

COMPANIES ACT, 2013

**PROSPECTUS
AND
ALLOTMENT
OF
SECURITIES**



**THE INSTITUTE OF
Company Secretaries of India**
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

PROSPECTUS AND ALLOTMENT OF SECURITIES

1. INTRODUCTION

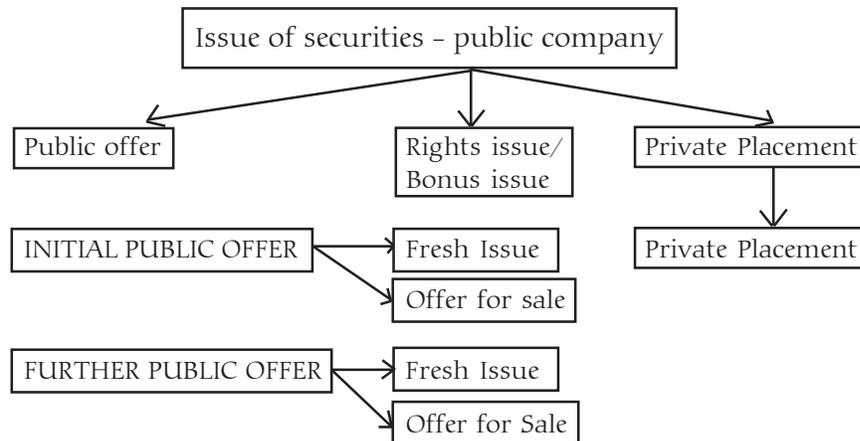
Financial markets have an important relationship with economic development. A company decides to issue securities for different reasons; the main reason being raising capital to meet its financial requirements may be for starting a venture, repaying debts, expansion and diversification. This actually reflects indulgence of enormous investor wealth for the sublime reason of economic development. This economic dependence of the corporate sector is a compelling rationale for an orderly regulated environment that boosts investor confidence and assures conformity with prescribed norms. It helps in creating conducive ownership base and wide capacities to create an impact on the national economy. When an investor buys securities he is enabling the company to carry on its business using those funds.

In India a company planning to issue securities shall abide by relevant provisions of

- (a) Securities Contracts (Regulation) Act, 1956,
- (b) Securities Contracts (Regulation) Rules, 1957,
- (c) Companies Act, 2013 (hereinafter referred to as the Act) and The Companies (Prospectus and Allotment of Securities) Rules, 2014,
- (d) Securities and Exchange Board of India Act, 1992 and the rules and regulations made there under.

2. OVERVIEW OF ISSUE OF SECURITIES

Primarily, issues can be classified as a Public, Rights or preferential issues (also known as private placements). While public and rights issues involve a detailed procedure, private placements or preferential issues are relatively simpler.



Chapter III of the Act deals with “Prospectus and allotment of securities”, the chapter is divided into two parts, Part I deals with Public Offer and Part II deals with Private Placement.

Section 23 of the Act provides that a company whether public or private may issue securities. A public company may issue securities:

- (a) to public through prospectus ("public offer") by complying with the provisions of Part I of Chapter III of the Act; or
- (b) through private placement by complying with the provisions of Part II of Chapter III of the Act; or
- (c) 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 SEBI Act, 1992 and the rules and regulations made thereunder.

For a private company the section provides that 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 Chapter III of the Act.

The section deals with issue of securities, which is a wider term not restricted to equity, preference or debentures. Securities has been defined under section 2(81) to mean the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956. The relevant section says that 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 investments issued by any collective investment scheme to the investors in such schemes;
- (ii) Government securities;
- (iia) such other instruments as may be declared by the Central Government to be securities; and
- (iii) rights or interest in securities.

A public company may issue any of the aforesaid securities by way of a public offer or rights/ bonus issue or private placement. Public Offer here includes initial public offer (IPO) or further public offer (FPO) of securities to the public by a company, or an offer for sale (OFS) of securities to the public by an existing shareholder, through issue of a prospectus.

To increase the accountability of companies and enhance protection to small investors the term private placement has been defined for the first time in the Act. Explanation II to Section 42 defines private placement so as to mean any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in this section.

3. GOVERNING LAWS

Issue of Securities is governed in the following manner:

In the case of a Public Company, which is a listed entity or is desirous of listing its securities on a recognized stock exchange in India, the issue of securities is governed by the Companies Act, Securities Contract Regulation Act, 1956, the SEBI Act, 1992 and the Issue of Capital and Disclosure Requirements (Regulations), 2009.

In the case of all issues by Private Companies, the same is governed by the Companies Act and the power of administration is exercised by the Central Government, the Tribunal or the Registrar of Companies as the case may be.

Section 24 of the Act empowers the Securities Exchange Board of India ('SEBI') to regulate the matters relating to issue and transfer of securities and non-payment of dividend by listed companies or those companies which intend to get their securities listed. All powers relating to prospectus, return of allotment, redemption of preference shares

and any other matter specifically provided in the Act shall be exercised by the Central Government, the tribunal or the Registrar of Companies as the case may be. Further the power relating to forward dealing and insider trading has been delegated to SEBI for listed companies or the companies which intend to get their securities listed.

4 PROSPECTUS

In general parlance prospectus refers to an information booklet or offer document on the basis of which an investor invests in the securities of an issuer company. It has been defined under section 2(70) so as to mean 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 a body corporate.

Red herring Prospectus under Explanation to section 32 has been referred to mean a prospectus which does not include complete particulars of the quantum or price of the securities included therein.

Shelf Prospectus under Explanation to section 31 has been referred to mean a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus.

The definition clarifies that any notice, circular, advertisement or any other document inviting offers from public for the subscription or purchase of securities shall be included in the definition of Prospectus.

MATTERS TO BE STATED IN PROSPECTUS

According to section 26(1) of the Act read with Companies (Prospectus and Allotment of Securities) Rules, 2014 (hereinafter referred to as "Rules"), the following are the matters to be included in a prospectus:

- (i) Names and addresses of the registered office of the company, Company Secretary, Chief Financial Officer, auditors, legal advisers, bankers, trustees, if any, underwriters and such other persons as may be prescribed.

The rules provide that the names, addresses and contact details of the corporate office of the issuer company, compliance officer of the issuer company, merchant bankers and co-managers to the issue, registrar to the issue, bankers to the issue, stock brokers to the issue, credit rating agency

for the issue, arrangers, if any, of the instrument, names and addresses of such other persons as may be specified by the Securities and Exchange Board in its regulations shall be included in prospectus.

- (ii) Dates of the opening and closing of the issue, and declaration about the issue of allotment letters and refunds within the prescribed time;

The rules clearly specify that the dates of opening and closing of the issue shall be prominently disclosed. Further the rules provide that the Board or the Committee authorized thereof shall make a declaration in the prospectus that the allotment letters shall be issued or application money shall be refunded within fifteen days from the closure of the issue or such lesser time as may be specified by SEBI or else the application money shall be refunded to the applicants forthwith, failing which interest shall be due to be paid to the applicants at the rate of fifteen per cent per annum for the delayed period.

- (iii) A statement by the Board of Directors about the separate bank account where all monies received out of the issue are to be transferred and disclosure of details of all monies including utilised and unutilised monies out of the previous issue in the prescribed manner.

The rules specify that the a statement shall be given by the Board of directors that all monies received out of the issue shall be transferred to a separate bank account maintained with a Scheduled Bank.

Section 2(80) of the Act "scheduled bank" means the scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934. The referred section enumerates a list of scheduled banks under second schedule of the Reserve Bank of India Act, 1934.

Further the aforesaid rules provide that the details of all utilized and unutilised monies out of the monies collected in the previous issue made by way of public offer shall be disclosed and continued to be disclosed in the balance sheet till the time any part of the proceeds of such previous issue remains unutilized indicating the purpose for which such monies have been utilized, and the securities or other forms of financial assets in which such unutilized monies have been invested.

- (iv) Details about underwriting of the issue.

As per the rules, the details about underwriting of the issue shall include the names, addresses, telephone numbers, fax numbers and e-mail addresses of the underwriters and the amount underwritten by them.

- (v) Consent of the directors, auditors, bankers to the issue, expert's opinion, if any, and of such other persons, as may be prescribed.

As per the rules, the consent of trustees, solicitors or advocates, merchant bankers to the issue, registrar to the issue, lenders and experts shall also be included in prospectus.

- (vi) The authority for the issue and the details of the resolution passed therefor.

- (vii) Procedure and time schedule for allotment and issue of securities.

- (viii) Capital structure of the company in the prescribed manner.

As per the rules, capital structure of the company shall be presented in the following manner:

- (i) (a) the authorised, issued, subscribed and paid up capital (number of securities, description and aggregate nominal value);
(b) the size of the present issue;
(c) the paid up capital-
(A) after the issue;
(B) after conversion of convertible instruments (if applicable);
(d) the share premium account (before and after the issue);
- (ii) The details of the existing share capital of the issuer company in a tabular form, indicating therein with regard to each allotment, the date of allotment, the number of shares allotted, the face value of the shares allotted, the price and the form of consideration.

In the case of an initial public offer of an existing company, the details regarding individual allotment shall be given from the date of incorporation of the issuer and in the case of a listed issuer company the details shall be given for five years immediately preceding the date of filing of the prospectus.

The issuer company shall also disclose the number and price at which each of the allotments were made in the last two years preceding the date of the prospectus separately indicating the allotments made for considerations other than cash and the details of the consideration in each case.

- (iii) main objects of public offer, terms of the present issue and such other particulars as may be prescribed.

As per the rules the prospectus to be issued shall contain the following particulars, namely: -

- (a) the objects of the issue;
- (b) the purpose for which there is a requirement of funds;
- (c) the funding plan (means of finance);
- (d) the summary of the project appraisal report (if any);
- (e) the schedule of implementation of the project;
- (f) the interim use of funds, if any

- (x) main objects and present business of the company and its location, schedule of implementation of the project.

- (xi) particulars relating to—

- a. management perception of risk factors specific to the project;
- b. gestation period of the project;
- c. extent of progress made in the project;
- d. deadlines for completion of the project; and
- e. any litigation or legal action pending or taken by a Government Department or a statutory body during the last five years immediately preceding the year of the issue of prospectus against the promoter of the company.

The rules with respect to sub part (e) states that the prospectus to be issued shall contain the following details and disclosures, namely:-

- (i) the details of any litigation or legal action pending or taken by any Ministry or Department of the Government or a statutory authority against any promoter of the issuer company during the last five years immediately preceding the year of the issue of the

prospectus and any direction issued by such Ministry or Department or statutory authority upon conclusion of such litigation or legal action shall be disclosed;

- (ii) the details of pending litigation involving the issuer, promoter, director, subsidiaries, group companies or any other person, whose outcome could have material adverse effect on the position of the issuer;
 - (iii) the details of pending proceedings initiated against the issuer company for economic offences;
 - (iv) the details of default and non-payment of statutory dues etc.
- (xii) minimum subscription, amount payable by way of premium, issue of shares otherwise than on cash.
 - (xiii) details of directors including their appointments and remuneration, and such particulars of the nature and extent of their interests in the company as may be prescribed.

As per the rules the details of directors including their appointment and remuneration, and particulars of the nature and extent of their interests in the company shall be disclosed in the following manner, namely:-

- (i) the name, designation, Director Identification Number (DIN), age, address, period of directorship, details of other directorships;
- (ii) the remuneration payable or paid to the director by the issuer company, its subsidiary and associate company; shareholding of the director in the company including any stock options; shareholding in subsidiaries and associate companies; appointment of any relatives to an office or place of profit;
- (iii) the full particulars of the nature and extent of interest, if any, of every director:
 - (a) in the promotion of the issuer company; or
 - (b) in any immovable property acquired by the issuer company in the two years preceding the date of the Prospectus or any immovable property proposed to be acquired by it.

- (iv) where the interest of such a director consists in being a member of a firm or company, the nature and extent of his interest in the firm or company, with a statement of all sums paid or agreed to be paid to him or to the firm or company in cash or shares or otherwise by any person either to induce him to become, or to help him qualify as a director, or otherwise for services rendered by him or by the firm or company, in connection with the promotion or formation of the issuer company shall be disclosed.
- (xiv) disclosures in such manner as may be prescribed about sources of promoter's contribution;

As per the rules the sources of promoters' contribution, if any, shall be disclosed in the following manner, namely:-

- (i) the total shareholding of the promoters, clearly stating the name of the promoter, nature of issue, date of allotment, number of shares, face value, issue price or consideration, source of funds contributed, date when the shares were made fully paid up, percentage of the total pre and post issue capital;
- (ii) the proceeds out of the sale of shares of the company and shares of its subsidiary companies previously held by each of the promoters;
- (iii) the disclosure for sources of promoters contribution shall also include the particulars of name, address and the amount so raised as loan, financial assistance etc, if any, by promoters for making such contributions and in case of own sources, complete details thereof.

The Prospectus shall also contain the following reports for the purpose of financial information:

- i. Reports by the auditors of the company with respect to its profits and losses and assets and liabilities and such other matters as may be prescribed.

The rules under the prescribed power provide that

- (a) reports by the auditors with respect to profits and losses and assets and liabilities shall also include the amounts or rates of dividends, if any, paid by the issuer company in respect of each class of shares for each of the five financial

years immediately preceding the year of issue of the prospectus, giving particulars of each class of shares on which such dividends have been paid and particulars of the cases in which no dividends have been paid in respect of any class of shares for any of those years; and

- (b) if no accounts have been made up in respect of any part of the period of five years ending on a date three months before the issue of the prospectus, a statement of that fact accompanied by a statement of the accounts of the issuer company in respect of that part of the said period up to a date not earlier than six months of the date of issue of the prospectus indicating the profit or loss for that period and assets and liabilities position as at the end of that period together with a certificate from the auditors that such accounts have been examined and found correct and the said statement may indicate the nature of provision or adjustments made or which are yet to be made.
- ii. reports relating to profits and losses for each of the five financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries and in such manner as may be prescribed:

Provided that in case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out in such manner as may be prescribed, the reports relating to profits and losses for each of the financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries;

The rules under the prescribed power provides reports relating to profits and losses for each of the five financial years or where five financial years have not expired, for each of the financial year immediately preceding the financial year of the issue of the prospectus shall:

- (a) if the company has no subsidiaries, so far as regards its profits and losses, deal separately with the profits or losses of the company (distinguishing items of a non-recurring nature) for each of the five financial years immediately preceding the year of the issue of the prospectus; and
- (b) if the company has subsidiaries, deal either -
 - (i) as a whole with the combined profits or losses of its

- subsidiaries, so far as they concern members of the issuer company; or
- (ii) individually with the profits or losses of each subsidiary, so far as they concern members of the issuer company; or
 - (iii) as a whole with the profits or losses of the company, and, so far as they concern members of the issuer company, with the combined profits or losses of its subsidiaries.
- (c) The mode adopted at 'b' above should be specified in the prospectus
- iii. reports made in the prescribed manner by the auditors upon the profits and losses of the business of the company for each of the five financial years immediately preceding the issue and assets and liabilities of its business on the last date to which the accounts of the business were made up, being a date not more than one hundred and eighty days before the issue of the prospectus:

Provided that in case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out in the prescribed manner, the reports made by the auditors upon the profits and losses of the business of the company for all financial years from the date of its incorporation, and assets and liabilities of its business on the last date before the issue of prospectus; and

The rules provide that the reports made by the auditors in respect of the business of the company shall be stated in the prospectus in the manner provided in rules for subsection 26(1) (b)(ii) (above stated).

- iv. reports about the business or transaction to which the proceeds of the securities are to be applied directly or indirectly;

Section 26(1)(c) of the Act provides that the issuer company shall make a declaration in the prospectus 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

Under the empowerment of delegated authority under section 26(1)(d) of the Act, the rules state other information, matters and reports, as under to be stated in the prospectus:

- (1) If the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly –
 - (a) in the purchase of any business; or
 - (b) in the purchase of an interest in any business and by reason of that purchase, or anything to be done in consequence thereof, or in connection therewith; the company will become entitled to an interest as respects either the capital or profits and losses or both, in such business exceeding fifty per cent, thereof; a report made by chartered accountants (who shall be named in the prospectus) upon:
 - (i) the profits or losses of the business for each of the five financial years immediately preceding the date of the issue of the prospectus; and
 - (ii) the assets and liabilities of the business as on the last date to which the accounts of the business were made up, being a date not more than one hundred and twenty days before the date of the issue of the prospectus;
 - (c) In case of purchase or acquisition of any immovable property including indirect acquisition of immovable property for which advances have been paid to even third parties, the following disclosures shall be made-
 - (i) the names, addresses, descriptions and occupations of the vendors;
 - (ii) the amount paid or payable in cash, to the vendor and, where there is more than one separate vendor, or the company is a sub-purchaser, the amount so paid or payable to each vendor, specifying separately the amount, if any, paid or payable for goodwill;
 - (iii) the nature of the title or interest in such property proposed to be acquired by the company;
 - (iv) short particulars of every transaction relating to the property completed within the two preceding years,

in which any vendor of the property to the company or any person who is, or was at the time of the transaction, a promoter, or a director or proposed director of the company had any interest, direct or indirect, specifying the date of transaction and the name of such promoter, director or proposed director and stating the amount payable by or to such vendor, promoter, director or proposed director in respect of the transaction.

- (2) Further the rules provide that a report shall be made by Chartered Accountants (who shall be named in the prospectus) if –
- (i) the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in any manner resulting in the acquisition by the company of shares in any other body corporate; and
 - (ii) by reason of that acquisition or anything to be done in consequence thereof or in connection therewith, that body corporate will become a subsidiary of the company.

Such report prepared by chartered accountant shall be prepared upon:

- (A) the profits or losses of the other body corporate for each of the five financial years immediately preceding the issue of the prospectus; and
- (B) the assets and liabilities of the other body corporate as on the last date to which its accounts were made up.

Further the aforesaid report said report shall:

- (i) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the issuer and what allowance would have fallen to be made, in relation to assets and liabilities so dealt with for holders of other shares, if the issuer had at all material times held the shares to be acquired; and
- (ii) where the other body corporate has subsidiaries,

deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiaries in the manner similar to that of rules pursuant to 26(1) (b)(ii).

- (3) The matters relating to terms and conditions of the term loans including re-scheduling, prepayment, penalty, default.
- (4) The aggregate number of securities of the issuer company and its subsidiary companies purchased or sold by the promoter group and by the directors of the company which is a promoter of the issuer company and by the directors of the issuer company and their relatives within six months immediately preceding the date of filing the prospectus with the Registrar of Companies shall be disclosed.

The term promoter has been defined in section 2(69) so as to mean a person—

- (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
- (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:

Nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity.

- (5) The matters relating to –
 - (A) Material contracts;
 - (B) Other material contracts;
 - (C) Time and place at which the contracts together with documents will be available for inspection from the date of prospectus until the date of closing of subscription list.
- (6) The related party transactions entered during the last five financial years immediately preceding the issue of prospectus as under –
 - (a) all transactions with related parties with respect to

giving of loans or, guarantees, providing securities in connection with loans made, or investments made;

- (b) all other transactions which are material to the issuer company or the related party, or any transactions that are unusual in their nature or conditions, involving goods, services, or tangible or intangible assets, to which the issuer company or any of its parent companies was a party.

The disclosures for related party transactions for the period prior to notification of these rules shall be to the extent of disclosure requirements as per the Companies Act, 1956 and the relevant accounting standards prevailing at the said time.

- (7) The summary of reservations or qualifications or adverse remarks of auditors in the last five financial years immediately preceding the year of issue of prospectus and of their impact on the financial statements and financial position of the company and the corrective steps taken and proposed to be taken by the company for each of the said reservations or qualifications or adverse remarks.
- (8) The details of any inquiry, inspections or investigations initiated or conducted under the Companies Act or any previous companies law in the last five years immediately preceding the year of issue of prospectus in the case of company and all of its subsidiaries; and if there were any prosecutions filed (whether pending or not); fines imposed or compounding of offences done in the last five years immediately preceding the year of the prospectus for the company and all of its subsidiaries.
- (9) The details of acts of material frauds committed against the company in the last five years, if any, and if so, the action taken by the company.
- (10) A fact sheet shall be included at the beginning of the prospectus which shall contain -
 - (a) the type of offer document ("Red Herring Prospectus" or "Shelf Prospectus" or "Prospectus").
 - (b) the name of the issuer company, date and place of its incorporation, its logo, address of its registered office, its telephone number, fax number, details of contact person, website address, e-mail address;

- (c) the names of the promoters of the issuer company;
- (d) the nature, number, price and amount of securities offered and issue size, as may be applicable;
- (e) the aggregate amount proposed to be raised through all the stages of offers of specified securities made through the shelf prospectus;
- (f) the name, logo and address of the registrar to the issue, along with its telephone number, fax number, website address and e-mail address;
- (g) the issue schedule -
 - (i) date of opening of the issue;
 - (ii) date of closing of the issue;
 - (iii) date of earliest closing of the issue, if any.
- (h) the credit rating, if applicable;
- (i) all the grades obtained for the initial public offer;
- (j) the name(s) of the recognised stock exchanges where the securities are proposed to be listed;
- (k) the details about eligible investors;
- (l) coupon rate, coupon payment frequency, redemption date, redemption amount and details of debenture trustee in case of debt securities.

In case of companies which have not completed five years, it shall be sufficient compliance for a company which has not completed five years, if such company provides such particulars or information for all the previous years since its incorporation.

Sub-section(2) of Section 26 provides that nothing aforesaid (i.e. provisions of section 26(1)) shall apply under following circumstances:

- (a) Where a prospectus or form of application relating to shares in or debentures of the company is issued to existing members or debenture-holders of a company, whether an applicant has a right to renounce the shares or not under section 62 sub-section (1) clause (a) sub-clause (ii) in favour of any other person; or;
- (b) Where 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.

Statement by Experts

A prospectus issued by public company 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. Such statement shall be included only when such expert 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. A statement to that effect shall be included in the prospectus.

Dating & Signing and Registration of Prospectus

According to Section 26(1) of the Act, 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. The date indicated in the prospectus shall be deemed to be the date of its publication. The prospectus shall be signed by every person who is named therein as a director or proposed director of the Company or by his duly authorised attorney.

Prospectus shall be issued by or on behalf of a company or in relation to an intended company only when it has been delivered to the Registrar for Registration a copy of signed prospectus on or before the date of its publication. The Registrar shall not register a prospectus unless the requirements 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.

Prospectus is to be issued within ninety days from the date of delivery of prospectus to the Registrar. 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.

Penalty for non- compliance of Section 26

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.

5 SHELF PROSPECTUS

Shelf Prospectus means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus. In simple terms Shelf Prospectus is a single prospectus for multiple public. Issuer is permitted to offer and sell securities to the public without a separate prospectus for each act of offering for a certain period.

Under the Act any class or classes of companies, as the Securities and Exchange Board (SEBI) may provide by regulations in this behalf, may file a shelf prospectus with the Registrar. Such prospectus is to be submitted at the stage of the first offer of securities which shall indicate a period not exceeding one year as the period of validity of such prospectus. The validity period shall commence from the date of opening of the first offer of securities under that prospectus, and in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required.

An information memorandum is required to be filed by a company filing a shelf prospectus which shall contain all material facts relating to

- new charges created,
- changes in the financial position of the company as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer of securities, and
- such other changes as may be prescribed,

with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus. According to the rules the information memorandum shall be prepared in Form PAS-2 and filed with the Registrar along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 within one month prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

The section also provides a benefitting provision for the investors, the proviso provides that where a company or any other person has received applications for the allotment of securities along with advance payments of subscription before the making of any such change, the company or other person shall intimate the changes to such applicants and if they express a desire to withdraw their application, the company

or other person shall refund all the monies received as subscription within fifteen days thereof.

Form PAS-2 significantly provides for following information to be disclosed:

1. Change in financial position of the company
2. Changes in the Share Capital, i.e. Capitalization Statement
3. Changes in accounting policies
4. Change in the risk factors as stated in the Shelf Prospectus and in the information memorandum filed with respect to previous offer)
5. Economic changes that may affect income from continuing operations
6. Any significant changes in the activities of the company, which may have a material effect on the profit/loss of the company, including the loss of agencies or markets and similar factors
7. Changes in the total turnover of each major industry segment in which the issuer operates
8. Any significant legal proceedings initiated by the company or against the company or its directors, the outcome of which could have an adverse impact on the company
9. Any significant claim made by any person or any authority against the company
10. Any significant change in the business environment of the company whether technological, financial, market related, government policy or otherwise, adversely affecting, in present or in future, the business of the company
11. Any significant change in the management or ownership of the company
12. Any other change which may reasonably influence the investment decision of an investor
13. Gist of details of Proposed objects with reference to the current offering including project plan, financial details, time period of meeting the objects and other relevant factors.
14. Date wise details of charges created on the assets / properties of the company since first offer or previous offer of securities-
 - a. Date of creation of charge

- b. Purpose for which charge has been created
- c. Amount for which charge has been created
- d. Period of charge
- e. Details of assets / property on which charge has been created
- f. Name of the charge holder
- g. Brief terms and conditions of the charge.

Where an information memorandum is filed, every time an offer of securities is made such memorandum together with the shelf prospectus shall be deemed to be a prospectus.

6 RED HERRING PROSPECTUS

Red herring Prospectus means a prospectus which does not include complete particulars of the quantum or price of the securities included therein. In simple terms a red herring prospectus contains most of the information pertaining to the company's operations and prospects, but does not include key details of the issue such as its price and the number of shares offered.

According to section 32 a company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus. Such company proposing to issue a red herring prospectus shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer.

A red herring prospectus shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus.

Upon the closing of the offer of securities under this section, the prospectus stating therein the total capital raised, whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board.

7 ABRIDGED PROSPECTUS

According to section 2(1) of the Act "abridged prospectus" means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf.

Section 33 of the Act provides that no form of application for the purchase of any of the securities of a company shall be issued unless such form is accompanied by an abridged prospectus. A copy of the prospectus shall, on a request being made by any person before the closing of the subscription list and the offer, be furnished to him.

Nothing aforesaid shall apply if it is shown that the form of application was issued—

- (a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to such securities; or
- (b) in relation to securities which were not offered to the public.

The penal provisions provide that a company which makes any default in complying with the provisions shall be liable to a penalty of fifty thousand rupees for each default.

8 OFFER FOR SALE

Public Offer includes or an offer for sale (OFS) of securities to the public by an existing shareholder, through issue of a prospectus.

Under section 25 of the Act 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. In simple terms any document by which the offer or sale of shares or debentures to public is made shall for all purposes be treated as prospectus. The document "Offer for sale" is an invitation to the general public to purchase the shares of a company through an intermediary, such as an issuing house or a merchant bank. A company may allot or agree to allot any shares or debentures to an "Issue house" without there being any intention on the part of the company to make shares or debentures available directly to the public through issue of prospectus. The issue house in turn makes an "Offer for sale" to the public.

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 to Offer for sale. Following additional information to the matters required 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;

According to the section in order to construe "Offer for Sale" either of the following conditions needs to be fulfilled:

- (a) "Offer for sale" to the public was made within six months after the allotment or agreement to allot; or
- (b) 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.

As for the signing of the Prospectus the section provides that where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the Offer document is signed on behalf of the company by two directors of the company and in case of a firm by not less than one-half of the partners in the firm, as the case may be.

Offer of sale of shares by certain members of a company

Section 28 of the Act permits certain members of a company, in consultation with Board of directors, to offer the whole or a part of their holdings of shares to the public. The document by which the offer offer of sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company.

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.

The section lays that 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.

The rules in this context provide that the provisions of Part I of Chapter III namely "Prospectus and Allotment of Securities" and rules made there under shall be applicable to an offer of sale referred to in section 28 except for the following, namely:-

- (a) the provisions relating to minimum subscription;
- (b) the provisions for minimum application value;

- (c) the provisions requiring any statement to be made by the Board of directors in respect of the utilization of money; and
- (d) any other provision or information which cannot be compiled or gathered by the offeror, with detailed justifications for not being able to comply with such provisions.

Further the rules provide that such offer document or prospectus issued under the section shall disclose the name of the entity bearing the cost of making the offer for sale along with reasons.

9 VARIATION IN TERMS OF CONTRACT OR OBJECTS IN PROSPECTUS

The section aims to protect the interests of those who subscribe to a company's shares and debentures in response to and on faith of a prospectus. Section 27 of the Act provides that 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. The section restrains a company from making any unilateral variations in terms of prospectus.

For the purpose of variation of terms of contract or objects the rules provide that in Prospectus where the company has raised money from public through prospectus and has any unutilized amount out of the money so raised, it shall not vary the terms of contracts referred to in the prospectus or objects for which the prospectus was issued except by passing a special resolution through postal ballot and the notice of the proposed special resolution shall contain the following particulars, namely:-

- (a) the original purpose or object of the Issue;
- (b) the total money raised;
- (c) the money utilised for the objects of the company stated in the prospectus;
- (d) the extent of achievement of proposed objects(that is fifty percent, sixty percent, etc);
- (e) the unutilised amount out of the money so raised through prospectus,
- (f) the particulars of the proposed variation in the terms of

- contracts referred to in the prospectus or objects for which prospectus was issued;
- (g) the reason and justification for seeking variation;
 - (h) the proposed time limit within which the proposed varied objects would be achieved;
 - (i) the clause-wise details as specified in sub-rule (3) of rule 3 as was required with respect to the originally proposed objects of the issue;
 - (j) the risk factors pertaining to the new objects; and
 - (k) the other relevant information which is necessary for the members to take an informed decision on the proposed resolution.

According to the first proviso of the section, the details of the notice in respect the resolution shall also be published in a newspaper (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. According to the rules such advertisement shall be in Form No. PAS-1 and shall be published simultaneously with dispatch of Postal Ballot Notices to Shareholders. The notice shall also be placed on the web-site of the company, if any.

Significant provisions under form PAS-1 are as under:

The details regarding such variation/alteration are as follows-

- 1) Particulars of the terms of the contract to be varied (or objects to be altered)
- 2) Particulars of the proposed variation/alteration
- 3) Reasons/justification for the variation
- 4) Effect of the proposed variation/alteration on the financial position of the company
- 5) Major Risk factors pertaining to the new Objects
- 6) Name of Directors who voted against the proposed variation/alteration

Second provision provides that a company which proposes to vary the terms of contract referred to in prospectus shall not use any amount raised by it through prospectus for buying, trading or otherwise dealing in equity shares of any other listed company.

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. The section protects the minority dissenting shareholders by providing them with an exit opportunity at a price which shall be determined by SEBI by making regulations.

10 ALLOTMENT OF SECURITIES

Section 39 of the Act prohibits allotment of securities where the minimum amount as stated in the prospectus has not been subscribed. The section further provides that for refund within a given time frame. It provides that all of the minimum amount must be 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, if minimum subscription remains unsubscribed it shall be returned within such time and manner as may be prescribed.

The rules provide that where 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. The application money to be refunded shall be credited only to the bank account from which the subscription was remitted.

The section provides that the minimum amount of 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.

A company having a share capital makes any allotment of securities shall file with the Registrar a return of allotment in such prescribed manner. The rules provide that whenever a company having a share capital makes any allotment of its securities, the company shall, within thirty days thereafter, file with the Registrar a return of allotment in Form PAS-3, along with the fee as specified in the Companies (Registration Offices and Fees) Rules, 2014.

The rules further provide for the attachments to Form PAS-3 i.e. return of allotment as under:

- A list of allottees stating their names, address, occupation, if any, and number of securities allotted to each of the allottees.

The list shall be certified by the signatory of the Form PAS-3 being complete and correct as per the records of the company.

- In the case of securities (not being bonus shares) allotted as fully or partly paid up for consideration other than cash, there shall be attached to the Form PAS-3 a copy of the contract, being duly stamped, pursuant to which the securities have been allotted together with any contract of sale if relating to a property or an asset, or a contract for services or other consideration.
- Where a contract such as is mentioned aforesaid is not reduced to writing, the company shall attach to the Form PAS-3 a complete particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing and those particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1899 (2 of 1899), and the Registrar may, as a condition of filing the particulars, require that the stamp duty payable thereon be adjudicated under section 31 of the Indian Stamp Act, 1899.
- A report of a registered valuer in respect of valuation of the consideration other than cash shall also be attached along with the copy of the contract.
- In the case of issue of bonus shares, a copy of the resolution authorizing the issue of such shares shall be attached to the Form PAS-3.
- In case the shares have been issued in pursuance of clause (c) of sub-section (1) of section 62(Rights issue) other than a listed company whose equity shares or convertible preference shares are listed on any recognised stock exchange, there shall be attached to Form PAS-3, the valuation report of the registered valuer.

Significantly, filing of return of allotment is now extended to any allotment of securities and not just shares.

For every default in with respect to refund and return of allotment, 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.

The Act under section 40 prohibits every company making public to llot securities without obtaining permission for the securities to be

dealt with in such stock exchange or exchanges. Where the prospectus states that an application has been made, such prospectus shall also state the name or names of the stock exchange in which the securities shall be dealt with.

All monies received on application from the public for subscription to the securities shall be kept in separate bank account in a scheduled bank. Such money can be utilised only for the following two purposes:

- (a) for adjustment against allotment of securities where the securities have been permitted listing; or
- (b) for the repayment of monies within the time specified by the Securities and Exchange Board, received from applicants in pursuance of the prospectus, where the company is for any other reason unable to allot securities.

The section permits that the company may pay commission to any person in connection with the subscription to its securities subject to such conditions as may be prescribed. The rules provide thus:

A company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to the following conditions, namely: -

- (a) the payment of such commission shall be authorized in the company's articles of association;
- (b) the commission may be paid out of proceeds of the issue or the profit of the company or both;
- (c) the rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent of the price at which the shares are issued or a rate authorised by the articles, whichever is less, and in case of debentures, shall not exceed two and a half per cent of the price at which the debentures are issued, or as specified in the company's articles, whichever is less;
- (d) the prospectus of the company shall disclose –
 - (i) the name of the underwriters;
 - (ii) the rate and amount of the commission payable to the underwriter; and
 - (iii) the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.

- (e) there shall not be paid commission to any underwriter on securities which are not offered to the public for subscription;
- (f) a copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.
 - (iii) the number of the shares or debentures which is to be subscribed by the underwriter absolutely or conditionally.
- (e) No commission shall be paid to any underwriter on shares or debentures which are not offered to the public for subscription.
- (f) a copy of the contract for the payment of the commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

11 DEMATERIALISATION OF SECURITIES

Section 29 of the Act mandates that every company making public offer and such other class or classes of companies as may be prescribed, shall issue the securities only through dematerialised form. Other companies may issue securities in physical or in dematerialised form.

The rules provide that the promoters of every public company making a public offer of any convertible securities may hold such securities only in dematerialised form. The entire holding of convertible securities of the company by the promoters held in physical form up to the date of the initial public offer shall be converted into dematerialised form before such offer is made and thereafter such promoter shareholding shall be held in dematerialized form only.

12 ADVERTISEMENT OF PROSPECTUS

Section 30 of the Act makes it mandatory for an advertisement of any prospectus of a company to specify the contents of memorandum as regards to the objects, the liability of members and the amount of share capital, the names of the signatories and the number of shares subscribed by them and also its capital structure.

13 LIABILITY FOR MIS-STATEMENTS

a. Criminal Liability

Section 34 of the Act states that where a prospectus, issued, circulated or distributed 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 authorizes the issue of such prospectus shall be liable under section 447 of the Act.

As per Section 447 of the -Act any person who is found to be guilty of fraud, 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.

For the purpose of this section,

- (i) "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;
- (ii) "wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled;
- (iii) "wrongful loss" means the loss by unlawful means of property to which the person losing is legally entitled.

This penalty shall however not 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.

b. *Civil Liability*

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 as defined in the Act

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

However, no person shall be liable for any civil liability if he proves 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 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.

Where it is proved that a prospectus has been issued with an intent to defraud the applicants for the securities of a company or any other person or for any fraudulent purpose, every director of the company at the time of the issue of the prospectus, every person who has authorized 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, every, promoter of the company, every person who has authorized the issue of the prospectus and every person who is an expert as defined in the Act 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 a prospectus. (Section 35)

c. Punishment for Fraudulently inducing persons to invest money

Any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into, or to offer to enter into,—

- (a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting securities; or
- (b) any agreement, the purpose or the pretended purpose of which is to secure a profit to any of the parties from the yield of

securities or by reference to fluctuations in the value of securities; or

- (c) any agreement for, or with a view to obtaining credit facilities from any bank or financial institution;

shall be liable for action under section 447 of the Act (The action under Section 447 has already been discussed)

d. *Liabilities for making an Application in a Fictitious Name*

Any person who makes or abets making of an application in a fictitious name to a company for acquiring, or subscribing for, its securities; or makes or abets making of multiple applications to a company in different names or in different combinations of his name or surname for acquiring or subscribing for its securities; or otherwise induces directly or indirectly a company to allot, or register any transfer of, securities to him, or to any other person in a fictitious name, shall be liable for action under section 447 of the Act.

The Act further mandates that this provision be prominently reproduced in every prospectus, abridged prospectus and in every form of application issued by it for securities. If any person is convicted under this Section i.e Section 38, the Court may also order disgorgement of gain, if any, made by, and seizure and disposal of the securities in possession of, such person. The amount received through this disgorgement or disposal of securities shall be credited to the Investor Education and Protection Fund.

e. *Class Action Suits*

Section 37 of the Act provides that 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. This section enables any person, group of persons or any association of persons who have been affected by any misleading statement or the inclusion or omission of any matter in the prospectus to file a suit or initiate any other action under section 34,35 or 36 of he Act.

14 STEPS INVOLVED IN A PUBLIC ISSUE OF SECURITIES

The various steps involved in a public issue of securities are enumerated below:

1. Before proceeding with the issue, it must be ensured that the company meets the general conditions that are required to

be complied with. The general conditions are that no issuer shall make a public issue of securities:

- a. If the Issuer, any of its promoters, promoter group or directors or persons in control of the issuer are debarred from accessing the capital market by SEBI;
 - b. If any of the promoters, directors or persons in control of the issuer was or is a promoter, director or person in control of any other company which is debarred from accessing the capital market under any order or directions made by SEBI;
 - c. If the issuer of convertible debt instruments is in the list of wilful defaulters published by the Reserve Bank of India or it is in default of payment of interest or repayment of principal amount in respect of debt instruments issued by it to the public, if any, for a period of more than six months;
 - d. Unless it has made an application to one or more recognised stock exchanges for listing of specified securities on such stock exchanges and has chosen one of them as a designated stock exchange. Further, in the case of an IPO, the issuer shall make an application for listing of the specified securities in at least one recognized stock exchange having nationwide trading terminals;
 - e. Unless the issuer has entered into an agreement with a depository for dematerialisation of specified securities already issued or proposed to be issued;
 - f. Unless all existing partly paid-up equity shares of the issuer have either been fully paid up or forfeited;
 - g. Unless firm arrangements of finance through verifiable means towards seventy five per cent of the stated means of finance, excluding the amount to be raised through the proposed public issue or through existing identifiable internal accruals must have been made.
2. In case the company would like to issue warrants along with the public issue of securities, the company may do so, provided that the tenure of the warrants shall not exceed 12 months from their date of allotment in the public issue and not more than one warrant shall be attached to one specified security.
 3. The amount earmarked for General Corporate Purposes as mentioned in objects of the issue in the draft offer document

filed with SEBI shall not exceed 25% of the total amount proposed to be raised by the company by issuance of securities.

4. The Issuer Company shall further ensure that the company is eligible to issue the securities. The eligibility criteria for an IPO as stipulated in the SEBI (ICDR) Regulations, are as under:

- a. the company has net tangible assets of at least three crore rupees in each of the preceding three full years (of twelve months each), of which not more than fifty per cent are held in monetary assets:

Provided that if more than fifty per cent of the net tangible assets are held in monetary assets, the issuer has made firm commitments to utilise such excess monetary assets in its business or project; Provided further that the limit of fifty per cent on monetary assets shall not be applicable in case the public offer is made entirely through an offer for sale;

- b. the company has a minimum average pre-tax operating profit of rupees fifteen crore, calculated on a restated and consolidated basis, during the three most profitable years out of the immediately preceding five years;
- c. the company has a net worth of at least one crore rupees in each of the preceding three full years (of twelve months each);
- d. the aggregate of the proposed issue and all previous issues made in the same financial year in terms of issue size does not exceed five times its pre-issue net worth as per the audited balance sheet of the preceding financial year;
- e. if the company has changed its name within the last one year, at least fifty per cent of the revenue for the preceding one full year has been earned by it from the activity indicated by the new name.

If an issuer company does not satisfy the conditions stipulated above, it may still make an IPO if the issue is made through the book-building process and the issuer company undertakes to allot, at least seventy five percent of the net offer to public, to qualified institutional buyers and to refund full subscription money if it fails to make the said minimum allotment to qualified institutional buyers.

- f. The issuer company shall not make an allotment of securities unless the number of prospective investors is atleast 1000 in number;
 - g. The issuer shall make an initial public offer, unless as on the date of registering prospectus or red herring prospectus with the Registrar of Companies, the issuer has obtained grading for the initial public offer from at least one credit rating agency registered with SEBI;
5. An Issuer may make a further public offer if it satisfies the conditions as specified below :
- a. the aggregate of the proposed issue and all previous issues made in the same financial year in terms of issue size does not exceed five times its pre-issue net worth as per the audited balance sheet of the preceding financial year;
 - b. if it has changed its name within the last one year, at least fifty per cent. of the revenue for the preceding one full year has been earned by it from the activity indicated by the new name.

If the Issuer making a further public offer does not satisfy the conditions specified above it may make a further public offer if the issue is made through the book-building process and the issuer undertakes to allot, at least seventy five percent of the net offer to public, to qualified institutional buyers and to refund full subscription money if it fails to make the said minimum allotment to qualified institutional buyers.

6. The Board of Directors of the Company shall consider the project or proposal for which the capital is required to be raised. Necessary resolutions shall be passed for the purpose of convening a General Meeting of the Shareholders.
7. A General Meeting shall be convened by issuing a proper notice and following resolutions needs to be passed:
- a. An Ordinary Resolution for the purpose of increase in Authorised Capital under Section 61 of the Companies Act, 2013, wherever applicable.
 - b. Special Resolution to amend the Memorandum and Articles of Association, with regard to the Authorised Capital, where necessary.
 - c. Special Resolution to issue capital to persons other than

existing holders of equity shares. (Section 62(1)(c) of the Companies Act, 2013).

(The specimen resolutions are given at the end of this section)

8. The company shall proceed to appoint one or more merchant banker, who shall be registered with SEBI at least one of whom shall be a lead merchant banker. In consultation with the merchant banker, the company shall appoint all other intermediaries who shall be registered with SEBI and hold valid registration as at the date of appointment and till conclusion of the public issue.
9. The issuer shall enter into an agreement with the lead merchant banker in the format specified and with other intermediaries as required under the respective regulations applicable to the intermediary concerned:

However such agreements may include such other clauses as the issuer and the intermediary may deem fit without diminishing or limiting in any way the liabilities and obligations of the merchant bankers, other intermediaries and the issuer under the Act, the Securities Contracts (Regulation) Act, 1956, the Depositories Act, 1996 and the rules and regulations made thereunder or any statutory modification or statutory enactment thereof.
10. An issuer shall, in case of an issue made through the book building process, appoint syndicate members and in the case of any other issue, appoint bankers to issue, at all mandatory collection centres as specified and such other collection centres as it may deem fit.
11. The issuer shall appoint a registrar which has connectivity with all the depositories.
12. The Issuer company shall obtain approval from its lenders, i.e. banks and financial institutions, if required before proceeding with the IPO.
13. The Auditors of the company shall be requested to prepare the financials of the company for the last 5 years. In case the company is in existence for less than 5 years, the financials shall be for such period that the company has been in existence. The financials shall be consolidated and restated along with all schedules in accordance with the requirements

specified in the SEBI (ICDR) Regulations, 2009. It must be ensured that the results are not more than 6 months old at the time of filing the offer document with SEBI.

14. The Merchant Bankers shall draft the offer document in accordance with the disclosure requirement laid down in the Companies Act, 2013 and in the SEBI (ICDR) Regulations, 2009. The Draft Offer Document shall be in accordance with Part A of Schedule VIII of the SEBI (ICDR) Regulations, 2009.
15. The Merchant Bankers, after ensuring that the Draft Offer Document is in conformity in all aspects with the Regulations, must file the Draft Offer Document with SEBI along with fees as specified. The Draft Offer Document must be filed along with a Due Diligence Certificate duly signed by the merchant bankers and all the other documents as stipulated in the SEBI (ICDR) Regulations, 2009. The Draft Offer Document must be filed with SEBI at least 30 days prior to registering the prospectus, red herring prospectus or shelf prospectus with the Registrar of Companies as the case may be.
16. The issuer shall obtain in-principle approval from recognised stock exchanges as follows and submit the same with SEBI:
 - (a) in case of an initial public offer, from all the recognised stock exchanges in which the issuer proposes to get its specified securities listed; and
 - (b) in case of a further public offer:
 - i. where the specified securities are listed only on recognised stock exchanges having nationwide trading terminals, from all such stock exchanges;
 - ii. where the specified securities are not listed on any recognised stock exchange having nationwide trading terminals, from all the stock exchanges in which the specified securities of the issuer are proposed to be listed;
 - iii. where the specified securities are listed on recognised stock exchanges having nationwide trading terminals as well as on the recognised stock exchanges not having nationwide trading terminals, from all recognised stock exchanges having nationwide trading terminals.

17. SEBI may specify changes or issue observations, if any, on the draft offer document and if SEBI specifies changes or issues observations on the draft offer document, the issuer and lead merchant banker shall carry out such changes in the draft offer document and comply with the observations issued by SEBI before registering the prospectus, red-herring prospectus or shelf prospectus, as the case may be, with the Registrar of Companies.
18. The issuer shall, simultaneously while registering the prospectus, red herring prospectus or shelf prospectus with the Registrar of Companies or before the opening of the issue, file a copy thereof with SEBI through the lead merchant banker.
19. The lead merchant banker shall, while filing the offer document with SEBI, file a copy of such document with the recognised stock exchanges where the specified securities are proposed to be listed.
20. The offer document filed with SEBI under this regulation shall also be furnished to SEBI in a soft copy in the manner specified.
21. The lead merchant bankers shall also submit a due diligence certificate in the form specified with SEBI at the time of registering the prospectus/red herring prospectus with the Registrar of Companies.
22. The issuer shall, at the time of filing draft offer document with the recognised stock exchange where the specified securities are proposed to be listed, submit the Permanent Account Number, bank account number and passport number of its promoters to such stock exchange.
23. The draft offer document filed with SEBI shall be made public, for comments, if any, for a period of at least twenty one days from the date of such filing, by hosting it on the websites of SEBI, recognised stock exchanges where specified securities are proposed to be listed and merchant bankers associated with the issue.

The lead merchant bankers shall, after expiry of the period stipulated above file with SEBI a statement giving information of the comments received by them or the issuer on the draft offer document during that period and the consequential changes, if any, to be made in the draft offer document.
24. The issuer either on the date of filing the draft offer document with SEBI or on the next day shall make a public

announcement in one English national daily newspaper with wide circulation, one Hindi national daily newspaper with wide circulation and one regional language newspaper with wide circulation at the place where the registered office of the issuer is situated, disclosing to the public the fact of filing of draft offer document with SEBI and inviting the public to give their comments to SEBI in respect of disclosures made in the draft offer document.

25. The Issuer shall after registering the red herring prospectus (in case of a book built issue) or prospectus (in case of fixed price issue) with the Registrar of Companies, make a pre-issue advertisement in one English national daily newspaper with wide circulation, Hindi national daily newspaper with wide circulation and Regional language newspaper with wide circulation at the place where the registered office of the issuer is situated. The Pre issue advertisement shall be in the format and shall contain the disclosures as specified in SEBI (ICDR) Regulations, 2009. The issuer may also issue advertisements for issue opening and issue closing advertisements, which shall be in the formats as specified in SEBI ICDR Regulations.
26. A public issue may be opened either (a) within twelve months from the date of issuance of the observations by SEBI; or (b) within three months of expiry of the period stipulated for specifying changes or issuance of observations, if any, on the draft offer document by SEBI, if SEBI has not issued observations. In case of shelf prospectus, the first issue may be opened within three months of issuance of observations by SEBI.
27. The minimum subscription to be received in an issue shall not be less than ninety per cent of the offer through offer document.
28. The lead merchant bankers shall dispatch the offer document and other issue material including forms for ASBA to the designated stock exchange, syndicate members, underwriters, bankers to the issue, investors' associations and Self Certified Syndicate Banks in advance.
29. The issuer and merchant bankers shall ensure that specified securities are allotted and/or application moneys are refunded within fifteen days from the date of closure of the issue. If the specified securities are not allotted and/or application

moneys are not refunded within the period stipulated, the issuer shall undertake to pay interest at such rate and within such time as disclosed in the offer document.

30. The Issue shall be kept open for at least 3 working days but not more than 10 working days including the days for which the issue is kept open in case of revision in price band. In case the price band in a public issue made through the book building process is revised, the issue period disclosed in the red herring prospectus shall be extended for a minimum period of three working days. A separate bank account shall be opened for the purpose of receipt of subscription monies.
31. Once the public issue closes for subscription, the basis of allotment is finalised and approval is obtained for the same from the stock exchange. After the same, share certificates are printed and despatched or appropriate demat credits are given to the accounts of the share holders. After the same have been completed, the shares are admitted for listing and trading on the stock exchanges.

15 GLOBAL DEPOSITORY RECEIPTS

According to Issue of Foreign Currency Convertible Bonds And Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 "Global Depository Receipts" means any instrument in the form of a depository receipt or certificate (by whatever name it is called) created by the Overseas Depository Bank outside India and issued to non-resident investors against the issue of ordinary shares or Foreign Currency Convertible Bonds of issuing company.

Under section 2(44) of the Act "Global Depository Receipt" means any instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts.

As per the scheme:

- A GDR may be issued for one or more underlying shares or bonds held with the Domestic Custodian Bank.
- When an issuing company issues ordinary shares or bonds under this Scheme, that company shall deliver the ordinary shares or bonds to a Domestic Custodian Bank who will, in terms of agreement, instruct the Overseas Depository Bank to issue GDR or certificate to non-resident investors against the shares or bonds held by the Domestic Custodian Bank.

- A non-resident holder of GDR may transfer those receipts, or may ask the Overseas Depository Bank to redeem those receipts. In the case of redemption, Overseas Depository Bank shall request the Domestic custodian Bank to get the corresponding underlying shares released in favour of the non-resident investor, for being sold directly on behalf of the non-resident, or being transferred in the books of account of the issuing company in the name of non-resident.

According to section 41 of the Companies Act, 2013, Act a company may, after passing a special resolution in its general meeting, issue depository receipts in any foreign country in such manner, and subject to such conditions, as may be prescribed.

The Companies (Issue of Global Depository Receipts) Rules, 2014 rules provide that for the purpose of issue of GDR, unless the context otherwise requires,

- (i) "Scheme" means the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 or any modification or re-enactment thereof;
- (ii) Words and expressions occurring in these rules shall bear the same meaning as in the Act and the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 or any modification or re-enactment thereof.

(A) Eligibility to issue depository receipts

- (a) A company may issue depository receipts provided it is eligible to do so in terms of the Scheme and relevant provisions of Foreign Exchange Management Rules and Regulations.

For the purposes of eligibility for issue of convertible bonds or ordinary shares of issuing company under the scheme:

- An issuing company desirous of raising funds through GDR is required to obtain prior permission of the Department of Economic Affairs, Ministry of Finance, and Government of India.
- An Indian company which has been restrained from accessing the securities market by SEBI will not be eligible to issue GDR.
- Further for unlisted Companies, according to notification issued by RBI in November 2013, "Unlisted

companies shall be allowed to raise capital abroad without the requirement of prior or subsequent listing in India initially for a period of two years subject to the following conditions.

- a. Unlisted companies shall list abroad only on exchanges in International Organization of securities Commissions (IOSCO)/Financial Action Task Force (FATF) compliant jurisdictions or those jurisdictions with which SEBI has signed bilateral agreements;
 - b. The Companies shall file a copy of the return which they submit to the proposed exchange/regulators also to SEBI for the purpose of Prevention of Money Laundering Act, 2002(PMLA). They shall comply with SEBI's disclosure requirements in addition to that of the primary exchange prior to the listing abroad;
 - c. While raising resources abroad, the listing company shall be fully compliant with the FDI Policy in force;
 - d. The capital raised abroad may be utilised for retiring outstanding overseas debt or for operations abroad including for acquisitions;
 - e. In case the funds raised are not utilised abroad as stipulated at (d) above, such companies shall remit the money back to India within 15 days and such money shall be parked only in Authorised Dealer (AD) category banks recognised by RBI and may be used domestically.
- (b) The authorized share capital of the company shall be sufficient for the company to issue new shares underlying depository receipts at the time of conversion of such receipts.

(B) Conditions for issue of depository receipts

- (a) The Board of Directors of the company intending to issue depository receipts shall pass a resolution authorizing the company to do so.
- (b) The company shall take prior approval of its shareholders by a special resolution to be passed at a general meeting or by postal ballot.

- (c) Depository receipts shall be issued by an overseas depository bank appointed by the company and the underlying shares shall be kept in the custody of a domestic custodian bank.
- (d) The company shall ensure that all the applicable provisions of the Scheme and the rules or regulations or guidelines are issued by the Reserve Bank of India are complied with before and after the issue of depository receipts.
- (e) The company shall appoint a merchant banker or a practicing chartered accountant or a practicing cost accountant or a practicing company secretary to oversee all the compliances relating to issue of depository receipts and the compliance report taken from such merchant banker or practicing chartered accountant or practicing cost accountant or practicing company secretary, as the case may be, shall be placed at the meeting of the Board of Directors of the company to be held immediately after closure of all formalities of the issue of depository receipts. The committee of the Board of directors referred to above shall have at least one independent director in case the company is required to have independent directors.

(C) Manner and form of depository receipts

- (a) Depository receipts can be issued by way of public offering or private placement or in any other manner prevalent abroad and may be listed or traded in an overseas listing or trading platform.
- (b) The depository receipts may be issued against issue of new shares or may be sponsored against shares held by shareholders of the company in accordance with such conditions as the Government and / or Reserve Bank of India may specify from time to time.
- (c) The underlying shares shall be allotted in the name of the overseas depository bank and against such shares, the depository receipts shall be issued by the overseas depository bank abroad.

(D) Voting rights

- (a) A holder of depository receipts may become a member of the company and shall be entitled to vote as such only on conversion of the depository receipts into underlying shares

after following the procedure provided in the Scheme and the provisions of this Act.

- (b) Until the conversion of depository receipts, the overseas depository shall be entitled to vote on behalf of the holders of depository receipts in accordance with the provisions of the agreement entered into between the depository, holders of depository receipts and the company in this regard.

(E) Proceeds of issue

The proceeds of issues of depository receipts shall either be remitted to a bank account in India or deposited in an Indian bank operating abroad or any foreign bank (which is a Scheduled Bank under the Reserve Bank of India Act, 1934) having operations in India with an agreement that the foreign bank having operations in India shall take responsibility for furnishing all the information which may be required and in the event of a sponsored issue of Depository Receipts, the proceeds of the sale shall be credited to the respective bank account of the shareholders.

(F) Depository receipts prior to commencement

A company which has issued depository receipts prior to commencement of these rules shall comply with the requirements under this rule within six months of such commencement. Any issue of depository receipts after six months of commencement of these rules shall be in accordance with the requirements of these rules.

(G) Non applicability of certain provisions of the Act

- (1) The provisions of the Act and any rules issued thereunder insofar as they relate to public issue of shares or debentures shall not apply to issue of depository receipts abroad.
- (2) The offer document, by whatever name called and if prepared for the issue of depository receipts, shall not be a prospectus or an offer document within the meaning of this Act and all the provisions as applicable to a prospectus or an offer document shall have no application to a depository receipts offer document.
- (3) Notwithstanding anything contained under section 88 of the Act, until the redemption of depository receipts, the name of the overseas depository bank shall be entered in the Register of Members of the company.

16 PRIVATE PLACEMENT

Part II of Chapter III of the Act deals with Private Placement, the section defines the term "Private Placement" so as to mean any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in this section. A company may make an offer or invitation of securities through issue of a private placement offer letter in Form PAS-4.

The section provides that the offer of securities or invitation to subscribe securities, shall be made to such number of persons not exceeding fifty or such higher number as may be prescribed, (excluding qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option).

"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.

Further the explanation provides that if a company whether listed or unlisted, makes an offer of securities to more than prescribed number of persons whether the payment for the securities or not on any recognised stock exchange in or outside India, the same shall be deemed to be an offer to public and shall be dealt accordingly.

According to Companies (Prospectus and Allotment of Securities) Rules, 2014 a private placement offer letter shall be accompanied by an application form serially numbered and addressed specifically to the person to whom the offer is made and shall be sent to him, either in writing or in electronic mode, within thirty days of recording the names of such persons.

No person other than the person so addressed in the application form shall be allowed to apply through such application form and any application not so received shall be treated as invalid.

Sub rule(2) provides that a company shall not make private placement unless:

- (a) the proposed offer of securities or invitation to subscribe securities has been previously approved by the shareholders of the company, by a Special Resolution, for each of the Offers or Invitations:

The explanatory statement annexed to the notice for the

general meeting the basis or justification for the price (including premium, if any) at which the offer or invitation is being made shall be disclosed.

In case of offer or invitation for non-convertible debentures, it shall be sufficient if the company passes a previous special resolution only once in a year for all the offers or invitation for such debentures during the year.

- (b) such offer or invitation shall be made to not more than two hundred persons in the aggregate in a financial year:

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 -

- (i) the restrictions under sub-clause (b) would be reckoned individually for each kind of security that is equity share, preference share or debenture;
 - (ii) the requirement of provisions of sub-section (3) of section 42 shall apply in respect of offer or invitation of each kind of security and no offer or invitation of another kind of security shall be made unless allotments with respect to offer or invitation made earlier in respect of any other kind of security is completed;
- (c) the value of such offer or invitation per person shall be with an investment size of not less than twenty thousand rupees of face value of the securities;
- (d) the payment to be made for subscription to securities shall be made from the bank account of the person subscribing to such securities and the company shall keep the record of the Bank account from where such payments for subscriptions have been received. 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.

- (3) The company shall maintain a complete record of private placement offers in Form PAS-5:

Provided that a copy of such record along with the private placement offer letter in Form PAS-4 shall be filed with the Registrar

with fee as provided in Companies (Registration Offices and Fees) Rules, 2014 and where the company is listed, with the Securities and Exchange Board within a period of thirty days of circulation of the private placement offer letter.

Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions of this Act, and the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 shall be required to be complied with.

Private Placement shall be made only to such persons whose names are recorded by the company prior to the invitation to subscribe, and that such person shall receive the offer by name, and that a complete record of such offers shall be kept by the company in such manner as may be prescribed and complete information about such offer shall be filed with the Registrar within a period of thirty days of circulation of relevant private placement offer letter.

The company shall maintain a complete record of private placement offers in Form PAS-5. A copy of such record along with the private placement offer letter in Form PAS-4 shall be filed with the Registrar with fee as provided in Companies (Registration Offices and Fees) Rules, 2014 and where the company is listed, with the Securities and Exchange Board within a period of thirty days of circulation of the private placement offer letter.

A company shall allot securities within 60 days from the date of receipt of application money, if it does not allot within 60 days then application money shall be repaid within 15 days after expiry of 60 days and if the company does not pay money after the aforesaid period the company is liable to repay the money with interest at the rate of 12 percent per annum from the expiry of 60th day. The monies received shall be kept in separate bank account with 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.

A company shall file with the Registrar a return of allotment in such manner as may be prescribed, including the complete list of all security-holders, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed. Under the rules, a return of allotment of securities shall be filed with

the Registrar in Form PAS-3 and with the fee as provided in Annexure 'B' along with a complete list of all security holders containing-

- (i) the full name, address, Permanent Account Number and E-mail ID of such security holder;
- (ii) the class of security held;
- (iii) the date of allotment of security ;
- (iv) the number of securities held, nominal value and amount paid on such securities; and particulars of consideration received if the securities were issued for consideration other than cash.

The section provides for certain restrictions on the private placement which are as under:

1. 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.
2. No monies payable on subscription of securities not to be made in cash, all monies shall be made through cheque or demand draft or other banking channels but not by cash.
3. No company offering 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 offer.

The provisions of clauses (b) and (c) of sub-rule (2) shall not be applicable to -

- (a) non-banking financial companies which are registered with the Reserve Bank of India under Reserve Bank of India Act, 1934; and
- (b) housing finance companies which are registered with the National Housing Bank under National Housing Bank Act, 1987, if they are complying with regulations made by Reserve Bank of India or National Housing Bank in respect of offer or invitation to be issued on private placement basis.

Such companies shall comply with sub-clauses (b) and (c) of sub-rule (2) in case the Reserve Bank of India or the National Housing Bank have not specified similar regulations.

17 CONCLUSION

The new legislation revamps several concepts and introduces various provisions for better clarity and effectiveness. The major introductions for fund raising and capital structuring under the Act is that it clearly provides for the ways in which public company or a private company may issue securities. A private has been defined to mean a company a company having a minimum paid-up share capital of one lakh rupees or such higher paid-up share capital as may be prescribed, and which by its articles,—

- (i) restricts the right to transfer its shares;
- (ii) except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that—

- (A) persons who are in the employment of the company; and
 - (B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and
- (iii) prohibits any invitation to the public to subscribe for any securities of the company;

Section 2(71) of the Act defines “public company” so as to mean a company which—

- (a) is not a private company;
- (b) has a minimum paid-up share capital of five lakh rupees or such higher paid-up capital, as may be prescribed:

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

The concept of offer of sale of shares by certain members of a company in consultation with the Board of directors gives an option

to the members to offer the whole or part of their holdings of shares to the public.

The Act provides for criminal liability for mis-statements in prospectus. Where a prospectus issued, circulated or distributed, includes any statement which is untrue or misleading, every person who authorises the issue of such prospectus shall be guilty for fraud punishable with imprisonment and fine under section 447.

The Act provides for class action suits 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.

