82, 85, 117, 118, 173, 179, 247 and 403 |
| The Companies (Share Capital and Debentures) Rules, 2014 | Rules 13, 18 and 19 |
| The Companies (Acceptance of Deposits) Rules, 2014 | Rule 2(1)(c)(ix) and (ix a) |
| The Companies (Prospectus and Allotment of Securities) Rules, 2014 | Rules 9A, 12 and 14 |
| The Companies (Management and Administration) Rules, 2014 | Rules 24 |
| The Companies (Registration of Charges) Rules, 2014. | Rules 3, 4, 6, 7, 8, 10 and 11 |
| 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 |
| e-Forms to be filed | MGT-14 PAS-3 DPT-3 CHG-9 CHG-4 (at the time of satisfaction of charge) |
| Forms to be kept as a record | PAS-4 and PAS-5 |

Significant Relevant Approvals and Requirements

- ❖ Board resolution
- ❖ 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
- ❖ Debentures are within the borrowing limits of the board, not exceeding aggregate of paid-up share capital, free reserves and securities premium together with amount already borrowed other than temporary loan obtained from the company's bankers in the ordinary course of business
- ❖ Debentures are not carrying any voting rights
- ❖ Debentures shall be redeemed within a period of 10 (ten) years from the date of issue
- ❖ Offer or invitation to subscribe or issue of 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 with the jurisdictional Registrar of Companies
- ❖ Offer shall not carry any right of renunciation
- ❖ Debentures shall be secured by the creation of a charge on the properties or assets of the company or its subsidiaries or its holding company or its associates companies, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon
- ❖ Debentures secured by a charge on the assets of the company referred to in Schedule III of the Act excluding intangible assets, the amount of such debentures shall not exceed the market value of such assets as assessed by a registered valuer
- ❖ Appointment of Debenture Trustee, obtaining prior written consent of the trustee and execution of debenture trust deed
- ❖ Creation of charge on the debentures and assets of the company
- ❖ Creation of debenture redemption reserve
- ❖ 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

66.1 PROCEDURE WITH CHECK POINTS

| S. No. | Particulars |
|---------------|--|
| 1. | Ensure that: <ul style="list-style-type: none">• 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. |

| 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"> • 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). • 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). • 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). • 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"> - shall not hold office as a director including any alternate directorship in more than 20 companies including directorship in dormant companies. - shall not hold office in more than 10 public companies including the private companies which are holding or subsidiary of public companies. |
| 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 Appointment and Qualification of Directors) Rule, 2014. |
| 4. | Form as mentioned 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. |
| 5. | 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

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