

Loans, Advances, Deposits, Inter corporate Loans

Various compliance and regulation under the

COMPANIES ACT, 2013

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Without prejudice to the provisions contained in this Act, a company shall unless otherwise prescribed, make investment through not more than two layers of investment companies

Section 185 will prevail over this subsection

Exemption given to

(i) Acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country;

(ii) a subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

Definition:

- “layer” in relation to a holding company means its subsidiary or subsidiaries;
- the expression “investment company” means a company whose principal business is the acquisition of shares, debentures or other securities; and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than fifty per cent. of its total assets, or if its income derived from investment business constitutes not less than fifty per cent. as a proportion of its gross income.

**Section -
186 (1)
(Investment
by Company
through
Investment
Companies or
other mode)**

Objective of the Section: Limit prescribed under Act to avoid siphoning off money

No Company shall directly or indirectly

Section 186 (8): A company in default of repayment of deposits or interest, can not make loans

a) Give any loan to any person or body corporate

b) Give any guarantee or security in the connection with loan to any person or body corporate

c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

Exceeding the CEILING LIMIT (WHICHEVER IS HIGHER)

60% of

- Paid up share capital +
- Free reserve +
- Securities premium

100% of

- Free reserve +
- Securities premium

Definition:

Person: For the purposes of this sub-section, the word “person” does not include any individual who is in the employment of the company (explanation to section 186(2))

Free reserves: means such reserves which, as per the latest audited balance sheet of a company, are available for distribution as dividend: Provided that—

- any amount representing unrealised gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise, or
- any change in carrying amount of an asset or of a liability recognised in equity, including surplus in profit and loss account on measurement of the asset or the liability at fair value, shall not be treated as free reserves;

**Section -
186 (2)
(Limit on loan
and
investment)**

Objective of the Section: Loan can be given with Board Approval and disclosure

Prior approval of Board required for any loan, guarantee or security and investment

a) Prior Board approval with consent of all directors present at the meeting

b) Prior approval of PFI is required if total amount exceeds the ceiling limit or there is default in repayment of principal and interest

Disclosure and maintenance of register

**Section -
186 (5) &
186(4)
(Approval and
disclosure)**

Section 186 (4) The company shall disclose to the members in the financial statement

- the full particulars of the loans given,
- investment made or guarantee given or security provided and
- the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security.

Section 186 (9): Every company giving loan or giving a guarantee or providing security or making an acquisition under this section shall keep a register which shall contain such particulars and shall be maintained in such manner as may be prescribed.

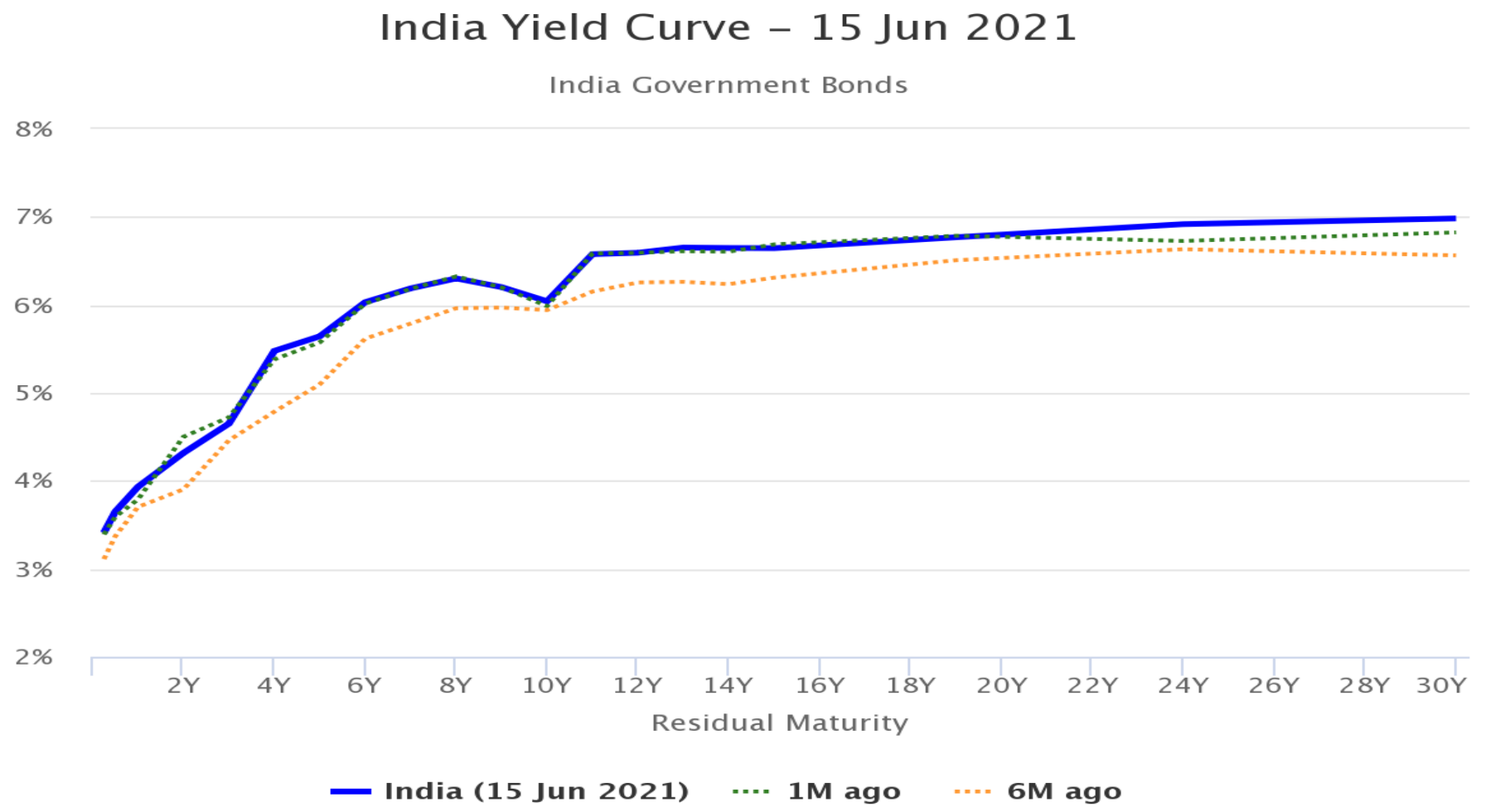
Definition:

PFI: Public financial institution means LIC of India, Infrastructure Development Finance Co Ltd, Unit Trust of India, Others notified by Central Government.

Objective of the Section: ROI should not be lower than Govt. Securities

All loan should not carry interest less than Government Security

Section -
186 (7)
(Rate of
interest)



Objective of the Section: Loan can be given with permission

Loan & investment > ceiling limit

Through shareholder approval

Shareholder approval not required

a) Prior Special resolution passed in General meeting

- Wholly owned subsidiary & joint venture company towards
 - ✓ Loan given
 - ✓ Guarantee given
 - ✓ Security has been provided
 - ✓ acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company

Section - 186 (3) (Prior Shareholder approval and exemption to WOS and JV)

Objective of the Section: Restriction for companies to avail inter corporate loans and deposits

Shall not exceed the Prescribed limit

a) Companies registered under section 12 of the Securities and Exchange Board of India Act, 1992 (stock-brokers, sub-brokers, share transfer agents)

b) Such class or classes of companies as may be prescribed by CG in consultation with SEBI

Penalty for non-compliance of Section 186

For Companies: Fine minimum Rs 25,000 up to Rs 500,000

For Officer in case of default:
✓ Fine minimum Rs 25,000 up to Rs 100,000 and
✓ imprisonment of up to 2 years

Section -
186 (6)
(Restriction to
few
companies for
taking IC loan)

Penalty -
Section
186(12)

Objective of the Section: Exemption given to certain class of companies

Section 186 (2) to Sec 186(10) Not Applicable

- a) Loan made
- b) Guarantee given
- c) Security provided

By:

- ✓ Banking company
- ✓ Insurance company
- ✓ Housing finance company

In the ordinary course of business

or,

Company engaged in the business of:

- ✓ Financing companies
- ✓ Providing infrastructure facilities

To any Investment made-

By an investment company

- ✓ made in shares through right issue
- ✓ a non-banking financial company registered under Chapter III-B of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities

**Section -
186 (11)
(Exempted
companies)**

Objective of the Section: Prohibition for giving loan to directors and interested entity

Section 185

PROHIBITED:

No company shall, directly or indirectly,

- advance any loan, including any loan represented by a book debt to, or
- give any guarantee or
- provide any security in connection with any loan taken by,—

(a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or

(b) any firm in which any such director or relative is a partner.

MAY BE ALLOWED (with special resolution passed in General Meeting*):

Person in whom director of the Company is interested:

- a) Any Pvt Co of which any such director is a director or member
- b) Any body corporate where 25% or more voting rights controlled by such director or by two or more such directors, together
- c) BOD & MD of borrowing Co accustomed to act in accordance with lending Co/Directors' direction

*In the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and

the loans are utilised by the borrowing company for its principal business activities.

**Section -
185 (1) &
185(2)**

Objective of the Section: Allowed entities

Section 185 (3) Nothing contained in sub-sections (1) and (2) shall apply to—

- (a) the giving of any loan to a managing or whole-time director—
 - (i) as a part of the conditions of service extended by the company to all its employees; or
 - (ii) pursuant to any scheme approved by the members by a special resolution; or
- (b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan; or
- (c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or
- (d) any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company:

Provided that the loans made under clauses (c) and (d) are utilised by the subsidiary company for its principal business activities.]

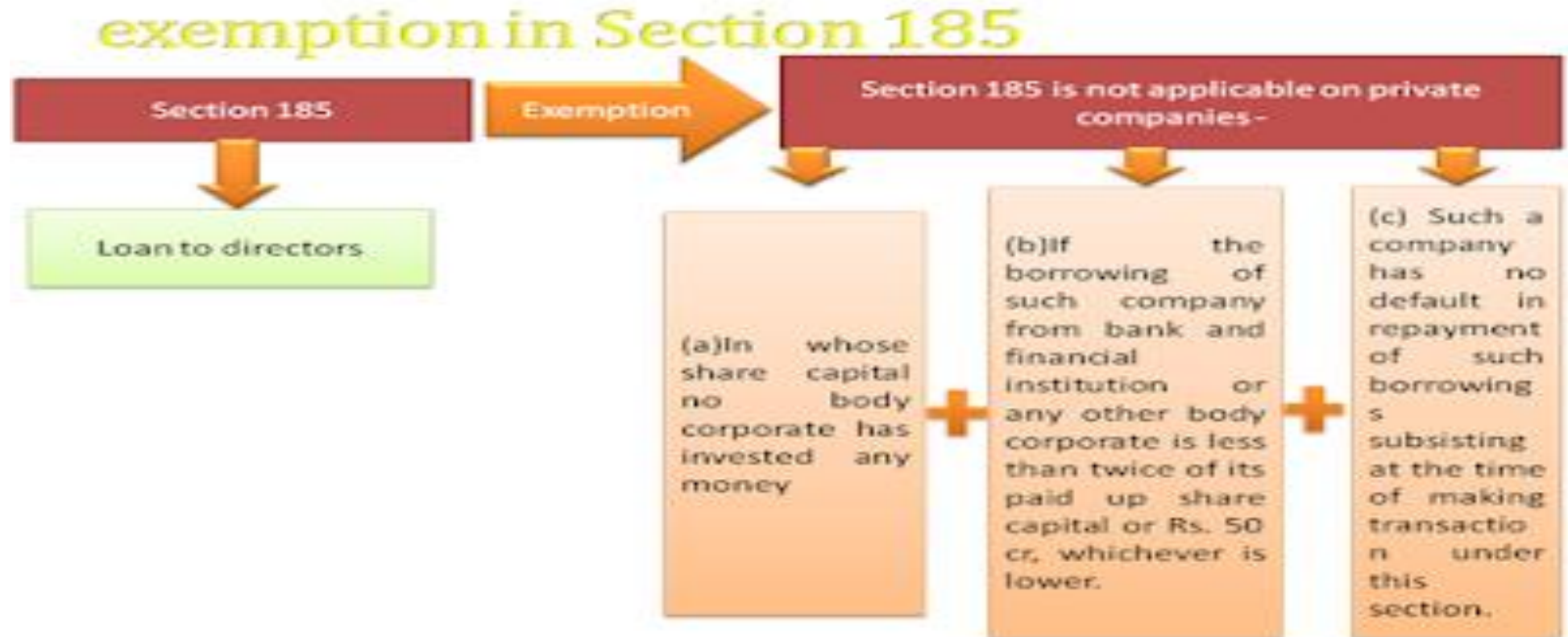
**Section -
185 (3)
(Freely
allowed to
give)**

Objective of the Section: Allowed entities

As per Exemption notification issued by MCA on 05th June, 2015, Section 185 shall not be applicable on Private Limited Companies, if it fulfils the conditions mentioned therein.

Section 185 of Companies Act, 2013 has been completely substituted by New Section 185 under Companies Amendment Act, 2017 (CA, 2017 got president assent on 3rd January, 2018). **Whether still private companies who fulfil the following conditions are exempted - legal opinion to be sought.**

Section - Exemption to private companies



Objective of the Section: Penalty for non-compliance

PENALTY PROVISIONS

- Fine not less than Rs. 5 Lakh extended up to Rs. 25 Lakh could be imposed upon the lending company
- Imprisonment for the officer in default, extendable up to 6 months along with fine not less than Rs. 5 Lakh and up to Rs. 25 Lakh.
- The recipient of the loan will be punishable with imprisonment which may extend to 6 months or with fine which shall not be less than Rs.5 lakhs but which may extend to Rs.25 lakhs or with both.

Section - 185 (4) (Penalty)

Objective of the Section: CARO reporting -reporting enhancement in CARO 2020

**CARO
reporting by
Auditors
(2016 Vs
2020)**

CARO 2016	CARO 2020
(iii)whether the company has granted any loans, secured or unsecured to companies, firms, Limited Liability Partnerships or other parties covered in the register maintained under section 189 of the Companies Act, 2013. If so,	(iii) whether during the year the company has made investments in, provided any guarantee or security or granted any loans or advances in the nature of loans, secured or unsecured to companies, firms, Limited Liability Partnerships or any other parties. If so,
	(a) whether during the year the company has provided loans or provided advances in the nature of loans, or stood guarantee, or provided security to any other entity [not applicable to companies whose principal business is to give loans], if so, indicate-
	(A) <u>the aggregate amount during the year, and balance outstanding at the balance sheet date</u> with respect to such loans or advances and guarantees or security to subsidiaries, joint ventures and associates.
	(B) <u>the aggregate amount during the year, and balance outstanding at the balance sheet date</u> with respect to such loans or advances and guarantees or security to parties other than subsidiaries, joint ventures and associates.

Objective of the Section: CARO reporting -reporting enhancement in CARO 2020

CARO 2016	CARO 2020
(a)whether the terms and conditions of the grant of such loans are not prejudicial to the company's interest;	(b) whether the investments made, guarantees provided, security given and the terms and conditions of the grant of all loans and advances in the nature of loans and guarantees provided are not prejudicial to the company's interest;
(b)whether the schedule of repayment of principal and payment of interest has been stipulated and whether the repayments or receipts are regular;	(c) in respect of loans and advances in the nature of loans whether the schedule of repayment of principal and payment of interest has been stipulated and whether the repayments or receipts are regular;
(c)if the amount is overdue, state the total amount overdue for more than ninety days, and whether reasonable steps have been taken by the company for recovery of the principal and interest;	(d) if the amount is overdue, state the total amount overdue for more than ninety days, and whether reasonable steps have been taken by the company for recovery of the principal and interest;

**CARO
reporting by
Auditors
(2016 Vs
2020)**

Objective of the Section: CARO reporting -reporting enhancement in CARO 2020

Additional reporting to be made as per CARO 2020

(e) whether any loan or advance in the nature of loan granted which has fallen due during the year, has been renewed or extended or fresh loans granted to settle the overdues of existing loans given to the same parties; If so,

specify the aggregate amount of such dues renewed or extended or settled by fresh loans and the percentage of the aggregate to the total loans or advances in the nature of loans granted during the year. [Not applicable to companies whose principal business is to give loans];

(f) whether the Company has granted any loans or advances in the nature of loans either repayable on demand or without specifying any terms or period of repayment; if so, specify the aggregate amount, percentage thereof to the total loans granted, aggregate amount of loans granted to Promoters, related parties as defined in clause (76) of section 2 of the Companies Act, 2013

The Companies Act, 2013 (“Act“) states that a related party with reference to a company, means:

- i. A director or a key managerial personnel or their relatives;
- ii. A firm, in which a director, manager or his relative is a partner;
- iii. a private company in which a director or manager or his relative is a member or director;
- iv. a public company in which a director or manager is a director and holds along with his relatives, more than two per cent of its paid-up share capital;
- v. anybody corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
- vi. any person on whose advice, directions or instructions a director or manager is accustomed to act;
- vii. any company which is (a) a holding, subsidiary or an associate company of such company;(b) a subsidiary of a holding company to which it is also a subsidiary; (c) an investing company or the venturer of the company.

Provided that nothing in sub-clauses (v) and (vi) shall apply to the advice, directions or instructions given in a professional capacity.

CARO reporting by Auditors (2016 Vs 2020)

Objective of the Section: To understand various legal aspects of acceptance of public deposits

Chapter V - Acceptance of deposits by Companies

- Definition of deposit: Section 2 (31) of the Companies Act, 2013 along with Rule 2(1)(C) of Companies (Acceptance of Deposit) Rules, 2014
- Section 73: Prohibition on Acceptance of Deposits from Public
- Section 74: Repayment of deposits, etc, Accepted before the Commencement of this Act
- Section 75: Damages for Fraud
- Section 76: Acceptance of deposits from public by certain companies
- Section 77: Punishment

**Acceptance of
public
deposits**

Objective of the Section: To understand various legal aspects of acceptance of public deposits

Definition of deposit: Section 2 (31)

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

Rule 2(1)(c) of Companies (Acceptance of Deposit) Rules, 2014 also defines ‘deposit’ to include any receipt of money by way of deposit or loan or in any other form, by a company, but does not include certain transactions as follows:

- Any amount received from Government/Authority shall not be treated as deposits (also any amount received from foreign government, foreign or international bank, etc)
- any amount received as a loan or facility from any banking company or from the State Bank of India or any of its subsidiary banks or from a banking institution
- any amount received as a loan or financial assistance from Public Financial Institutions notified by the Central Government in this behalf in consultation with the Reserve Bank of India or any regional financial institutions or Insurance Companies or Scheduled Banks as defined in the Reserve Bank of India Act, 1934 (2 of 1934)
- any amount received against issue of commercial paper or any other instruments issued in accordance with the guidelines or notification issued by the Reserve Bank of India
- any amount received by a company from any other company
- Any share application money accepted under this Act shall be treated as deposit if allotment is not made within 60 days

Acceptance of public deposits

Objective of the Section: To understand various legal aspects of acceptance of public deposits

Definition of deposit: Exempted from Deposit section

- any amount received from a person who, at the time of the receipt of the amount, was a director of the company or a relative of the director of the Private company
- any amount raised by the issue of bonds or debentures secured by a first charge on any assets referred to in Schedule III of the Act excluding intangible assets of the company (provided the amount of such bonds or debentures shall not exceed the market value of such assets as assessed by a registered valuer) or
- bonds or debentures compulsorily convertible into shares of the company within Ten (10) years.
- any amount received from an employee of the company not exceeding his annual salary under a contract of employment with the company in the nature of non-interest bearing security deposit
- any non-interest bearing amount received and held in trust
- an amount of Rs 25 lakh or more received by a start-up company, by way of a convertible note (convertible into equity shares or repayable within a period not exceeding 10 years from the date of issue) in a single tranche, from a person
- any amount received in the course of, or for the purposes of, the business of the company-
 - ✓ Customers advances if not adjusted against goods and services within 365 days shall be deposit (capital advance for long term project not to be considered as deposit) - In the case of service -can be 5 years
 - ✓ as security deposit for the performance of the contract for supply of goods or provision of services
 - ✓ as an advance for subscription towards publication, whether in print or in electronic to be adjusted against receipt of such publications

Acceptance of public deposits

Period of Accepting deposits

- No company shall accept or renew any deposit whether secured or unsecured which is repayable within a period of less than 6 months or more than 36 months for the date of acceptance or renewal

However, A company may for the purpose of meeting its short-term requirement, accept the deposits for repayment earlier than 6 months, but not earlier than 3 months. Such deposit shall not exceed ten per cent. of the aggregate of the Paid-up share capital, free Reserves and securities premium account of the company

- No company shall accept or renew any deposit from its members, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits exceeds 35% of the aggregate of the Paid-up share capital, free Reserves and securities premium account of the company. (in the case of IFSC public company and Pvt co - limit can be extended up to 100%)

- Provided further that the maximum limit in respect of deposits to be accepted from members shall not apply to following classes of private companies, namely:-

(i) a private company which is a start-up, for 10 years from the date of its incorporation;

(ii) a private company which fulfils all of the following conditions, namely:-

(a) which is not an associate or a subsidiary company of any other company;

(b) the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or 50 crore rupees, whichever is less ; and

(c) such a company has not defaulted in the repayment of such borrowings

- No Eligible Company, shall accept or renew deposit from its members (10% of paid up share capital+free reserves+securities Premium) and in the case of public deposit (threshold limit will be 25%). Eligible company are public company having networth of Rs 100 crores or turnover of Rs 500 crores
- In the case of government company - threshold limit is 35% of capital+free reserve+Securities Premium

Period of Acceptance of public deposits

Section 73(2) and 73(3) of the Companies Act, 2013

Accepting deposits from members

A Company may, subject to the passing of a resolution in general meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the Company and its members, subject to the fulfilment of the following conditions, namely: –

- issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the Company and such other particulars in such form and in such manner as may be prescribed;
- filing a copy of the circular along with such statement with the Registrar within thirty days before the date of issue of the circular;
- depositing, on or before the thirtieth day of April each year, such sum which shall not be less than twenty per cent. of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account;
- certifying that the Company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits and where a default had occurred, the Company made good the default and a period of five years had lapsed since the date of making good the default
- providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company:

Every deposit accepted by a Company under sub-section (2) shall be repaid with interest in accordance with the terms and conditions of the agreement referred to in that sub-section

- **Provided** that in case where a Company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as “unsecured deposits” and shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits.

Exception for Private Companies

In case of private company - Clause (a) to (e) of Sub-section 2 of Section 73 shall not apply to private Companies which accepts from its members monies not exceeding one hundred per cent, of aggregate of the paid up share capital and free reserves, and such company shall file the details of monies so accepted to the Registrar in such manner as may be specified

Exception for Private Companies

Practical aspects

Return of deposits to be filed with Registrar

Every company, shall on or before the 30th day of June, of every year, file with the Registrar, a return in **Form DPT-3** along with the fee and furnish the information contained therein as on the 31st day of March of that year **duly audited by the auditor of the company.**

- It is hereby clarified that Form DPT-3 shall be used for filing return of deposit or particulars of transaction not considered as deposit or both by every company other than Government company.

Applicability of form DPT-3

This form is applicable on all companies except:

- a government company
- a banking company
- a non-banking financial company registered with the Reserve Bank of India
- a housing finance company registered with the National Housing Bank established under the National Housing Bank Act, 1987

However, insurance companies are registered with IRDA, so the obligation to file DPT-3 is also applicable on them.