

PROCEDURE FOR BORROWING MONEY BY PUBLIC COMPANY EXCEEDING AGGREGATE OF ITS PAID-UP SHARE CAPITAL, FREE RESERVES AND SECURITIES PREMIUM

84

{Section 180(1)(c) of the Companies Act, 2013}

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 77, 78, 81, 85, 117, 173, 179(3)(d), 180(1)(c) and 403
The Companies (Management and Administration) Rules, 2014	Rule 24
The Companies (Acceptance of Deposits) Rules, 2014	Rules 2, 16 and 16A
The Companies (Registration of Charges) Rules, 2014	Rules 3, 4, 7, 10 and 12
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 (Board Meeting) MGT-14 (General Meeting) MGT-14 (Board Meeting after General Meeting) CHG-1 (For creation of charges when borrowings are secured) DPT-3

Significant Relevant Approvals and Requirements

- ❖ Board resolution
- ❖ Special resolution
- ❖ Documents related to creation of charges on the assets of the company when borrowings are secured

84.1 PROCEDURE WITH CHECK POINTS

S. No.	Particulars
1.	<p>Note that—</p> <ul style="list-style-type: none"> • the provisions of section 180 shall apply on a IFSC unlisted public company licensed to operate from IFSC located in approved SEZ, unless the articles of the company provide otherwise {<i>Notification No. GSR 8(E) dated 04.01.2017</i>}. • the provisions of section 180 shall not apply on a private company, if the private company is not having committed a default in filing of its financial statements and annual return with the Registrar of Companies {<i>Notification No. GSR 464(E) dated 05.06.2015</i>}. • if the private company has committed a default in filing of its financial statement and annual return with the registrar of companies, the private company cannot borrow money exceeding aggregate of its paid-up share capital, free reserves and securities premium without complying the provisions of section 180(1)(c) of the Act. {<i>Notification No GSR 464(E) dated 05.06.2015 read with Notification No GSR 583(E) dated 13.06.2017</i>}. • the acceptance of deposits of money from public by a banking company, in the ordinary course of its business, which are repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company within the meaning of this clause {<i>Proviso to section 180(1)(c) of the Act</i>}. • in case any money borrowed by a company which falls under the definition of deposit, the company shall comply with the provisions related to acceptance of deposits, and as per rule 2 of the Companies (Acceptance of Deposits) Rules, 2014, "deposit" includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include— <ul style="list-style-type: none"> (i) any amount received from the Central Government or a State Government, or any amount received from any other source whose repayment is guaranteed by the Central Government or a State Government, or any amount received from a local authority, or any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature; (ii) any amount received from foreign Governments, foreign or international banks, multilateral financial institutions (including, but not limited to, International Finance Corporation, Asian Development Bank, Commonwealth Development Corporation and International Bank for Industrial and Financial Reconstruction), foreign Governments owned development financial institutions, foreign export credit agencies, foreign collaborators, foreign bodies corporate and foreign citizens, foreign authorities or persons resident outside India subject to the provisions of Foreign Exchange Management Act, 1999 and rules and regulations made there under; (iii) any amount received as a loan or facility from any banking company or from the State Bank of India or any of its subsidiary banks or from a banking institution notified by the Central Government under

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 company provisions of 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 DIR-2 (Part 7 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 DIR-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 Directors Rules, 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 \(in 2 vols.\)](#)