

CHAPTER V – PREFERENTIAL ISSUE

Provisions of this chapter not to apply in certain cases

158. (1) The provisions of this Chapter shall not apply where the preferential issue of equity shares is made pursuant to:

- a) conversion of a loan or an option attached to convertible debt instruments in terms of sub-sections (3) and (4) of sections 81 of the Companies Act, 1956 or sub-section (3) and (4) of section 62 of the Companies Act, 2013, whichever is applicable;
- b) a scheme approved by a High Court under section 391 to 394 of the Companies Act, 1956 or approved by a tribunal or the Central Government under sections 230 to 234 of the Companies Act, 2013, as applicable;

Provided that the pricing provisions of this Chapter shall apply to the issuance of shares under schemes mentioned in clause (b) in case of allotment of shares only to a select group of shareholders or shareholders of unlisted companies pursuant to such schemes;

- c) a qualified institutions placement in accordance with Chapter VI of these regulations.

(2) The provisions of this Chapter, except the lock-in provisions, shall not apply where the preferential issue of specified securities is made in terms of the rehabilitation scheme approved by the Board of Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 [1 of 1986] or the resolution plan approved under Section 31 of the Insolvency & Bankruptcy Code, 2016 [No. 31 of 2016], whichever is applicable.

(3) The provisions of this Chapter relating to pricing and lock-in shall not apply to equity shares allotted to any financial institution within the meaning of sub-clauses (ia) and (ii) of clause (h) of section 2 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (51 of 1993).

(4) The provisions of regulation 163 and sub-regulations (1), (2), (3) and (4) of regulation 164 shall not apply to a preferential issue of equity shares and compulsorily convertible debt instruments, whether fully or partly, where the Board has granted relaxation to the issuer in terms of regulation 11 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, if adequate disclosures about the plan and process proposed to be followed for identifying the allottees are given in the explanatory statement to notice for the general meeting of the shareholders.

(5) The provisions of sub-regulation (1) of regulation 159 and sub-regulation (6) of regulation 167 shall not apply to a preferential issue of specified securities where the proposed allottee is a mutual fund registered with the Board or insurance company registered with Insurance Regulatory and Development Authority of India or a scheduled commercial bank or a public financial institution.

(6) The provisions of this Chapter shall not apply where the preferential issue of specified securities is made to the lenders pursuant to conversion of their debt, as part of a debt restructuring [***]¹ implemented in accordance with the guidelines specified by the Reserve Bank of India, subject to the following conditions:

- a) guidelines for determining the conversion price have been specified by the Reserve Bank of India in accordance with which the conversion price shall be determined and which shall be in compliance with the applicable provisions of the Companies Act, 2013;
- b) conversion price shall be certified by two independent valuers;
- c) specified securities so allotted shall be locked-in for a period of one year from the date of their allotment

¹ Word “scheme” omitted by the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2019, w-e-f 29.03.2019.

- Provided that for the purpose of transferring the control, the lenders may transfer the specified securities allotted to them before completion of the lock-in period subject to continuation of the lock-in on such securities for the remaining period, with the transferee;
- d) the lock-in of equity shares allotted pursuant to conversion of convertible securities issued on preferential basis shall be reduced to the extent the convertible securities have already been locked-in;
- e) the applicable provisions of the Companies Act, 2013 are complied with, including the requirement of a special resolution.

[*Explanation.* – For the purpose of this sub-regulation, “lenders” shall mean all scheduled commercial banks (excluding Regional Rural Banks) and All India Financial Institutions.]²

[***]³

PART I: ISSUERS INELIGIBLE TO MAKE A PREFERENTIAL ISSUE

159. (1) Preferential issue of specified securities shall not be made to any person who has sold or transferred any equity shares of the issuer during the six months preceding the relevant date: Provided that in respect of the preferential issue of equity shares and compulsorily convertible debt instruments, whether fully or partly, the Board may grant relaxation from the requirements of this sub-regulation, if the Board has granted relaxation in terms of sub-regulation (2) of regulation 11 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 to such a preferential allotment.

² Inserted by the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2019, w-e-f 29.03.2019.

³ Omitted by the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2019, w-e-f 29.03.2019. Prior to its omission, sub-regulation (7) read as follows,-

“(7) The provisions of this Chapter shall not apply where the preferential issue of specified securities is made to person(s) at the time of lenders selling their holding of specified securities or enforcing change in ownership in favour of such person(s) pursuant to a debt restructuring scheme implemented in accordance with the guidelines specified by the Reserve Bank of India, subject to the following conditions:

- a) guidelines for determining the issue price have been specified by the Reserve Bank of India in accordance with which the issue price shall be determined and which shall be in compliance with the applicable provisions of the Companies Act, 2013;
- b) issue price shall be certified by two independent valuers;
- c) specified securities so allotted shall be locked-in for a period of at least three years from the date of their allotment;
- d) lock-in of equity shares allotted pursuant to conversion of convertible securities issued on preferential basis shall be reduced to the extent the convertible securities have already been locked-in;
- e) special resolution has been passed by shareholders of the issuer before the preferential issue;
- f) issuer shall, in addition to the disclosures required under the Companies Act, 2013 or any other applicable law, disclose the following information pertaining to the proposed allottee(s) in the explanatory statement to the notice for the general meeting proposed for passing the special resolution as stipulated at clause (e) of this sub-regulation:
 - b. identity, including that of the natural persons, who are the ultimate beneficial owners of the shares proposed to be allotted and/ or who ultimately control the proposed allottee(s);
 - c. business model;
 - d. statement on growth of business over a period of time;
 - e. summary of audited financial statements of previous three financial years;
 - f. track record, if any, in turning around companies;
 - g. proposed roadmap for effecting turnaround of the issuer.
 - h. applicable provisions of the Companies Act, 2013 are complied with.”

Explanation: Where any person belonging to promoter(s) or the promoter group has sold/transferred their equity shares in the issuer during the six months preceding the relevant date, the promoter(s) and promoter group shall be ineligible for allotment of specified securities on preferential basis.

Provided that the above restriction shall not apply to any sale of equity shares by any person belonging to promoter(s) of the promoter group which qualifies for inter-se transfer amongst qualifying persons under clause (a) of sub-regulation (1) of regulation 10 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover Regulations), 2011 or in case of transfer of shares held by the promoters or promoter group on account of invocation of pledge by a scheduled commercial bank or public financial institution or a systemically important non-banking finance company or mutual fund or insurance company registered with the Insurance Regulatory and Development Authority.

(1) Where any person belonging to promoter(s) or the promoter group has previously subscribed to warrants of an issuer but has failed to exercise the warrants, the promoter(s) and promoter group shall be ineligible for issue of specified securities of such issuer on preferential basis for a period of one year from:

- a) the date of expiry of the tenure of the warrants due to non-exercise of the option to convert; or
- b) the date of cancellation of the warrants, as the case may be.

(2) An issuer shall not be eligible to make a preferential issue if any of its promoters or directors is a fugitive economic offender.

PART II: CONDITIONS FOR PREFERENTIAL ISSUE

Conditions for preferential issue

160. A listed issuer making a preferential issue of specified securities shall ensure that:

- a) all equity shares allotted by way of preferential issue shall be made fully paid up at the time of the allotment;
- b) a special resolution has been passed by its shareholders;
- c) all equity shares held by the proposed allottees in the issuer are in dematerialised form;
- d) the issuer is in compliance with the conditions for continuous listing of equity shares as specified in the listing agreement with the stock exchange where the equity shares of the issuer are listed and the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements), 2015, as amended, and any circular or notification issued by the Board thereunder;
- e) the issuer has obtained the Permanent Account Numbers of the proposed allottees, except those allottees which may be exempt from specifying their Permanent Account Number for transacting in the securities market by the Board.

Relevant date

161. For the purpose of this Chapter, "relevant date" means:

- a) in case of preferential issue of equity shares, the date thirty days prior to the date on which the meeting of shareholders is held to consider the proposed preferential issue:
Provided that in case of a preferential issue of specified securities pursuant to any resolution of stressed assets under a framework specified by the Reserve Bank of India or a resolution plan approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code 2016, the date of approval of the corporate debt restructuring package or resolution plan shall be the relevant date.
- b) in case of a preferential issue of convertible securities, either the relevant date referred to in clause (a) of this regulation or a date thirty days prior to the date on which the holders of the convertible securities become entitled to apply for the equity shares.

Explanation: Where the relevant date falls on a weekend or a holiday, the day preceding the weekend or the holiday will be reckoned to be the relevant date.

Tenure of convertible securities

162. The tenure of the convertible securities of the issuer shall not exceed eighteen months from the date of their allotment.

PART III: DISCLOSURES TO SHAREHOLDERS

163. (1) The issuer shall, in addition to the disclosures required under the Companies Act, 2013 or any other applicable law, disclose the following in the explanatory statement to the notice for the general meeting proposed for passing the special resolution:

- a) objects of the preferential issue;
- b) maximum number of specified securities to be issued;
- c) intent of the promoters, directors or key managerial personnel of the issuer to subscribe to the offer;
- d) shareholding pattern of the issuer before and after the preferential issue;
- e) time frame within which the preferential issue shall be completed;
- f) identity of the natural persons who are the ultimate beneficial owners of the shares proposed to be allotted and/or who ultimately control the proposed allottees, the percentage of post preferential issue capital that may be held by them and change in control, if any, in the issuer consequent to the preferential issue:

Provided that if there is any listed company, mutual fund, scheduled commercial bank, insurance company registered with the Insurance Regulatory and Development Authority of India in the chain of ownership of the proposed allottee, no further disclosure will be necessary.

Explanation: For the purpose of identification of the ultimate beneficial owners of the allottees, where the allottees are institutions/entities, the identification of such ultimate beneficial owners, shall be in accordance with the guidelines prescribed by the Board, if any.

- g) undertaking that the issuer shall re-compute the price of the specified securities in terms of the provision of these regulations where it is required to do so;
- h) undertaking that if the amount payable on account of the re-computation of price is not paid within the time stipulated in these regulations, the specified securities shall continue to be locked- in till the time such amount is paid by the allottees.
- i) disclosures specified in **Schedule VI**, if the issuer or any of its promoters or directors is a wilful defaulter.

(2) The issuer shall place a copy of the certificate of its statutory auditors before the general meeting of the shareholders considering the proposed preferential issue, certifying that the issue is being made in accordance with the requirements of these regulations.

(3) Where the specified securities are issued on a preferential basis for consideration other than cash, the valuation of the assets in consideration for which the equity shares are issued shall be done by an independent valuer, which shall be submitted to the stock exchanges where the equity shares of the issuer are listed:

Provided that if the stock exchange(s) is not satisfied with the appropriateness of the valuation, it may get the valuation done by any other valuer and for this purpose it may seek any information, as deemed necessary, from the issuer.

(4) The special resolution shall specify the relevant date on the basis of which price of the equity shares to be allotted on conversion or exchange of convertible securities shall be calculated.

PART IV: PRICING

Pricing of frequently traded shares

164. (1) If the equity shares of the issuer have been listed on a recognised stock exchange for a period of twenty six weeks or more as on the relevant date, the price of the equity shares to be allotted pursuant to the preferential issue shall be not less than higher of the following:

- a. the average of the weekly high and low of the volume weighted average price of the related equity shares quoted on the recognised stock exchange during the twenty six weeks preceding the relevant date; or
- b. the average of the weekly high and low of the volume weighted average prices of the related equity shares quoted on a recognised stock exchange during the two weeks preceding the relevant date.

(2) If the equity shares of the issuer have been listed on a recognised stock exchange for a period of less than twenty six weeks as on the relevant date, the price of the equity shares to be allotted pursuant to the preferential issue shall be not less than the higher of the following:

- a) the price at which equity shares were issued by the issuer in its initial public offer or the value per share arrived at in a scheme of compromise, arrangement and amalgamation under sections 391 to 394 of the Companies Act, 1956 or sections 230 to 234 the Companies Act, 2013, as applicable, pursuant to which the equity shares of the issuer were listed, as the case may be; or
- b) the average of the weekly high and low of the volume weighted average prices of the related equity shares quoted on the recognised stock exchange during the period the equity shares have been listed preceding the relevant date; or
- c) the average of the weekly high and low of the volume weighted average prices of the related equity shares quoted on a recognised stock exchange during the two weeks preceding the relevant date.

(3) Where the price of the equity shares is determined in terms of sub-regulation (2), such price shall be recomputed by the issuer on completion of twenty six weeks from the date of listing on a recognised stock exchange with reference to the average of the weekly high and low of the volume weighted average prices of the related equity shares quoted on the recognised stock exchange during these twenty six weeks and if such recomputed price is higher than the price paid on allotment, the difference shall be paid by the allottees to the issuer.

(4) A preferential issue of specified securities to qualified institutional buyers, not exceeding five in number, shall be made at a price not less than the average of the weekly high and low of the volume weighted average prices of the related equity shares quoted on a recognised stock exchange during the two weeks preceding the relevant date.

(5) For the purpose of this Chapter, “frequently traded shares” means the shares of the issuer, in which the traded turnover on any recognised stock exchange during the twelve calendar months preceding the relevant date, is at least ten per cent of the total number of shares of such class of shares of the issuer:

Provided that where the share capital of a particular class of shares of the issuer is not identical throughout such period, the weighted average number of total shares of such class of the issuer shall represent the total number of shares.

Explanation: For the purpose of this regulation, ‘stock exchange’ means any of the recognised stock exchange(s) in which the equity shares of the issuer are listed and in which the highest trading volume in respect of the equity shares of the issuer has been recorded during the preceding twenty six weeks prior to the relevant date.

Pricing of infrequently traded shares

165. Where the shares of an issuer are not frequently traded, the price determined by the issuer shall take into account the valuation parameters including book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies:

Provided that the issuer shall submit a certificate stating that the issuer is in compliance of this regulation, obtained from an independent valuer to the stock exchange where the equity shares of the issuer are listed.

Adjustments in pricing - Frequently and Infrequently traded shares

166. The price determined for a preferential issue in accordance with regulation 164 or regulation 165, shall be subject to appropriate adjustments, if the issuer:

- a) makes an issue of equity shares by way of capitalization of profits or reserves, other than by way of a dividend on shares;
- b) makes an issue of equity shares after completion of a demerger wherein the securities of the resultant demerged entity are listed on a stock exchange;
- c) makes a rights issue of equity shares;
- d) consolidates its outstanding equity shares into a smaller number of shares;
- e) divides its outstanding equity shares including by way of stock split;
- f) re-classifies any of its equity shares into other securities of the issuer;
- g) is involved in such other similar events or circumstances, which in the opinion of the concerned stock exchange, require adjustments.

PART V: LOCK-IN AND RESTRICTIONS ON TRANSFERABILITY

Lock-in

167. (1) The specified securities, allotted on a preferential basis to the promoters or promoter group and the equity shares allotted pursuant to exercise of options attached to warrants issued on a preferential basis to the promoters or the promoter group, shall be locked-in for a period of three years from the date of trading approval granted for the specified securities or equity shares allotted pursuant to exercise of the option attached to warrant, as the case may be:

Provided that not more than twenty per cent. of the total capital of the issuer shall be locked-in for three years from the date of trading approval:

Provided further that equity shares allotted in excess of the twenty per cent. shall be locked-in for one year from the date of trading approval pursuant to exercise of options or otherwise, as the case may be.

Provided further that in case of convertible securities or warrants which are not listed on stock exchanges, such securities shall be locked in for a period of one year from the date of allotment.

(2) The specified securities allotted on a preferential basis to persons other than the promoters and promoter group and the equity shares allotted pursuant to exercise of options attached to warrants issued on preferential basis to such persons shall be locked-in for a period of one year from the date of trading approval.

Provided that in case of convertible securities or warrants which are not listed on stock exchanges, such securities shall be locked in for a period of one year from the date of allotment.

(3) Lock-in of the equity shares allotted pursuant to conversion of convertible securities other than warrants, issued on preferential basis shall be reduced to the extent the convertible securities have already been locked-in.

(4) The equity shares issued on a preferential basis pursuant to any resolution of stressed assets under a framework specified by the Reserve Bank of India or a resolution plan approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code 2016, shall be locked-in for a period of one year from the trading approval:

(5) If the amount payable by the allottee, in case of re-calculation of price under sub-regulation (3) of regulation 164 is not paid till the expiry of lock-in period, the equity shares shall continue to be locked-in till such amount is paid by the allottee.

(6) The entire pre-preferential allotment shareholding of the allottees, if any, shall be locked-in from the relevant date up to a period of six months from the date of trading approval:

Provided that in case of convertible securities or warrants which are not listed on stock exchanges, the entire pre-preferential allotment shareholding of the allottees, if any, shall be locked-in from the relevant date up to a period of six months from the date of allotment of such securities.

Explanation 1: For the purpose of this regulation:

- (I) The expression “total capital of the issuer” means:
 - (a) equity share capital issued by way of public issue or rights issue including equity shares issued pursuant to conversion of specified securities which are convertible; and
 - (b) specified securities issued on a preferential basis to the promoters or the promoters group.
- (II) For the computation of twenty per cent. of the total capital of the issuer, the amount of minimum promoters’ contribution held and locked-in, in the past in terms of Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 or these regulations shall be taken into account.
- (III) The minimum promoters’ contribution shall not be put under fresh lock-in again, even though it is considered for computing the requirement of twenty per cent. of the total capital of the issuer, in case the said minimum promoters’ contribution is free of lock-in at the time of the preferential issue.

Explanation 2: For the purposes of this regulation, the date of trading approval shall mean the latest date when trading approval has been granted by all the stock exchanges where the equity shares of the issuer are listed, for specified securities allotted as per the provisions of this Chapter.

Transferability

168. (1) Subject to the provisions of Securities and Exchange Board of India (Substantial Acquisition of shares and Takeovers) Regulations, 2011, specified securities held by promoters and locked-in in terms of sub-regulation (1) of regulation 167, may be transferred among the promoters or the promoter group or to a new promoter or persons in control of the issuer:

Provided that the lock-in on such specified securities shall continue for the remaining period with the transferee.

(2) The specified securities allotted on a preferential basis shall not be transferable by the allottees till the trading approval is granted for such securities by all the recognised stock exchanges where the equity shares of the issuer are listed.

PART VI: CONSIDERATION AND ALLOTMENT

Payment of consideration

169. (1) Full consideration of specified securities other than warrants, shall be paid by the allottees at the time of allotment of such specified securities except in case of shares issued for consideration other than cash.

Provided that in case of a preferential issue of specified securities pursuant to any resolution of stressed assets under a framework specified by the Reserve Bank of India or a resolution plan approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code 2016, the consideration may be in terms of such scheme.

(2) In the case of warrants, an amount equivalent to at least twenty five per cent. of the consideration determined in terms of regulation 164 shall be paid against each warrant on the date of allotment of warrants and the balance seventy five per cent. of the consideration shall be paid at the time of allotment of the equity shares pursuant to exercise of options against each such warrant by the warrant holder.

Provided that in case the exercise price of the warrants is based on the formula, at least twenty-five per cent. of the consideration amount calculated as per the formula with conversion date being the relevant date shall be paid against each warrant on the date of allotment of warrants and the balance consideration shall be paid at the time of allotment of the equity shares pursuant to exercise of options against each such warrant by the warrant holder.

(3) In case the warrant holder does not exercise the option for equity shares against any of the warrants held by the warrant holder, the consideration paid in respect of such warrant in terms of sub-regulation (2) shall be forfeited by the issuer.

(4) The issuer shall ensure that the consideration of specified securities, if paid in cash, shall be received from respective allottee's bank account and in the case of joint holders, shall be received from the bank account of the person whose name appears first in the application.

(5) The issuer shall submit a certificate from the statutory auditors to the stock exchanges where the equity shares of the issuer are listed stating that the issuer is in compliance of sub-regulation (4) and the relevant documents thereof are maintained by the issuer as on the date of certification.

Allotment

170. (1) Allotment pursuant to the special resolution shall be completed within a period of fifteen days from the date of passing of such resolution:

Provided that where any application for exemption from the applicability of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 or any approval or permission by any regulatory authority or the Central Government for allotment is pending, the period of fifteen days shall be counted from the date of the order on such application or the date of approval or permission, as the case may be:

Provided further that where the Board has granted relaxation to the issuer in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the preferential issue of equity shares and compulsorily convertible debt instruments, whether fully or partly, shall be made by it within such time as may be specified by the Board in its order granting the relaxation:

Provided further that requirement of allotment within fifteen days shall not apply to allotment of specified securities on preferential basis pursuant to any resolution of stressed assets under a framework specified by the Reserve Bank of India or a resolution plan approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code 2016.

(2) If the allotment of the specified securities is not completed within fifteen days from the date of special resolution, a fresh special resolution shall be passed and the relevant date for determining the price of specified securities under this Chapter shall be taken with reference to the date of the latter special resolution.

(3) Notwithstanding anything contained in this regulation, where a preferential allotment is made that attracts an obligation to make an open offer for shares of the issuer under Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011, and there is no offer made under sub-regulation (1) of regulation 20 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011, the period of fifteen days shall be considered from the expiry of the period specified in sub-regulation (1) of regulation 20 or date of receipt of all statutory approvals required for the completion of an open offer under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011:

Provided that if an offer is made under sub-regulation (1) of regulation 20 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011, the period of fifteen days shall be counted from the expiry of the offer period as defined in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011:

Provided further that the provisions of this sub-regulation shall not apply to an offer made under sub-regulation (1) of regulation 20 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011, pursuant to a preferential allotment.”

(4) Allotment of the specified securities shall be made only in dematerialised form.

Explanation: The requirement of allotment in dematerialised form shall also be applicable for the equity shares to be allotted pursuant to exercise of option attached to warrant or conversion of convertible securities.