

**PROCEDURE TO ISSUE UNSECURED
COMPULSORILY CONVERTIBLE
DEBENTURES THROUGH PRIVATE
PLACEMENT BY UNLISTED PUBLIC
LIMITED COMPANY EXCEEDING THE
BORROWING LIMIT OF THE BOARD**

(Amount exceeding aggregate of paid-up share capital, free reserves and securities premium together with amount already borrowed)

{Section 71 read with sections 180(1)(c) and (d) and 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, 118, 173, 179(3)(c) and (d), 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)
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 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 DPT-3
Forms to be kept as a record	PAS-4 and PAS-5

Significant Relevant Approvals and Requirements

- ❖ Board resolution
- ❖ Special resolution for borrowings and issue of debentures
- ❖ Debentures are compulsorily convertible into shares of the company within a period of 10 years
- ❖ 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 exceeding the borrowing limits of the board, exceeding aggregate of paid-up share capital, free reserves and securities premium together with amount already borrowed
- ❖ Debentures are not carrying any voting rights
- ❖ 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
- ❖ 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

71.1 PROCEDURE WITH CHECK POINTS

S. No.	Particulars
1.	<p>Ensure that:</p> <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.• the company shall make an offer or invitation to subscribe to debentures through private placement only after obtaining previous approval of the shareholders of the company, by a special resolution* for each of the offers or invitations. <p>* no special resolution required for each and every offer in case of offer or invitation of debentures to qualified institutional buyers, and it shall be sufficient if the company has passed a previous special resolution only in a year for all the allotments to such buyers during the year.</p> <p><i>{Rule 14(1) of the Companies (Prospectus and Allotment of Securities) Rules, 2014}.</i></p>

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+ (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 prescribed a government company and regulations in COA 2012 dated 16.01.2012). • 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 308-2 (Part 2 of the Companies Appointment and Qualification of Directors) Rule, 2014.
4.	Form created in writing, on or before appointment, from the appointed director as Form 308-3 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 Directors) Rule, 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

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