

Companies Act, 2013: Highlights of Company Incorporation

The Ministry of Corporate Affairs (MCA) notified 183 sections of the new Companies Act, 2013 (the Act), which came into effect from 1 April 2014. With this, 282 of 470 sections of the Act have been notified in a phased manner. The changes in the Act have far-reaching implications that are set to significantly change the manner in which companies operate in India.

Chapter II, “Incorporation of Company and Matters Incidental thereto”, and the corresponding Companies (Incorporation) Rules, 2014 have also come into effect from 1 April 2014. In this note, we have encapsulated the major changes with respect to the incorporation of companies and the possible implications.

TYPES OF COMPANIES

Under the Act, three types of companies can be incorporated on the basis of number of members:

- **One Person Company**
- **Private Company**
- **Public Company**

I. One Person Company

A **One Person Company**¹ (OPC) means a company incorporated by a natural person, who is an Indian citizen and resident in India. An OPC is incorporated as a private limited company, where there is only one member and invitation to the public for subscription of securities of the company is prohibited. Further, an OPC must adhere to the following

- Paid-up capital to be less than INR 5,000,000 (INR 5 million)
- Average annual turnover should be less than INR 20,000,000 (INR 20 million)

II. Private Limited Company

A private company² requires a minimum of two shareholders and the paid-up capital should be a minimum of INR 100,000. The name of a private company carries the suffix ‘Private Limited’ (Pvt Ltd). A Private limited company is one, which restricts (by its Articles of Association):

- a) the right of its shareholders to transfer the shares;

¹ Section 2(62) of the Companies Act, 2013

² Section 2(68) of the Companies Act, 2013

- b) the number of shareholders (excluding present and past employee – shareholders) to 200;
- c) the company from inviting the public to subscribe to shares or debentures of the company;

III. Public Limited Company

A public company³ is a company, which is not a private company. The abovementioned restrictions applicable to a private company are not applicable to a public company. A minimum of seven shareholders and share capital of INR 500,000 are required to form a public company. Further, a company which is a subsidiary of a public company shall be deemed to be a public company.

PROCEDURAL REQUIREMENTS

1. Director Identification Number (DIN) and Digital Signature Certificate (DSC)

Obtaining a DIN and DSC for Directors is a prerequisite for making an application for Name Availability and Registration of a company. All the forms and connected documents have to be filed electronically. **Now, it is mandatory to obtain a DSC and DIN for all the Directors before the process of incorporation is initiated.**

Henceforth, every company to be incorporated shall have at least one Resident Director who has stayed in India for a total period of not less than 182 days in the previous calendar year.

2. Name Application

The second step is to select a few suitable names, in order of preference and not less than six, indicative of the main objects of the company.

Furthermore, the proposed name should not resemble the name of any other company already registered and should not violate the provisions of Emblems and Names (Prevention of Improper Use) Act, 1950.

The table below explains some important naming regulations that a company needs to consider while filing a name application with the Registrar of Companies, as prescribed in the Act.

SN	Particulars	Naming Regulation/ Requisite Document
i.	The proposed name needs to be in consonance with the principal objects (indication of objects) of the company as set out in the Memorandum of Association	
ii.	If the name of the proposed company contains/uses the name of a person other than the promoter	No Objection letter from that person
iii.	If name of the proposed company contains/ uses the name of a promoter's relative	Proof of relationship

³ Section 2(71) of the Companies Act, 2013

iv.	If the name of the proposed company is already in use by a sole proprietorship/partnership/unregistered entity	No Objection Certificate (NOC) from Partners/Associates for use of such name by the proposed company/LLP
v.	If the name of the proposed company is a subsidiary of a foreign company	The original name of the holding company as it is may be allowed with the addition of the word 'India'
vi.	If the name of the proposed company is identical to the name of a company which is struck off	Such name shall not be allowed before the expiry of 20 years from such strike off
vii.	If the name of the proposed company is identical to the name of an LLP which is struck off	Such name shall not be allowed before the expiry

3. Drafting of Memorandum and Articles of Association

The Memorandum and Articles of Association of the proposed company need to be drafted in accordance with the applicable provisions of the Companies Act, 2013 (to the extent applicable) and the Companies Act, 1956; or the model Memorandum/Articles as prescribed in the Act may be adopted by a company either in totality or otherwise.

4. Application for Incorporation of the Company

The fourth step is to apply for the registration of the company. After the name is approved, an application for incorporation may be filed with the Registrar within a period of 60 days from the date of such application for reserving the name. The prescribed forms along with filing fees and applicable stamp duty need to be submitted to the ROC along with the Memorandum and Articles of Association, other supporting documents and declaration from professional i.e. an advocate/a Chartered Accountant/a Cost accountant/a Company Secretary in practice.

The Registrar of Companies, after scrutiny of documents submitted online, approves the company incorporation application and issues a digitally signed Certificate of Incorporation.

5. Verification of the Registered Office

As per notified provisions of the Act, the company must finalise a registered office within 15 days of the incorporation date and shall furnish verification of its registered office to the ROC within 30 days of the said date, in the prescribed form.

Every company shall now be required to paint or affix its name and registered office address outside the office and at every place of business.

6. Declaration of Commencement of Business

A declaration of commencement of business has to be filed with the ROC within a period of 180 days from the date of incorporation of the company. In case this is not filed, the Registrar would

initiate action for the removal of the name of the company from the register of companies (the company would be considered as if it is not carrying on any business or operations).

In case the new company also requires registrations with other regulatory authorities prior to commencement, such as the Reserve Bank of India or the Securities and Exchange Board of India, a copy of such registration must be submitted along with the declaration.

A declaration is required to be filed by a Director in such form and verified with the Registrar that:

- every subscriber to the Memorandum has paid the value of the shares agreed to be taken by him and on the date of making this declaration, the paid-up share capital of the company must not be less than INR 500,000 in case of a public company and not less than INR 100,000 in case of a private company. *[This means the company's bank account must be activated reflecting the credit of funds towards initial subscription within 180 days of the date of incorporation]*
- the company has filed a verification of its registered office with the Registrar

CONCLUSION

There are some significant changes that have been made to the process of incorporation of companies in the Act. Private companies now fall within the ambit of the stringent disclosure requirements as was in the case of public companies.

One important change is that now even a private company is required to file a declaration before it can commence business. Also, each subscriber and director needs to file an affidavit confirming that they have not committed any offence in connection with the promotion, formation or management of any company and have not been found guilty of misfeasance, fraud or breach of duty to any company in the preceding five years.

Another important aspect is that an applicant can be held liable for knowingly furnishing any false or incorrect particulars or information or suppressing any material information in documentation filed with the Registrar for the purpose of incorporating a company. The penalties prescribed in this regard are stated in section 447 of the Act i.e. fine and imprisonment for a term of six months to 10 years.

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