

**Intricacies in the Private Placement**

**&**

**Recent Amendments in PMLA, 2002**

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**Thane Chapter- 09 March 2024**



**AMITA DESAI & CO.**  
Company Secretaries

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## Overview

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# Business Needs Money



Securities



## Definition of Securities

### Securities

"securities" means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956



## Definition of Securities

**Securities** include

1. Shares, scrips stocks, bonds, debentures, debenture stock, or other marketable securities of a like nature in or of any incorporated company or a pooled investment vehicle or other body corporate,
2. Derivative,
3. Units or any other instrument issued by any collective investment scheme to the investors in such schemes;
4. Security Receipt as defined in clause (zg) of section 2 of (the SARFAESI Act 2002),
5. Units or any other such instrument issued to the investors under any mutual fund scheme;
6. Units or any other instrument issued by any pooled investment vehicle;
7. 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 the beneficial interest of such investor in such debt or receivable including mortgage debt, as the case may be; (ii) Government securities; and (iii) rights or interests in securities;

Explanation.--Securities **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



## Few other Definitions

### Debenture

“Debenture” includes debenture stock, bonds, or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not;

*Provided that—(a) the instruments referred to in Chapter III-D of the RBI Act, 1934; and (b) such other instrument, as may be prescribed by the Central Government in consultation with RBI issued by a company, shall not be treated as Debenture;*

### Deposits

“Deposit” includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with RBI;

## Few other Definitions

### Derivative

“Derivative” means the derivative as defined in Section 2 (ac) of the Securities Contracts (Regulation) Act, 1956, which is an inclusive definition.

Derivatives include—

- (A) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;
- (B) a contract which derives its value from the prices, or index of prices, of underlying securities;

## Few other Definitions

### Employees' Stock Option

Employees Stock Option means the Option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price;

## Few other Definitions

### Private Placement

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 section 42 of the Companies Act, 2013

### Preferential Offer

Preferential Offer means an issue of shares or other securities (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) by a company to any select person or group of persons on a preferential basis and does not include shares or other securities offered through a public issue, rights issue, employee stock option scheme, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities;

## Types of Securities / Instruments

- Shares- Equity shares (with or without Differential Rights) & Preference.
- Warrants
- Debentures- Convertible (Fully / Partially/ Optionally)
- Debentures- Non- Convertible
- Loans
- Options as Derivatives

## Issue of Shares and Securities

### For Private Limited / Unlisted company

Section 23 - Public Offer or Private Placement or Right Issue or Bonus Issue

Section 42 - Offer or invitation for subscription of securities on Private Placement.

Section 43 - Kinds of Share Capital

Section 47 - Voting Rights

Section 55 - Issue and Redemption of Preference Shares

Section 62 - Further Issue of Share Capital

Section 71 - Debentures

Section 73 - Deposits

### Shares -

Equity– Sections 23, 42,43, 47, 62

Preference– Sections 23, 42, 62, 55

### Debenture-

CCD- Section 23, 42, 62, 71

NCD- Section 23, 42, 71

OCD- Section 23, 42, 62, 71,73

PCD- Section 23, 42, 62, 71, 73

## Modes of Raising of Capital

Public  
Issue

Right Issue

Preferential  
Issue

Private  
Placement

Sweat  
Equity

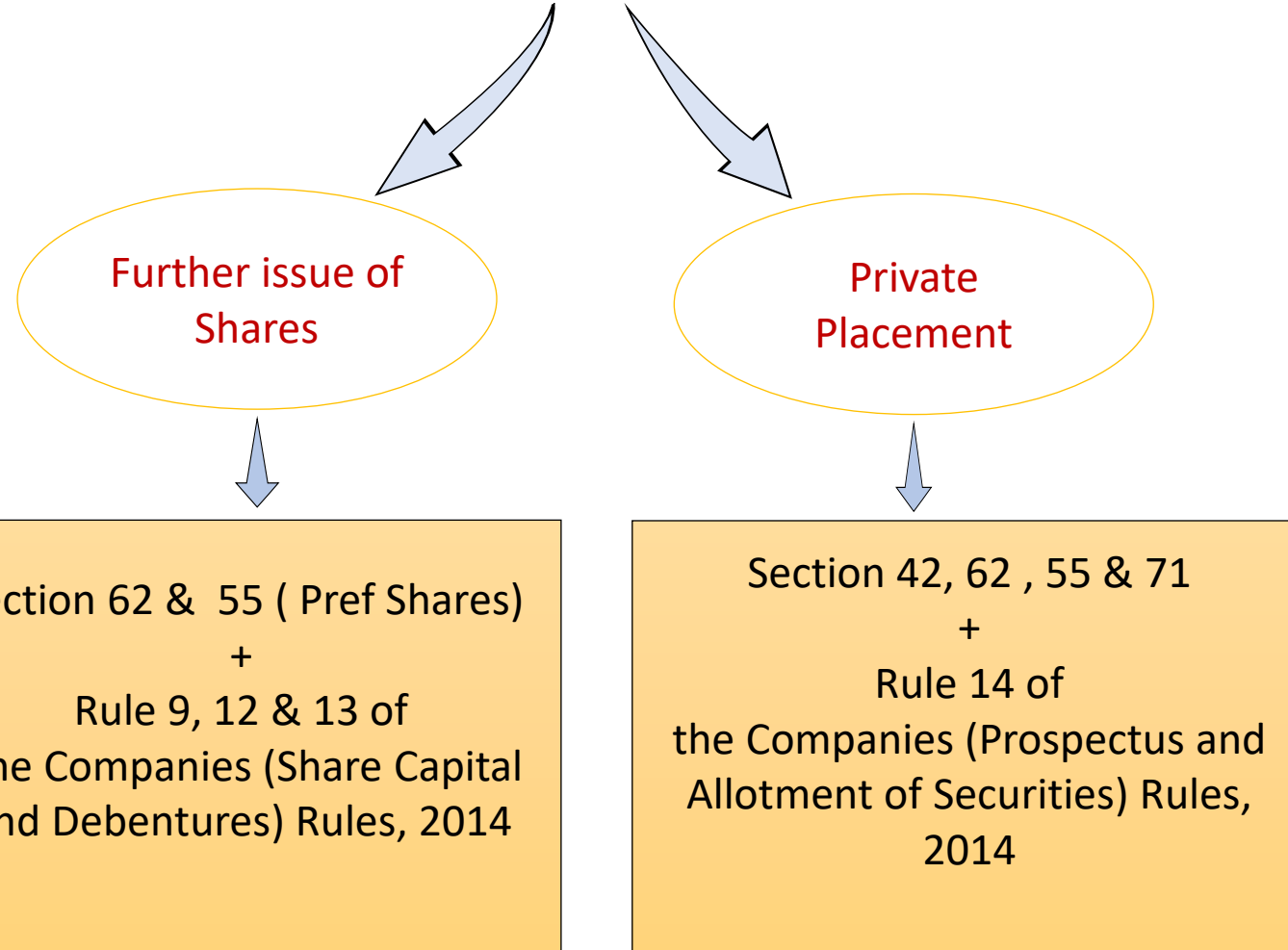
Bonus  
Issue



*IPO– Through SEBI Regulations and Sections 24 to 41- We are not discussing the same today*



## Legal framework



## Further issue of shares- Section 62 of the Companies Act, 2013



Further Issue of Shares



Existing Shareholder

Employees

Select Group of Persons

## Legal Framework

Right issue

- When shares are issued to Existing Shareholders
- Section 62(1)(a) read with the Rules

ESOP

- When shares are issued to Employees
- Section 62(1)(b) read with the Rules

Private Placement &  
Pref Issue

- When shares are issued to a Select Group of Persons including Members or Employees
- Section 42 and 62(1)(c) read with the Rules

## Section 39 (4) & (5) – Return of Allotment of securities

**PENALTY!**

When a company makes allotment of securities, it shall file return with RoC in PAS-3,  
and If it defaults in filing such return

Company and Officer- in- default

Liable to penalty for each default

Rs.1000 per day till the default continues  
or Rs. 1 lakh, whichever is less

## Few Points to be noted for any Offer of Shares or Securities

- There could be a dilution of shareholdings due to Right Issue if the shareholders do not subscribe
- If the Company has availed any Credit facilities, check the terms of such facilities for obtaining prior approval of the Lender, for any change in the shareholding pattern
- Articles to be reviewed if there is a Right of First Refusal (ROFR) to Promoters in a private limited company or General Meeting is mandated for any further issue or approval of Nominee Directors is required etc.
- Right Issue of shares can be offered for partly paid or fully paid shares
- Cut-off date BENPOS is required to ascertain the proportion of offer to each shareholder
- If the funds are received from NRE Account, obtain a certificate from the Banker
- If any NRI is subscribing shares from NRO account, there is no need to comply with FEMA 1999
- Please note that shares/securities before issuance is not "Goods" as defined under Sale of Goods Act, 1930

# **Issue of Shares on Preferential Basis**





## Preferential issue of shares or other securities

Issue of Shares/other securities to a select group of persons (on a preferential basis)

### Shares/other securities mean

1. Equity or Preference Shares
2. Debentures  
(Fully / Partly/ Optionally Convertible)
3. Any other security that is convertible or exchangeable with equity shares of the company at a later date



Any persons including  
**Existing Shareholders or Employee**

A preferential offer does not include shares or other securities offered through a  
**Public Issue/ Rights issue/ ESOP/ ESOS/ Sweat Equity /Bonus / Depository Receipts**

## Preferential issue of shares or other securities

Legal Provisions Section 62 (1) (c) r/w Rule 13 of the Companies ( Share Capital and Debentures ) Rule 2014

1. The Articles of Association of the Company to have the provisions to make Preferential Issue
2. Valuation Report of Registered Valuer to be obtained for fair value of shares/ securities
3. If the shares or other securities are issued for consideration other than cash, then the justification along with the Valuation Report of the Registered Valuer to be obtained
4. Special Resolution is required to be passed for a Preferential Offer and required disclosures as per Rule 13 to be made in the Explanatory Statement. **The validity of a Special Resolution is one year.**
5. Preferential Issue should also comply with provisions of Section 42 ( Private Placement)
6. If the Preferential Issue is made to one or more existing members then the Company is not required to send a Private Placement Offer cum Application Letter (PPOL)

## Relevant Date for Price determination of shares issued under Preferential issue

When convertible securities are offered on a preferential basis with an Option to get equity shares



Relevant Date for determination price of resultant shares



Upfront at the time of the Offer of convertible securities is made on the basis of Valuation Report of the Registered Valuer given at the stage of such Offer

OR

At the time which shall not be earlier than 30 days to the date when the holder becomes entitled to apply for equity shares on the basis of the Valuation Report of the Registered Valuer given not earlier than 60 days of the date when the holder of convertible security becomes entitled to apply for shares:

The company to take a decision at the time of offer of convertible security itself

# Private Placement



**Entire section 42 is substituted vide CAA 2017 w.e.f 07 August 2018**

# Private Placement



Securities

Select Group of Persons  
(Identified Persons)

Max 200 persons  
(In a financial year)

**Deemed Public Offer:**  
If makes an offer/ allot/ agree to allot to  
**> 200 persons**

While counting 200 persons:  
**Not to count**  
1) Qualified Institutional Buyer (QIB)  
2) Employee to whom allotment is made  
under ESOP

## Step Plan for Private Placement of Securities

1. Article to authorize such issue and ensure that authorized share capital is sufficient for the issue of securities.
2. Valuation Report is required from the Registered Valuer
3. Hold 1<sup>st</sup> Board Meeting for a) Approving issue of securities b) Approving PPOL c) Authorizing the opening of separate bank accounts along with other authorities.
4. File e- form for MGT 14 for the Board Resolution [*Applicable for any Issue of Securities as per Section 179 (3) (c )*]
5. Hold a General Meeting and approve through Special Resolution for each offer or invitation. The Explanatory Statement to have full details as per the Rules.
6. However, in case of offer or invitation for NCD is within the limit as per Section 180 (1) (c) only the Board Resolution would be sufficient. Further, if the Offer of NCD is exceeding the limit as per Section 180 (1) (c), it will be sufficient if the company passes a previous special resolution only once in a year for all the offers or invitations of such NCDs during the year (not FY).
7. If the offer or invitation to QIB, it will be sufficient if the company passes a previous special resolution only once in a year

## Step Plan for Private Placement of Securities

8. File e-form MGT 14 for the Special Resolution
9. Open a Separate Bank account with Scheduled Bank for receipt of money
10. Private Placement Offer Cum Application (PPOL) in Form PAS 4 with Sr. no. and address to be sent to Identified Person only, after filing of Form MGT 14 with RoC for Special Resolution or the Board Resolution, as the case may be
11. PPOL to be sent in writing or in electronic mode within 30 days from recording the name of the Applicant
12. Maintain records to whom PPOL is sent in Form PAS 5 (Now there is no requirement to file it in Form GNL-2)
13. Receive the subscription amount in the specified Bank account from the person to whom PPOL has been sent (The subscription amount to be used for the purpose of Issuing the securities or Refunding to the applicant)
14. Hold 2<sup>nd</sup> BM for the Allotment with authority to any Board member or Company Secretary
15. File e-form PAS 3 for the date of allotment after that the Funds can be used and not otherwise



## Step Plan for Private Placement of Securities

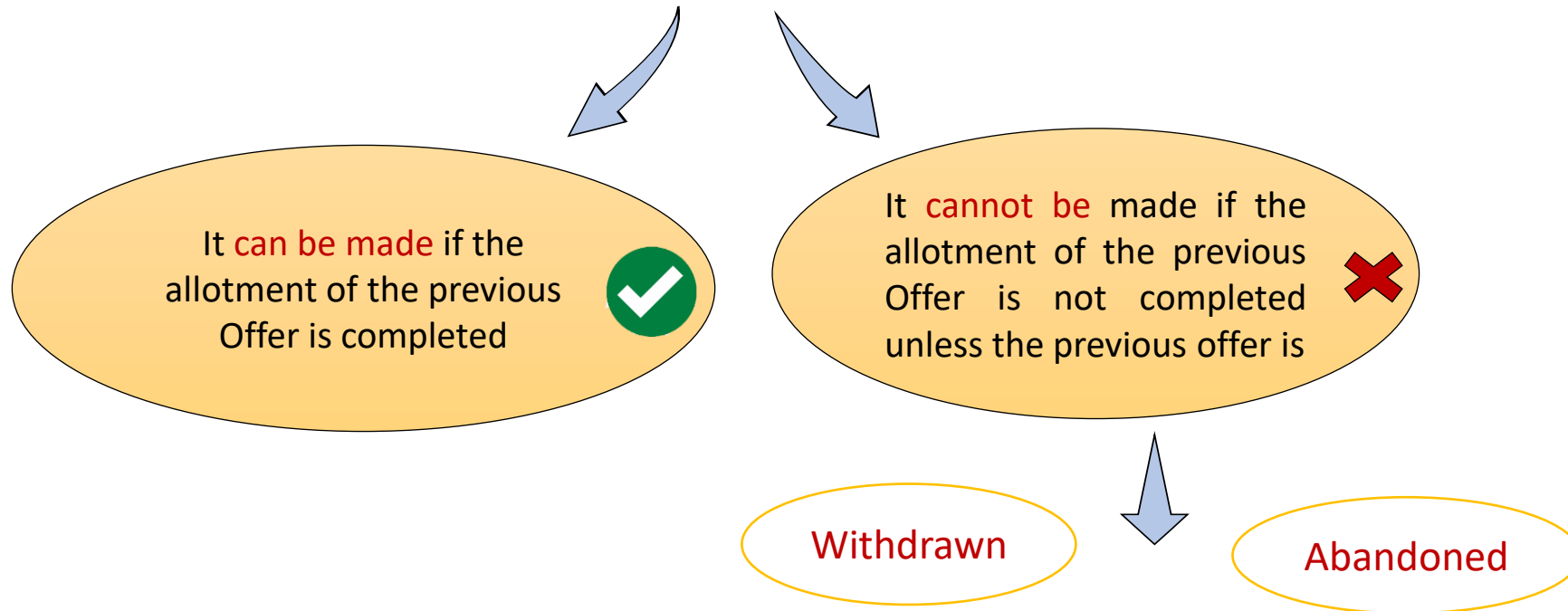
16. Make entries in the Register of Members
17. Issue the Share certificate within 2 months from the date of allotment
18. If shares are issued in DEMAT Form the file CAF with the depository
19. If the shares are issued on a Repatriable basis to Non-Resident – comply with FEMA 1999 provisions
20. For NBFC/ HFC separate rules have to be complied with as applicable.

### **Note wrt receipt of funds**

1. The subscription money is to be received only from the bank account of the person subscribing to the securities and company to keep the record of the Bank account from where the payment is received.
2. In the case of a joint holder – The subscription money to be paid from the bank account of the person whose name appears first in the Application.

## Another Private Placement Offer

If a Private Placement Offer has been made by the Company and it intends to bring another Offer

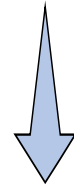


The Company may at any time make more than one issue of securities to such class of Identified Persons

## Prohibition



Company issuing securities u/s 42



To release any public advertisements  
or  
To utilize any media, marketing or distribution channels or agents  
to inform the public at large about the issue

## Allotment under Private Placement

Allotment to be made within maximum 60 days of the receipt of Application money

Repay in the next 15 days

Fails to repay by 75<sup>th</sup> day



12% interest  
p.a from  
61<sup>st</sup> day

## Allotment under Private Placement

Filing of Form PAS 3  
(Return of Allotment)  
in **15 days** from the date of  
Allotment

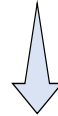
**The Application money  
cannot be used without  
filing of Form PAS 3**

The Return of Allotment to  
be filed  
with details of  
list of allottees  
(Name, Address, PAN and Email  
ID, etc.)

## Dual Penalty

**PENALTY!**

If the Company defaults in filing the Return of Allotment within 15 days of the Allotment



Company / Promoters/ Directors



Liable to penalty for each default  
Rs.1000 per day till the default continues  
(Max Rs. 25 lakhs)

## Dual Penalty

**PENALTY!**

If the Company makes an offer or accepts money in contravention of Section 42



Company / Promoters/ Directors



Liable to a penalty that may extend to the amount raised  
Or Rs.2 Crores  
whichever is lower



To refund all monies  
with interest in 30 days  
of the Order imposing  
the penalty



## Lesser Penalties for certain types of company

### Class of Companies

- OPC / Small Company/ Start-up company/ Producer Company,
- Any of its Officer-in-Default or any other person in respect of such company,

Penalty – ½ of the penalty specified in respective provisions of the Act

### Upper Cap-

Maximum Rs.2 Lakh to such company

Maximum Rs.1 lakh its Officer-in-Default or any other person in respect of such company.

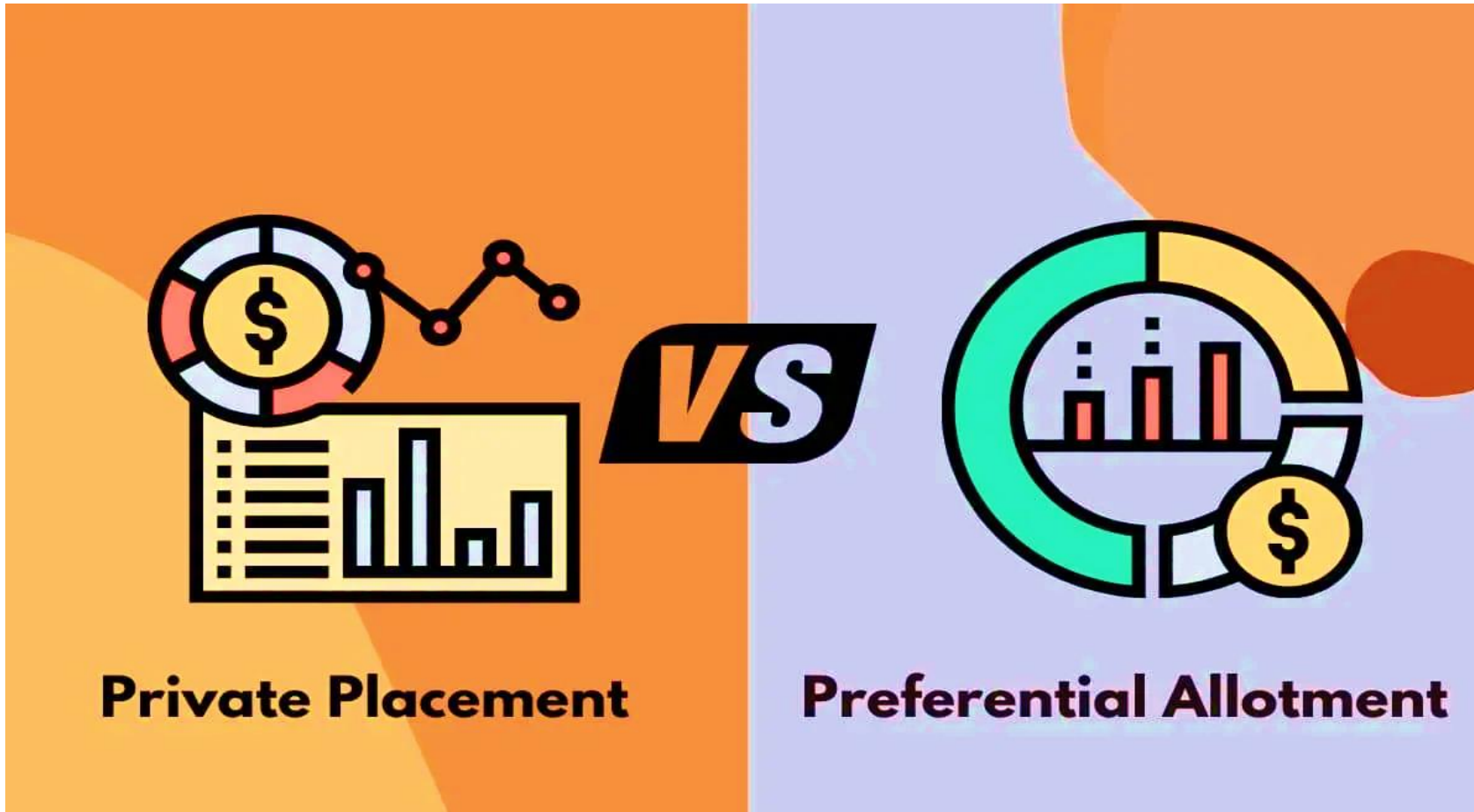
## Issue of Debentures

### Legal Provisions – Sections 42 & 71

1. The Company may offer and Issue Debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption and the same to be approved by the shareholders by way of a Special resolution.
2. If the issue of Debenture is within the borrowing limits u/s 180(1)(c), the Company is not required to pass a Special Resolution (Section 180 does not apply to a Private Company and hence it requires Special Resolution for the issue of Debenture)
3. Redemption shall not exceed 10 years from the date of issue, except in a few cases
4. The Company needs to file an e-form CHG-9 with ROC within 30 days of the creation of the Charge.
5. The Non-Convertible Debenture (NCD) to be secured by the creation of a charge on the assets referred to in Schedule III of the Act having value not less than full payment of the Debenture and the interest thereon.
6. If the Company issues unsecured NCDs then it is required to be listed on the recognized stock exchange so that same does not come under the purview of Deposits

## Issue of Debentures

7. The Company to appoint a Debenture Trustee and charge to be created in favour of the Debenture Trustee
8. The Company to execute the Debenture Trust Deed ( in Form SH-12) within max 60 days from the date of allotment of Debentures
9. The Company is required to create Debenture Redemption Reserve (DRR)
10. The Company is to maintain liquid deposit or invest as the case may be, a sum which shall not be less than 15% of the amount of its debentures maturing during the year ending on 31<sup>st</sup> day of March of the next year
11. Issue a Debenture Certificate within 6 (Six) months from the date of allotment of Debentures.



## Key Differences between Private Placement & Preferential Allotment

Sr No.	Private Placement	Preferential Allotment
1	<b>Any security</b> including Equity shares, Preference shares or Debentures can be issued.	<b>Only Equity Shares and other securities convertible into Equity Shares</b> can be issued
2	Can be made to any person as <b>identified by the Board</b>	Can be made to <b>existing shareholder, employees</b> or any other persons
3	Offer Letter to be in Form PAS 4	<b>No such Format</b> is prescribed
4	Subscription money to be deposited in a separate <b>Bank</b>	Subscription money can be <b>for consideration other than cash</b>
5	<b>Section 42</b> to be complied with	<b>Section 42 and 62(1)(c)</b> to be complied with

## Practical Tips

1. If the allottee is a Company/ Body corporate- call for its Chartered Documents (MoA/ AoA), get an SBO declaration, obtain Demat Statement and BENPOS for their previous holding to give details in the Explanatory Statement
2. It may take some time to open a special Bank Account for the Private Placement of Securities and hence plan to open such an account.
3. Warrant is a Securities as per SCRA, 1956, and hence e-Form PAS 3 is required to be filed, though Form PAS 3 has no such field so it's advisable to attach a clarification letter and file e-Form PAS 3.

## Practical Tips

4. In the case of preference shares if the Dividend has *not been paid* for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company. (Refer to section 47)
5. In case of remittance of subscription of shares or securities is from overseas, as per FEMA 1999, the excess of 0.5% needs to be refunded to the remitter and it cannot be waived. KYC is a must.
6. The Provision u/s 42 requires that the company should adhere to the limit of 200 persons not just with respect to the number of persons who ultimately subscribe to the securities of the company, but also for making an offer or invitation to offer the securities of the company.



## Adjudication Orders by Registrar of Companies (ROC)



## Adjudication Order of violation of Section 42

**Registrar of Companies (ROC), Pune-- Order dated: 30 June 2023**

**Cookiejar Technologies Private Limited**



### **Facts in brief**

1. Opening of Separate Bank Account ( for receipt of private placement share application money )
2. Not Filing of e-Form MGT-14 & e-Form PAS-3 within the prescribed time.

**ROC levied penalty as follows ;**

### **1) Penalty u/s 42(9) :- For not filing return of allotment within time**

Particulars	Penalty (Per day)	No. of days	Total	Reduced penalty u/s 446B
Company	1000	397	3,97,000/-	2,00,000/-
Director	1000	397	3,97,000/-	1,00,000/-
Director	1000	397	3,97,000/-	1,00,000/-
Director	1000	397	3,97,000/-	1,00,000/-

**2) Under Section 42(10) For not opening separate bank account ;**

<b>Particulars</b>	<b>Penalty</b>	<b>Reduced penalty u/s 446B</b>
Company	74,95,830/-	2,00,000/-
Director	74,95,830/-	1,00,000/-
Director	74,95,830/-	1,00,000/-
Director	74,95,830/-	1,00,000/-

**3) Penalty u/s 42(10):- For utilization of money without filing the return of allotment**

<b>Particulars</b>	<b>Penalty</b>	<b>Reduced penalty u/s 446B</b>
Company	74,95,830/-	2,00,000/-
Director	74,95,830/-	1,00,000/-
Director	74,95,830/-	1,00,000/-
Director	74,95,830/-	1,00,000/-

## Adjudication order under section 42

**Registrar of companies (ROC), Hyderabad (For State Of Telangana) Order dated : 16<sup>th</sup> May 2023**

Payswiff Technologies Private Limited



### Facts in brief :

The Company failed to keep money in a separate bank account and Erroneously utilized the funds before the allotment of shares.

ROC levied penalty u/s 42(10) as follows :

Particulars	Penalty as per the Act		Actual Penalty levied
	Total amount collected	Maximum amount levied	
Company	Rs. 7,83,24,231	Rs 2,00,00,000	Rs 80,00,000
Managing Director			Rs 20,00,000
Director			Rs 20,00,000
Director			Rs 20,00,000
Director			Rs 20,00,000
Director			Rs 20,00,000
Director			Rs 20,00,000

## Adjudication order under Section 62 and 42

**Registrar of companies (ROC), BANGLORE** Date of order : 5 July 2023

Krishikan Krishikan Private Limited (Small company)

### **Facts in brief :**

The Company issued and allotted Optionally Convertible Debentures(OCDs) thrice.

The said OCDs were issued as Right Issue u/s 62(1)(a), whereas, it should have been issued and allotted under 62(1)(c) on a preferential basis.

### **Violations by the Company in the given case**

**Section 62(1)(c)** – attracts liability u/s 450 penalties where no specific penalty is provided in the Act

**Section 42** – attracts liability u/s 42(10)



**Each issue of OCD is default and the company has issued OCDS thrice making it liable for each default**

1. Penalty u/s 450 read with 446B for violation of 62(1)(c)

<b>Particulars</b>	<b>Default 1</b>	<b>Default 2</b>	<b>Default 3</b>
Company	5000 (half of 10,000 as provided u/s 450)	5000	5000
Director	5000	5000	5000
Director	5000	5000	5000

2. Penalty imposed u/s 42(10) read with 446B for violation of section 42

<b>Particulars</b>	<b>Default 1</b>	<b>Default 2</b>	<b>Default 3</b>
Company	2,00,000 (Maximum Penalty U/S 446b)	2,00,000	2,00,000
Director	1,00,000(Maximum Penalty U/S 446b)	1,00,000	1,00,000
Director	1,00,000	1,00,000	1,00,000

## Appeal Orders by the Regional Director

<b>Name of the Company</b>	<b>Violation of Section</b>	<b>Facts of the Case</b>	<b>Penalty Imposed</b>	<b>Remarks</b>	<b>Order of RD</b>
Krishikan Krishikan Private Limited  <b>(Date of Application)</b> 7.09.2023)	Section 42, 62(1)(c) and 62(3)	The Company wrongly issued <i>Optionally Convertible Debentures (OCD) as right issue</i> , three times, under Section 62(1)(a) instead of Preferential Allotment under 62(1)(c).	12,45,000/-	The said default was <b><u>repeated 3 times</u></b> and it was stated by the company that the default was purely due to complexity arising out of the legal terminology of the words OCDs and CCDs and in understanding the provisions of the Companies Act, 2013.	Penalty ordered by ROC was upheld.

## Adjudication order under Section 62 and 42

**Registrar of Companies (ROC), GUJARAT Date of order: 5 July 2023**

Alag Brainworks Limited

**Facts in brief ;**

The Company **failed to file MGT-14 within 30 days of passing a special resolution** for the preferential issue u/s 62(1)(c). Therefore, the company and its officers shall be liable for a penalty u/s 117.



Particulars	Penalty	Penalty for continuing failure	Maximum penalty	Total penalty imposed
Company	10,000	280 days* 100=28,000/-	2,00,000/-	38000/-
Director	10,000	280 days* 100=28,000/-	2,00,000/-	38000/-
Director	10,000	280 days* 100=28,000/-	2,00,000/-	38000/-
Director	10,000	280 days* 100=28,000/-	2,00,000/-	38000/-

## Adjudication order under Section 62

**Registrar of Companies (ROC), Chennai** **Date of order: 9 February 2023**  
**Guvi Geek Network Private Limited**



**Facts In Brief:** The Board Resolution was passed for the grant of 327 Options under the Scheme to identified employees during the financial year 2021-22 **which exceeds 1% of the issued capital** of the Company. The approval of shareholders by way of a **separate resolution was not obtained** for approval to grant stock options to identified employees exceeding 1% of the issued capital. After the Company was made aware of such contravention, it **took approval by way of a Special Resolution for ratification and approval** for the grant of Options to identified employees exceeding 1% of the issued capital of the Company during the financial year 2021-2022.

**In the view of the facts above, ROC levied penalty u/s 450 as follows ;**

Particulars	Amount of penalty	Additional penalty for a continuing offence (Delay of 522 days)	Total amount of Penalty Imposed
Company	Rs.10,000/-	Rs.5,22,000/- (Maximum Limit upto Rs.2,00,000/-)	Rs.2,10,000/-
Director	Rs.10,000/-	Rs.5,22,000/- (Maximum Limit upto Rs.50,000/-)	Rs.60,000/-
Director	Rs.10,000/-	Rs.5,22,000/- (Maximum Limit upto Rs.50,000/-)	Rs.60,000/-



## Adjudication order under section 42

**Registrar of Companies (ROC), NCT of Delhi & Haryana Date of order: 1 March 2023**

Anbronica Technologies Private Limited. (*Small company*)

**Facts in brief-** The Company issued **CCDs using the website of another company** that is engaged in business of running a technology-based community platform.

**Contravention by company** : Section 42(7) with respect to public advertisement

**ROC levied penalty u/s 42(10) read with 446B as follows**

Particulars	Penalty Levied
Company	2,00,000 (Maximum Penalty U/S 446b)
Director	1,00,000 (Maximum Penalty U/S 446b)
Director	1,00,000

## Adjudication Orders under Companies Act, 2013

### *Registrar of Companies:*

<b><i>Sr No</i></b>	<b><i>Name of the Company</i></b>	<b><i>Violation of Section</i></b>	<b><i>Facts of the Case</i></b>	<b><i>Penalty Imposed</i></b>
<b>1.</b>	Viraj Profiles Private Limited	Section 42	The Company <b><u>failed to maintain a Separate Bank Account</u></b> as required and also failed to file PAS-3 and PAS-4 with ROC within the prescribed time.	Rs.2,07,56,000/-

## Adjudication Orders under Companies Act, 2013

<b>Sr No</b>	<b>Name of the Company</b>		<b>Violation of Section</b>	<b>Facts of the Case</b>	<b>Penalty Imposed</b>
2.	Wurknet Limited	Private	Section 62(1)(b) read with Rule 12 of the Companies (Share Capital and Debenture) Rules, 2014	The Company <u>failed to make the required disclosure</u> w.r.t ESOP Scheme in the Notice of the Extra-Ordinary General Meeting.	Rs.1,10,500/-
3.	Wurknet Limited	Private	Section 62(3)	The Company issued <u>Convertible Notes as per 62(1)(c) instead of 62(3)</u>	Rs.1,50,000/-

## Adjudication Orders under Companies Act, 2013

<b><i>Sr No</i></b>	<b><i>Name of the Company</i></b>	<b><i>Violation of Section</i></b>	<b><i>Facts of the Case</i></b>	<b><i>Penalty Imposed</i></b>
4.	Ignosi System Private Limited	Section 62(3)	<p>The Company had taken a loan from a director, subsequently, the loan was converted into shares and was allotted to shareholders.</p> <p>However, while filing Form PAS-3, an incorrect Board resolution was attached relating to the <u>Right issue under 62(1) (a) instead of the conversion of loan to equity under section 62(3) of the Companies Act,2013.</u></p>	<p>On Company- Rs. 68,000/-</p> <p>On Director- Rs.50,000/-</p>

## Appeal Orders by the Regional Director

<b>Sr No</b>	<b>Name of the Company</b>	<b>Violation of Section</b>	<b>Facts of the Case</b>	<b>Penalty Imposed</b>	<b>Remarks</b>	<b>Order of RD</b>
1.	Tatva Chintan Pharma Chem Limited  <b>(Date of Application 28.02.2022)</b>	Section 42(6)	The Company <u>failed to keep the application money in separate bank account</u> required to be opened with Schedule Commercial Bank.  <u>In a rush to file an IPO company made error in disclosing the facts</u>	On Company Rs.1 Crore  On officer in default- Rs.1 Crore	RD noted that the <u>allotment was made while the company was private limited</u> and there was no unfair advantage made by the Company or the loss caused to the investors ( Promoters) in a Default of this nature.	Penalty reduced to Rs. 10 Lakh/- for company  Rs.2 Lakh on each Directors  Penalty on CFO and CS was set aside.





FATF is an international organization founded in 1989 (200 Countries).

FATF membership was granted to India in 2010 and 109 recommendations were followed by India.

Any shortcomings discovered in the country's ability to combat money laundering could result in unfavorable reviews or have an influence on its rating, making it more expensive for foreign companies to conduct business in the country.

## Understanding of a few provisions of the PMLA Act and Rules

### What is a Money Laundering offense under the PMLA Act?

Section 3 of PMLA, 2002 defines it as “Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is involved **in any process or activity connected with the proceeds of crime** including its concealment, possession, acquisition or use or projecting or claiming it as untainted property shall be guilty of the offense of money-laundering.”

### Who is a Reporting Entity (RE)?

Reporting Entity means an *entity defined u/s 2 (1) (wa) of the PMLA Act 2002 and includes* a banking company, financial institution, intermediary, or a person carrying on a designated business or profession like Inspector General of Registration, Real Estate Agent, Persons carrying on activities for playing games of chance/casinos or as notified by the Central Government, are all Reporting Entity.



# Understanding of a few provisions of the PMLA Act and Rules

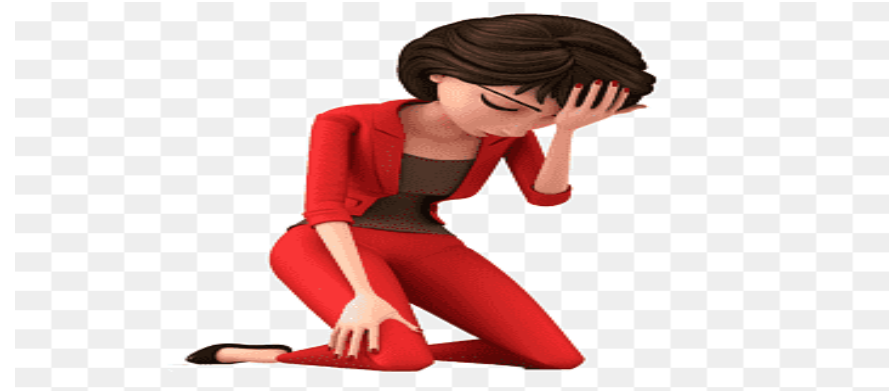
## PML Maintenance of Records Rules, 2005

The Rules Defines Designated Director, Designated Officer, Non-Profit Organization, Principal Officer, Transaction, and Suspicious Transaction.

The Rules further provide for

- Maintenance of records of transactions,
- Manner of maintaining information
- Manner of providing information to the Officer appointed by CG
- Details for KYC
- Client Due Diligence
- Appoint a Designated Director and Principal Officer and report to FIU-IND

## Background for certain amendments



### Chinese App scam

Some professionals assisted in setting up shell companies for this app.

These professionals used their office addresses to register these shell companies and even became directors, with some having access to their bank accounts.

Now professionals are required to perform due diligence on their clients' ownership, financial status, and source of funds, as well as document the transaction's purpose.

## PMLA Act and Rules

Notification dated May 03, 2023



On May 03, 2023, the Finance Ministry notified changes in the Prevention of Money Laundering Act, 2002 (“PMLA”) and extended it to **certain activities and certain professions** like Chartered Accountants/ Cost Accountants/ Company Secretaries who provide certain financial transactions on behalf of their clients in the course of their profession.

## Reporting Entities after amendment dt 03 May 2023

Before amendment, Following were under ambit of PMLA as Reporting Entities



- Banking Companies,
- Financial institution,
- Intermediaries
- Person carrying on activities for playing games of chance for cash or kind including casino;
- Inspector-General of Registration,
- Real Estate Agent,
- Dealer in precious metals, precious stones,
- Person engaged in safekeeping and administration of cash and liquid securities on behalf of other persons

After amendment, it now also covers following:



Now also includes

- Chartered Accountants, Company Secretaries, and Cost Accountants If they carry out **financial transactions** on behalf of their client **in relation to certain specified activities**.

**does not include lawyers and legal professionals.**

## Type of activities covered to trigger to be RE as per Notfn dt 03 May 2023

following 5 activities relating to the financial transactions that are carried out by the CA/ CS/ CWA on behalf of his/ her client in the course of his/ her profession

buying and selling of any *immovable property*;

*managing of client monies* securities or other assets

*management of the bank,* savings, or securities accounts

organization of contributions for the *creation, operation, or management* of companies;

*creation, operation, or management of companies, LLP or trusts, and buying and selling of business entities.*

**Creation means the incorporation of Company/ LLP**  
**Buying and Selling of Business entities means involve in transaction of change in Control**

## Notification dt 09 May 2023

### Type of activities covered to trigger to be RE

**Notification dated May 09, 2023**, further broadened the scope of the PMLA and has brought within the ambit certain activities when carried out in the course of business on behalf of or for another person.

These include:

1. acting as a *formation agent* of companies and LLPs;-- Not defined term
2. acting as (or arranging for another person to act as) a *director or secretary* of a company, a *partner* of a firm, or a similar position in relation to other companies or LLPs;
3. providing a *registered office, business address or accommodation*, correspondence or administrative address for a company, LLP, or trust;
4. acting as (or arranging for another person to act as) *a trustee* of an express trust or performing the equivalent function for another type of trust; and
5. acting as (or arranging for another person to act as) a *nominee shareholder* for another person.

There is no threshold value prescribed for such activities

## Notification 09 May 2023 --- Excluded Activities

Activities that is carried on by an Advocate, CA, CS, or CWA in practice, who are *engaged in the formation of a company to the extent of filing a declaration of compliance of the law for registration of the company* (LLP not covered)

Activities carried out **by employees** on behalf of their employer

Activities carried out under **lease or sub-lease or tenancy agreement** where the consideration is subject to a deduction of income tax

Activities by **an Intermediary** under PMLA like Stock Broker, Recognised Stock Exchange or other Registered Intermediaries

## SRBs and FIU-IND

### To whom the information needs to be submitted?

For Chartered Accountants/ Cost Accountants/ Company Secretaries - **their respective Institute are Statutory Regulatory Bodies (SRB) through which they shall file prescribed reports with FIU-IND**

The *Financial Intelligence Unit of India* (FIU-IND) is the central coordinating agency responsible for receiving, processing, analyzing, and disseminating information relating to reportable transactions.

FIU collects information from various Reporting Entity (RE) in the form of Reports.



## Obligation to Report to SRB by RE

Chartered Accountants/ Cost Accountants/ Company Secretaries as a Reporting Entity (RE) are required to, where they have reasonable grounds to suspect that funds are the proceeds of crime or are related to Money Laundering (ML), Terrorism Financing (TF), and Proliferation Financing (PF), report their suspicions promptly to Statutory Regulatory Bodies (SRBs) in the form of **Suspicious Transaction Reports**, as well as other reportable transactions in pursuance of PMLA and PMLR.

RE to **evolve an internal mechanism** to detect transactions related to cash, transactions with NGOs, suspicious transactions, cross-border transactions, and transactions related to immovable property, etc.

**AML (Anti-Money Laundering ) & CFT ( Countering the Financing of Terrorism) Guidelines  
issued by FIU wef 19 June 2023  
For Professionals with Certificates of Practice from ICAI, ICSI and ICMAI**

The Guideline gave the summary of legal provisions of anti-money laundering, counter-terrorism financing, and proliferation financing legislations in India, viz.

1. The Prevention of Money Laundering Act, 2002 (hereinafter referred to as the “PMLA”),
2. The Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the “UAPA”),
3. The Weapons of Mass Destruction and Delivery Systems (Prohibition of Unlawful Activities) Act, 2005 (hereinafter referred to as the “WMDA”)

and rules/notifications thereunder and to lay down steps that a Relevant Person carrying out certain financial transactions, on behalf of their clients needs to take.

## ICSI Circular dt October 11, 2023

On October 11, 2023, ICSI issued a Circular/ Notice to all the members holding a Certificate of Practice and falling within the definition of **Reporting Entity** under the PMLA and are requested to register themselves by filling in their details in the form within seven (7) days

- [PMLA\\_AIIPCS11102023.pdf \(icsi.edu\)](#)
- [AMLCFTguidelines04072023.pdf \(fiuindia.gov.in\)](#)

## Is it worrisome for PCS

### PCS is made Reporting Entity only when:

1. There is a **financial transaction** carried out by;
2. A **Company Secretary in Practice**;
3. On behalf of **his/her client**;
4. In relation to **Notified activities**

The word “**financial transactions**” refers to the use of money – for instance, capital contribution, deployment of funds into properties, capital market, sourcing of funds, etc.

Professionals carrying out such financial transactions may face penalties for non-compliance with the PMLA, such as *fin****es, imprisonment, cancellation of license***, etc.

## Obligations

As a designated service provider one must guarantee that he has a stringent AML policy in place.

- **Policies, practices, and controls** relating to money laundering and terrorism financing.
- **Employee training**
- **Transaction monitoring**, with a focus on high-risk accounts; consumer identity verification; customer profiling utilizing risk categorization; and regular customer reviews.
- A well-managed AML program has **adequate systems and controls**, role-divided tasks, and training, among other things.
- **Internal audits** to monitor, investigate, and confirm compliance with anti-money laundering and countering financing of terrorism policies and procedures.
- Hiring a **Compliance Officer** with the necessary credentials to oversee the AML program.
- Communicate the name of the **Designated Director and Principal Officer** to the Director of FIU IND
- **Reporting** and documentation

## What are the internal policies, procedures, and controls that Relevant Persons should implement?

PCs as RE shall develop internal policies and procedures related to:

1. Policies and procedures for prevention of ML, TF, and PF
2. Policies and procedures for dealing with risks related to ML, TF, and PF
3. Policy and procedure for KYC
4. Undertake Client Due Diligence (CDD) measures-wrt Financial transactions
5. Customer Risk Profiling
6. Adopt Customer Acceptance Policies.
7. Customer Transaction Monitoring
8. Suspicious Transaction Monitoring and identification of the Red Flags indicators in the financial transactions
9. Reporting of Designated Director / Principal officer and branch-level compliance officer.
10. Documentation and Preservation of records, etc.
11. Procedure for Employee Training Program

These policies should comply with legal and regulatory requirements and guidance issued by competent authorities and **Statutory Regulatory Bodies (SRBs)** and shall be reviewed periodically to ensure their alignment with the same.

## Obligations on Professionals

The Amendment requires the professionals to comply with the following obligations:

1. *Registration* with the statutory body -ICSI / ICAI/ ICWA—as Statutory Regulatory Bodies (SRB) to verify the practicing status of the RE and forward the same information and report to FIU-IND.
2. *Framing the policies and procedures* within a firm related to client KYC, client acceptance, client risk profiling, monitoring of transactions, maintenance of records, and furnishing information to FIU- IND through SRB in the form of various reports such as:
  - i. Cash Transaction Report (CTR)
  - ii. Suspicious Transaction Report (STR)
  - iii. Wireless transfer Transaction Report (WTR)
  - iv. Not-for-profit organization Transaction Report (NTR)
3. To comply with these *obligations FIU-IND* has issued guidelines that should be referred to.

## General Obligations of RE

1. Reporting of Reportable Transactions
2. Policies and Procedures to Combat AML/CFT/CPF Program & its Periodic Review
3. Internal Policies, Procedures and controls to be implemented
4. Registration of Reporting Entities, appointment of Designated Director and Principal Officer
5. Training to Employees including Screen procedure before hiring employees
6. Period review of Policies, Procedures and controls
7. Robust mechanisms in place for complying with KYC requirements
8. Client Due Diligence (CDD) Norms
9. Enhanced Due Diligence (EDD) Norms
10. Enhanced Due Diligence (EDD) wrt to high-risk jurisdictions/ persons/ entities
11. Enhanced monitoring and sanctions screening while performing notified activities
12. Counterparty Screening
13. Prohibition on Tipping-off
14. Maintenance of Records
15. Risk Assessment



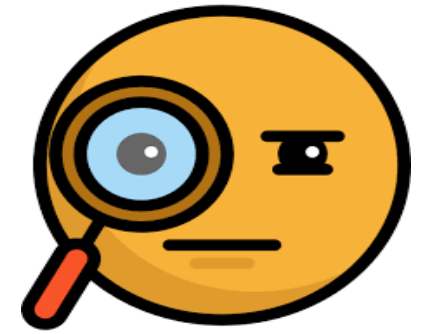
# Suspicious Transactions

## Rule 2(1)(g) of PMLA-2002 defines suspicious transactions

A transaction whether or not made in cash which, to a person acting in good faith-

- (a) gives rise to a reasonable ground of suspicion that it may involve the proceeds of crime regardless of the value involved ;
- (b) appears to be made in circumstances of unusual or unjustified complexity;
- (c) appears to have no economic rationale or bonafide purpose ;
- (d) Gives rise to a reasonable ground of suspicion that it may involve financing of activities relating to terrorism.

## Suspicious Transactions



1. Loans that have been granted without proper due diligence being carried out or without appropriate collaterals, guarantees, securities, a commercial rate of interest, or a repayment period.
2. Issue of a power of attorney to various individuals, especially those quite wide and general.
3. A large amount of cash is deposited in smaller portions or at once and sometimes in the dormant accounts.
4. Unexplained payments from a third party.
5. Use of multiple or foreign accounts
6. Transactions inconsistent with the customer's business profile
7. Deposit or transfer of funds without any specific justification
8. Any customer for whom you cannot determine the true Ultimate Beneficial Owner
9. Payment from countries considered high risk for money laundering or terrorist financing
10. Frequent Changes in – Name of Company, Directors, Guarantors

## Restriction to carry out transactions with



ICSI has advised its members not to enter into a transaction with organizations or individuals, **banned by the Government of India** and the link to review such details is below

[Ministry of Home Affairs | Government of India \(mha.gov.in\)](https://mha.gov.in)

## Certain examples of Reporting Entity

### Excluded

- Insolvency Professional, Liquidator
- Nominee Directors or Independent Directors
- Charging Professional Fees and Receiving Money for Client Payments for Govt or Legal Dues Not Considered as Financial Transactions

### Included

- Carrying out Financial Transaction on behalf of the Client
- Having Power of Attorney
- Project Financing or Recovery consultant of Banks
- Acting as an Executor of wills, if client relationship is established

## Notification dt 17 October 2023 Ministry of Finance

Notified the Prevention of Money Laundering (Maintenance of Records) 3<sup>rd</sup> Amendment Rules, 2023.

1. Implementation of policies by groups- Group-wise programs and sharing of information
2. Reporting transactions immediately -by fax or email
3. Keeping such reporting confidential
4. Client Due Diligence- Threshold limit of an amount exceeding 50,000/-

## Vigilant Professional

Company Secretaries play a crucial role and hence they need to be vigilant and **adopt robust compliance frameworks** to address emerging challenges.

Policies, KYC, DD, EDD, Employee Training, and **proactive measures** are essential for the successful implementation of PMLA provisions.

This proactive approach not only ensures adherence to anti-money laundering standards but also contributes significantly to the **global effort against financial crimes.**

## No fear – just be vigilant



We as a professional are **Gatekeeper and need to be more vigilant**, take utmost care, adhere to professional standards, and follow policies and procedure



**Amita Desai & Co.**  
***Company Secretaries***

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