

Offer for sale of share (Sec 28)

1. Rationale behind the provision

This is new provision introduced under the Act. “Offer for Sale” means an offer of securities by existing members to the general public for subscription through an offer document. It extends to all securities. Even the existing members of a listed company can offer securities to the general public through an offer document.

In the past few years, high investor sentiment has thrown up several good opportunities for Indian companies via private equity investments. Such deals have witnessed exponential growth particularly in unlisted public companies. These Private Equity (PE) funds or financial institutions might have stipulated a condition based on their investment agreements for investing money into the company or subscribing to the shares of the company through private placement, that the company promoters have to give an exit option to these funds or institutions via listing. Sometimes, the companies may desire to have the shares listed and also might not be in need of further capital. In these situations, the existing members like promoters or funds or institutions offer of securities to the general public.

Sometimes, the existing members offer their shares to the general public for subscription through an offer document coupled with fresh issue of shares by the company. It is called Offer for sale cum Public Issue or a composite issue.

The concept of ‘offer for sale’ is explained in Palmer’s Company Law [23rd edition, para 21-03] as follows:

“the concept of offer for sale is explained as follows: An offer for sale occurs where a company allots shares or debentures to allottees normally an issuing house which will publish an invitation to the public offering these shares or debentures for sale on application by a member of public. The issuing house renounces the allotment as far as relating to securities to which the application in favour of purchasers who become a direct allottee of shares or debentures. This procedure has the advantage of saving stamp duty which would be payable on a transfer of shares or debentures from the issuing house to the purchaser which is not payable on direct allotment.”

2. Meaning of ‘in consultation with the board’

8uThe process of consultation with the board is a key aspect. This issue being strategic decision of the company and which may affect the operations of the company in future, whether the board will have a prerogative to accept the proposal or not? To evaluate this scenario, there are various judgements of the Supreme Court in other laws which need to be considered. While considering the word ‘consultation’ as mentioned in rules of Indian Administrative Service (Regulation of Seniority) (First Amendment) Rules 1989, Supreme Court considered a catena of cases and formulated

certain general principles for determining what is 'consultation' in Indian Administrative Service (S.C.S.) Association, U.P. and Others v. Union Of India And Or [1993 Supp (1) SCC 730 :

"This Court in Union of India v. Sankalchand Himatlal Sheth & Anr., [1977] 4 SCC 193, held that the word "consult" implies a conference of two or more persons or an impact of two or more minds in respect of a topics in order to enable them to evolve a correct or at least a satisfactory solution. In order that the two minds may be able to confer and produce a mutual impact it is essential that each must have for its consideration full and identical facts which can at one constitute both the source and foundation of the final decision. In Chandramouleshwar Prasad v. Patna High Court & Ors. [1970] 2 SCR 666 at 674 & 675, construing the word "consultation" in Art. 233 of the Constitution, another Constitution Bench in the context of removal of a District Judge by the Governor on the recommendation of the High Court, held that "consultation" or "deliberation" is not complete or effective unless the parties thereto, i.e., the State Govt. and High Court make their respective points of view known to each other and discuss and examine the relative merits of their views. If the one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. ... In Rollo & Anr. v. Minister of Town & Country Planning [1948] 1 All Eng. Report 13, Sec. 1(1) of the Towns Act, 1946 envisages the Minister of Town & Country Planning after consultation with the local authorities, if satisfied that it is expedient in the national interest that any area of land should be developed as a new town by the Corporation established under the Act, he may make an order designating that area as a site of the proposal of the new town. On October 7, 1946 press notice was issued giving the date of meeting of the representatives of the local authorities and the Minister explained in the meeting what he had in his mind in arriving at the boundaries of the area. Objections were raised and public enquiry was held. But actual explanation was not sought from any local authorities. In those circumstance contention was raised that there was no consultation as adumbrated under Sec. 1(1). Repelling the contention, the House of Lords held that in the meeting the local authorities clearly were informed of the general nature of the proposal, the areas suggested, its size and what the Minister wished and intended to do. Discussion was followed. Minutes were prepared and press notice was issued stating what had happened. In those circumstance it was held that there was consultation and the requirement was complied with."

Relevant general principles evolved in the above case are: "Consultation is a process which requires meeting of minds between the parties involved to evolve a correct or at least satisfactory solution. There should be meeting of mind between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in

that behalf is mandatory. When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action or order illegal. When the opinion or advice or view does not bind the person or authority, any action or decision taken contrary to the advice is not illegal, nor becomes void. No hard and fast rules could be laid, no useful purpose would be served by formulating words or definitions nor would it be appropriate to lay down the manner in which consultation must take place. It is for the Court to determine in each case in the light of its facts and circumstances whether the action is “after consultation”; “was in fact consulted” or was it a “sufficient consultation”

In the light of the above cases, the word ‘consultation’ may be taken to mean ‘concurrence’.

3. Key points for making offer for sale

The following points need to be noted for making offer for sale:

- Such offer needs to be done in the prescribed manner.
- Such shareholders need to authorise the company to take all actions on their behalf and reimburse the company for all expenses incurred by the company. Therefore, it would no longer be possible for the company to bear the expenses incurred for securities exclusively offered by the existing shareholders.
- The provisions of part-I of chapter-III are not applicable with respect to minimum subscription, minimum application value and provisions requiring any statement to be made by the board of directors in respect of utilisation of money.
- Any other information which cannot be gathered by the offeror with justification for not being able to comply with such information.
- Prospectus shall also mention the name of the person or persons or entity bearing the cost of the offer along with the reasons.

The additional contents as specified in section 25 shall be incorporated in such offer document.

4. Offer for sale through stock exchange mechanism

Offer for sale (OFS), introduced by SEBI, in February 2012, helps promoters of listed companies to dilute their stake through an exchange platform. The promoters are the sellers. The bidders may include market participants such as individuals, companies, qualified institutional buyers (QIBs) and foreign institutional investors (FII). The facility is available on the BSE Limited (BSE) and National Stock Exchange of India Limited (NSE).

4.1 Eligible Seller(s)

Definition of seller(s) i.e. promoters/promoter group entities/ non- promoter shareholder

- I. All promoter(s)/ promoter group entities of such companies that are eligible for trading and are required to increase public shareholding to meet the minimum public shareholding requirements in terms rule 19(2)(b) and 19A of Securities Contracts (Regulation) Rules, 1957 (SCRR), read with clause 40A (ii) (c) of Listing Agreement.
- II. All promoters/promoter group entities of Top 200 companies by market capitalization in any of the last four completed quarters.
- III. Any non-promoter shareholder of eligible companies holding at least 10% of share capital may also offer shares through the OFS mechanism.

For I, II and III above, the promoters/promoter group entities/ non-promoter shareholder should not have purchased and/or sold the shares of the company in the 12 weeks period prior to the offer and they should undertake not to purchase and/or sell shares of the company in the 12 weeks period after the offer. However, within the cooling off period of +12 weeks, the promoter(s)/promoter group entities/ non-promoter shareholder can offer their shares only through OFS/ Institutional Placement Programme (IPP) with a gap of 2 weeks between successive offers. The above shall also be applicable on promoter(s) /promoter group entities/ non-promoter shareholder who have already offered their shares through OFS/IPP.

- IV. In case a non-promoter shareholder offers shares through the OFS mechanism, promoters/ promoter group entities of such companies may participate in the OFS to purchase shares subject to compliance with applicable provisions of SEBI (ICDR) Regulations, 2009 and SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

4.2 Size of the offer for sale of shares

- I. The size of the offer shall be a minimum of Rs. 25 crores. However, size of offer can be less than Rs. 25 crores so as to achieve minimum public shareholding in a single tranche.
- II. Minimum 10% of the offer size shall be reserved for retail investors. For this purpose, retail investor shall mean an individual investor who places bids for shares of total value of not more than Rs. 2 lakhs aggregated across the exchanges.

4.3 Eligible Buyer(s)

- I All investors registered with trading member of the exchanges other than the promoter(s)/ promoter group entities.
- II In case a non-promoter shareholder offers shares through the OFS mechanism, promoters/ promoter group entities of such companies may participate in the OFS to purchase shares subject to compliance with applicable provisions of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 and SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

(Reference: SEBI circular and Comprehensive guidelines on sale of shares through OFS mechanism were issued under circular no. CIR/MRD/DP/36/2016 dated Feb 15, 2016, circular no. CIR/MRD/DP/12/2015 dated June 26, 2015, vide circular no. IR/MRD/DP/32 /2014 dated December 1, 2014, CIR/MRD/DP/24/2014 dated August 8, 2014, CIR/MRD/DP/17/2013 dated May 30, 2013, CIR/MRD/DP/04/2013 dated January 25, 2013 and CIR/ MRD/DP/18/2012 dated July 18, 2012 for further details, BSE Ltd, NSE.)

5. Distinction between OFS, FPO and IPO

In an Initial Public Offer (IPO), an unlisted company issues fresh shares and goes public. In a follow-on public offer (FPO), an already listed company issues fresh shares to new investors or existing shareholders. Companies take the FPO route after they have been through the IPO process. But OFS, as previously mentioned, is for diluting promoter stake in a listed company. No new shares are created. In IPOs and FPOs, the process to raise funds is lengthy as it involves issuing a prospectus and then wait for receiving applications and allotting shares to investors. OFS does not involve any cash flow to the company. An OFS can be completed in one trading session under Stock Exchange Mechanism. While IPOs and FPOs remain open for three days, it is observed that OFS issues get over in a single trading day. It should further be noted that as the wordings of section 31 and 32 (shelf prospectus and red herring prospectus respectively) are dealing with the issue of securities by a company, Offer for Sale may not be made through the said types of prospectus.

6. Punishment and Compoundability

This section does not prescribe any penal provision for contravention of the section. Hence, section 450 of the Act will be applicable. Accordingly, for contravention, the company and every officer of the company who is in default shall be punishable with a fine upto Rs. 10,000, where the contravention is a continuing one then the fine shall be Rs. 1,000 for every day of contravention. The offence, being punishable only with fine, is compoundable under section 441 of the Act.