

PROCEDURE FOR SELLING, LEASING OR OTHERWISE DISPOSING OFF THE WHOLE OR SUBSTANTIALLY THE WHOLE OF THE UNDERTAKING BY A PUBLIC LIMITED COMPANY

91

{Section 180(1)(a) of the Act}

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 117, 173, 179, 180 and 403
The Companies (Management and Administration) Rules, 2014	Rules 22(16) 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 (Board resolution) MGT-14 (Special resolution)

Significant Relevant Approvals and Requirements

- ❖ Board resolution
- ❖ Special resolution

91.1 PROCEDURE WITH CHECK POINTS

S. No.	Particulars
1.	Note that— <ul style="list-style-type: none"> • the provisions of section 180 shall not be applicable on specified IFSC public company, unless the articles of the company provides otherwise {Notification No. GSR 8(E) dated 04.01.2017}. • whether transaction related to selling, leasing or otherwise disposing of the whole or substantially the whole of the undertaking falls under section 180(1)(a) of the Companies Act, 2013. • the word undertaking means an undertaking

S. No.	Particulars
	<ul style="list-style-type: none"> - in which the investment of the company exceeds 20 % (twenty per cent) of its net worth as per the audited balance sheet of the preceding financial year or - which generates 20% (twenty per cent) of the total income of the company during the previous financial year; <p><i>{Explanation (i) of Section 180(1)(a) of the Act}.</i></p> <ul style="list-style-type: none"> • “substantially the whole of the undertaking” in any financial year shall mean 20% (twenty per cent) or more of the value of the undertaking as per the audited balance sheet of the preceding financial year <i>{Explanation (ii) of Section 180(1)(a) of the Act}.</i> • mortgage of whole or substantially the whole of the undertaking of a company for obtaining financial assistance will not require compliance of section 180(1)(a) of the Act, but if the mortgage is usufructuary mortgage, the provisions of section 180(1)(a) of the Act shall be complied with <i>{Clarification by Department of Company Affairs vide letter dated 21.7.1964 for section 293(1)(a) of the Companies Act, 1956}</i> • the sale of shares, even it amounts to transfer of controlling interest of a company, cannot be equated to the sale of any part of the undertaking so as to come within the mischief of section 293(1)(a) of the Companies Act, 1956 which is corresponding section to Section 180(1)(a) of the Act <i>{Brooke Bond India Ltd. v U.B. Ltd. (1994) 79 Comp Cas 346 (Bom)}.</i> • nothing contained in section 180(1)(a) of the Act shall affect the title of a buyer or other person who buys or takes on lease any property, investment or undertaking as is referred to in that clause, in good faith <i>{Section 180 (3)(a) of the Act}.</i> • nothing contained in section 180(1)(a) of the Act shall affect the sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing <i>{Section 180 (3)(b) of the Act}.</i> • whether any specific procedure regarding selling or disposing of the assets of the company is provided in the articles of the company, or any restrictions provided under any agreement with the company, and if yes, the company shall follow that clauses also alongwith the provisions of section 180(1)(a) of the Act. • if the undertaking/assets are sold to a related party, the company shall comply the provisions of section 188 of the Act read with Rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014 besides the provisions of section 180(1)(a) of the Act <i>{Please refer procedure for related party transactions}.</i> • the company is not a listed company or company is an unlisted public company and the number of members is up to 200 otherwise, members resolution shall be transacted through postal ballot <i>{Section 110(1) read with Rule 22(16)(i) of the Companies (Management and Administration) Rules, 2014}</i> and the resolution may be transacted in general meeting after providing facility to members to vote by electronic means in the manner provided under section 108 of the Act <i>{First proviso to Rule 22(16) of the Companies (Management and Administration) Rules, 2014}</i> .

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 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 DIR-2 (Part 7 of the Companies Incorporation and Qualification of Directors Rules, 2014).
4.	Forms an certificate in writing, on or before appointment, from the appointed director as Form DIR-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 17 of the Companies Incorporation and Qualification of Directors 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

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