



CA. Pramod Jain

**B. Com (H), FCA, FCS, FCMA, LL.B.
DISA, MIMA, INSOLVENCY
PROFESSIONAL**

LOANS

Version 1.2



This Document would assist the reader in understanding the Requirements for **Loans** under Companies Act, 2013 as amended by Companies (Amendment) Act 2017

28th October 2018



CA. PRAMOD JAIN
B. COM (H), FCA, FCS, FCMA,
LL.B, DISA, MIMA, INSOLVENCY PROFESSIONAL

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Pursuant to amendments through Companies (Amendment) Act, 2017, it was thought prudent to amend the original document to make it relevant as on date. Hence, this document is updated as version 1.2

Earlier version of the document on Loan was:

- Original dated 31st August 2015

“Loans” is not defined anywhere in Companies Act, 2013. However in normal parlance any transaction in which money is given with the intention to be returned, with or without interest is loan.

Under income-tax law, loans and deposits are covered under sections 269SS & 269T and Section 2(22)(e) covers only loans and not deposits. This document only covers giving and taking of loans under Companies Act 2013 only i.e. Sections 179, 180, 185 & 186. Deposits are covered in another document.

STATUTORY SUMMARY

Loans	Section	Forms	
Taking	179,180,185	MGT-14	Filing of Resolutions and Agreements to the Registrar
Giving	185,186	MBP 2	Register of Loans

DIFFERENCE BETWEEN LOAN, ADVANCE AND DEPOSIT

There is a difference between Loan, Advance and Deposit under Companies Act 2013. A deposit includes a loan, but every loan may not be a deposit. An advance may be deemed to be a deposit but it may not be a loan. We should understand the difference between Loan, Deposit and Advance for the purposes of Companies Act 2013 and related compliances.



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A deposit is a much wider term in the Companies Act and includes loans as well as advances. All amounts of money received as loans and advances are deposits except as mentioned in Rule 2(1)(c) of Companies (Acceptance of Deposit) Rules, 2014.

For accepting amount of money as Advances which are NOT Deposits, no procedure is to be followed under the Companies Act 2013.

For accepting amount of money as Loans which are NOT Deposits, procedures have to be followed under the Companies Act 2013 as discussed further in this chapter.

For accepting amounts of money as Loans or Advances or Deposits, which ARE Deposits, procedure has to be followed under Companies Act 2013 which has been discussed in our other document titled 'DEPOSITS'.

LOAN FROM DIRECTORS

Amounts received from directors are loans and not deposits if the directors give the amount out of their own sources and not borrowed funds and give a certificate to that effect to the company. In such a case a company may accept loans from directors. The loan may be interest bearing or without interest too.

Consequent to amendment in Companies (Acceptance of Deposit) Rules 2014 w.e.f. 15th September 2015 amounts received from directors by a private company out of their own funds are to be reported in Directors Report. Hence, any Director's Report prepared after 15th September 2015 would require disclosing this information.

Also it is pertinent to note that consequent to amendment in Companies (Acceptance of Deposit) Rules 2014 w.e.f. 29th June 2016 amounts received from directors out of their own funds are also to be disclosed in Financial Statements (in Notes to the Accounts).

Director gives money out of borrowed funds

If the director gives the money out of borrowed funds, it would be a 'deposit' and provisions of section 76 read with Companies (Acceptance of Deposit) Rules 2014 would be applicable. In such a case no company other than an eligible company can take such loan within specified limits. An Eligible Company is a Public Company which has either minimum Net-Worth of Rs. 100 crores or Turnover of Rs. 500 Crores. A private company cannot accept such loan from the director.

However, if the director is a shareholder also, then in such a case (i.e., director borrowed funds to give loan to the company) section 73(2) read with Companies (Acceptance of Deposit) Rules 2014 would



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B. COM (H), FCA, FCS, FCMA,
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be applicable and it would be treated as deposit from shareholder. For compliances related to DEPOSITS read our document titled 'DEPOSITS UNDER COMPANIES ACT 2013'.

LOAN FROM FRIENDS AND RELATIVES OF DIRECTORS

Amounts received from relatives of directors prior to 1st April 2014 by a private company were not deposits, but Loans. A public company could not have received any loans from relatives of directors under 1956 Act.

Loan from friends were neither allowed in 1956 Act nor in 2013 Act. A company cannot accept loans from friends of the directors.

With effect from 1st April 2014 amounts received from relatives of directors were deposits even for a private company and if received were be in contravention of the Companies Act 2013.

However, later Companies (Acceptance of Deposit) Rules 2014 was amended w.e.f. 15th September 2015 to allow private companies to accept amounts from relatives of a director out of their own funds. For this purpose the relative will have to submit a declaration with the Company that amount is not being given out of funds acquired by them by borrowing or accepting loans or deposits from others. Such amounts are not deposits as per amended Companies (Acceptance of Deposit) Rules, 2014. It is pertinent to note that even after the amendment a public company cannot accept amounts from relatives of its directors.

Relatives for this purpose means:

- Husband and wife;
- Father (including step-father);
- Mother (including step-mother);
- Son (including step-son);
- Son's wife;
- Daughter;
- Daughter's husband;
- Brother (including step-brother); and
- Sister (including step-sister).

Consequent to amendment in Companies (Acceptance of Deposit) Rules 2014 w.e.f. 15th September 2015 amounts received from relatives of directors by a private company out of their own funds are to be reported in Directors Report. Hence, any Director's Report prepared after 15th September 2015 would require disclosing this information.



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B. COM (H), FCA, FCS, FCMA,
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Also it is pertinent to note that consequent to amendment in Companies (Acceptance of Deposit) Rules 2014 w.e.f. 29th June 2016 amounts received from relatives of directors out of their own funds are also to be disclosed in Financial Statements (in Notes to the Accounts).

LOAN FROM SHAREHOLDERS

Amounts received from shareholders prior to 1st April 2014 by a private company were not deposits, but Loans.

However, with effect from 1st April 2014 amounts received from shareholders are deposits and the limits and conditions as specified and discussed in our other document titled 'DEPOSITS'.

LOAN FROM COMPANIES

Any amount received by a company from another company is not a deposit as per the provisions of Companies (Acceptance of Deposit) Rules, 2014. It may be a loan or deposit and generally termed as Inter-Corporate Deposit, yet they are not deposits under the Companies Act 2013.

By Public Company

A Public Company can accept loan / deposit from any other company and would NOT be deposits under the Companies Act 2013, however, it could not have accepted monies from another company till 6th May 2018 (other than its wholly owned holding company) if:

- The lending company's director individually or along with one or more of its directors exercised or controlled not less than 25% of its voting rights; or
- It's Board of Directors, MD or Manager was accustomed to act in accordance with the directions or instructions of the Board, or any director or directors of the lending company.

However, w.e.f. 7th May 2018 section 185 has been amended through the Companies Amendment Act, 2017. Now a public company can accept monies in the above stated two situations if:

- A Special Resolution is passed by the company in general meeting, provided that 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.



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By Private Company

A Private Company can accept loan / deposit from any other company and would NOT be deposits under the Companies Act 2013. However, it could not have accepted monies from another company (other than its wholly owned holding company) if:

- The lending company's any director was a director or member of the company.
- The lending company's director individually or along with one or more of its directors exercised or controlled not less than 25% of its voting rights; or
- It's Board of Directors, MD or Manager was accustomed to act in accordance with the directions or instructions of the Board, or any director or directors of the lending company.

However, if the lending company is a private company then with effect from 5th June 2015 (private company exemption notification) it can give loan to another private company even if the above conditions are not met, if:

- In the lending company's capital no other body corporate has invested any money i.e., it's shareholder does not include any body corporate;
- If the borrowings of the lending company from banks or financial institutions or anybody corporate is less than twice its paid up capital or Rs. 50 crores, whichever is lower; and
- Lending company is not in default in repayment of such borrowings subsisting at the time of giving such loan.

It is also important to note that a private company as stated above can accept loans due to the private company exemption notification, however in case the lending company defaults in filing its Financial Statements u/s 137 i.e. Form AOC-4 or Annual Return u/s 92 i.e. Form MGT 7, then the benefit of non-applicability of section 185 would not be available (as notified vide notification dated 13th June 2017)

What is a default in such case of filing is an unsettled preposition. However, as per my view, if the compliance is made within the due dates as prescribed under relevant sections i.e., s. 92/137, then there is no default. Filing thereafter even with additional fee could be a default. Here it is pertinent to note that upto 6th May 2018 ss. 92/137 allowed the forms to be filed with additional fee within the time given u/s 403 i.e. additional 9 months, hence till 6th May 2018 if these were filed along with additional fee within 9 months after the due dates given, there was no default. However, w.e.f. 7th May 2018, the time limit u/s 403 has been removed from ss. 92/137, so when the forms are filed after the due date, there is a default and the company cannot take benefit of the private company exemption notification.



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Further, w.e.f. 7th May 2018 section 185 has been amended through the Companies Amendment Act, 2017. Now a private company can accept monies in any of the above stated three situations if:

- A Special Resolution is passed by the company in general meeting, provided that 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.

LOANS WHICH ANY COMPANY CAN ACCEPT

A company whether Public or Private can accept amounts of loans from following:

- Central Government, State Government, Local Authority, Statutory Authority
- Foreign government, foreign or international banks, multilateral financial institutions, foreign export credit agencies, foreign collaborators, foreign bodies corporate and foreign citizens, foreign authorities or persons resident outside India subject to the provisions of Foreign Exchange Management Act
- Loan or facility from banking Company, SBI, etc. notified by CG as per RBI Act
- Loan or financial assistance from Public Financial Institutions, Regional Financial Institutions, Insurance Companies or Scheduled Banks
- Loans against Commercial Papers, etc.
- Any other Company, subject to section 185 (as discussed in this document).
- Directors, out of his own funds.
- Bonds / debenture secured by first charge on any assets (excluding intangible assets) or convertible into shares within 5 years (10 years w.e.f. 29th June 2016)
- Listed unsecured non-convertible debentures (w.e.f. 29th June 2016)
- Interest free security deposit from employee not exceeding his annual salary
- Interest free amount received and held in Trust



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- Loans brought in by promoters as unsecured loans in stipulation of any lending Financial Institution or Banks subject to:-
 - Loan is brought in pursuance of stipulation imposed by lending institutions on promoters to contribute such finance; and
 - Loan is provided by the promoters themselves and/or by their relatives.

However, exemption is available only till loans are repaid

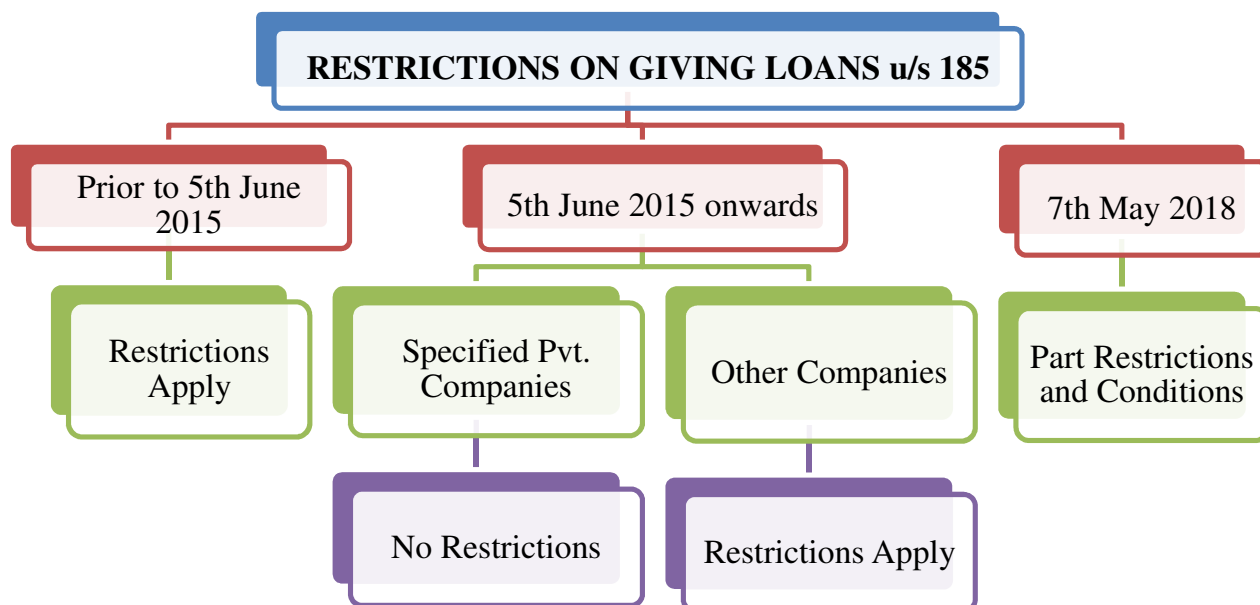
- Amount received by Nidhi companies
- Amount received as subscription in respect of a chit under Chit Fund Act 1982 (w.e.f. 29th June 2016)
- Amount received under any collective investment scheme as per SEBI regulations (w.e.f. 29th June 2016)
- Amount of Rs. 25 Lakhs or more in a single trench from a person received by a start-up company by way of convertible note (convertible into equity shares or repayable within 5 years from date of issue) (w.e.f. 29th June 2016)
- Amounts received from Alternative Investment Funds, Domestic Venture Capital Funds, Infrastructure Investment Trusts (w.e.f. 11th May 2017) and Mutual Funds registered with SEBI

RESTRICTIONS ON GIVING LOANS u/s 185

Restriction on giving of loan has been prescribed under section 185 of the Companies Act 2013. It has to be understood period-wise as under:



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A company could not directly or indirectly give any loan or any loan represented by a book debt to the following till 6th May 2018:

1. Director
2. Partner of its director
3. Relative of its director
4. Director of its holding company or his partner or relative
5. Any firm in which its director is a partner
6. Any firm in which relative of its director is a partner
7. Any Private Company in which its director is a director
8. Any Private Company in which its director is a member
9. Any company in which its director individually or along with one or more of its directors exercises or controls not less than 25% of its voting rights; or
10. Any company whose Board of Directors, MD or Manager is accustomed to act in accordance with the directions or instructions of the Board, or any director or directors of the lending company.

However, a private company would give loan to anyone w.e.f. 5th June 2015 if:

- In the lending company's capital no other body corporate has invested any money i.e., its shareholder does not include any body corporate;
- If the borrowings of the lending company from banks or financial institutions or anybody corporate is less than twice its paid up capital or Rs. 50 crores, whichever is lower; and



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- Lending company is not in default in repayment of such borrowings subsisting at the time of giving such loan.

Section 185 has been substituted w.e.f. 7th May 2018 to give effect to Companies (Amendment) Act 2017. Now a company still cannot directly or indirectly give any loan or any loan represented by a book debt to the following:

1. Director
2. Partner of its director
3. Relative of its director
4. Director of its holding company or his partner or relative
5. Any firm in which its director is a partner
6. Any firm in which relative of its director is a partner

However, a company can give loan to another company if:

- The lending company's any director was a director or member of the lendee private company.
- The lending company's director individually or along with one or more of its directors exercised or controlled not less than 25% of its voting rights; or
- It's Board of Directors, MD or Manager was accustomed to act in accordance with the directions or instructions of the Board, or any director or directors of the lending company

IF:

- A Special Resolution is passed by the company in general meeting, provided that 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.

However, such restriction either prior to 7th May 2018 or thereafter is not applicable to a specified private company with effect from 5th June 2015 (private company exemption notification), which has also been discussed in this document.

LOANS ALLOWED TO BE GIVEN u/s 185

Section 185 allows certain specific transactions and they when undertaken would not violate s. 185. In other words these loans can be given by any company. These are:



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1. Loan given to a managing director/whole-time director, as a part of the conditions of service extended by the Company to all its employees.
2. Loan given to a managing director/whole-time director in pursuant to any scheme approved by the members by a special resolution.
3. Company which in the ordinary course of its business provides loans or gives guarantees or securities **and** the Company charges interest at a rate not less than the bank rate declared by RBI (*changed to rate of interest lower than the prevailing yield of 1 year, 3 year, 5 year or 10 year government security closest to the tenor of the loan w.e.f. 7th May 2018*).
4. Loan given by a holding Company to its Wholly Owned Subsidiary, provided the money is utilised by the subsidiary for its principle business activity.

RELAXATION GIVEN TO SPECIFIED PRIVATE CO. U/S 185 W.E.F. 5TH JUNE 2015

A Private Company which satisfies the following conditions w.e.f. 5th June 2015 would not invite restrictions contained in section 185:

- (a) In its capital no other body corporate has invested any money, i.e., its shareholder does not include any body corporate;
- (b) If the borrowings of the lending company from banks or financial institutions or anybody corporate is less than twice its paid up capital or Rs. 50 crores, whichever is lower; and
- (c) Such a company is not in default in repayment of such borrowings subsisting at the time of making transactions under this section

In such a case the private company can give loan to anyone without any restriction of section 185 (complete s. 185 is not applicable to such companies). It is pertinent to note that the benefit to such company would still continue even after amendment to section 185 w.e.f. 7th May 2018.

However, the private company defaults in filing its Financial Statements u/s 137 i.e. Form AOC-4 or Annual Return u/s 92 i.e. Form MGT 7, then the benefit of exemption notification would not be available (as notified vide notification dated 13th June 2017).

What is a default in such case of filing is an unsettled preposition. However, as per my view, if the compliance is made within the due dates as prescribed under relevant sections i.e., s. 92/137, then there is no default. Filing thereafter even with additional fee could be a default. Here it is pertinent to note that upto 6th May 2018 ss. 92/137 allowed the forms to be filed with additional fee within the time given u/s 403 i.e. additional 9 months, hence till 6th May 2018 if these were filed along with additional fee within 9 months after the due dates given, there was no default. However, w.e.f. 7th May 2018, the time limit u/s 403 has been removed from ss. 92/137, so when the forms are filed after the due date, there is a default and the company cannot take benefit of the private company exemption notification.



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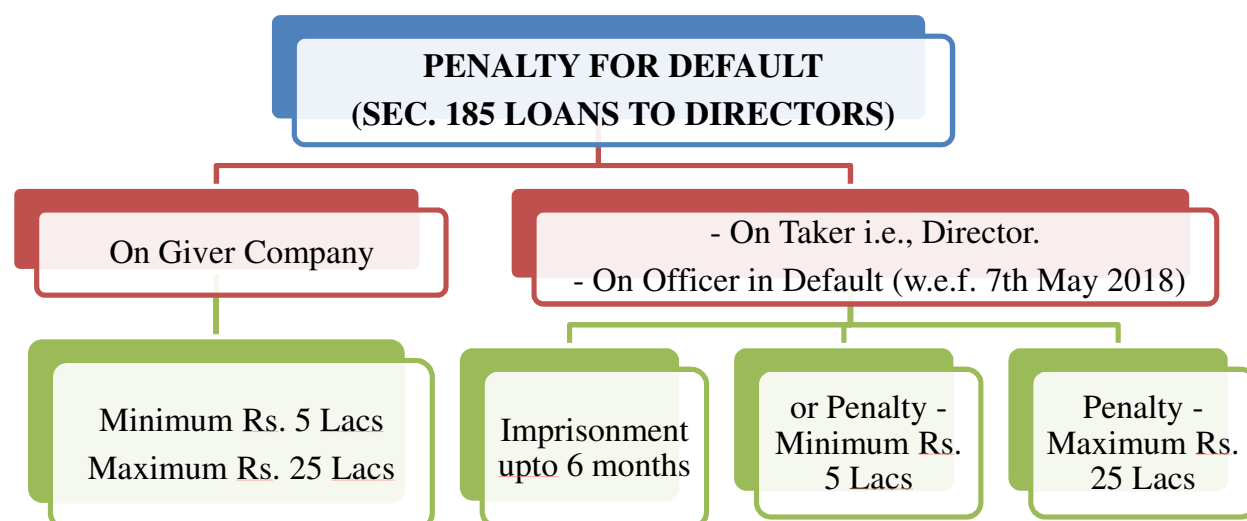
RESTRICTION ON SEBI REGISTERED COMPANIES

According to section 186(6) read with relevant Rules a company registered u/s 12 of SEBI Act, 1992 i.e., a stock broker, share transfer agent, banker to the issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment advisors and intermediaries registered with SEBI cannot take intercorporate loans or deposit exceeding:

- (a) 60% of its paid-up share capital plus free reserves plus securities premium account; or
- (b) 100% of its free reserves plus securities premium account

whichever is more

PENALTY FOR DEFAULT u/s 185



COMPLIANCES FOR TAKING LOAN

Compliance for taking loan under Companies Act 2013 could be bifurcated into two categories:

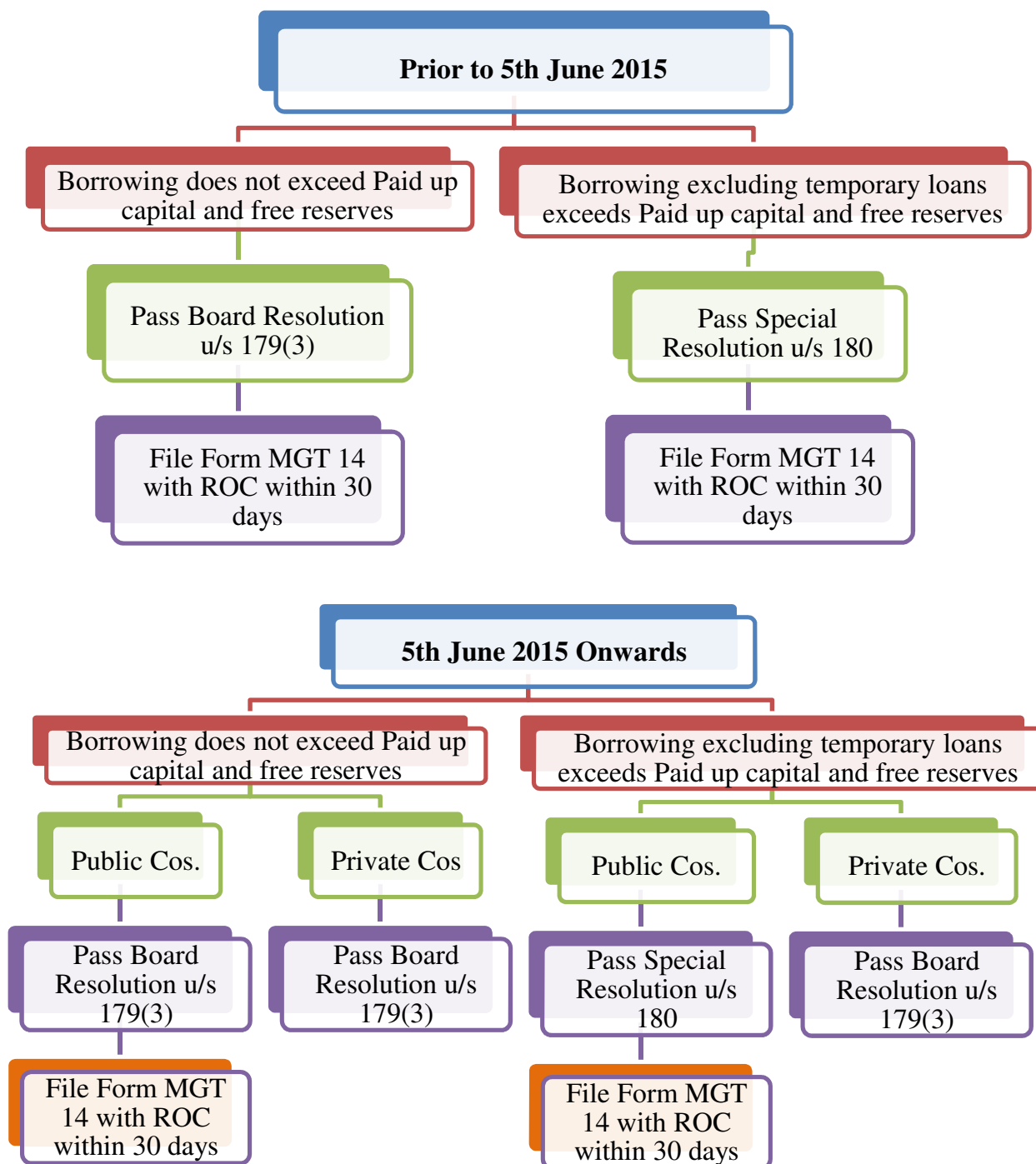
1. Where borrowings does not exceed paid up capital and free reserves
2. Where borrowings except temporary loans exceeds paid up capital and free reserves

Further the compliance as to be studied period-wise:-

1. Prior to 5th June 2015
2. 5th June 2015 Onwards



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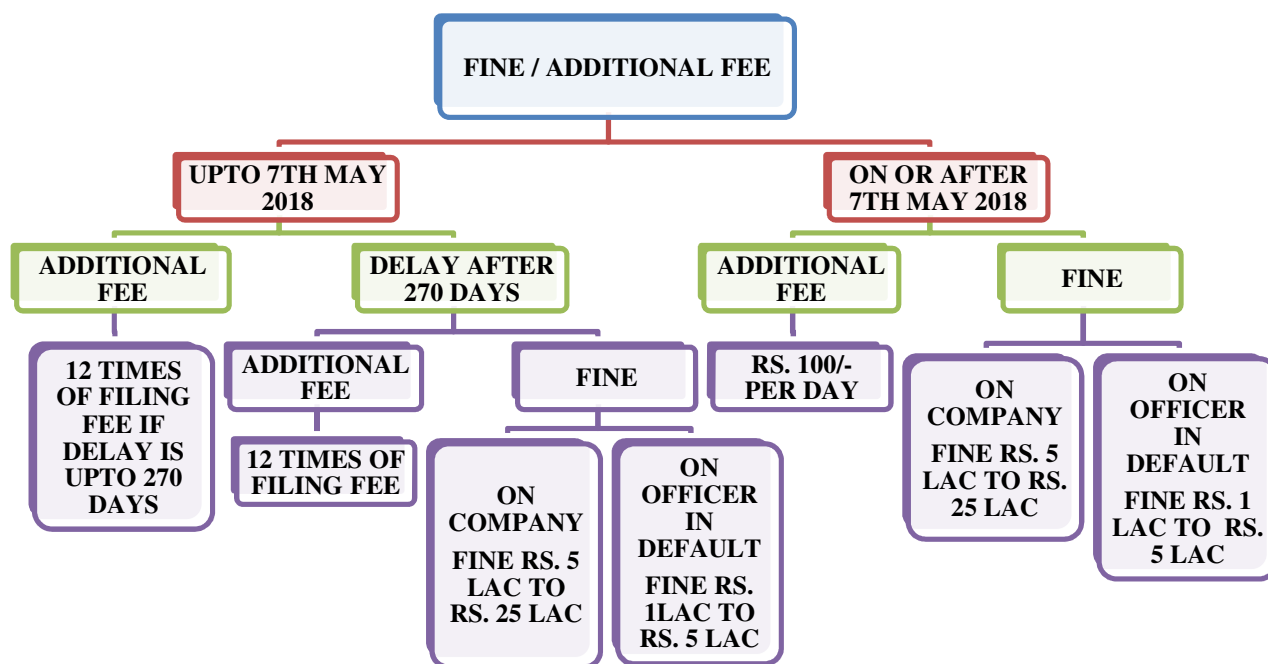


It is to be noted that section 180 is not applicable to a private company w.e.f. 5th June 2015.



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PENALTY FOR DELAY IN FILING MGT 14



GIVING OF LOANS

Apart from section 185, following companies cannot give loans:

- Any company which is in default of repayment of any deposit accepted under 1956 Act or 2013 Act and the default is subsisting.
- Any company which is in default of repayment of any interest on the above and the default is subsisting.

Also section 186 prescribes certain conditions to be complied for giving of the loans. Further the following transactions of giving loans are not covered under section 186, hence would not require compliances u/s 186. Loans given by:

- Banking Company
- Insurance Company



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- Housing Finance Company in its ordinary course of business
- Company engaged in business of financing. *W.e.f. 7th May 2018 changed to Company established with the object of and engaged in the business of financing industrial enterprises.*
- Company engaged in business of providing infrastructural facilities. *W.e.f. 7th May 2018 changed to Company established with the object of and engaged in the business of providing infrastructural facilities*
- Loans given to employees other than MD and WTD in accordance with conditions of service. *W.e.f. 7th May 2018 Loan to all employees are excluded from s. 186.*

COMPLIANCE FOR GIVING OF LOANS U/S 186

Compliance for giving loan u/s 186 has to be divided in two parts, according to limits of loan to be given. These for simplicity are divided into 2 categories:

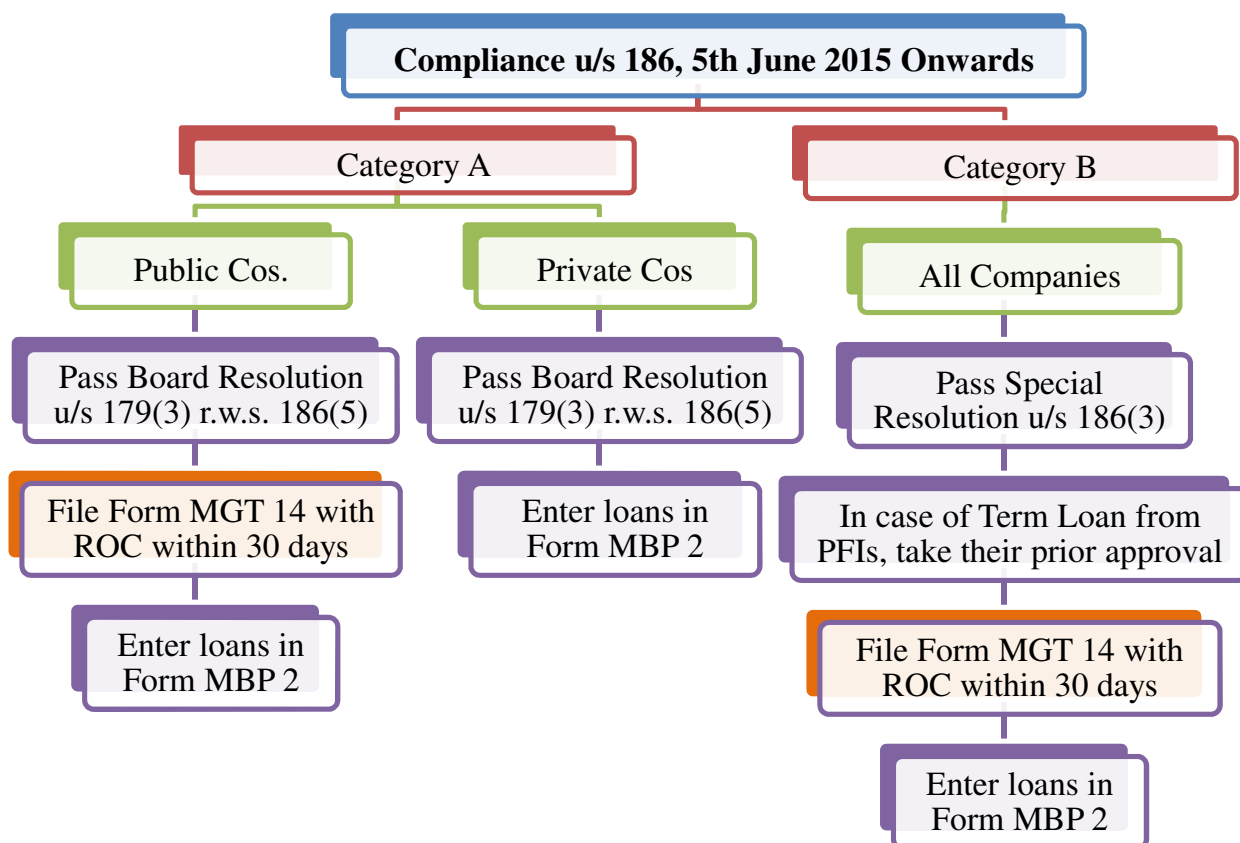
Category A - Amounts not exceeding:

- a) 60% of its paid-up share capital plus free reserves plus securities premium account; or
- b) 100% of its free reserves plus securities premium account

Category B - Amounts exceeding limits as stated above in A.



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INTEREST ON LOANS U/S 186

According to section 186(7) no loans can be given under section 186 at a c. There is a controversy in interest to be charged on loans by a company. There are two views on the same.

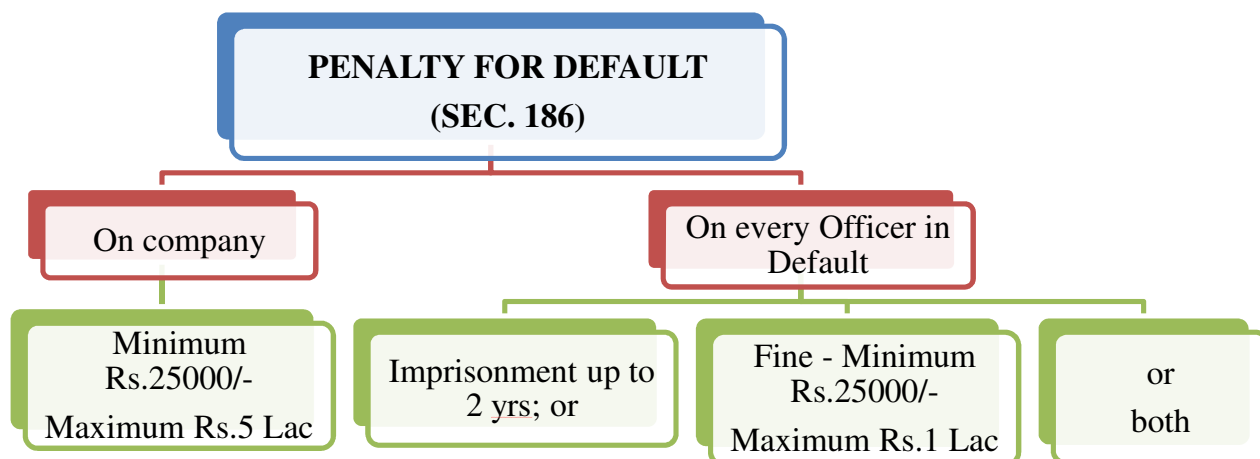
First View : Mandatory charging of interest is only on category B (as stated above) companies.

Second View : Mandatory charging of interest is on all companies category A and B both (as stated above)



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LL.B, DISA, MIMA, INSOLVENCY PROFESSIONAL

PENALTY FOR DEFAULT u/s 186



I hope this document would be of use to you. Suggestions and comments would be appreciated.

Best Regards

CA. Pramod Jain
pramodjain@lunawat.com
+91 9811073867

(Disclaimer: Though full efforts have been made to state the interpretations correctly, yet the author is not responsible / liable for any loss or damage caused to anyone due to any mistake / error / omissions)