

# Public Offer And Private Placement

## Introduction

Section 23 of **Companies Act, 2013** lays down the provision for public offer and private placement. The 2013 Act became effective in stages over 2013 and 2014. This section is a part of chapter III of the act, 2013. It briefly lays down the methods that can be used by public and private companies to issue securities and raise money. There are two parts to chapter III, the first part relates to public offer and the second part pertains to private placement. Hence every company that wishes to issue securities and raise money has to follow through and compile this chapter. The purpose of his analysis is to give a better understanding of this section and to analyze the rules and regulations governing issuance of securities by company.

## Purpose of Section 23

Chapter 3 of Companies Act 2013 lays down the provisions with respect to prospectus and allotment of securities. Section 23 being the first section under this chapter lays down the basic methods of issuing security used by public and private companies. The section briefly lays down the following:

1. A public company can issue securities in three ways as follows:
2. Through prospectus to the public.
3. Private Placement.
4. Rights issue or Bonus issue.
5. A listed company or a company, which intends to get its securities listed, can issue securities according to the provisions of **Securities and Exchange Board of India Act, 1992** and necessary prescribed rules.
6. A private company may issue securities in following ways:
7. Rights issue or bonus issue.
8. Private Placement.

An explanation of this section clarifies that a “Public Offer” under this section includes initial public offer or further public offer of securities by the company or an offer of sale of securities to the public by an existing shareholder through issue of prospectus. An initial public offer refers to an offer of securities by an unlisted company to the public for subscription and includes an offer for sale of securities to the public by any existing holder of such securities in an unlisted company. A further public offer refers to an offer of securities by a listed company to the public for subscription and includes an offer for sale of securities to the public by existing holders of such securities in a listed company.

By way of public issue that is by issuing securities to public at large a company can be listed on a recognized stock exchange in India. For public issue there are various rules and regulations that have to be followed as well, like **SEBI (Issuance of capital and disclosure requirement) regulation, 2009** and **SEBI (Listing obligations and Disclosure Requirements), Regulations 2015** as under **section 24** of the act, 2013, SEBI has power to regulate issue and transfer of securities by listed and unlisted companies. Publicly traded securities are subject to more regulations and scrutiny than those for private placements by a company.

A prospectus as per companies act, 2013 is defined as a “*document inviting deposits from the public or a document-inviting offer from the public for the subscription of shares or debentures of the company*”. Private placement is basically a way of raising capital by company by issuing private placement offer letter for securities to a relatively small group of selected investors. In general, private placements do not have to be registered with the Securities and Exchange Commission and do not require majority of disclosure requirements found in public offerings. This way of raising security is governed by section 42 of Companies Act 2013. Section 42 of Companies act 2103 read with rule 14(2)(b) of Companies (Prospectus and allotment of securities) rules, 2014 states that an offer to more than 200 persons in the aggregate in a financial year will constitute a public offer.

Raising money by way of rights issue is method used by company to offer shares directly to existing shareholders of the company in proportion to their existing holding. Bonus issue is when company issues fully paid up shares to its own members.

### Situation Before Enactment of Section 23

This provision was first time introduced in the **Companies Bill, 2011**. Before this there was no similar provision. This particular clause of the bill was amended by the suggestions of standing committee on finance. There after the amended clause now stands as Section 23 of the act, 2013.

### Application of Section 23

This newly inserted provision lists out the mode and means by which private and public limited companies can issue securities, thus providing explicit means for issuance of securities by both public and private companies in India. There is confusion and dilemma with respect to its application, which has not been up till now explicitly cleared up by any notification or legislation. It is believed that use of the word “May” with respect to private placement creates ambiguity. If this “May” is to be interpreted in its literal sense than it would mean that a private company issuing securities can also follow the procedure under Section 42 (private placement), Section 54 (issue of sweat equity shares), Section 62 (further issue of share capital), Section 71 (debentures) and Rule 12 of Companies (Share Capital and Debentures) Rules, 2014 independently. But at the same time if the “May” in section 23(2) is to be interpreted and read as shall, it would become a mandatory provision and it would mean that if a company has to issue securities under the act, 2013 it has to be done as per the provision of section 23(2), that is every time any security, whether shares, debentures or employee stock options, are proposed to be issued either a private placement or a rights issue process will have to be followed by the private company, unless such shares are being issued as bonus shares.

### Amendments to Section 23

This section has been quite constant and has not been amended as it was is a fairly new section, incorporated for the first time in 2013 act and merely lays down the methods to be used by companies to issue securities. More detailed procedure about each method is further explained under different provisions following this section. There has been a circular providing clarity on the applicability of this section. The M.C.A circular clarifies that unless the applicable law and rules/regulations of RBI explicitly specify the application of this section and all other sections under chapter III of the act, 2013 will not be applicable for issuance of foreign currency convertible bonds and foreign currency bonds by companies to person resident outside India.

## Section 25

A **prospectus** of a company is defined under section 2(70) of The Company’s Act. It is a legal document that explains the securities or shares of the company which have been offered to the public. The document can be any circular, advertisement, notice, or any kind of manuscript which serves the purpose of inviting offers from the general public for the purchase of shares or securities of a company. The motive behind providing a prospectus to the public is to raise capital.

Since a prospectus contains necessary and detailed information about the company’s securities that are put to sale, it allows the investors to make informed decisions regarding investment in the shares of the company. It is important for the issuing company to always file the prospectus with the regulator.

### What is a deemed prospectus?

A deemed prospectus is a type of prospectus which is defined under section 25(1) of The Company's Act. As the name suggests, a deemed prospectus is a document that is *deemed* to be the prospectus of a company. In general, any offer for the sale of its stock by a company when presented in the form of a detailed document addressed to the public is deemed to be a prospectus.

More specifically, the concept of deemed prospectus becomes important when a company intends to issue shares via an intermediary in order to bypass compliance regulations issued by the [SEBI](#). Whenever a company allots or agrees to allot its shares or securities to an intermediary such as a merchant bank, another company, or an issuing house, for the eventual purpose of offering those shares for sale, a document of Offer for Sale is made by the intermediary or issuing house. The document of [Offer for Sale](#) is called a deemed prospectus. If it satisfies any one of the following two conditions:

**Condition 1:** The Offer for Sale to the public by the intermediary was made within six months from the allotment of [shares](#) to the intermediary; or

**Condition 2:** The company which allotted its shares to the intermediary has not received any consideration for the shares till the date the Offer for Sale was made by the intermediary.

If any of these two conditions are fulfilled, the document through which Offer for Sale is presented by the intermediary is deemed to become a prospectus of the company allotted its shares to the intermediary. In such a case, all the provisions of content and liability which apply to the prospectus of a company are also applicable to a deemed prospectus. The purpose of the concept of deemed prospectus here is to make it clear that even though the document of an offer for sale was issued by an intermediary, it will still be *deemed* to be a prospectus issued by the original company. This helps to pinpoint accountability on the original issuer of shares.

### **Understanding what is deemed prospectus with the help of an example**

Suppose there is a company named XYZ Ltd. that wants to issue its shares to the public without being answerable to the law or without having to follow the guidelines issued by SEBI.

For this purpose, XYZ Ltd. agrees to allot its shares to an issuing house in January 2020. The issuing house here was an underwriting company. This issuing house offers the shares of XYZ Ltd. to the public through a document of Offer for Sale. The shares of XYZ Ltd. are now being offered to the general public not directly via XYZ Ltd. but via the issuing house. This document of Offer for Sale has now been deemed to become the prospectus of XYZ Ltd.

For XYZ Ltd. to directly issue its shares to the general public, it has to comply with Section 26 of The Company's Act and the SEBI guidelines. But since XYZ Ltd. wanted to be exempted from the regulatory compliances so it could not issue its shares directly to the public. However, under Indian law, if a company

makes use of another company or issuing house for issuing its shares to the public, then the issuing house will be considered as representative of the company and the document thus issued by the issuing house will be considered the deemed prospectus of the company that is XYZ Ltd. provided one of the following two conditions need to be fulfilled.

**Condition 1:** If XYZ Ltd. made an agreement of issuing its shares or allotted its shares to the issuing house in January 2020, then the issuing house has to offer those shares to the public within 6 months. So, if the issuing house offered the shares to the public in April 2020, then it fulfills the first condition and the document of Offer for Sale can be deemed as the prospectus of XYZ Ltd.

**Condition 2:** When the issuing house offered the shares of XYZ Ltd. to the public, XYZ Ltd. shouldn't have received any consideration for the same by then. Just like the process of online selling. When a seller sells their product via online companies, they get paid only after their products are sold and revenue is generated through that sale. Similarly, if XYZ Ltd. does not receive any consideration until the issuing house offers the shares to the public, then the second condition is fulfilled.

If any one of these conditions is fulfilled then the document has become the deemed prospectus of XYZ Ltd.

Another interesting question arises here as to who would be the director in the prospectus? Since the prospectus was offered by the issuing house, the director of the issuing house will be presumed to be the director in the deemed prospectus.

So, it can now be said that a deemed prospectus is the assumption of a document as the prospectus of a company.

### **To Sum Up**

A prospectus contained detailed information about a company and its offer to issue shares to investors. A prospectus is, therefore, an important document. However, in case a company attempts to issue shares via an intermediary or an underwriter, and the prospectus in such a case is also issued by the underwriter, an ambiguity may arise as to who is responsible for the terms and conditions mentioned in the prospectus. The idea of a deemed prospectus in the Companies Act clears this ambiguity by stating that as long as certain conditions are met, the prospectus issued by the intermediary/underwriter shall be deemed to be the prospectus of the original company itself. It thus brings greater transparency in the public issue of companies.

