

## Its all about deposits!

- What is a deposit?

Deposits, in common parlance refers to the savings/excess funds that general public entrust to a reliable entity for safekeeping; and in turn expect a return based on productive use of these funds or to be held in trust for withdrawal on demand. This reliable entity was originally created in the form of a Bank and regulated by RBI through the RBI Act, 1934 and then by the Banking Regulation Act, 1949. Over the years various unauthorized entities started collecting deposits from public with a promise to generate exorbitantly high returns within a short period of time. Given the inherent weakness in the business model of these entities or due to their malicious intent, public funds at large have been fleeced and none of their deposits repaid, resulting in a jolt to the financial system. Therefore arose a need to include the term loan as being a deposit and to ensure that the true nature of the transaction of receipt of money does not go unnoticed or hidden in the books of the borrower and the liability gains the deserved seniority in terms of repayment.

Sec 2(31) of The Companies Act, 2013 defines the term “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. The Companies Act, 2013 demarcates the acceptance of deposits from public [Sec 73(1)] and prescribes no rules in this regard as public deposits accepted by any Company incorporated under this Act shall be governed only by RBI. However with respect to acceptance of deposits from members [Sec 73(2)], Companies Act 2013 governs the companies other than those governed by RBI (Banks, NBFCs) and Housing Finance Companies.

Sec 45I(bb) of the RBI Act, 1934 defines Deposit as “deposit” includes and shall be deemed always to have included any receipt of money by way of deposit or loan or in any other form.

- What is not a Public deposit?

Sec 45I(bb) of RBI Act, 1934 excludes a few receipts of money or loans from being treated as a "deposit". Para 2[1(xii)] of NBFC Acceptance of Deposits (Reserve Bank) Directions, 1998 states that the term "public deposit" includes the term "deposit" as defined under RBI Act, 1934 and also excludes a few receipts of money or loans from being treated as "Public deposits".

The abovementioned two definitions when read together exclude the following from being deemed as Public deposits:

- (i) amounts raised by way of share capital by way of subscriptions to any shares, stock, bonds or debentures pending the allotment of the said shares, stock, bonds or debentures and any amount received by way of calls-in-

advance on shares, in accordance with the Articles of Association (AoA) of the company so long as such amount is not repayable to the members under the AoA of the company;

- (ii) amounts contributed as capital by partners of a firm;
- (iii) any amount received from the Central Government or a State Government or any amount received from any other source and whose repayment is guaranteed by the Central Government or a State Government or any amount received from a local authority or a foreign Government or any other foreign citizen, authority or person;
- (iv) amounts received from a scheduled bank or a co-operative bank or any other banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949;
- (v) any amount received from Industrial Development Bank of India, or Life Insurance Corporation of India, or General Insurance Corporation of India and its subsidiaries, or Small Industries Development Bank of India, or Unit Trust of India, or National Bank for Agriculture and Rural Development, or Electricity Board constituted under the Electricity (Supply) Act, 1948, or the Tamil Nadu Industrial Investment Corporation Ltd, or the National Industrial Development Corporation of India Ltd, or the Rehabilitation Industries Corporation of India Ltd, or the Industrial Credit & Investment Corporation of India Ltd, or the Industrial Finance Corporation of India Ltd, or the Industrial Investment Bank of India Ltd, or the State Trading Corporation of India Ltd, or the Rural Electrification Corporation Ltd, or the Minerals and Metals Trading Corporation of India Ltd, or the Agricultural Finance Corporation Ltd, or the State Industrial and Investment Corporation of Maharashtra Ltd, or the Gujarat Industrial Investment Corporation Ltd, or Asian Development Bank or International Finance Corporation or any State Finance Corporation or institution that may be specified by RBI in this behalf;
- (vi) amounts received in the ordinary course of business, by way of security deposit, dealership deposit, earnest money or advance against orders for goods, properties or services.
- (vii) any amount received by a company from any other company;
- (viii) any amount received from a person who at the time of receipt of the amount was a director of the company or any amount received from its shareholders by a private company or by a private company which has become a public company under section 43A of the Companies Act, 1956 and continues to include in its AoA provisions relating to the matters specified in section 3[1(iii)] of The Companies Act, 1956 or Sec 2(68) of The Companies Act, 2013. Such director or shareholder from whom the money is received

furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting from others. In the case of joint shareholders of a private company, monies received from or in the name of the joint shareholders except the first named shareholder shall not be eligible to be treated as the receipt of money from the shareholder of the company.

- (ix) any amount received from a relative of a director of an NBFC. Such deposit shall be accepted only on an application made by the depositor containing therein that as on the date of deposit, he is related to the specific director in the capacity of a relative as defined under Companies Act, 2013
- (x) any amount raised by the issue of bonds or debentures secured by the mortgage of any immovable property of the company; or by any other asset or *which would be compulsorily convertible into equity* provided that in the case of such bonds or debentures secured by the mortgage of any immovable property or secured by other assets, the amount of such bonds or debentures shall not exceed the market value of such immovable property/other assets
- (xi) any amount brought in by the promoters by way of unsecured loan in pursuance of stipulations of lending institutions subject to fulfillment of certain conditions, like (a) the loan is brought in pursuance of the stipulation imposed by the lending public financial institution in fulfilment of the obligation of the promoters to contribute such finance, (b) the loan is provided by the promoters themselves and/or by their relatives, and not from their friends and business associates, and (c) the exemption under this sub-clause shall be available only till the loan of financial institution is repaid and not thereafter
- (xii) any amount received from an individual or a firm or an association of individuals not being a body corporate, registered under any enactment relating to money lending which is for the time being in force in any State
- (xiii) any amount received by way of subscriptions in respect of a 'chit' having the meaning assigned to it in clause (b) of section 2 of the Chit Funds Act, 1982.
- (xiv) Any credit given by a seller to a buyer on the sale of any property (movable or immovable)
- (xv) any amount received from a Mutual Fund which is governed by the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996
- (xvi) any amount received as hybrid debt or subordinated debt the minimum maturity period of which is not less than sixty months provided there is no option for recall by the issuer within the period

- (xvii) any amount received by issuance of commercial paper, in accordance with the guidelines issued by the Bank, vide Circular No. IECD.3/08.15.01/2000-2001 dated October 10, 2000
  - (xviii) any amount received by a Systemically important non-deposit taking NBFC by issuance of 'perpetual debt instruments' in accordance with Company Circular DNBS (PD) CC. No.131 /03.05.002 /2008-2009 dated October 29, 2008 as amended from time to time.
  - (xix) any amount raised by the issue of infrastructure bonds by an Infrastructure Finance Company, as specified in the notification issued from time to time by the Central Government under section 80CCF of the Income Tax Act, 1961
- Who regulates deposit accepting activities of NBFCs and how?

The only regulator for NBFCs as far as acceptance of deposits from public is concerned, is RBI. It is evident from the NBFC Acceptance of Public Deposit (Reserve Bank) Directions, 1998 issued by RBI that any deposit received from public by an NBFC has to be compliant with these regulations and only those NBFCs holding a Category A - Deposit Taking Certificate of Registration can hold or accept public deposits. Sec 73(1) of Companies Act, 2013 categorically exempts NBFCs from being governed for deposit acceptance activities from public under Chapter V of Companies Act, 2013.

An NBFC may consider accepting deposits from shareholders/members of the Company. Sec 73(2) of Companies Act, 2013 governs acceptance of deposits from members however when read with Companies (Acceptance of deposits) Rules, 2014; it clearly exempts NBFCs from these regulations. Therefore the only regulation which an NBFC would have to refer to would be the RBI regulations which govern acceptance of public deposits as there are no separate regulations prescribed by RBI with respect to governing acceptance of deposits from members. In this instance what needs to be checked is whether the NBFC is a Public company or a Private Company. It does not matter whether the NBFC is a Deposit Taking NBFC or not because as per NBFC Acceptance of Public Deposit (Reserve Bank) Directions, 1998 issued by RBI, shareholder deposits accepted by private companies are exempted from being categorised as Public Deposits. However Shareholder deposits are exempted from being Public deposits, only for Private Companies (Subject to a prescribed declaration).

If an NBFC, deposit taking or not and being a public company or private company, desires to accept Deposits from Directors/relatives, it can refer to NBFC Acceptance of Public Deposit (Reserve Bank) Directions, 1998 which clearly excludes these deposits from being defined as Public Deposits. However there is a need to obtain the prescribed declaration from the director extending the deposit or in case of accepting deposit from a relative of a director, an application confirming therein the

relationship with the director (Refer Sec 2(77) of Companies Act, 2013 read with rules) as on date of accepting deposit needs to be obtained.

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