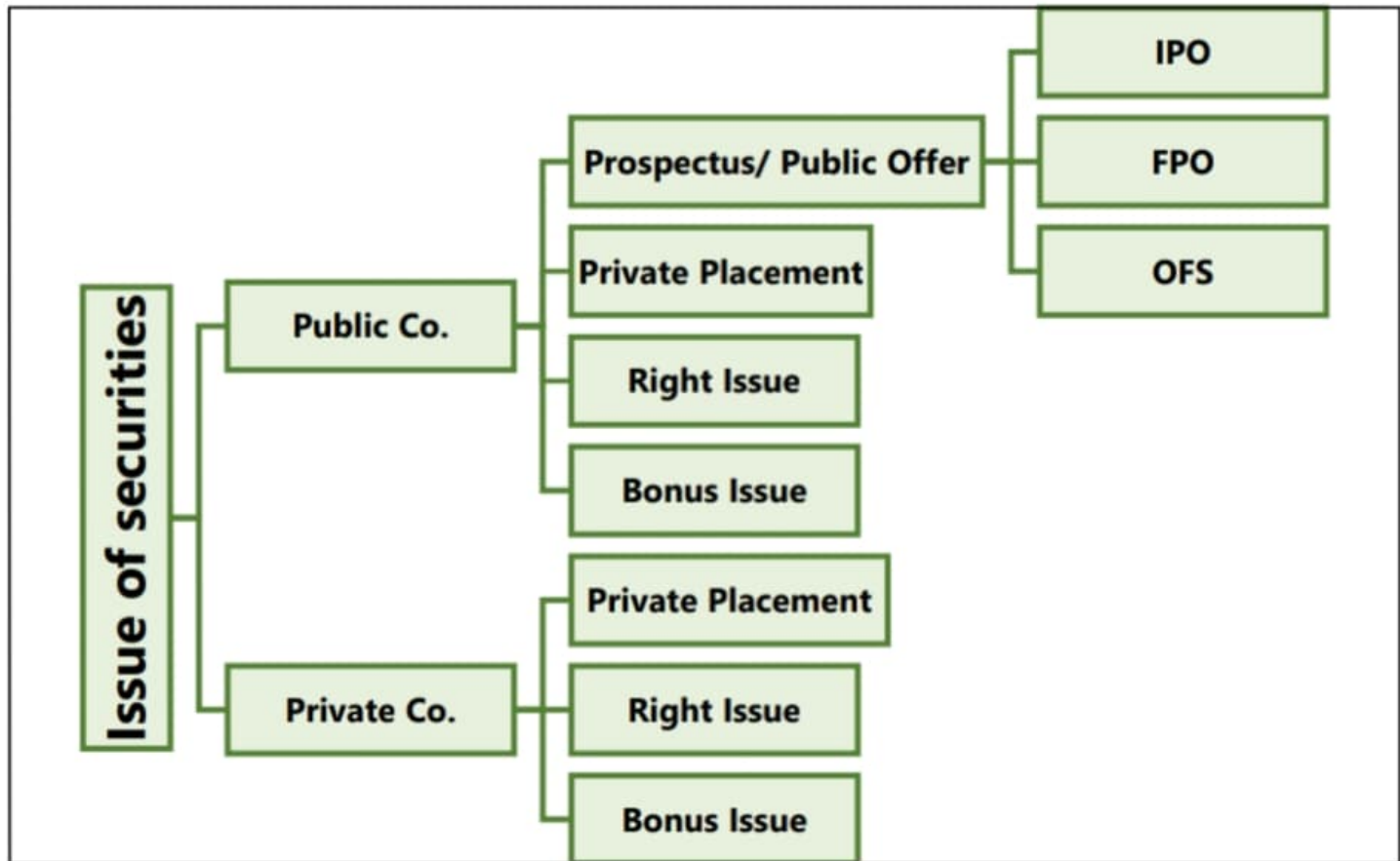


**Part I** – Public Offer of the chapter comprise sections 23 to 41, and

**Part II** – Private Placement comprises section 42.



## 2. PUBLIC OFFER AND PRIVATE PLACEMENT



**As per Section 23** (1) A **public company** may issue securities—

- to public through prospectus (herein referred to as “**public offer**”) by complying with the provisions of this Part; or
- through **private placement** by complying with the provisions of **Part II** of this Chapter; or
- through a **rights** issue or a **bonus issue** in accordance with the provisions of this Act and in case of a listed company or a company which intends to get its securities listed also with the provisions of the Securities and Exchange Board of India Act, 1992 and the rules and regulations made thereunder.

As per **Section 23(2)**, a **private company** may issue securities—

- (a) by way of **rights** issue or **bonus** issue in accordance with the provisions of this Act; or
- (b) through **private placement** by complying with the provisions of **Part II** of this Chapter.

**Explanation** —For the purposes of this Chapter, “public offer” includes initial public offer (IPO) or further public offer (FPO) of securities to the public by a company, or an offer for sale of securities (OFS) to the public by an existing shareholder, through issue of a prospectus.

As per **Section 2 (81)**—securities means the securities as defined in clause (h) of section 2 of **the Securities Contracts (Regulation) Act, 1956**

“**Securities**” include—

- (i) Shares, scrips, stocks, bonds, debentures, debenture stock or other **marketable** securities of a like nature in or of any incorporated company or other body corporate;
- (ia) **derivative**;
- (ib) **units** or any other instruments issued by any collective investment scheme to the investors in such schemes;
- (ic) security **receipt** as defined in clause (zg) under section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
- (id) **units** or any other such instrument issued to the investors under any **mutual fund** scheme.

Securities however, shall not include any **unit linked insurance** policy or scrips or any such instrument or unit, by whatever name called, which provides a combined benefit risk on the life of the persons and investment by such persons and issued by an insurer referred to in clause (9) of section 2 of the Insurance Act, 1938.

- (ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a **special purpose** distinct **entity** which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be;

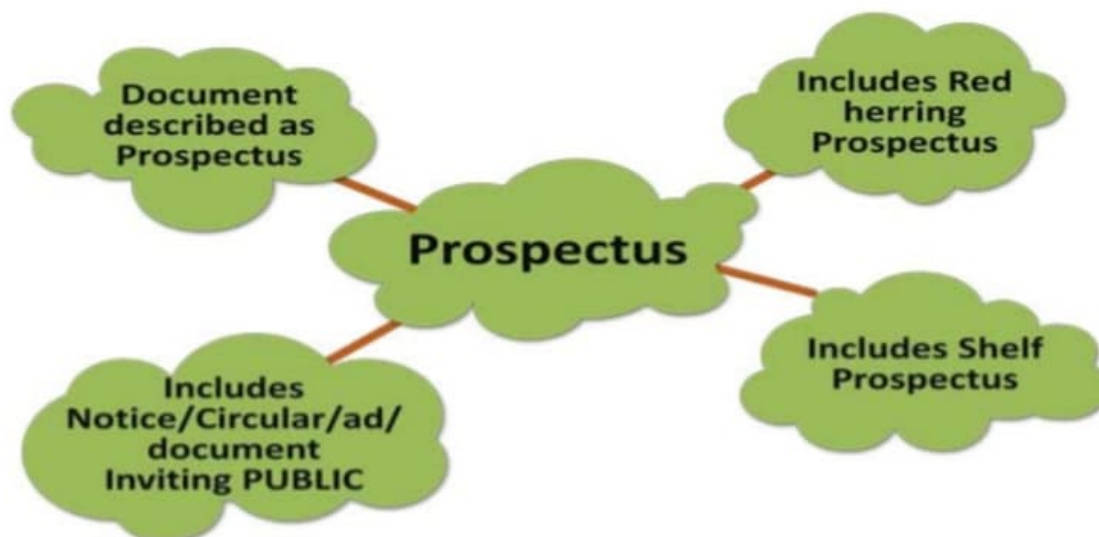
- (ii) **Government** securities;
- (iia) such other instruments as may be **declared by the Central Government** to be securities; and
- (iii) rights or **interests in** securities;

The provisions of Section 23 are tabulated below:

|                                            | <b>Public Company</b>                                    | <b>Private Company</b> |
|--------------------------------------------|----------------------------------------------------------|------------------------|
| Public Offer (including IPO, FPO or OFS)   | Yes                                                      | No                     |
| Private Placement                          | Yes                                                      | Yes                    |
| Rights issue / Bonus Issue                 | Yes                                                      | Yes                    |
| Compliance with SEBI rules and regulations | Yes, for listed company or company proposed to be listed | No                     |

### 3. PROSPECTUS

As per the definition given in Section 2(70) of the Companies Act, 2013, prospectus means any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of body corporate.



(I) **Matters to be stated in prospectus**

- (1) According to **Section 26 (1)**, every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be **dated and signed** and shall state such **information** and set out such **reports** on financial information as may be **specified by the Securities and Exchange Board in consultation with the Central Government**:

Provided that until the Securities and Exchange Board specifies the information and reports on financial information under this sub-section, the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, in respect of such financial information or reports on financial information shall apply.

<sup>1</sup>(c) prospectus shall make a declaration about the compliance of the provisions of this Act and a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules and regulations made thereunder; and

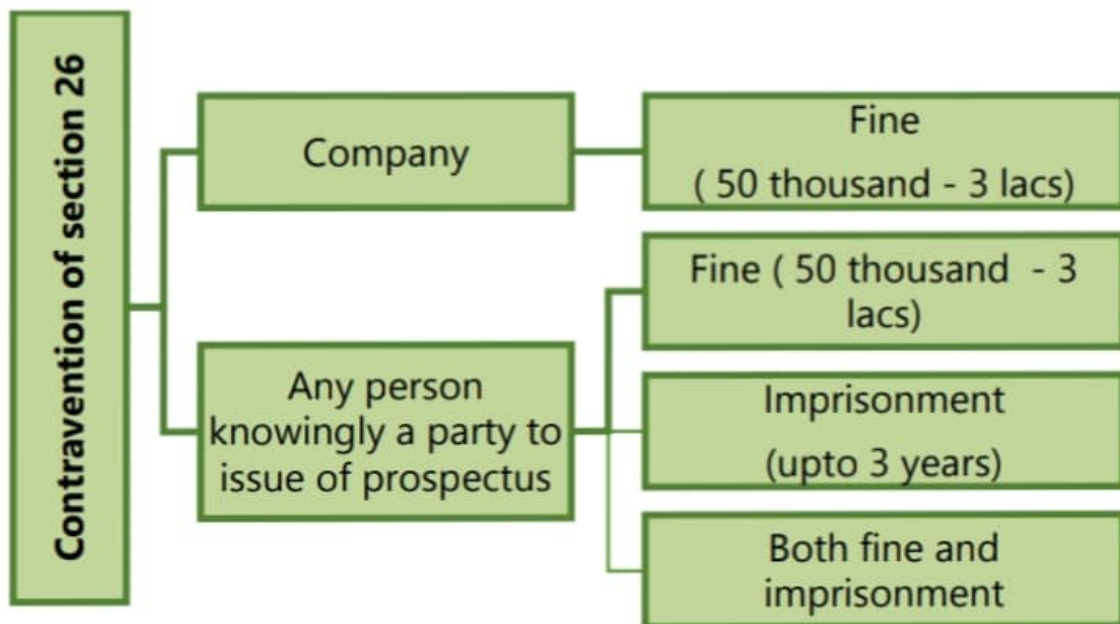
- (2) **Exceptions:** Nothing in sub-section (1) shall apply—

- (a) to the issue to **existing** members or debenture-holders of a company, of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant has a right to renounce the shares or not under sub-clause (ii) of clause (a) of sub-section (1) of section 62 in favour of any other person; or
- (b) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects **uniform** with shares or debentures previously issued and for the time being dealt in or **quoted** on a recognised stock exchange.
- [Sub- section (2)]

- (3) **Application of sub-section (1) to prospectus or to an application related to formation of a company:** Subject to sub-section (2), the provisions of sub-section (1) shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently. The date indicated in the prospectus shall be deemed to be the date of its publication.
- (4) **Prospectus to be issued after registration and compliance with other formalities:** No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless **on or before the date of its publication**, there has been delivered to the Registrar for registration, a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his duly authorised attorney. [Sub- section (4)]
- (5) **Experts' excluded from making a statement:** A prospectus issued under sub-section (1) shall not include a statement purporting to be made by an expert unless the expert is a person who is not, and has not been, engaged or interested in the formation or promotion or management, of the company and has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for registration and a statement to that effect shall be included in the prospectus.
- (6) **Mention compliances of the formalities:** Every prospectus issued under sub-section (1) shall, on the face of it—
- (a) state that a copy has been delivered for registration to the Registrar as required under sub-section (4); and
  - (b) specify any documents required by this section to be attached to the copy so delivered or refer to statements included in the prospectus which specify these documents.



- (7) **Compliance of requirements of this sections before registration:** The Registrar shall **not register** a prospectus unless the requirements of this section with respect to its registration are **complied** with and the prospectus is accompanied by the consent in writing of all the persons named in the prospectus.
- (8) **Period for the issue of prospectus:** No prospectus shall be **valid** if it is issued more than **ninety days** after the date on which a copy thereof is delivered to the Registrar under sub-section (4).
- (9) **Punishment in case of contravention:** If a prospectus is issued in contravention of the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees and every person who is knowingly a party to the issue of such prospectus shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both.



The major minimum contents of a prospectus or deemed prospectus are underlined in the sub-section (1) of Section 26 above. In addition to these there are substantial disclosure requirements which are prescribed under *Companies (Prospectus and Allotment of Securities) Rules, 2014*.

As per Section 2(38) — **expert includes** an engineer, a valuer, a Chartered Accountant, a Company Secretary, a Cost Accountant and any other person who has the power or authority to issue a certificate in pursuance of any law for the time being in force;

## (II) Public offer of securities to be in dematerialised form

- (1) Section 29(1) states that every company making **public offer**; and Such other class or classes of public companies as may be **prescribed** under the Rule 9 of the *Companies (Prospectus and Allotment of Securities) Rules, 2014*, shall issue the securities only in **dematerialised** form by complying with the provisions of the *Depositories Act, 1996* and the regulations made thereunder.
- (2) Any company, **other than** a company mentioned in sub-section (1), may **convert** its securities into dematerialised form **or issue** its securities in **physical** form in accordance with the provisions of this Act **or** in **dematerialised** form in accordance with the provisions of the *Depositories Act, 1996* and the regulations made thereunder.

Securities could be held in physical or dematerialised form. However public offer of securities has to be mandatorily in demat form in accordance with the **Depositories Act, 1996**. Demat ensures fool proof control over issue, sale, purchase, pledge, extinguishment of securities lending transparency and credibility to the entire process and securities markets.

#### **(IV) Document containing offer of securities for sale to be deemed prospectus**

Section 25 of the Act states the law related to the document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company.

- (1) Documents which deemed to be a prospectus:** As per Section 25(1), where a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company; and all enactments and rules of law as to the contents of prospectus and as to liability in respect of mis-statements, in and omissions from, prospectus, or otherwise relating to prospectus, shall apply with the modifications specified in subsections (3) and (4) and shall have effect accordingly, as if the securities had been offered to the public for subscription and as if persons accepting

the offer in respect of any securities were subscribers for those securities, but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof.

- (2) **Securities offered for sale to the public:** For the purposes of this Act, it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, securities was made with a view to the securities being offered for sale to the public if it is shown—
- (a) that an offer of the securities or of any of them for sale to the public was made within **six months** after the allotment or agreement to allot; or
  - (b) that at the date when the offer was made, the **whole consideration** to be received by the company in respect of the securities had not been received by it.
- (3) **Effect of section 26:** Section 26 as applied by section 25 shall have effect as if —
- (i) it required a prospectus to state in **addition** to the matters required by that section to be stated in a prospectus—
    - (a) the net amount of the **consideration received or to be received** by the company in respect of the securities to which the offer relates; and
    - (b) the **time and place** at which the contract where under the said securities have been or are to be allotted may be inspected;
  - (ii) the persons making the offer were persons named in a prospectus as **directors of a company**.
- (4) **Person making an offer is a company or a firm:** Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the **document** referred to in sub-section (1) is **signed** on behalf of the company or firm by **two directors** of the company or by **not less than one-half of the partners** in the firm, as the case may be.



Accordingly, all applicable provisions relating to prospectus viz., mis-statement, contents, civil, criminal liability etc. are applicable to the said deemed prospectus. There is no dilution of liability for the persons making the offer which is in addition to liability of the company whose securities are offered for sale. Additionally, below to be disclosed as well in the deemed prospectus:

- the net amount of the consideration received or to be received by the company in respect of the securities to which the offer relates; and
- the time and place at which the contract where under the said securities have been or are to be allotted may be inspected;

The purpose is to protect gullible investors in all possible manners.

#### (V) Offer of sale of shares by certain members of company

Sections 28 of the Act deals with the Offer for sale of securities by certain members of company.

- (1) Where certain members of a company propose, in consultation with the Board of directors to offer, in accordance with the provisions of any law for the time being in force, whole or part of their holding of shares to the public, they may do so in accordance with such procedure as may be prescribed.
- (2) Any document by which the offer of sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company and all laws and rules made thereunder as to the contents of

the prospectus and as to liability in respect of mis-statements in and omission from prospectus or otherwise relating to prospectus shall apply as if this is a prospectus issued by the company.

- (3) The members, whether individuals or bodies corporate or both, whose shares are proposed to be offered to the public, shall collectively **authorise the company**, whose shares are offered for sale to the public, to take all actions in respect of offer of sale for and on their behalf and they shall reimburse the company all expenses incurred by it on this matter.

## (VI) Variation in terms of contract or objects in prospectus [Section 27]

**Section 27** deals with Variation in terms of contract or objects in prospectus. Once funds are raised through a given prospectus, the principles of "doctrine of ultra vires" (*mutatis mutandis*) comes into play i.e., the company has to use the funds strictly in accordance with the prospectus. Deviations are required to be pre-approved by the investors and recall option to be given to dissenting investors. Deviation regarding use of issue proceeds for buying, trading or otherwise dealing in equity shares of any other listed company is not permitted.

Accordingly, the section states that-

- (1) **Variation on approval in general meeting by passing of SR:** A company shall not, at any time, vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued, except subject to the approval of, or except subject to an authority given by the company in general meeting by way of **special resolution**:

Provided that the details, as may be prescribed, of the notice in respect of such resolution to shareholders, shall also be published in the newspapers (one in English and one in vernacular language) in the city where the registered office of the company is situated indicating clearly the justification for such variation:

Provided further that such company shall **not use** any amount raised by it through prospectus for buying, trading or otherwise dealing in equity shares of any **other listed company**.

- (2) **Exit offer to dissenting shareholders:** The dissenting shareholders being those shareholders who have not agreed to the proposal to vary the terms of contracts or objects referred to in the prospectus, shall

be given an exit offer by promoters or controlling shareholders at such exit price, and in such manner and conditions as may be specified by the Securities and Exchange Board by making regulations in this behalf.



## 5. ALLOTMENT OF SECURITIES BY COMPANY

“**Allotment**” means the appropriation out of previously un-appropriated capital of a company, of a certain number of shares to a person. Till such allotment, the shares do not exist as such. It is on allotment that the shares come into existence.

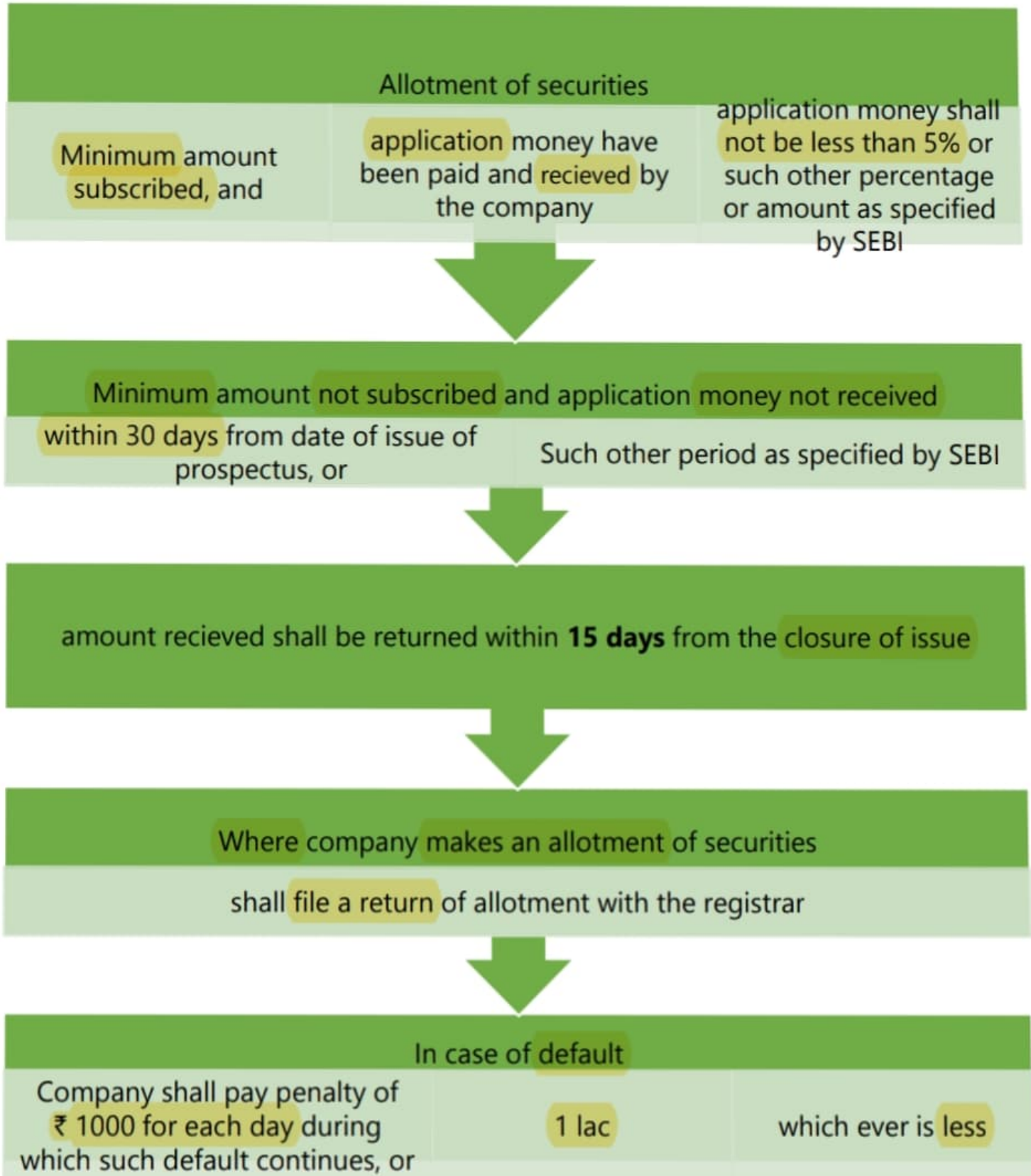
According to **Section 39(1)** no allotment of any securities of a company offered to the public for subscription shall be made unless the amount stated in the prospectus as the **minimum** amount has been subscribed and the sums payable on **application** for the amount so stated have been paid to and received by the company by cheque or other instrument.

**(2)** The amount payable on application on every security shall not be less than **five per cent.** of the nominal amount of the security or such other percentage or amount, as may be specified by the Securities and Exchange Board by making regulations in this behalf.

**(3)** If the stated minimum amount has not been subscribed and the sum payable on application is not received within a period of thirty days from the date of issue of the prospectus, or such other period as may be specified by the Securities and Exchange Board, the amount received under sub-section (1) shall be **returned** within such time and manner as may be prescribed.

**(4)** Whenever a company having a share capital makes any allotment of securities, it shall file with the Registrar a **return of allotment** in such manner as may be prescribed.

(5) In case of any default under sub-section (3) or sub-section (4), the company and its officer who is in default shall be liable to a **penalty**, for each default, of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.



Once securities are issued and subscribed for, these needs to be allotted in tune with the conditions as given below:

- ◆ Minimum subscription to be received within 30 days of issue of prospectus. In case minimum subscription is not received, the issue is regarded as failed. To take care of such eventuality, the merchant bankers in case of public offer resort to underwriting, suitable pricing, bringing in anchor investors etc. among other things. In case failed issue, the entire issue proceeds need to be refunded along with applicable interest.
- ◆ Application money > 5% of the nominal amount.
- ◆ Return of allotment needs to be filed with the ROC

As per **Rule 11 (Refund of Application Money)**

(1) If the stated minimum amount has not been subscribed and the sum payable on application is not received within the period specified therein, then the application money shall be repaid within a period of fifteen days from the closure of the issue and if any such money is not so repaid within such period, the directors of the company who are officers in default shall jointly and severally be liable to repay that money with interest at the rate of fifteen percent per annum.

(2) The application money to be refunded shall be credited only to the bank account from which the subscription was remitted.

**Example:** After receiving 80% of the minimum subscription as stated in the prospectus, a company allotted 100 equity shares in favour of 'X'. The company deposited the said amount in the bank but withdrew 50% of the amount, before finalisation of the allotment, for the purchase of certain assets. X refuses to accept the allotment of shares on the ground that the allotment is violative of the provisions of the Companies Act, 2013.

**Answer:** The company has received 80% of the minimum subscription as stated in the prospectus. Hence, the allotment is in contravention of section 39(1) of the Companies Act, 2013 which prohibits a company from making any allotment of securities until it has received the amount of minimum subscription stated in the prospectus. Under section 39 (3), it is required to refund the money received (i.e. 80% of the minimum subscription) to the applicants. It has no other option available.

Therefore, in the present case, X is within his rights to refuse to accept the allotment of shares which has been illegally made by the company.



## 6. MIS-STATEMENTS IN PROSPECTUS

In common parlance, mis-statement is the act of stating something that is false or not accurate. It could either be by commission or by omission or by both.

Mis-statement of prospectus is a serious offence which attracts section 34 and / or section 35. Liabilities can be classified under two headings:



### CRIMINAL LIABILITY FOR MIS-STATEMENTS IN PROSPECTUS [SECTION 34]

Where a prospectus, issued, circulated or distributed under this Chapter, includes any statement which is **untrue** or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to **mislead**, every person who authorises the issue of such prospectus shall be liable under section 447:

Provided that nothing in this section shall apply to a person if he proves that such statement or omission was **immaterial** or that he had **reasonable grounds to believe**, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

### CIVIL LIABILITY FOR MIS-STATEMENTS IN PROSPECTUS [SECTION 35]

**(1) Liabilities of persons:** According to **Section 35(1)**, where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the **company and every person who—**

(a) is a **director** of the company at the time of the issue of the prospectus;

- (b) has **authorised himself** to be named and is named in the prospectus as a **director** of the company, or has agreed to become such director, either immediately or after an interval of time;
- (c) is a **promoter** of the company;
- (d) has **authorised** the **issue of the prospectus**; and
- (e) is an **expert** referred to in sub-section (5) of section 26,

-shall, without prejudice to any punishment to which any person may be liable under section 36, be **liable to pay compensation** to every person who has sustained such loss or damage.

**(2) Exceptions:** No person shall be **liable** if he proves—

- (a) that, having consented to become a director of the company, **he withdrew his consent before the issue of the prospectus**, and that it was issued without his authority or consent; or
- (b) that the prospectus was **issued without his knowledge** or consent, and that **on becoming aware** of its issue, he forthwith gave a **reasonable public notice** that it was issued without his knowledge or consent.
- (c) that, as regards every misleading statement purported to be made by an expert or contained in what purports to be a copy of or an **extract** from a **report** or **valuation** of an expert, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the report or valuation; and **he had reasonable ground to believe** and did up to the time of the issue of the prospectus believe, that the **person making the statement was competent to make it** and that the said person had **given the consent** required by sub-section (5) of section 26 to the issue of the prospectus and **had not withdrawn** that consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder.

**(3) Liability on fraud:** Where it is proved that a prospectus has been issued with **intent to defraud** the applicants for the securities of a company or any other person or for any fraudulent purpose, every person referred to in subsection (1) shall be **personally** responsible, without any **limitation** of liability, for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus.



**Example:** A company issued a prospectus. All the statements contained therein were literally true. It also stated that the company had paid dividends for a number of years, but did not disclose the fact that the dividends were not paid out of trading profits, but out of capital profits. An allottee of shares wants to avoid the contract on the ground that the prospectus was false in material particulars.

**Answer:** The non disclosure of the fact that dividends were paid out of capital profits is a concealment of material fact as a company is normally required to distribute dividend only from trading or revenue profits and under exceptional circumstances can do so out of capital profits. Hence, a **material misrepresentation** has been made. Hence, in the given case the allottee can **avoid** the contract of allotment of shares.

**Example:** An allottee of shares in a Company brought action against a Director in respect of false statements in prospectus. The director contended that the statements were prepared by the promoters and he has relied on them and so director is not liable.

**Answer:** The Director shall be held liable for the false statements in the prospectus under sections 34 and 35 of the Companies Act, 2013. Section 34 imposes a criminal punishment on every person who authorises the issue of such prospectus, and section 35 more particularly includes a director of the company in the imposition of liability for such mis statements. Therefore, in the present case the director cannot hide behind the excuse that he had relied on the promoters for making correct statements in the prospectus.



## 8. ACTION BY AFFECTED PERSONS [SECTION 37]

A suit may be filed or any other action may be taken under section 34 or section 35 or section 36 by any person, **group of persons** or any association of persons **affected by any misleading statement** or the inclusion or omission of any matter in the prospectus.

### Class Actions – Gift of Companies Act, 2013

Class action suit is for a group of people filing a suit against a defendant who has caused **common harm** to the entire group or class. This is **not like a common litigation** method where one defendant files a case against another defendant while both the parties are available in court. In the case of class action suit, the class or the **group** of people filing the case **need not be present** in the court and **can be represented by one petitioner**. The benefit of these type of suits is that if several people have been injured by one defendant, each one of the injured people **need not file a case separately** but all of the people can file one single case together against the defendant.

The **need for these types of suits** was first felt in the context of securities market during the time of **Satyam Scam**, where a large group of people were cheated

regarding their hard earned money invested in Stock Market. During that time, it was felt that it was **not** at all viable regarding **cost effectiveness** for a small stakeholder to file a case independently against the defendant. Millions of cheated investors during that time formed a large group and filed the case against the company, but since there was no available legal remedy or law which can actually support this type of litigation of a group filing charges, it became tough for those investors to take a recourse or gain advantage in the Indian Judicial System by this method. **Class action suits in India were so far filed under the guise of public interest litigations.** Courts were free to dismiss these. These shareholders ran pillar to post right from the National Consumer Disputes Redressal Commission up to the extent of Supreme Court and had their claims rejected.

**Example:** M applies for share on the basis of a prospectus which contains mis-statement. The shares are allotted to him, who afterwards transfers them to N. Can N bring an action for a rescission on the ground of mis-statement under section 37 of the Companies Act, 2013?

**Answer:** No, N cannot bring an action for rescission of the contract to buy shares from M on the ground of mis-statement as under section 37 of the Companies Act, 2013. A suit may be filed or any other action may be taken under section 34 or section 35 or section 36 only by any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the prospectus.



## 9. PUNISHMENT FOR FRAUD

**Meaning of fraud:** "Fraud" in relation to affairs of a company or any body corporate, includes-

- ◆ any act,
- ◆ omission,
- ◆ concealment of any fact, or
- ◆ abuse of position

committed by any person, or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person,

whether or not there is any wrongful gain or wrongful loss;

**“Wrongful gain”** means the gain by unlawful means of property to which the person gaining is not legally entitled;

**“Wrongful loss”** means the loss by unlawful means of property to which the person losing is legally entitled.

According to section 447 of the Act, any person who is found to be guilty of fraud involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.

|                                                                                   | Fine                                               |     | Imprisonment                   |
|-----------------------------------------------------------------------------------|----------------------------------------------------|-----|--------------------------------|
| Fraud of less than 10 lakh rupees or 1% of turnover whichever is less             | Upto ₹ 50 Lakhs                                    | or  | Upto 5 years                   |
| Fraud of equal to or more than 10 lakh rupees or 1% of turnover whichever is less | Min: amount of fraud<br>Max: (amount of fraud) x 3 | and | Min: 6 months<br>Max: 10 Years |
| Involving Public Interest                                                         | Min: amount of fraud<br>Max: (amount of fraud) x 3 | and | Min: 3 years<br>Max: 10 Years  |



# 10. PRIVATE PLACEMENT OFFER OR INVITATION FOR SUBSCRIPTION OF SECURITIES ON PRIVATE PLACEMENT [SECTION 42]

## Private Placement

A private placement is a way of raising capital that involves the sale of securities to a relatively small number of select investors.

A private placement is different from a public issue in which securities are made available for sale on the open market to any type of investor.

### Offer or Invitation for Subscription of Securities on Private Placement: [Section 42]

(1) A company may, **subject** to the provisions of this section, make a private placement of securities.

(2) A private placement shall be made only to a **select group of persons** who have been **identified by the Board** (herein referred to as "identified persons"), whose number shall **not exceed fifty** or such higher number as may be **prescribed** [excluding the **qualified institutional buyers** and **employees** of the company being offered securities under a scheme of **employees** stock option in terms of provisions of clause (b) of sub-section (1) of section 62], **in a financial year** subject to such conditions as may be prescribed.

(3) A company making private placement shall **issue private placement offer and application** in such **form** and manner as may be prescribed to identified persons, whose names and addresses are recorded by the company in such manner as may be prescribed:

Provided that the private placement offer and application shall **not carry any right of renunciation**.

Explanation 1.—"private placement" means any offer or invitation to subscribe or

issue of securities **to a select group of persons by a company (other than by way of public offer)** through private placement offer-cum-application, which satisfies the conditions specified in this section.

Explanation II.—"qualified institutional buyer" means the qualified institutional buyer as defined in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, as amended from time to time, made under the Securities and Exchange Board of India Act, 1992.

*Explanation III.*—If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of this Chapter.

(4) Every identified person willing to subscribe to the private placement issue shall apply in the private placement and application issued to such person alongwith subscription money paid either by **cheque or demand draft or other banking channel** and not by cash:

Provided that a company shall **not utilise** monies raised through private placement unless allotment is made and the return of allotment is filed with the Registrar in accordance with sub-section (8).

(5) **No fresh offer** or invitation under this section 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:

Provided that, subject to the maximum number of identified persons under sub-section (2), a company may, at any time, make more than one issue of securities to such class of identified persons as may be prescribed.

(6) A company making an offer or invitation under this section shall allot its securities within **sixty days** from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within **fifteen days** from the expiry of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of **twelve per cent.** per annum from the expiry of the sixtieth day:

Provided that monies received on application under this section 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.

(7) **No** company issuing securities under this section shall release any **public advertisements** or utilise any media, **marketing** or distribution channels or agents to inform the public at large about such an issue.

(8) A company making any allotment of securities under this section, shall file with the Registrar a **return of allotment** within **fifteen days** from the date of the allotment in such manner as may be prescribed, including a complete list of all allottees, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed.

(9) If a company **defaults** in filing the return of allotment within the period prescribed under sub-section (8), the company, its promoters and directors shall be liable to a **penalty** for each default of **one thousand rupees** for each day during which such default continues but not exceeding **twenty-five lakh rupees**.

(10) Subject to sub-section (11), if a company makes an offer or accepts monies in contravention of this section, the company, its promoters and directors shall be liable for a **penalty** which may extend to the **amount raised** through the private placement or **two crore rupees**, whichever is lower, and the company shall also **refund** all monies with interest as specified in sub-section (6) to subscribers within a period of **thirty** days of the order imposing the penalty.

(11) Notwithstanding anything contained in sub-section (9) and sub-section (10), any private placement issue not made in compliance of the provisions of sub-section (2) shall be deemed to be a **public offer** and all the provisions of this Act and the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 shall be applicable.

As per **Rule 14** of *Companies (Prospectus and Allotment of Securities) Rules, 2014*,

(1) For the purposes of sub-section (2) and sub-section (3) of section 42, a company shall not make an offer or invitation to subscribe to securities through private placement unless the proposal has been previously approved by the shareholders of the company, by a **special resolution** for **each of the offers** or invitations:

Provided that in the explanatory statement annexed to the notice for shareholders' approval, the following disclosure shall be made:-

- (a) particulars of the offer including date of passing of Board resolution;
- (b) kinds of securities offered and the price at which security is being offered;
- (c) basis or justification for the price (including premium, if any) at which the offer or invitation is being made;
- (d) name and address of valuer who performed valuation;
- (e) amount which the company intends to raise by way of such securities;
- (f) material terms of raising such securities, proposed time schedule, purposes or objects of offer, contribution being made by the promoters or directors either as part of the offer or separately in furtherance of objects; principle terms of assets charged as securities:

Provided further that this sub-rule shall not apply in case of offer or invitation for non-convertible debentures, where the proposed amount to be raised through such offer or invitation does not exceed the limit as specified in clause (c) of sub-section (1) of section 180 and in such cases relevant Board resolution under clause (c) of subsection (3) of section 179 would be adequate:

Provided also that in case of offer or invitation for non-convertible debentures, where the proposed amount to be raised through such offer or invitation exceeds the limit as specified in clause (c) of sub-section (1) of section 180, it shall be sufficient if the company passes a previous special resolution only once in a year for all the offers or invitations for such debentures during the year.

(2) For the purpose of sub-section (2) of section 42, an offer or invitation to subscribe securities under private placement shall not be made to persons more than **two hundred** in the aggregate in a financial year:

Provided that any offer or invitation made to qualified institutional buyers, or to employees of the company under a scheme of employees stock option as per provisions of clause (b) of sub-section (1) of section 62 shall not be considered while calculating the limit of two hundred persons.

Explanation.- For the purposes of this sub-rule it is hereby clarified that the restrictions aforesaid would be reckoned individually for each kind of security that is equity share, preference share or debenture.

(3)<sup>2</sup> A return of allotment of securities under section 42 shall be filed with the Registrar within fifteen days of allotment.

(4)<sup>3</sup> The provisions of sub-rule (2) shall not be applicable to -

- (a) non-banking financial companies which are registered with the Reserve Bank of India under the Reserve Bank of India Act, 1934 and
- (b) housing finance companies which are registered with the National Housing Bank under the National Housing Bank Act, 1987,

if they are complying with regulations made by the Reserve Bank of India or the National Housing Bank in respect of offer or invitation to be issued on private placement basis:

Provided that such companies shall comply with sub-rule (2) in case the Reserve Bank of India or the National Housing Bank have not specified similar regulations.

(5)<sup>4</sup> A company shall issue private placement offer cum application letter only after the relevant special resolution or Board resolution has been filed in the Registry:

Provided that private companies shall file with the Registry copy of the Board resolution or special resolution with respect to approval under clause (c) of subsection (3) of section 179.