‘Deposits’ under Cos. Act, 2013

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Coverage of Session

‘Deposits’ under Cos. Act, 2013

‘Exempted Deposits’ under Cos. Act, 2013

Reporting of ‘Exempted Deposits’ – DPT 3.

Banning of Unregulated Deposit Schemes Ordinance, 2019

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Background of ‘Deposits’

Companies (Amendment) Act, 1974
[introduction of Sec. 58A in Cos. Act, 1956]

Background of 'Deposits' – Companies (Amendment) Act, 1974 [Sec. 58A]

Sec. 58A was inserted in 1956 Act by Cos. (Amendment) Act, 1974. The purpose was stated in Notes of Clauses as: *"Clause 6 – It has been the practice of the cos. to take deposits from the public at a high rate of interest.* ***Experience has shown that in many cases deposits so taken by the companies have not been refunded on the due dates. In many such cases either the companies have gone into liquidation or the funds are depleted to such an extent that the companies are not in a position to refund the deposits. It is accordingly considered necessary to control the companies inviting deposits from the public.*** *The issue of an advertisement in such form and in such manner as may be prescribed including therein, a statement showing the financial position of the company seeking deposits from the public is being made obligatory. Provisions has also been made for the Central Government to make Rules in consultation with RBI. Penal penal provisions have also been included. There is also a provision for the refund of the amount of deposits received by a company in violation of the requirements of the law. The provisions of the Act relating to a prospectus are also made applicable to the issue of such advertisements as contemplated in this Clause."*

‘Deposit’ under Cos. Act, 1956 Vs Cos. Act, 2013

- For the purposes of this section (i.e. Sec. 58A of Cos. Act, 1956), ‘**deposit**’ means any deposit of money with, and includes any amount borrowed by, a Co. but shall not include such categories of amount as may be prescribed in consultation with RBI. **[Expln to Sec. 58A of Cos. Act, 1956]**

- 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 RBI **[Sec. 2(31) of Cos. Act, 2013]**

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Background to reporting of ‘exempted deposits’

Report of the Committee to review offences under Cos. Act, 2013 (August 8, 2018)

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In clause 66 of the Companies Bill, 2009 there was a clear proposal for prohibiting the acceptance or renewal of public deposits after the commencement of the Act. This provision was later on removed on the recommendation of the 21st Report of the Parliamentary Standing Committee on Finance, presented to the Parliament on 31.08.2010.

However, with the commencement of Cos. Act, 2013, all companies were required to file the form stating the amount of deposits accepted by them prior to the commencement of the Act in Form DPT-4 (Statement regarding deposits existing on the commencement of the Act).

An analysis of the filings indicates that a total of 3,635 companies filed Form DPT-4, showing acceptance of deposits worth Rs.332.1 crore. Besides this, an analysis of the annual filings of the return of deposits shows that very few companies have been filing such returns (374 for the FY 2015, 501 for the FY 2016-17 and 465 for the 2017-18)

…. Report of the Committee to review offences under Cos. Act, 2013 (August 8, 2018)

It has been observed that certain companies have misused the provisions relating to acceptance of deposits from public. The definition of deposits under rule 2 (c) of the Companies (Acceptance of Deposits) Rules, 2014, excludes certain transactions from the ambit of 'deposits', and as a result these transactions go unreported.

Some of the exclusions, such as the one relating to appropriation of advance for supply of goods and services within a period of 365 days are being exploited for following dubious trade practices.

During assessment of the Basel Core Principles under the Financial Sector Assessment Programme (FSAP) of India, ***IMF has recommended that deposit taking by institutions that are not regulated as banks should be prohibited, notwithstanding a very small volume of such deposits.***

Recommendation of the Committee to review offences under Cos. Act, 2013

The decision of omitting Section 76 of Cos. Act, 2013, which allows an eligible public company to raise public deposits may require greater consultation.

However, an e-Form may be introduced where all companies (public or private) may be required to provide the details of transactions which are excluded from the purview of 'deposit' under Rules.

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‘Deposits’ under Companies Act, 2013

What are deposits?

- Sec. 2(31) of Cos. Act, 2013 defines **Deposits**:

- Deposit <u>includes</u> any receipt of money by way of deposit or loan or in any other form by a company, but does include such categories of amount as may be prescribed in consultation with the RBI.

- Chapter V [Sec. 73 – 76A of Cos. Act, 2013] – relates to acceptance of deposits by companies.

Limited discussion on ‘Deposits’

- Acceptance of ‘deposits’ from member of Co. – T&C has been prescribed;
- Repayment of ‘deposit’ accepted before commencement of Cos. Act, 2013 (i.e. 01-04-2014)
- Acceptance of ‘deposits’ from public by certain Cos. (other than members) – T&C has been prescribed.

13 Acceptance of Deposit from members of Co.

Sec. 73(2) of Cos. Act, 2013:

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 RBI, 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 ROC within 30 days before the date of issue of the circular;

…Sec. 73(2) of Cos. Act, 2013:

- Depositing, on or before the 30th day of April each year, such sum which shall not be less than 20% of the amount of its deposits maturing during the following FY 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 5 years had lapsed since the date of making good the default; and

…Sec. 73(2) of Cos. Act, 2013:

- 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: **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.

MCA Notification – exemption to Private Cos. [MCA Notification No. GSR 464(E) [F.No.1/1/2014-CL-V], dated June 5, 2015]

Clauses (a) to (e) of section 73(2) of the Act shall not apply to Private Cos.:

(A) Which accepts from its members monies not exceeding 100% of aggregate of Paid-up Share Capital, Free Reserves & Sec. Premium A/c; or

(B) Which is a start-up, for 5 years from the date of its incorporation; or

(C) Which fulfils all of the following conditions, namely:

a) Which is not an Associate or Subsidiary Co. of any other Co.;

b) If 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 Rs. 50 cores, whichever is lower; and

c) Such a Co. has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section:

Company referred to in clauses (A), (B) or (C) shall file the details of monies accepted to the Registrar in such manner as may be specified.

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Cos. (Acceptance of Deposit Rules) 2014

Cos. (Acceptance of Deposit Rules) 2014

Rule 2(1)(c) – 'Deposit' includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include:

List of 18 transactions [such transactions are referred to as 'exempted deposits']

Analysis of the definition of ‘Exempted Deposits’

- Inclusive Definition
- Any receipt of money
- Exceptions provided i.e. Exempted Deposits
- Question – Whether ‘exempted deposits’ are ‘deposits’?

Clause by clause discussion of ‘Exempted Deposits’

Money or Loan not amounting to 'Deposit'

- Any amount received from the Central Government or a State Government, or any amount received from any other source whose repayment is guaranteed by the Central Government or a State Government, or any amount received from a local authority, or any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature.

Money or Loan not amounting to 'Deposit'

- Any amount received from foreign Govts., foreign or international banks, multilateral financial institutions (including…..), foreign Govts. owned development 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 FEMA and rules and regulations made there under.

Money or Loan not amounting to 'Deposit'

- 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 notified by the Central Government under section 51 of the Banking Regulation Act, 1949 ….

Money or Loan not amounting to 'Deposit'

- Any amount received as loan or financial assistance from Public Financial Institutions notified by the Central Government in this behalf in consultation with RBI or any regional financial institutions or Insurance Companies or Scheduled Banks as defined in RBI Act.

Money or Loan not amounting to 'Deposit'

- Any amount received against issue of commercial paper or any other instruments issued in accordance with the guidelines or notification issued by the RBI.

Money or Loan not amounting to 'Deposit'

- Any amount received by a company from any other company

Money or Loan not amounting to 'Deposit'

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 the securities applied for.

Explanation.—For the purposes of this sub-clause, it is hereby clarified that -

a. Without prejudice to any other liability or action, if the securities for which application money or advance for such securities was received cannot be allotted within 60 days from the date of receipt of the application money or advance for such securities and such application money or advance is not refunded to the subscribers within 15 days from the date of completion of 60 days, such amount shall be treated as a Deposit under these rules:

b. Any adjustment of the amount for any other purpose shall not be treated as refund.

Money or Loan not amounting to 'Deposit'

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:

1) *Any amount received from a person who, at the time of the receipt of the amount, was a director of the company (private company or public company) OR*
2) *Any amount received from a person who, at the time of the receipt of the amount, was relative of the director of the private company.*

Subject to following T&C:

- ✓ Director of the company or relative of the director of the private company, as the case may be, from whom 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 loans or deposits from others
- ✓ Company shall disclose the details of money so accepted in the Board's Report;

Query received from a professional:

Whether the loan taken by the Co. from Current A/c of proprietorship firm of the director be treated as 'exempt category deposit' i.e. loan from director?

Money or Loan not amounting to 'Deposit'

- **BONDS or DEBENTURES – SECURED or COMPULSORY CONVERTIBLE?**
- Any amount raised by the issue of bonds or debentures secured by a first charge or a charge ranking pari passu with the first charge on any assets (referred to in Schedule III of the Act excluding intangible assets of the company) <u>or</u> bonds or debentures compulsorily convertible into shares of the company within 10 years:
  - Provided that if such bonds or debentures are secured by the charge of any assets referred to in Schedule III of the Act, excluding intangible assets, the amount of such bonds or debentures shall not exceed the market value of such assets as assessed by a Registered Valuer.

Money or Loan not amounting to 'Deposit'

Any amount raised by issue of non-convertible debenture not constituting a charge on the assets of the company and listed on a recognised stock exchange as per applicable regulations made by SEBI.

i.e. Listed & unsecured NCD ≠ Deposit

Money or Loan not amounting to 'Deposit'

- 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

Money or Loan not amounting to 'Deposit'

Any amount received in the course of, or for the purposes of, the business of the company,-

(a) As an advance for the supply of goods or provision of services accounted for in any manner whatsoever provided that such advance is appropriated against supply of goods or provision of services within a period of 365 days from the date of acceptance of such advance:

Provided that in case of any advance which is subject matter of any legal proceedings before any court of law, the said time limit of 365 days shall not apply:

Money or Loan not amounting to 'Deposit'

- As advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against such property in accordance with the terms of agreement or arrangement;
- As security deposit for the performance of the contract for supply of goods or provision of services;
- As advance received under long term projects for supply of capital goods except those covered under item (b) above:
- As an advance towards consideration for providing future services in the form of a warranty or maintenance contract as per written agreement or arrangement, if the period for providing such services does not exceed the period prevalent as per common business practice or 5 years, from the date of acceptance of such service whichever is less.

Money or Loan not amounting to 'Deposit'

- As an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;

- As an advance for subscription towards publication, whether in print or in electronic to be adjusted against receipt of such publications;

Money or Loan not amounting to 'Deposit'

Any amount brought in by the promoters of the company by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank subject to fulfillment of the following conditions, namely:-

a) Loan is brought in pursuance of the stipulation imposed by the lending institutions on Promoters to contribute such finance;

b) Loan is provided by the promoters themselves or by their relatives or by both; and

c) Exemption under this sub-clause shall be available only till the loans of financial institution or bank are repaid and not thereafter;

Money or Loan not amounting to 'Deposit'

- Any amount accepted by a Nidhi company in accordance with the rules made under section 406 of the Act;
- Any amount received by way of subscription in respect of a chit under the Chit Fund Act, 1982;
- Any amount received by the company under any CIS in compliance with regulations framed by SEBI;
- An amount of Rs. 25 lacs 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 5 years from the date of issue) in a single tranche, from a person;
- Any amount received by a company from Alternate Investment Funds, Domestic Venture Capital Funds, Infrastructure Investment Trusts, Real Estate Investment Trusts and Mutual Funds registered with SEBI in accordance with regulations made by it.

Reporting of ‘Exempted Deposits’

Introduced by Companies (Acceptance of Deposits) Amendment Rules, 2019

Notification GSR. 42 [F.NO.1/8/2013-CL-V], dated 22-1-2019

Companies (Acceptance of Deposits) Amendment Rules, 2019

- **Every company** other than Government company **shall file a one-time return of outstanding receipt of money or loan by a company but not considered as deposits**, in terms of clause (c) of sub-rule 1 of rule 2 **from April 1, 2014 to the date of publication of this notification in Official Gazette** (i.e. Jan. 22, 2019), as specified in Form DPT-3 within 90 days from the date of said publication of this notification along with fee as provided in the Companies (Registration Offices and Fees) Rules, 2014.

MCA Circular No. 05/2019 dated April 12, 2019

- *It may be noted that data on the deposits should be filed upto March 31, 2019 (as opposed Jan. 22, 2019 – which was originally indicated in the Rules). Rule change is being issued separately.*

- *Pending the deployment of DPT – 3 Form on MCA21 portal and in order to avoid inconvenience to stakeholders on account of various factors, it is stated that the additional fees as provided under the Cos. (Registration Offices and Fees) Rules, 2014 shall be levied after 30 days from the date of deployment of the DPT 3 Form on MCA21 portal.*

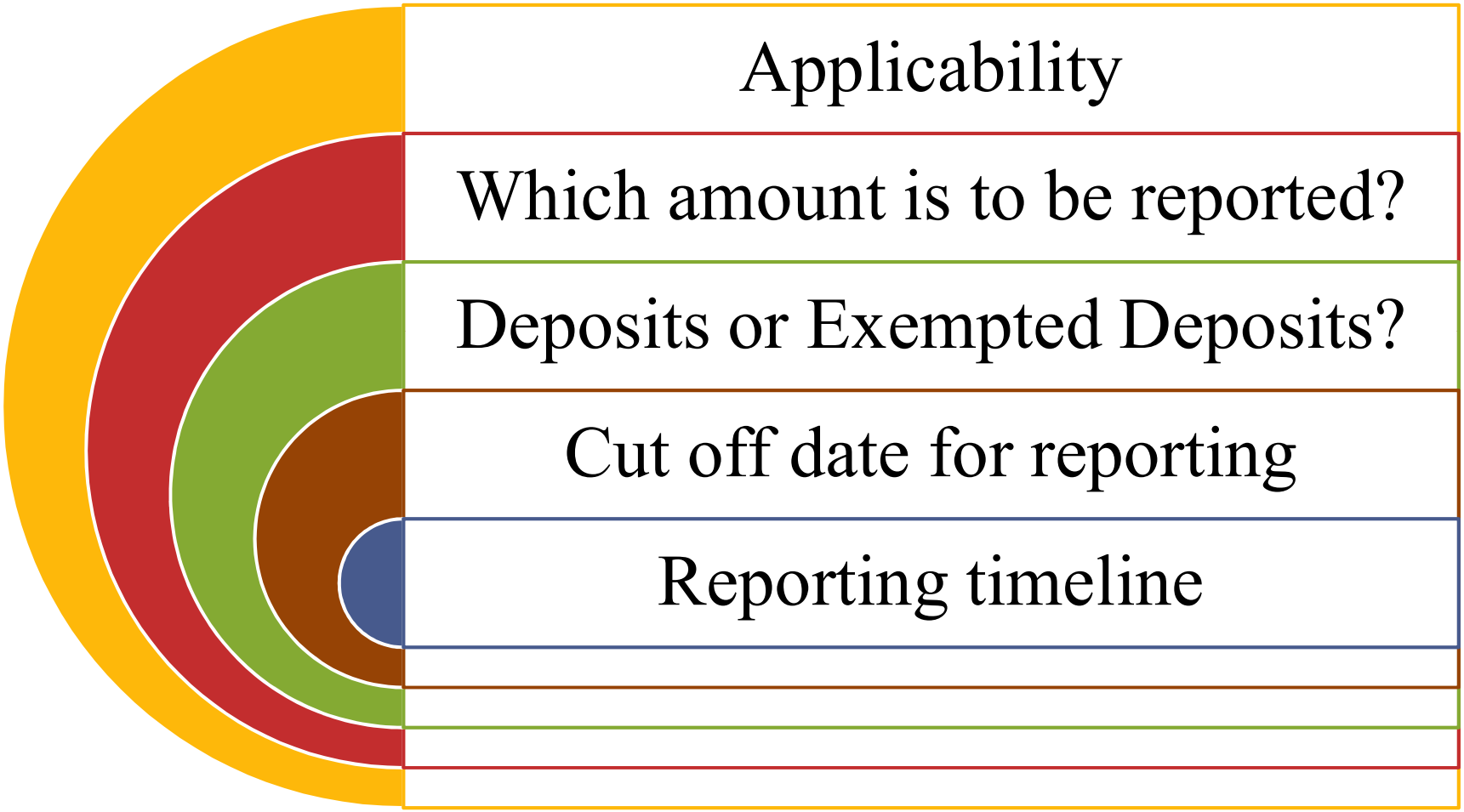
Query received from a professional:

Is filing of eForm DPT – 3 mandatory for all the companies (i.e. NIL return to be filed where no deposits/ exempt category deposit is taken)?

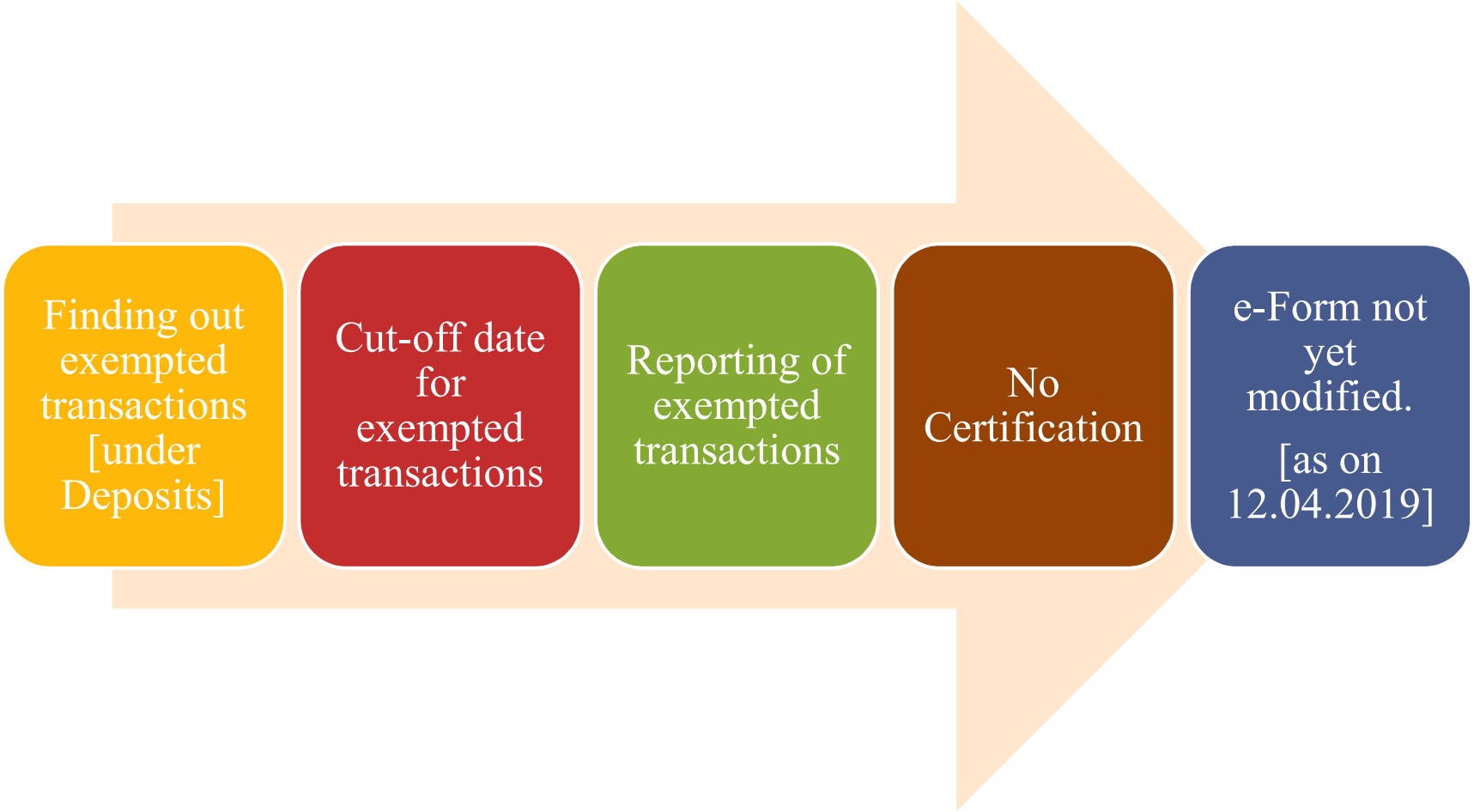
Query received from a professional:

Whether Statutory Auditor's certificate is mandatory for filing eForm DPT – 3?

Questions on DPT – 3



Timeline for DPT – 3



Q&A Session

Let's now move on to the presentation on "*Banning of Unregulated Deposit Schemes Ordinance, 2019*"

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