



Fund Raising via Private Instruments

11/26/15



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Private Placement

A Genre for raising funds



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REGULATORY FRAMEWORK FOR PRIVATE PLACEMENT AS PER COMPANIES ACT 2013

Chapter III: Prospectus And Allotment of Securities

Section 42: Offer or invitation for subscription of securities on private placement

- Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014

Chapter IV: Share Capital And Debentures

Section 55: Issue and redemption of preference shares

- Rule 9 & 10 the Companies (Share Capital and Debentures) Rules, 2014

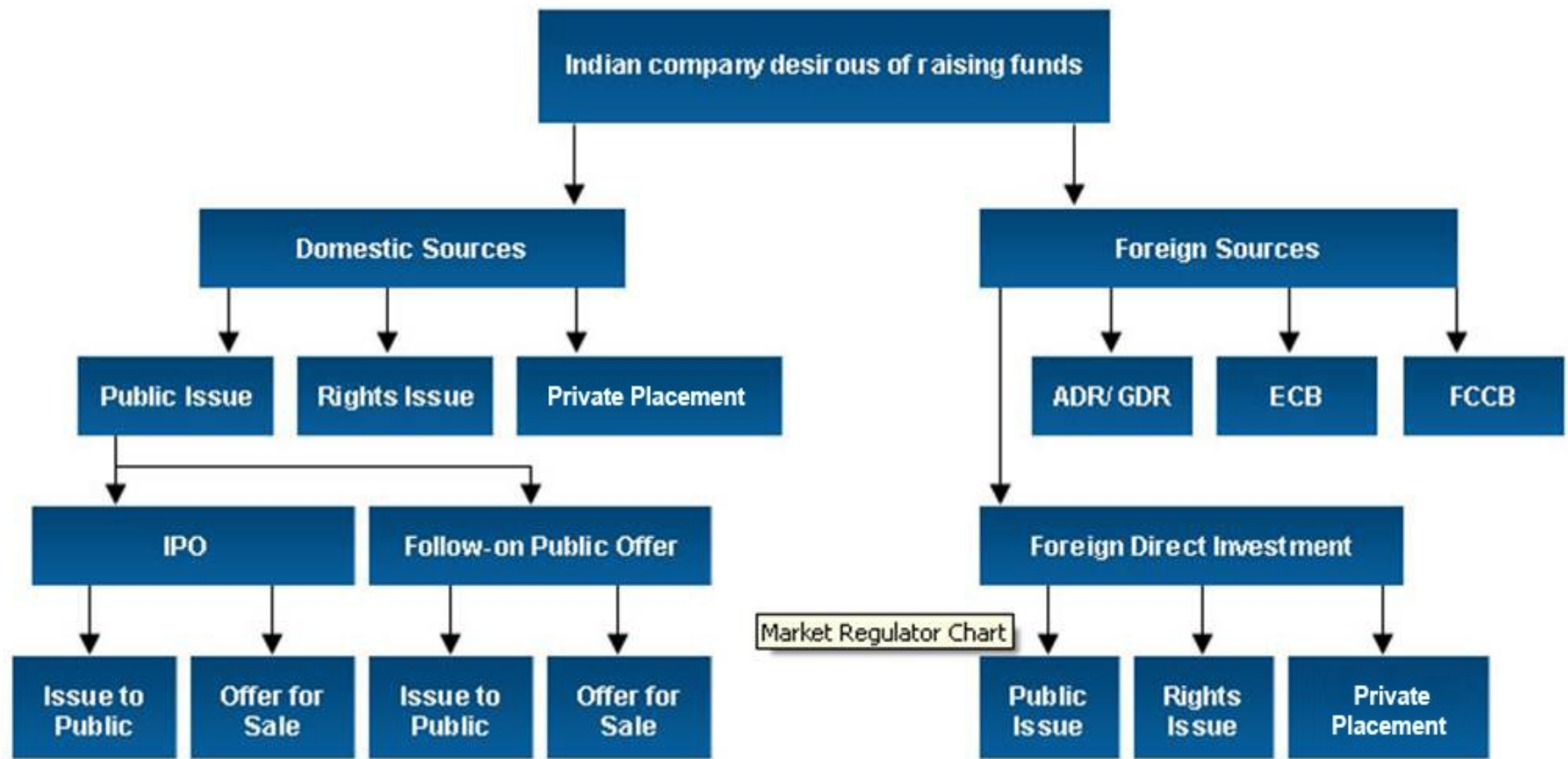
Section 62: Further Issue of Share Capital

- Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014

Section 71: Debentures

- Rule 18 of the Companies (Share Capital and Debentures) Rules, 2014

Modes Available For Indian Companies For Raising Funds



Private Placement as per Section 42 of the Act

For the 1st time in Indian legal history, the term “Private Placement” has been defined under the Companies Act 2013

*Private Placement has been specifically defined 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.*

Securities

Securities as defined in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956

Companies Act, 2013 seeks to regulate issue of all types of securities and not just shares and debentures



Securities as per Securities Contract (Regulation) Act, 1956

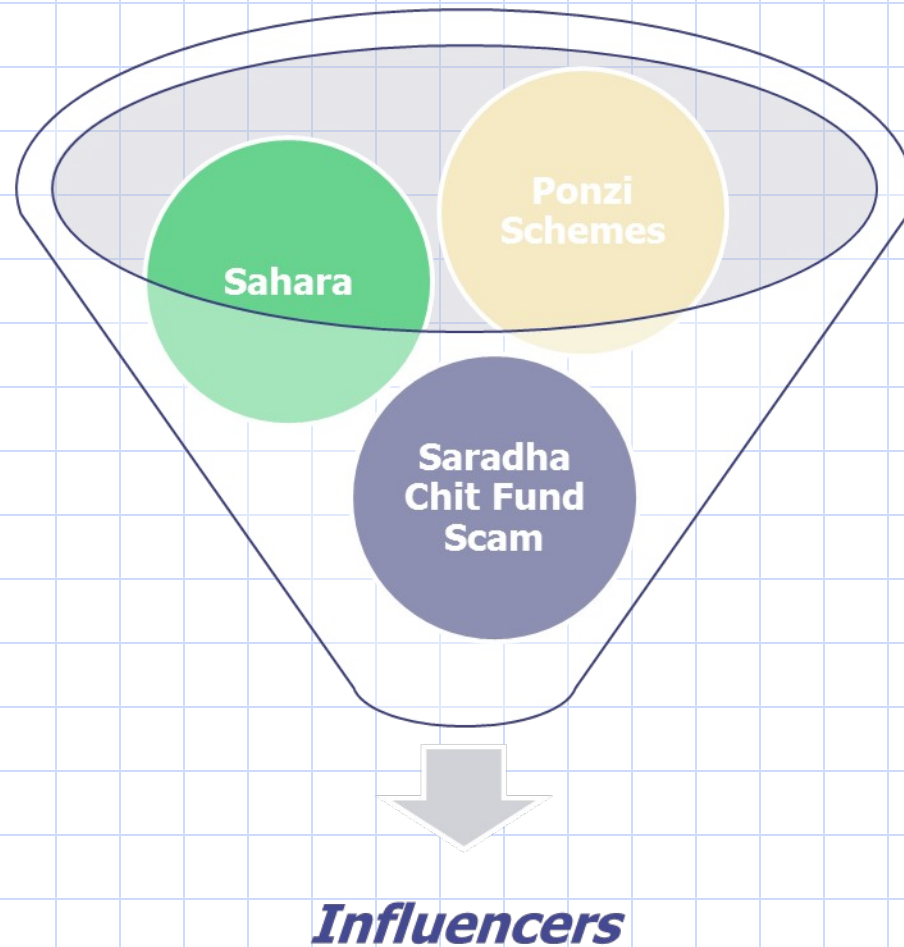
As per Clause (h) of Section 2, **Securities** include:

- (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.*



Use of term ‘securities’ instead of ‘shares’ - Use of the term shares in the Companies Act, 1956 restricted regulations of issuances of various other instruments by Company to raise funds . **Companies manipulated this loophole by using other terminology or nomenclature for instruments used to raise funds, thereby easily escaping the regulatory oversight.**

Scandals that lead Lawmakers to enact Stringent Provisions



Why Stringency in Provisions??

- Lacunae in the legal provisions of the Companies Act, 1956 regarding private placement have lead to increase in malpractices. :
 - Provisions of the Companies Act, 1956 were narrow and covered under its ambit only shares and not all securities, while SEBI defines the term ‘securities’
 - While a private placement could be made only to a maximum of 49 persons at one go, there was no provision to prevent companies from convening multiple board meetings to approve such allotments. As a result, companies started calling several meetings and made allotment to 49 allottees at each such meeting, thereby manipulating the law.
 - Companies also took advantage of the overlapping of powers between the MCA and SEBI to make multiple private placements.

The landmark judgment in the Sahara Case has set the direction for private placement code and the Companies Act, 2013 draws heavily out of the principles enunciated by the Apex Court



Ambit of Listed Companies as per Companies Act, 2013



A company which has any of its securities listed on any recognized stock exchange.

Meaning thereby



The company even if having its debentures/preference share listed on any recognized stock exchange is now deemed to be considered as the Listed Company.

For the Preferential offer, the Listed Companies are required to comply with SEBI (ICDR) Regulations, 2009 in addition to Section 42.



Ambit of Private Placement

Section 42 read with
Rule 14 of the Companies
(Prospectus and Allotment of Securities) Rules, 2014

Private Placement

Section 55
read with
Rule 9 & 10
the
Companies
(Share
Capital and
Debentures)
Rules, 2014

Section 62 read with Rule 13
of the Companies
(Share Capital and Debentures) Rules, 2014

**Preferential
Offer**

**Issuance of
Redeemable
Preference
Shares**

Section 71 read with Rule 19
the Companies (Share Capital
and Debentures) Rules, 2014

**Issuance of
Redeemable
Debentures**



Private Placement in terms of Section 42 of the Act:

A Stringent Regime governing all types of Companies

Limit would be reckoned individually for each class of security (i.e. Equity, Debentures, Preference Shares,)

Offer in One FY

- 200 investors excluding QIB and ESOP

Conditions related to Private Placement

- Prior approval of Shareholders is required to be obtained via Special Resolution

For Non-Convertible Debentures, a previous special resolution in respect of all the offers during one year can be obtained.

- Justification or basis for the offer price to be disclosed in the Explanatory Statement calling General Meeting
 - * Minimum investment size of Rs 20,000 per person
- Cash receipt prohibited

The above mentioned limit of 200 investors and Rs 20,000/- Face Value of Investment shall not be applicable to:

- NBFC Companies; and
- Housing finance companies;

Provided they comply with the Regulations made in respect of offers on private placement basis, by RBI or National Housing Board. However, if RBI or NHB have not specified any similar regulations, even such companies would be required to comply with the provisions of these Rules.

Private Placement in terms of Section 42 read with Rule of the Companies (Prospectus and Allotment of Securities) Rules, 2014

Conditions related to Private Placement

- Maintenance of complete database of the persons to whom the offer to subscribe to the securities is proposed to be made
- Offer of Securities will be made only through personalized offer letter to such persons whose names are recorded prior to the invitation to subscribe
- Maintenance of Record of the Bank Account of the Applicants
- Allotment to be made within 60 days from the date of receipt of application money, else refund @ 12% interest p.a. within 15 days from the date of completion of 60 days
- Minimum gap between two offers to be not less than 60 days
- No fresh offer to be made unless previous offer is completed
- Share application money to be kept in Separate Bank Account.
- * Transfer of securities is permitted



Disclosures Required under Offer Document



- *General Information about the Company*
- *Factors that directly impact the business of the Company*
- *Details of default, if any, including therein the amount involved, duration of default and present status, in repayment of –*
 - I. statutory dues;*
 - II. debentures and interest thereon;*
 - III. deposits and interest thereon;*
 - IV. loan from any bank or financial institution and interest thereon.*
- *Details of Issuance of Securities*
- *Disclosures with regard to interest of Directors, Litigation etc.*
- *Financial Information of the Company*



Preferential Offer

As per Explanation to Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014, 'Preferential Offer' means an issue of shares or other securities, by a company to any select person or group of persons on a preferential basis and does not include shares or other securities offered through a public issue, rights issue, employee stock option scheme, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities.

"shares or other securities" means equity shares, fully convertible debentures, partly convertible debentures or any other securities, which would be convertible into or exchanged with equity shares at a later date.

↓

Section 62 read with **Rule 13** of the Companies (Share Capital and Debentures) Rules, 2014 pertaining to issuance of Equity Shares & other convertible securities

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Provides Procedural Framework



Main Highlights of Section 62 read with Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014

Main Highlights of Preferential Offer

- Prior approval of Shareholders is required to be obtained via Special Resolution
- Allotment to be made within 12 months from the date of Special Resolution
- Mandatory Disclosures in the Explanatory Statement to the Notice calling General Meeting:
 - a. intention of the promoters, directors & KMPs
 - b. Change in control, if any, consequent to the preferential offer
 - c. Justification for the allotment proposed to be made for consideration other than cash
 - d. Details of the proposed allottees along with post preferential shareholding
 - e. Basis on which price is arrived along with the report of Registered Valuer

Rule 13 is applicable only on unlisted companies

As on date, valuation can be done by an Independent Merchant Banker or by Independent Chartered Accountant in Practice having minimum experience of 10 years.



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SEBI ICDR Regulations vis-à-vis Companies Act, 2013

Particulars	SEBI ICDR Regulations (Chapter VII)	Companies Act, 2013
In-Principle Approval	Stock Exchange in-principle approval is required	No Approval is required
Valuation	Clear cut pricing criteria is defined .	Pricing to be done by Registered Valuer
Relevant Date	Specific Criteria for determination of Relevant Date	No specific criteria for determination of Relevant Date
Offer Document	No Offer document is prescribed for raising funds via preferential issue.	Offer document is prescribed for issuance of shares even to a single investor.
Filing of Offer Document with ROC & SEBI	Not Applicable	Mandatory filing of offer document with ROC & SEBI
Time period for making allotment	Within 15 days from the date of passing of Special Resolution or receipt of Regulatory Approval, whichever is later	Within 12 months from the date of passing of Special Resolution. Provided in the event of receipt of application money, the said allotment is required to be made within 60 days from the date of receipt.
Lock-in Requirement	Minimum Lock-in of 3 years for Promoters & 1 year for Non-Promoter	No mandatory Lock-in
Tenure of Convertible Securities	Maximum tenure is 18 months	Not prescribed. However, as per deposit provisions, the maximum tenure of CCDs can be 5 years



Issuance of Redeemable Preference Shares

Section 55 read with **Rule 9** of the Companies (Share Capital and Debentures) Rules, 2014 pertaining to issuance and redemption of preference shares.



Provides Procedural Framework

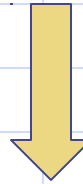
Main Highlights for issuance of Redeemable Preference Shares:

- a. Prior approval of shareholders via Special Resolution is required for issuance of Redeemable Preference Shares;
- b. Maximum tenure for redemption of preference shares shall not exceed 20 years;
- c. Enhanced disclosure requirement in the Explanatory Statement to the Notice calling General Meeting of the Shareholders;
- d. Specific requirement of making disclosures of certain parameters in the shareholders' resolution that have a direct bearing on the interest of shareholders'.



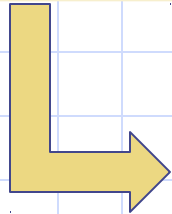
Relaxation for Issuance of Redeemable Preference Shares by Infrastructure based Companies

Company Engaged in Infrastructural Projects



May Issue

Preference Shares for a maximum period of 30 years.



Provided option be given to preference shareholder for redemption of a minimum 10% preference shares per year from the 21st year onward or earlier.



Issuance of Redeemable Debentures

Section 71 read with **Rule 18** of the Companies (Share Capital and Debentures) Rules, 2014
pertaining to issuance and redemption of Debentures



Provides Procedural Framework

Main Highlights for issuance of Redeemable Debentures:

- a. Creation of Charge or mortgage on securities;
- b. Maximum tenure for redemption of Debentures shall not exceed 20 years;

In case of Company engaged in setting infrastructure projects, maximum tenure for redemption is 30 years.



Interplay of Private Placement and issuance of other securities

Private Placement: Section 42 read with Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014

Bible for all types of issues to a specific group of persons



Specific Provisions prescribed under the Act for issuance of any specified Securities

For Example, if the Company proposes to issue redeemable preference shares to a specific group of persons, then in addition to Section 42, the Company is required to comply with the provisions of Section 65 read with Rule 9 of the Companies (Share Capital and Debentures) Rules, 2014

Other highlights of Private Placements

- **Filing of Form MGT 14 with ROC:** In compliance with the provisions of **Section 117(1) of the Companies Act 2013**, a *copy of special resolution along with the Explanatory Statement is required to be filed within 30 days from the date of passing of the said resolution.*
- **Preparation of a private placement offer letter in terms of Form PAS-4:** In terms of **Rule 14(1)(a) of the Companies (Prospectus and Allotment of Securities) Rules, 2014:** *A Company may make an offer or invitation to subscribe to securities through issue of a private placement offer letter in Form PAS-4.*
- **Filing of private placement offer document in Form PAS-5 within 30 days** from the date of circulation of the private placement offer: In terms of **Section 42(7) read with proviso to Rule 14(3) of the Companies (Prospectus and Allotment of Securities) Rules, 2014**
- **Filing of Form PAS 3 with ROC** within 30 days of allotment of securities: As per **Section 42(9) of the Companies Act, 2013 read with Rule 14(4) of the Companies (Prospectus and Allotment of Securities) Rules, 2014**
- Maintenance of Register of holders of securities in compliance with the provisions of Section 88 of the Companies Act, 2013



Penal Provisions for contravention with the stipulations of Private Placements

If a Company makes an offer or accepts monies in contravention with the provisions of Section 42, its promoters & directors shall be liable for a penalty which may extend to:

- (a) The amount involved in the offer or invitation; or
- (b) Rupees 2 Crores,

Whichever is higher

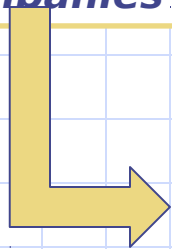
And

The Company shall also refund all monies to subscribers within 30 days of the order imposing the penalty.



Industry Concerns with the promulgation of New Provisions

Company is having pending application money/unsecured loan as on 1st April, 2014 and now it would like to allot the shares against the said outstanding money/unsecured loan. The pertinent question is how to comply with the stringent stipulations of Section 42 & 62 of the Companies Act, 2013?

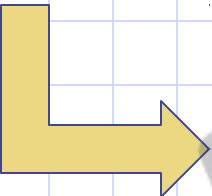


Presently, the option available with the Company is to tender the pending application money/unsecured loan in the separate bank account and then make the allotment



Industry Concerns with the promulgation of New Provisions

Section 42(7) of the Act mandates the Companies that the offer shall be made only to those persons whose names are recorded prior to invitation to subscribe and only such persons should receive the offer. The said provisions would lead to practical difficulties in raising funds via Qualified Institutional Placement, a route prescribed by SEBI ICDR Regulations.



As per SEBI ICDR Regulations, the Company can make offer to “n” no. of QIBs and if they find potential in the Company’s business, they will accept offer accordingly.

Industry Concerns with the promulgation of New Provisions

SEBI presently allows listed Companies to come out with Warrant issues, however, Companies Act restricts the issuance of warrants as the term securities does not cover issuance of Warrants. *In such scenario, what would be the status of Warrants that have already been issued by the Listed Companies. Would it also tantamount to outstanding share application money?*

If Company is having its Debt Securities Listed then whether such Company is required to comply with the SEBI ICDR Regulations or *Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014 for issuance of Equity or other convertible Securities?*

As per FEMA, the allotment to be made to foreign investor within 180 days from the date of receipt of Share Application Money whereas as per Companies Act, 2013, the allotment is required to be made within 60 days from the date of receipt of application money. Whether the allotment is supposed to be made within 60 days or 180 days from the receipt of application money from Non-Resident?





Acceptance of Public Deposits Critical Aspects

11/26/15

REGULATORY FRAMEWORK FOR PUBLIC DEPOSITS AS PER COMPANIES ACT 2013

Chapter V: Acceptance of Deposits by Companies

Section 73: *Prohibition on acceptance of Deposits from Public*

Section 74: *Repayment of Deposits, etc. accepted before commencement of this Act*

Section 75: *Damages for Fraud*

Section 76: *Acceptance of deposits from Public by certain Companies*

- *The Companies (Acceptance of Deposits) Rules, 2014*



Deposits – As per Section 2(31) of the Companies Act, 2013

“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.*



Public Deposits – Wider Coverage...

Accepting Deposits

- All companies, including Private, can accept deposits only from members
- Any funds received from directors are exempted from the definition if Director gives declaration of investment of own fund. Deposits from Relatives of directors not allowed
- Prior approval of members required for accepting deposits
- Deposit to be invited by issue of circular to members
- Where deposits are unsecured it has to be specifically quoted in every document inviting deposit

Accepting deposit from public no longer easy. Strict requirements to ensure protection of depositor's interests

Repayment

- All the outstanding deposits or any interest due thereon on commencement of the Act have to be repaid within 1 year from date of commencement or from the due date of payment, whichever is earlier

Conditions

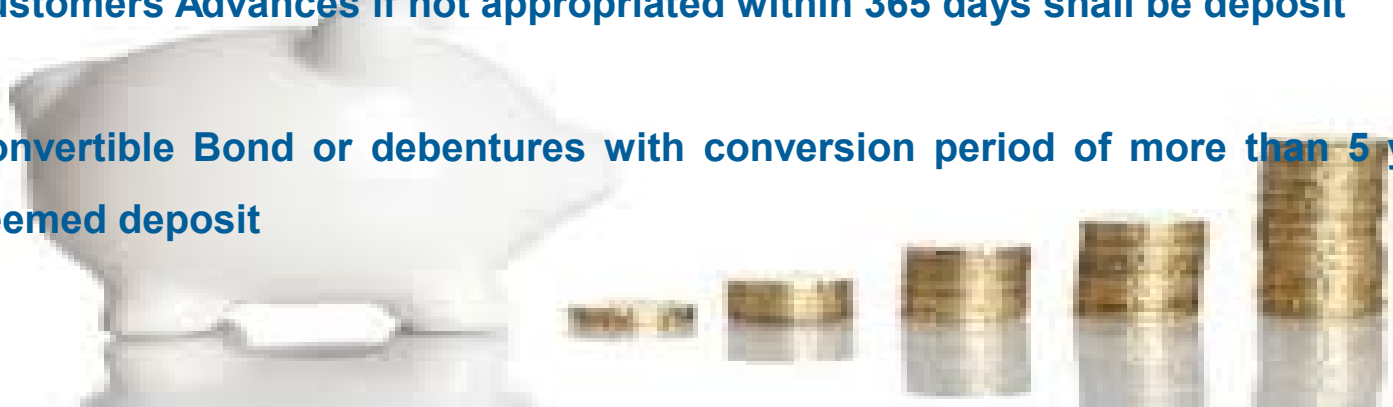
- Only prescribed classes of companies having net worth of INR 100 crore or turnover of INR 500 crore are allowed to raise deposits from public
- Credit rating of deposits compulsory
- Obtaining Deposit Insurance (after 31.03.2015)
- Compulsory creation of charge on the assets of the company within 30 days of acceptance, if deposits are secured and appointment of Deposit trustee



Public Deposits – Wider Coverage...

Extended scope of Public Deposits

- Any share application money accepted under this Act shall be treated as Deposit if allotment is not made within 60 days
- Customers Advances if not appropriated within 365 days shall be deposit
- Convertible Bond or debentures with conversion period of more than 5 years are deemed deposit



Limit on Acceptance of Deposits

C
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ELIGIBLE COMPANIES*

Deposits

From Public

From Members

From Members

25% of paid-up
capital and free
reserves.

10% of paid-up
capital and free
reserves.

From Public

-

-

*** Eligible Companies are Companies having net worth of INR 100 crore or turnover of INR 500 crore and are allowed to raise deposits from the persons other than its members**



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Ambit of Free Reserves

As per Companies Act 2013

Free Reserves= Reserves available for distribution of Dividend

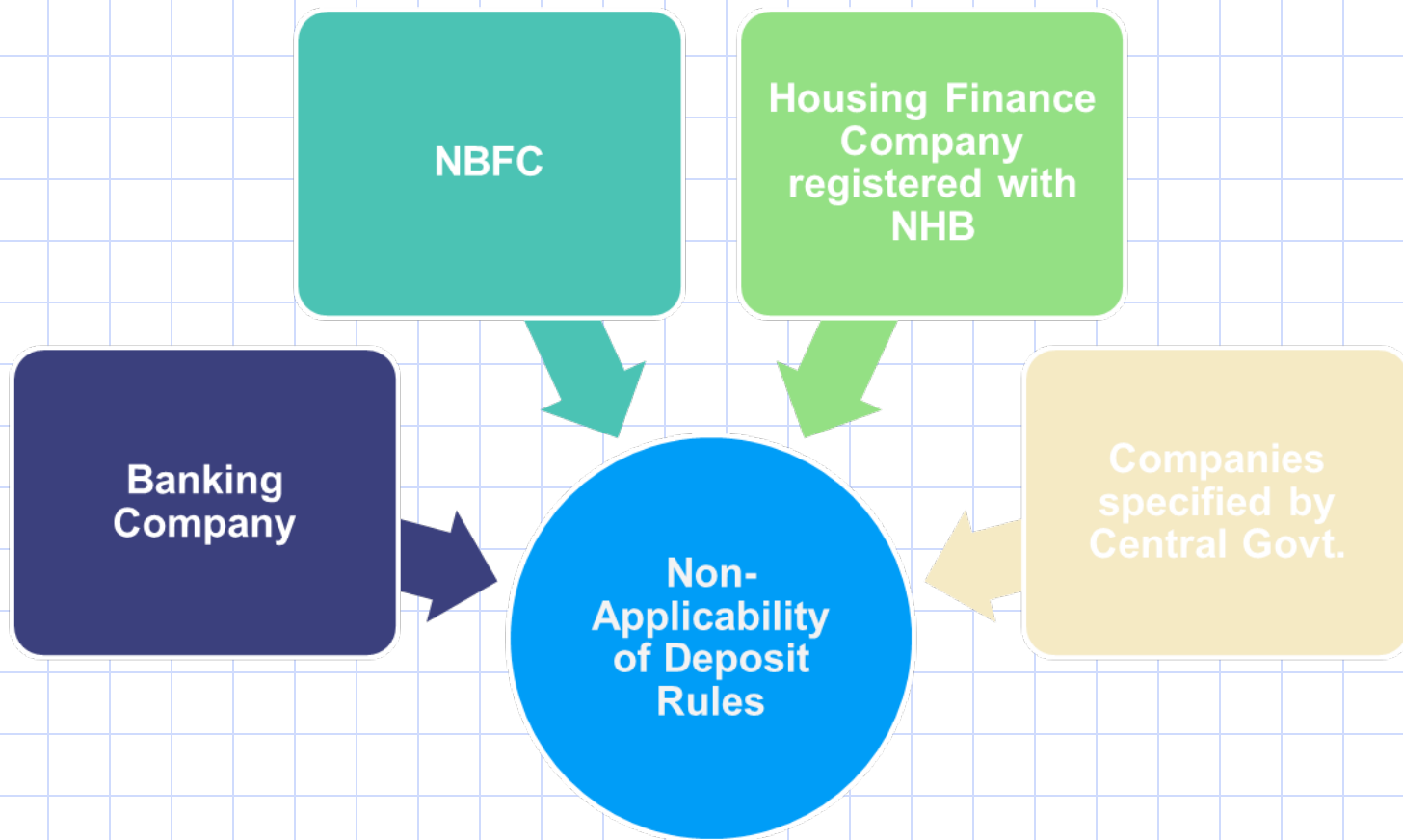
As per Companies Act 1956

Free Reserves= Reserves available for distribution of Dividend plus Securities Premium Account

Securities Premium Account is the premium used only for issuance of Bonus Shares not for distribution of Dividend.



Non-Applicability of Public Deposits Rules on certain Companies



Whether unsecured loan received from Promoter in stipulation of Financial Commitment with financial institution will tantamount to Deposits??

As per Rule 2(1) (c) of **The Companies (Acceptance of Deposits) Rules, 2013:**

Amount received from promoter or their relatives or both, by way of unsecured loan in stipulation of financial institution shall continue to be exempt from deposit but such exemption is available only till the loans of financial institutions or banks are repaid and not thereafter.



Public Deposits – Clarification in terms of Explanation to Rule 19

With regard to

Acceptance of Deposit by the Company under the Companies Act, 1956

The Company is Repaying Deposits and interest thereon in accordance with the provisions of Companies Act, 1956 and continues to repay on due dates as per terms of issuance

Considered as deemed compliance with the provisions of Section 74(1) of the New Act



Other Important Provisions

- Issuance of Circular to all its members by registered post or speed post or by electronic mode in Form DPT-1.
- *Filing a copy of the aforesaid Circular with ROC within 30 days before the date of issuance of the Circular.*
- Publication of the above circular in English Language in English Newspaper and in Vernacular Language language in a vernacular newspaper having wide circulation in the State where the Registered Office of the Company is situated and uploading the copy of the same on website.
- Mandatory Appointment of one or more Deposit Trustees for creating security for the Deposits (in the event of inviting secured deposits) by executing Trust Deed as prescribed in terms of Form DPT-2 within 7 days before issuing the advertisement inviting Deposits.
- Furnishing of Return with ROC in Form DPT-3 on or before 30th June of every year for the period ended 31st March as per the information duly audited by the Auditor.



Other Important Provisions

- *Deposit Receipt shall be issued to the Depositor within 21 days from date of receipt of money or realization of cheque (under Companies Act 1956, the time period was 8 weeks)*
- *Register of Deposits is required to be maintained at Registered Office in respect of deposits accepted or renewed and the entries shall be made within 7 days from the date of issuance of receipt and the said Register shall be maintained for a period of not less than 8 years from the financial year in which the latest entry is maintained in the Register.*



Other Important Provisions

- **Penal Rate of Interest:** Eighteen percent per annum for the overdue period in case of deposits, whether secured or unsecured, matured and claimed but remaining unpaid.
- **Punishment for Contravention:** Company & every officer of the Company who is in default shall be punishable with fine which may extend to **Rs. 5000** and where the contravention is a continuing one, with a further fine which may extend to **Rs. 500 for every day after the first day during which the contravention continues.**

If the deposits are existing as on the date of commencement of the Act or any interest remains unpaid on such commencement, the same shall be disclosed in Form DPT-4 within a period of 3 months from such commencement or from the date on which such payments are due.



Creation of Deposit Repayment Reserve Account

As per Section 73 (2) (c) of the Companies Act, 2013 read with Rule 13 of the Companies (Acceptance of Deposits) Rules, 2013, a deposit of not less than 15% of the amount of its deposits maturing during the Financial Year and the next following financial year is required to be maintained with scheduled commercial bank in a separate bank account to be called as Deposit Repayment Reserve Account on or before the 30th day of April of each year.

For Example: If the Company came out with the Deposit Issue of Rs. 50 Crores wherein Deposits amounting to Rs. 12 Crores are to be redeemed during the current financial year and Rs. 20 Crores are proposed to be redeemed in the next financial year, then the Company is required to deposit Rs. 4.80 Crores (15% of 32 Crores)

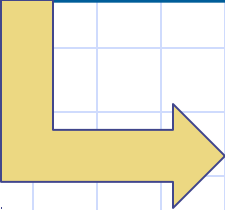




Industry Concerns...

Concerns with regard to Creation of Deposit Repayment Reserve Account

As per Section 74, the deposits accepted before commencement of the new Act have to be repaid within one year from the commencement of the new Act and as per Rule 19 of the Companies (Acceptance of Deposits) Rules, 2014, the Deposits accepted earlier under Companies Act, 1956 can be repaid on the due dates for the remaining period of such deposits.



The pertinent question is whether the liquid deposit (of 15% of deposits maturing during the Financial Year and the next Financial Year to be kept in a Deposit Repayment Reserve Account

Share Application Money Pending Allotment outstanding in the Books of Accounts would be covered under the ambit of Deposits or not??

As per **The Companies (Acceptance of Deposits) Rules, 2013:**

“any amount received and held pursuant to an offer made in accordance with the **provisions of the Act** towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment, so long as such amount is appropriated only against the amount due on allotment of securities applied for”.

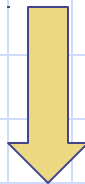
Company is having pending application money on 1st April, 2014 and it has not even allotted the securities within 60 days from the aforesaid date. In such scenario, whether that outstanding share application money would be considered as Deposit even though such money has not been received under the provisions of this Act i.e. Companies Act, 2013?



Unsecured Loan outstanding in the Books of Accounts on 1st April, 2014 would be covered under the ambit of Deposits or not??

As per the Companies Act 1956, unsecured loan received by the Company was not covered under the purview of Deposits, therefore, treating the entire unsecured loan outstanding in the Books of the Company would cause undue hardship on the Company.

One of the stipulations laid down in Section 73 of the Act to qualify for accepting deposits from members require that the Company has not defaulted in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest thereon



Would act as a hurdle for the genuine Companies who have not intentionally committed default in repayment.

In the best interest of industry and economic growth, it is recommended that the specific period of debarment from raising funds should be incorporated. For Example, the Companies which have defaulted in repayment of deposits or interest thereon during a period of 5 years is not eligible to accept deposits..



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Other Industry Concerns...

Whether it is necessary to refund the entire amount which is treated as deposits under the Companies Act 2013 but not under Companies Act 1956 within a period of 1 year under Section 74 of the Companies Act, 2013

If the Company has repaid the deposits accepted earlier, is it still required to file Form DPT 4 within 90 days?

A Company which has published the advertisement for accepting deposit under the provisions of the Companies Act, 1956 but has not still accepted any deposit can continue to do so or need to comply with the provisions of Companies Act, 2013?

A Company may accept any amount from its members only. A private company may accept any amount from its Directors which will not be considered as Deposit. What happened if Director or shareholder are the same persons?



Thank You

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