

# ICSI – WIRC Webinar

Capacity Building - Come Back to Profession

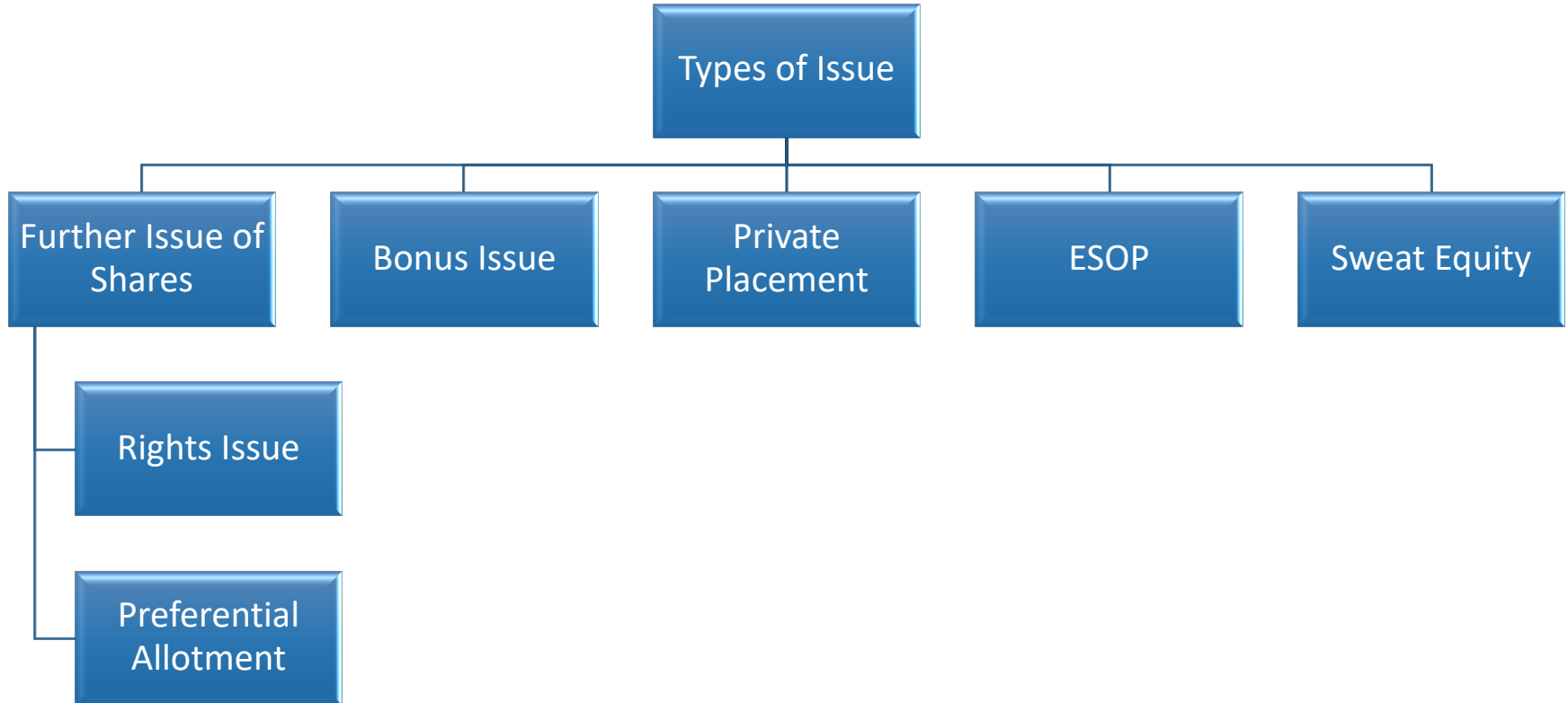
Private Placement and Preferential Allotment

April 21, 2021

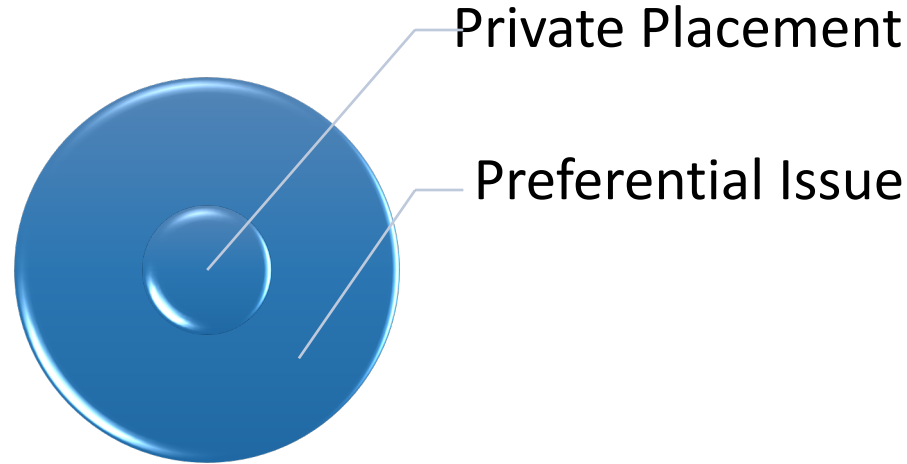
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# What's the difference?



## Why Private Placement / Preferential Issue?

- Private Placement
  - Section 42
  - Rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014
- Preferential Allotment
  - Section 62
  - Rule 13 of The Companies (Share Capital and Debentures) Rules, 2014

- Private Placement
  - 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 (PAS-4)
- Not more than 200 persons
  - If made to more than 200 persons, it will be treated as public offer

- Preferential Offer
  - Issue of shares or other securities
  - by a company to any select person or group of persons
  - on a preferential basis
  - Does not include shares or other securities offered through
    - Public issue
    - Rights issue
    - ESOP
    - Sweat Equity
    - Bonus Shares

- Private Placement
  - Securities" means the securities as defined in SCRA
    - 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;
- Preferential Allotment
  - Shares or other securities means equity shares, fully convertible debentures, partly convertible debentures or any other securities, which would be convertible into or exchanged with equity shares at a later date

- Term “Securities” play a crucial role in interpretation of these two sections
  - Allotment of any kind of security on a private basis attracts Section 42
  - Allotment of equity shares or convertible securities attracts both Section 42 and 62(1)(c).
- Preferential Allotment means Private Placement of equity shares or convertible securities.



- Private Placement
  - Select group of persons who have been identified by the Board
- Preferential Allotment
  - Any person, whether or not existing members of the company

- Private Placement Offer required to be approved by a special resolution for each of the offers or invitations
- Explanatory statement to contain the prescribed disclosures
- Special resolution not required for offer or invitation for NCD, where the proposed amount is within the limits prescribed under Section 180
- Single special resolution can be passed offer or invitation for NCD, where the proposed amount exceeds the limit specified in section 180, for all the offers or invitations for such debentures during the year.

- Offer or invitation to subscribe securities shall not be made to more than 200 persons in the aggregate in a financial year
  - Offer or invitation made to QIB, or to employees under ESOP shall not be considered while calculating the limit
  - Restrictions to be reckoned individually for each kind of security that is equity share, preference share or debenture
- No company 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

- Private placement offer cum application letter shall be in Form PAS-4 serially numbered
  - Addressed specifically to the person to whom the offer is made
  - Shall be sent to him, either in writing or in electronic mode, within thirty days of recording the name of such person
  - No person other than the person so addressed shall be allowed to apply
- Company shall issue private placement offer cum application letter only after the relevant special resolution or Board resolution has been filed

- Identified person willing to subscribe to the private placement issue shall apply in application issued to such person alongwith
- Pay subscription money
  - Either by cheque or demand draft or other banking channel not by cash
  - Payment to be made for subscription from bank account of the person subscribing
  - Monies payable on subscription to securities to be held by joint holders shall be paid from the bank account of the person whose name appears first in the application
  - Provisions not apply in case of issue of shares for consideration other than cash

- Company shall not utilise monies raised through private placement unless
  - Allotment is made
  - Return of allotment is filed
- No fresh offer or invitation shall be made unless
  - Allotments with respect to any offer or invitation made earlier have been completed or
  - Offer or invitation has been withdrawn or abandoned by the company:
  - Subject to the maximum number of identified persons, a company may, at any time, make more than one issue of securities to such class of identified persons as may be prescribed.

- Return of allotment of securities shall be filed with the Registrar within fifteen days of allotment in Form PAS-3
- Monies received on application under this section shall be kept in a separate bank account in a scheduled bank
- Allotment to be made within 60 days from the date of receipt of the application money for such securities
- If no allotment within 60 days
  - Repay the application money to the subscribers within fifteen days from the expiry of sixty days
  - If the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at 12% per annum from the expiry of the sixtieth day:

- Private Placement not satisfying the conditions shall be treated as public offer
- Penalty for contravention: fine upto Rs. 2 crores and refund all money within 30 days of order imposing penalty



- Further Issue of Shares
  - Existing Shareholders – Rights Issue
  - Employees under ESOP
  - Any other Persons

- Other than Existing Shareholders
  - Authorised by Articles
  - Authorised by Special Resolution,
  - Conditions related to Private Placement needs to be complied with
- Provisions not to be complied with for conversion of loan / debentures into shares

- Company to make the prescribed disclosures in the explanatory statement
- Allotment of securities shall be completed within a period of twelve months from the date of passing of the special resolution
- If the allotment of securities is not completed within twelve months, another special resolution shall be passed for the company to complete such allotment thereafter
- Allotment can be
  - For Cash
  - For Consideration other than cash

- Share Swap
- Acquiring Company or IP
- Against Services
- Advisors / Strategic Investors
- Conversion of loan into equity? Whether other than cash?

- Price to be determined on the basis of valuation report of a registered valuer
- Price shall not be less than the price determined on the basis of valuation report of a registered valuer
- Explanatory Statement to contain relevant date with reference to which the price has been arrived at
  - Relevant Date means a date atleast thirty days prior to the date on which the general meeting of the company is scheduled to be held

- Where convertible securities are offered on a preferential basis with an option to apply for and get equity shares allotted
  - Price of the resultant shares pursuant to conversion shall be determined
    - Upfront at the time when the offer of convertible securities is made or
    - at the time, which shall not be earlier than 30 days to the date when the holder of convertible security becomes entitled to apply for shares, on the basis of valuation report of the registered valuer given not earlier than sixty days of the date when the holder of convertible security becomes entitled to apply for shares:
  - Decision to be taken at the time of offer of convertible security itself

# Valuation - Convertible Securities issued to Non Residents

- FEMA NDI Rules will apply on pricing guidelines
- Valuation to be done by CA or Merchant Banker
- Valuation have to be done upfront
- Price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such instruments

- For consideration other than cash, valuation of consideration shall be done by a registered valuer
- RV shall submit a valuation report to the company giving justification for the valuation



Thank you

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