

Corporate Entities - Companies

Lesson 2

KEY CONCEPTS

- Public Company ■ Private Company ■ One Person Company ■ Producer Company ■ Section 8 Company
- Foreign Company ■ Nidhi ■ Memorandum of Association ■ Articles of Association

Learning Objectives

To understand:

- The classification and characteristics of companies
- Incorporation Documents
- The working knowledge and understanding of the various procedural requirements involved in the setting up of corporate entities

Lesson Outline

- Types of Corporate Entities:
 - Introduction
 - Private Company
 - Public Company
 - One Person Company
 - Nidhi
 - Section 8 Company
 - Producer Company
 - Foreign Company
- Drafting Of Incorporation Documents:
 - Memorandum of Association and Articles of Association
 - Incorporation Contracts, Documents and Forms
- Formation and Registration:
 - Procedural aspects with regard to Incorporation of Corporate Entities
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

REGULATORY FRAMEWORK

- Companies Act, 2013
- The Companies (Incorporation) Rules, 2014

INTRODUCTION

The word “Company” is combination of the Latin word ‘Cum’ meaning “with or together” and “Panis” meaning “bread.” Originally, it referred to a group of persons who took their meals together. A company is a group of persons who have come together or who have contributed money for some common purpose and who have incorporated themselves as a separate legal entity in the form of a company for that purpose. Under Halsbury’s Laws of England, the term “ company” has been defined as a collection of many individuals united into one body under special denomination, having perpetual succession under an artificial form and vested by the policies of law with the capacity of acting in several respect as an individual, particularly for taking and granting of property, for contracting obligation and for suing and being sued, for enjoying privileges and immunities in common and exercising a variety of political rights, more or less extensive, according to the design of its institution or the powers upon it, either at the time of its creation or at any subsequent period of its existence.

However, the Supreme Court of India has held in the case of ***State Trading Corporation of India vs. CTO*** that a company cannot have the status of a citizen under the Constitution of India.

A company as an entity has several distinct features which together make it a unique organization. The following are the defining characteristics of a company:



The Companies Act, 2013 provides for the kinds of companies that can be registered under the Act. The three basic types of companies which may be registered under the Act are:

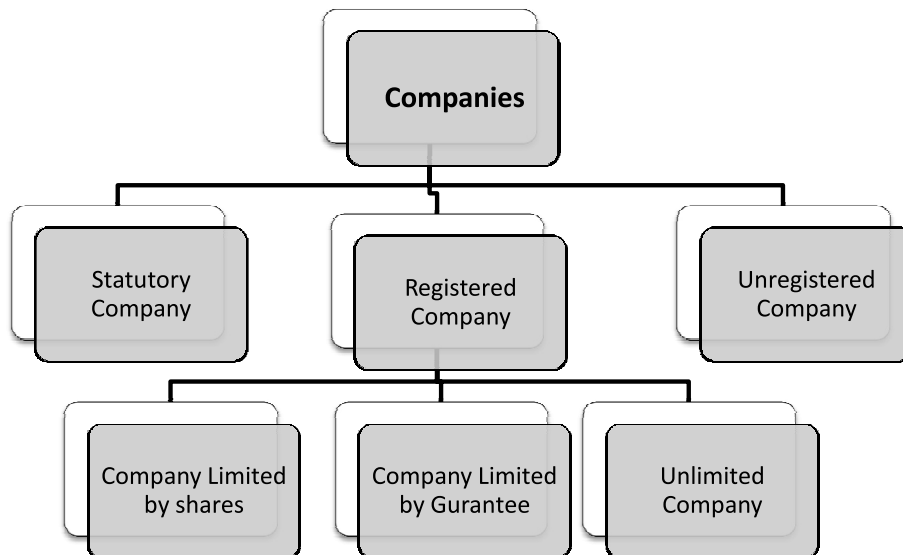
- (a) Private Companies;
- (b) Public Companies; and
- (c) One Person Company (to be formed as a Private Limited Company).

Section 3 of the Companies Act 2013 read with the Companies (Incorporation) Rules, 2014, states that:

- 1) A company may be formed for any lawful purpose by–
 - (a) seven or more persons, where the company to be formed is a public company;
 - (b) two or more persons, where the company to be formed is a private company; or
 - (c) one person, where the company to be formed is a One Person Company that is to say, a private company,

by subscribing their names or his name to a memorandum and complying with the requirements of the Act in respect of registration.

- 2) A company formed under sub-section (1) may be either–
 - (a) a company limited by shares; or
 - (b) a company limited by guarantee; or
 - (c) an unlimited company.



Classification of Companies:

- (i) **Classification on the basis of Incorporation:** Companies may be incorporated under the following categories:
 - (a) **Statutory Companies:** Statutory Companies are constituted by a special Act of Parliament or State Legislature. The provisions of the Companies Act, 2013 do not apply to them. Examples of these types of companies are Reserve Bank of India, Life Insurance Corporation of India, etc.
 - (b) **Registered Companies:** The companies which are incorporated under the Companies Act, 2013 or under any previous company law and registered with the Registrar of Companies fall under the category of Registered Companies.
- (ii) **Classification on the basis of Liability:** Companies can be classified into following three categories on the basis of Liability: -
 - (a) **Unlimited Companies:** The liability of members of this type of company is unlimited. Section 2(92) of the Companies Act, 2013 provides that unlimited company means a company not having any

limit on the liability of its members. Such companies may or may not have share capital. They may be either a public company or a private company. The members are liable to the company and to any other person.

- (b) **Companies limited by guarantee:** Section 2(21) of the Companies Act, 2013 provides that a company that has the liability of its members limited to such amount as the members may undertake respectively, by the Memorandum of Association, to contribute to the assets of the company in the event of its being wound-up, is known as a company limited by guarantee. The members of a guarantee company are placed in the position of guarantors of the company's debts up to the agreed amount. The members are liable to the company and to any other person upto the extent of guarantee given by them.
- (c) **Companies limited by shares:** In this type of company, the liability of its members is limited by the liability clause in the Memorandum of Association to the amount, if any, unpaid on the shares respectively held by them. Section 2(22) of the Companies Act, 2013 provides that **“company limited by shares”** means a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them.

For example, a shareholder who has paid Rupees 85 on a share of face value Rupees 100 can be called upon to pay the balance of Rupees.15 only. These companies can be either public or private.

(iii) **Other Forms of Companies:**

- (a) **Section 8 Companies:** Any person or an association of persons proposed to be registered under this Act as a limited company and are able to prove to the satisfaction of the Central Government that the company –
- i. has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;
 - ii. intends to apply its profits, if any, or other income in promoting its objects; and
 - iii. intends to prohibit the payment of any dividend to its members,

such person or association of person may be allowed to be registered as a limited company without addition to its name of the word “limited” or “private limited” by the Central government by issuing a license under section 8 of the Companies Act and by prescribing the specified conditions. The association proposed to be registered under section 8 shall not be proposed to be an unlimited company. However, the same may be company limited by guarantee or a Company limited by shares.

- (b) **Foreign Companies:** As per section 2(42) of the Companies Act, 2013 the “foreign company” means any company or body corporate incorporated outside India which,-
- i. has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
 - ii. Conducts any business activity in India in any other manner.
- (c) **Producer Companies:** Under Section 378A of the Companies Act, 2013, Producer Company means a body corporate having objects or activities specified in section 378B and registered as Producer Company under this Act or under the Companies Act, 1956.
- (d) **Nidhi:** A Nidhi is a type of company in the Indian non-banking financial sector, recognized under section 406 of the Companies Act, 2013. Their core business is borrowing and lending money only among their members. They are also known as Permanent Fund, Benefit Fund, Mutual Benefit

Fund and Mutual Benefit Society. These companies are regulated under the Nidhi (Amendment) Rules, 2022 issued by the Ministry of Corporate affairs.

- (e) **Listed Company:** “Listed company” means a company which has any of its securities listed on any recognized stock exchange.
- (f) **“Small company”** means a company, other than a public company,—
1. paid-up share capital of which does not exceed four crore rupees, or such higher amount as may be prescribed which shall not be more than ten crore rupees; and
 2. turnover of which as per profit and loss account for the immediately preceding financial year does not exceed forty crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees.

Provided that nothing in this clause shall apply to -

- (a) a holding company or a subsidiary company;
- (b) a company registered under section 8; or
- (c) a company or body corporate governed by any special Act.

(Note: For more details on classification of companies the students are advised to read Lesson 2 of “Company Law & Practice”)

PRIVATE COMPANY

As per Section 2(68) of the Companies Act, 2013, “Private Company” means a company, which by its articles—

- i. restricts the right to transfer its shares;
- ii. except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that—

- (A) persons who are in the employment of the company; and
 - (B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and
- iii. prohibits any invitation to the public to subscribe for any securities of the company.

It must be noted that it is only the number of members that is limited to two hundred. A private company may issue debentures to any number of persons, the only condition being that an invitation to the public to subscribe for debentures is prohibited.

The aforesaid definition of private limited company specifies the restrictions, limitations and prohibitions, which must be expressly provided in the articles of association of a private limited company.

As per proviso to Section 14 (1) of the Act, if a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, such company shall, as from the date of such alteration, cease to be a private company.

The words ‘Private Limited’ must be added at the end of its name by a private limited company.

As per section 3(1), a private company may be formed for any lawful purpose by two or more persons, by subscribing their names to a memorandum and complying with the requirements of this Act in respect of registration. Section 149(1) further lays down that a private company shall have a minimum number of two directors. The only two members may also be the two directors of the private company.

Examples of Private Companies:

1. Flipkart India Private Limited
2. Ola Automatic Engine Private Limited
3. Caratlane Trading Private Limited
4. Zomato Foods Private Limited
5. Makemytrip (India) Private Limited

Source: Master Data of Company

PUBLIC COMPANY

By virtue of Section 2(71), a public company means a company which is not a private company.

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

As per section 3(1)(a), a public company may be formed for any lawful purpose by seven or more persons, by subscribing their names to a memorandum of association and complying with the requirements of this act in respect of registration.

A public company may be said to be an association consisting of not less than 7 members, which is registered under the Act. In principle, any member of the public who is willing to pay the price may acquire shares in or debentures of it. The securities of a public company may be quoted on a Stock Exchange. The number of members is not limited to two hundred.

As per section 58(2), the securities or other interest of any member in a public company shall be freely transferable. However, any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract.

The concept of free transferability of shares in public and private companies is discussed in the case of *Western Maharashtra Development Corpn. Ltd. v. Bajaj Auto Ltd.* [2010]. It was held that the Companies Act makes a clear distinction in regard to the transferability of shares relating to private and public companies. By definition, a “private company” is a company which restricts the right to transfer its shares. In the case of a public company, the Act provides that the shares or debentures and any interest therein, of a company, shall be freely transferable.

The provision contained in the law for the free transferability of shares in a public company is founded on the principle that members of the public must have the freedom to purchase and every shareholder should have the freedom to transfer.

Examples of Public Companies:

1. Snapdeal Limited
2. Procter & Gamble Health Limited
3. Reliance Agro Tech Ltd
4. Godrej Capital Limited

Source: Master Data of Company

ONE PERSON COMPANY

OPC is a one shareholder corporate entity, where legal and financial liability is limited to the company only. In India, in the year 2005, the J.J. Irani Expert Committee recommended the formation of OPC. It had suggested that such an entity may be provided with a simpler legal regime through exemptions so that the small entrepreneur is not compelled to devote considerable time, energy and resources on complex legal compliances.

Characteristics of One Person Company

1. The financial statement, with respect to One Person Company, may not include the cash flow statement.
2. The Memorandum of One Person Company shall indicate the name of the other person, with his prior written consent in the prescribed form, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company and the written consent of such person shall also be filed with the Registrar at the time of incorporation of the One Person Company along with its memorandum and articles.
3. The words "One Person Company" shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.
4. In relation to One Person Company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.
5. For the purposes of section 114, in respect of any business which is required to be transacted at an annual general meeting or other general meeting of a company by means of an ordinary or special resolution, it shall be sufficient if, in case of One Person Company, the resolution is communicated by the member to the company and entered in the minutes-book required to be maintained under section 118 and signed and dated by the member and such date shall be deemed to be the date of the meeting for all the purposes under this Act.
6. Notwithstanding anything in this Act, where there is only one director on the Board of Directors of a One Person Company, in respect of any business which is required to be transacted at the meeting of the Board of Directors of a company, it shall be sufficient, if, in case of such One Person Company, the resolution by such director is entered in the minutes-book required to be maintained under section 118 and signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all the purposes under this Act. [sub section (4) of section 122]
7. The financial statement, shall be approved by the Board of Directors before they are signed on behalf of the Board by only one director, for submission to the auditor for his report thereon.
8. A One Person Company shall file a copy of the financial statements duly adopted by its member, along with all the documents which are required to be attached to such financial statements, within 180 days from the closure of the financial year.
9. A One Person Company, small company and dormant company shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than 90 days.

Provided that nothing contained in this sub-section and in section 174 shall apply to One Person Company in which there is only one director on its Board of Directors. [Section 173(5)].

Examples of OPC:

1. Pharma First (OPC) Private Limited
2. Solar Nest (OPC) Private Limited

Source: Master Data of Company

NIDHI

The primary objective of Nidhi is to carry on the business of accepting deposits and lending money to member-borrowers only against jewels, etc., and mortgage of property. The principle of mutual benefit has been incorporated to pool the savings from members and lend only to members and they are prohibited from having dealing with non-members. Nidhis are not permitted to engage themselves in the business of chit fund, hire-purchase, insurance or in any other business including investments in shares or debentures. These Nidhis do their business only with members. Such members are only individuals. Bodies Corporate or Trusts are not to be admitted as members in these companies.

Nidhi means a company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift and saving amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit, and which complies with the rules made by the central Government for regulation of such class of companies.

In exercise of powers conferred under section 406 read with section 469 of the Companies Act, 2013, Central Government issued the Nidhi Rules, 2014 which came into force on the 1st day of April, 2014. Nidhi Rules, 2014 are applicable to:

- every company which had been declared as a Nidhi or Mutual Benefit Society under sub-section (1) of Section 620A of the Companies Act, 1956;
- every company functioning on the lines of a Nidhi company or Mutual Benefit Society but has either not applied for or has applied for and is awaiting notification to be a Nidhi or Mutual Benefit Society under sub-Section (1) of Section 620A of the Companies Act, 1956;
- every company incorporated as a Nidhi pursuant to the provisions of Section 406 of the Companies Act, 2013;
- every company declared as Nidhi or Mutual Benefit Society under sub-section (1) of section 406 of the Companies Act, 2013.

Characteristics of Nidhi

- Every Nidhi shall be incorporated as a public company and shall have the last words "Nidhi Limited" as part of its name. It shall have a minimum paid up share capital of ten lakh rupees.
- Every Nidhi shall, within a period of 120 days from the date of its incorporation, file an application in form NDH-4 ensure that it has—
 - i. not less than two hundred members;
 - ii. Net Owned Funds of twenty lakh rupees or more.
- **Share capital and allotment:**
 - (a) Every Nidhi shall issue fully paid up equity shares of the nominal value of not less than ten rupees each.

- (b) No service charge shall be levied for issue of shares.
- (c) Every Nidhi shall allot to each deposit holder at least a minimum of ten equity shares or shares equivalent to one hundred rupees.

It may be noted that a savings account holder and a recurring deposit account holder shall hold at least one equity share of rupees ten.

- **Membership of Nidhi:**

- (a) A Nidhi shall not admit a body corporate or trust as a member.
- (b) Every Nidhi shall ensure that its membership is not reduced to less than two hundred members at any time.
- (c) A minor shall not be admitted as a member of Nidhi.
- (d) It may be noted that deposits may be accepted in the name of a minor, if they are made by the natural or legal guardian who is a member of Nidhi.
- (e) A member shall not transfer more than fifty percent of his shareholding during the subsistence of such loan or deposit, as the case may be; Provided that the member shall retain the minimum number of shares required under sub rule (3) of rule 7 at all times.

- **Branches of Nidhi:**

- (a) A Nidhi may open branches, only if it has earned net profits after tax continuously during the preceding 3 financial years. A Nidhi may open up to 3 branches within the district.
- (b) If a Nidhi proposes to open more than 3 branches within the district or any branch outside the district, it shall obtain the prior permission of the Regional Director in Form NDH-2 with fee and an intimation is to be given to the Registrar about opening of every branch within thirty days of such opening.
- (c) Nidhi shall not open branches outside the State where its registered office is situated.
- (d) Nidhi shall not open branches unless financial statement and annual return (up to date) are filed with the Registrar.
- (e) A Nidhi shall not close any branch unless –
 - i. the proposal to close the branch along with the plan as to how the existing deposits have been or shall be paid off and how the existing loan shall be recovered is duly approved by the board at its meeting;
 - ii. it has obtained the approval of the Regional Director for such closure by applying in Form NDH-2 with fee at least sixty days prior to such closure.
- (f) After obtaining the approval of the Regional Director, publishes an advertisement in a newspaper in vernacular language in the place where it carries on business at least thirty days prior to such closure, informing the public about such closure.
- (g) Fixes a copy of such advertisement or a notice informing such closure of the branch on the notice board of Nidhi for a period of at least thirty days from the date on which advertisement was published.
- (h) Gives an intimation to the Registrar within thirty days of such closure.

- **Acceptance of deposits:**

Rule 13 of the Nidhi Rules, 2014 provides that

- (a) Fixed deposits accepted by a Nidhi shall be for a minimum period of 6 months and a maximum period of 60 months.
- (b) Recurring deposits shall be accepted for a minimum period of 12 months and a maximum period of 60 months. In case of recurring deposits relating to mortgage loans, the maximum period of recurring deposits shall correspond to the repayment period of such loans granted by Nidhi.
- (c) The maximum balance in a savings deposit account at any given time qualifying for interest shall not exceed one lakh rupees at any point of time and the rate of interest shall not exceed 2% above the rate of interest payable on savings bank account by nationalised banks.
- (d) A Nidhi may offer interest on fixed and recurring deposits at a rate not exceeding the maximum rate of interest prescribed by the Reserve Bank of India which the Non-Banking Financial Companies can pay on their public deposits.

- **Un-encumbered term deposits by Nidhi:**

Under Rule 14 of the Nidhi Rules, 2014, every Nidhi shall invest and continue to keep invested, in unencumbered term deposits with a Scheduled commercial bank (other than a co-operative bank or a regional rural bank), or post office deposits in its own name an amount which shall not be less than 10% of the deposits outstanding at the close of business on the last working day of the second preceding month.

In cases of unforeseen commitments, temporary withdrawal may be permitted with the prior approval of the Regional Director by making an application in Form NDH-2 for the purpose of repayment to depositors, subject to such conditions and time limit which may be specified by the Regional Director to ensure restoration of the prescribed limit of 10%.

- **Loans by Nidhi :**

According to Rule 15 a Nidhi shall provide loans only to its members. In the case of joint holders, loan shall be provided to the member whose name appears first in the register of members. The loans given by a Nidhi to a member shall be subject to the following limits, namely:—

- (a) two lakh rupees, where the total amount of deposits of such Nidhi from its members is less than two crore rupees;
- (b) seven lakh fifty thousand rupees, where the total amount of deposits of such Nidhi from its members is more than two crore rupees but less than twenty crore rupees;
- (c) twelve lakh rupees, where the total amount of deposits of such Nidhi from its members is more than twenty crore rupees but less than fifty crore rupees; and
- (d) fifteen lakh rupees, where the total amount of deposits of such Nidhi from its members is more than fifty crore rupees.

Where a Nidhi has not made profits continuously in the three preceding financial years, it shall not make any fresh loans exceeding fifty per cent of the maximum amounts of loans specified in clauses (a), (b), (c) or (d).

A member shall not be eligible for any further loan if he has borrowed any earlier loan from the Nidhi and has defaulted in repayment of such loan.

- **Rate of interest on any loan given by a Nidhi:**

The rate of interest to be charged on any loan given by a Nidhi shall not exceed seven and half per cent above the highest rate of interest offered on deposits by Nidhi and shall be calculated on reducing balance method. Nidhi shall charge the same rate of interest on the borrowers in respect of the same class of loans and the rate of interest of all classes of loans shall be prominently displayed on the notice board at the registered office and each branch office of Nidhi.

- **Directors in a Nidhi:**

The Director shall be a member of the Nidhi. The Director of a Nidhi shall hold office for a term up to 10 consecutive years on the Board of the Nidhi. The Director shall be eligible for re-appointment only after the expiration of two years of ceasing to be a Director. Where the tenure of any Director in any case had already been extended by the Central Government, it shall terminate on expiry of such extended tenure. The person to be appointed as a Director shall comply with the requirements of Director Identification Number. All the directors of the company shall fulfill the fit and proper person criteria.

- **Dividend:** A Nidhi shall not declare dividend exceeding 25% in a financial year.

SECTION 8 COMPANY

Section 8 company is a company established for promoting commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object, provided the profits, if any, or other income is applied for promoting only the objects of the company and no dividend is paid to its members. Section 8 Companies are registered under the Companies Act, 2013.

Section 8 of the Companies Act, 2013 reads as under:

- (1) Where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a limited company—
 - (a) has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;
 - (b) intends to apply its profits, if any, or other income in promoting its objects; and
 - (c) intends to prohibit the payment of any dividend to its members,

the Central Government may, by licence issued in such manner as may be prescribed, and on such conditions as it deems fit, allow that person or association of persons to be registered as a limited company under this section without the addition to its name of the word “Limited”, or as the case may be, the words “Private Limited”, and thereupon the Registrar shall, on application, in the prescribed form, register such person or association of persons as a company under this section.

- (2) The company registered under this section shall enjoy all the privileges and be subject to all the obligations of limited companies.
- (3) A firm may be a member of the company registered under this section.
- (4) (i) A company registered under this section shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government.
 - (ii) A company registered under this section may convert itself into company of any other kind only after complying with such conditions as may be prescribed.
- (5) Where it is proved to the satisfaction of the Central Government that a limited company registered

under this Act or under any previous company law has been formed with any of the objects specified in clause (a) of sub-section (1) and with the restrictions and prohibitions as mentioned respectively in clauses (b) and (c) of that sub-section, it may, by licence, allow the company to be registered under this section subject to such conditions as the Central Government deems fit and to change its name by omitting the word "Limited", or as the case may be, the words "Private Limited" from its name and thereupon the Registrar shall, on application, in the prescribed form, register such company under this section and all the provisions of this section shall apply to that company.

- (6) The Central Government may, by order, revoke the licence granted to a company registered under this section if the company contravenes any of the requirements of this section or any of the conditions subject to which a licence is issued or the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest, and without prejudice to any other action against the company under this Act, direct the company to convert its status and change its name to add the word "Limited" or the words "Private Limited", as the case may be, to its name and thereupon the Registrar shall, without prejudice to any action that may be taken under sub-section (7), on application, in the prescribed form, register the company accordingly.

Provided that no such order shall be made unless the company is given a reasonable opportunity of being heard. Provided further that a copy of every such order shall be given to the Registrar.

- (7) Where a licence is revoked under sub-section (6), the Central Government may, by order, if it is satisfied that it is essential in the public interest, direct that the company be wound up under this Act or amalgamated with another company registered under this section.

Provided that no such order shall be made unless the company is given a reasonable opportunity of being heard.

- (8) Where a licence is revoked under sub-section (6) and where the Central Government is satisfied that it is essential in the public interest that the company registered under this section should be amalgamated with another company registered under this section and having similar objects, then, notwithstanding anything to the contrary contained in this Act, the Central Government may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.

- (9) If on the winding up or dissolution of a company registered under this section, there remains, after the satisfaction of its debts and liabilities, any asset, they may be transferred to another company registered under this section and having similar objects, subject to such conditions as the Tribunal may impose, or may be sold and proceeds thereof credited to "Insolvency and Bankruptcy Fund formed under section 224 of the Insolvency and Bankruptcy Code, 2016".

- (10) A company registered under this section shall amalgamate only with another company registered under this section and having similar objects.

- (11) If a company makes any default in complying with any of the requirements laid down in this section, the company shall, without prejudice to any other action under the provisions of this section, be punishable with fine which shall not be less than ten lakh rupees but which may extend to one crore rupees and the directors and every officer of the company who is in default shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to twenty-five lakh rupees.

Provided that when it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447.

Characteristics of Section 8 Company

Certain features of a Section 8 company can be summarized as under:

1. It is formed for promoting commerce, art, science, sports, education, research, social welfare, religion, Charity, protection of environment or any such other object.
2. The profits, if any, are applied in promoting its objects.
3. It prohibits the payment of dividends to its members.
4. The Company can be incorporated without using the word “Limited” or “Private Limited” as the case may be.
5. There is no requirement of any minimum paid up capital.
6. It is exempted from stamp duty registration.
7. Many privileges and exemptions are available to such a company, Section 8 companies have been granted total/partial exemptions from various sections of the Companies Act, 2013 vide Notification No. F. No. 1/2/2014-CL.I dated June 5, 2015.
8. A One Person Company cannot be incorporated or converted into a Section 8 Company.
9. Section 8 company has its independent corporate legal entity, similar to private company, public company or a Limited Liability Partnership and hence enjoys credibility in the eyes of the public.

PRODUCER COMPANY

Chapter XXIA (Section 378 A to 378 ZU) of Companies Act, 2013 deals with the producer companies. A producer company is a body corporate having objects or activities specified in Section 378B of Companies Act, 2013 and which is registered as such under the provisions of this Act or the Companies Act, 1956. The membership of producer companies is open to such people who themselves are the primary producers, which is an activity by which some agricultural produce is produced by such primary producers.

Objects of Producer Companies

In terms of Section 378B of the Companies Act, 2013, the objects of a producer company registered under this Act may be all or any of the following matters:

- (a) production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the Members or import of goods or services for their benefit: Provided that the Producer Company may carry on any of the activities specified in this clause either by itself or through other institution;
- (b) processing including preserving, drying, distilling, brewing, vinting, canning and packaging of produce of its Members;
- (c) manufacture, sale or supply of machinery, equipment or consumables mainly to its Members;
- (d) providing education on the mutual assistance principles to its Members and others;
- (e) rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its Members;
- (f) generation, transmission and distribution of power, revitalisation of land and water resources, their use, conservation and communications relatable to primary produce;

- (g) insurance of producers or their primary produce;
- (h) promoting techniques of mutuality and mutual assistance;
- (i) welfare measures or facilities for the benefit of Members as may be decided by the Board;
- (j) any other activity, ancillary or incidental to any of the activities referred to in clauses (a) to (i) or other activities which may promote the principles of mutuality and mutual assistance amongst the Members in any other manner;
- (k) Financing of procurement, processing, marketing or other activities specified in clauses (a) to (j) which include extending of credit facilities or any other financial services to its Members.

(2) Every Producer Company shall deal primarily with the produce of its active Members for carrying out any of its objects specified in this section.

Examples of Producer Companies:

1. Kisan Bandhu Agro Producer Company Limited
2. Kisan Bhoomi Producer Company Limited
3. Agro Acres Women Farmers Producer Company Limited

Source: Master Data of Company

FOREIGN COMPANY

As per section 2(42), “foreign company” means any company or body corporate incorporated outside India which –

- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode ; and
- (b) Conducts any business activity in India in any other manner.

Sections 379 to 393 under Chapter XXII of the Act deal with such companies.

Section 380 of the Act lays down that every foreign company which establishes a place of business in India must, within 30 days of the establishment of such place of business, file with the Registrar of Companies for registration:

- (i) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in the English language, a certified translation thereof in the English language;
- (ii) the full address of the registered or principal office of the company;
- (iii) a list of the directors and secretary of the company containing such particulars as may be prescribed;
- (iv) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
- (v) the full address of the office of the company in India which is deemed to be its principal place of business in India;

- (vi) particulars of opening and closing of a place of business in India on earlier occasion or occasions;
- (vii) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
- (viii) Any other information as may be prescribed.

Every foreign company has to ensure that the name of the company, the country of incorporation, the fact of limited liability of members is exhibited in the specified places or documents as required under Section 382 of the Act.

Section 376 of the Companies Act, 2013 provides further that when a foreign company, which has been carrying on business in India, ceases to carry on such business in India, it may be wound up as an unregistered company under Sections 375 to 378 of the Act, even though the company has been dissolved or ceased to exist under the laws of the country in which it was incorporated.

Section 379 provides that where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference of a foreign company is held by one or more citizens of India or by one or more bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with such of the provisions of this Act, as may be prescribed by the Central Government with regard to the business carried on by it in India, as if it were a company incorporated in India.

Section 381 requires a Foreign Company to maintain books of Account and file a copy of balance sheet and profit and loss account in prescribed form with ROC every calendar year. These accounts should be accompanied by list of places of business established by the foreign company in India as at the date with reference to which the balance sheet is made out.

As regards the applicability of the provisions of the Companies Act, 2013 to foreign companies, the following provisions of section 384 are to be noted:

- (i) The provisions of section 71 relating to Debentures shall apply mutatis mutandis to a foreign company.
- (ii) The provisions of Section 92 regarding (filing of annual returns) and Section 135 (Corporate Social Responsibility) shall, subject to such exceptions, modifications or adaptations as may be made therein by the rules made under the Act, apply to a foreign company as they apply to a company incorporated in India.
- (iii) The provisions of Section 128 shall apply to a foreign company to the extent of requiring it to maintain at its principal place of business in India books of account with respect to moneys received and spent, sales and purchase made and assets and liabilities, in the course of or in relation to its business in India.
- (iv) The provisions of Chapter VI (Registration of Charges) shall apply mutatis mutandis to charges on properties which are created or acquired by any foreign company.
- (v) The provisions of Chapter XIV (Inspection, Inquiry and Investigation) shall apply mutatis mutandis to the Indian business of a foreign company as they apply to a company incorporated in India.

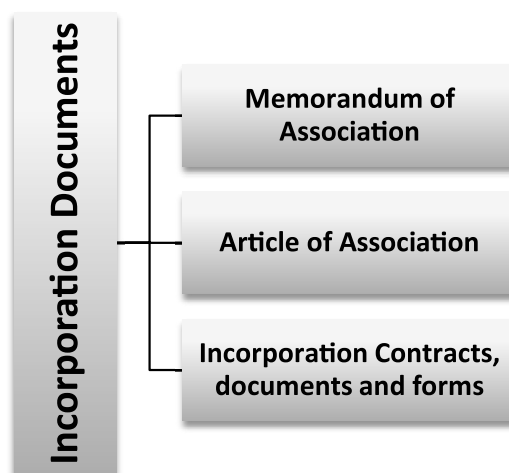
As per Section 386(c), having a share transfer office or registration office will constitute a place of business. In *Tovarishestvo Manufacture Liudvig Rabenek, Re* [1944] it was held that where representatives of a company incorporated outside the country frequently stayed in a hotel in England for looking after matter of business, it was held that the company had a place of business in England.

In a certain case, it was held that mere holding of property cannot amount to having a place of business.

Illustration:

India and America have had strong business relations over the many years. Some renowned American companies are Amazon, Citibank, Coca-Cola, Ford India, Google, American Express, Pepsico, Hewlett Packard, IBM, JP Morgan Chase, Adobe Systems Incorporated, Apple Inc., Microsoft Corporation, Cognizant, Oracle.

Source: <https://www.makeinindia.com/5-countries-are-making-big-india#:~:text=Some%20renowned%20American%20companies%20are,Microsoft%20Corporation%2C%20Cognizant%2C%20Oracle.>

DRAFTING OF INCORPORATION DOCUMENTS**MEMORANDUM OF ASSOCIATION**

The Memorandum of Association is a document which sets out the constitution of a company and is therefore the foundation on which the structure of the company is built. It defines the scope of the company's activities and its relations with the outside world.

The first step in the formation of a company is to prepare a document called the memorandum of association. In fact, memorandum is one of the most essential pre-requisites for incorporating any form of company under the Companies Act, 2013 (hereinafter referred to as 'Act'). This is evidenced in Section 3 of the Act, which provides the mode of incorporation of a company and states that a company may be formed for any lawful purpose by seven or more persons, where the company to be formed is a public company; two or more persons, where the company to be formed is a private company; or one person, where the company to be formed is a One Person Company by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of its registration.

To subscribe means to append one's signature or mark in a document as an approval or attestation of its contents.

According to Section 2(56) of the Act "memorandum" means the memorandum of association of a company as originally framed and altered, from time to time, in pursuance of any previous company law or this Act.

Section 4 of the Act specifies in clear terms the contents of this important document which is the charter of the company. The memorandum of association of a company contains the objects of the company which it shall pursue. It not only shows the objects of formation of the company but also determines the scope of its operations beyond which its actions cannot go.

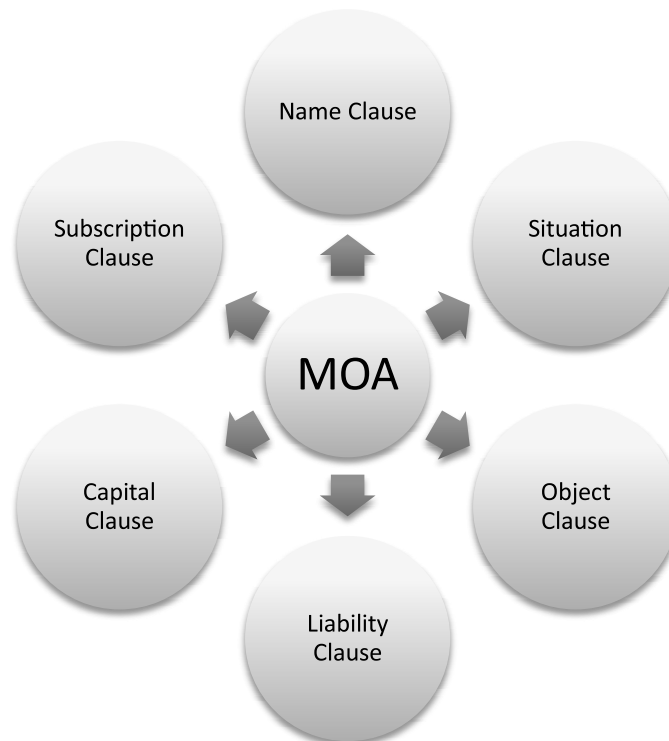
Forms of Memorandum of Association

Section 4(6) of the Act provides that the memorandum of association should be in any one of the Forms specified in Tables A, B, C, D or E of Schedule I to the Act, as may be applicable in relation to the type of company proposed to be incorporated or in a Form as near thereto as the circumstances admit.

- (i) the Form in Table A is applicable in the case of companies limited by shares;
- (ii) the Form in Table B is applicable to companies limited by guarantee not having a share capital;
- (iii) the Form in Table C is applicable to the companies limited by guarantee having a share capital;
- (iv) the Form in Table D is applicable to unlimited companies not having a share capital;
- (v) The Form in Table E is applicable to unlimited companies having a share capital.

A company shall adopt any of the model Forms of the memorandum of association mentioned above, as may be applicable to it.

Contents of Memorandum of Association



As per Section 4, the memorandum of a limited company must state the following:

- (a) **Name Clause** : The name of the company with “Limited” as its last word in the case of a public company; and “Private Limited” as its last words in the case of a private company. This shall not apply in case of companies registered under section 8.

Similarly, in case of government companies the name of the company need not end with the words “Limited” or “Private Limited”. This is as per the exemptions to Government Companies under Section 462 of Companies Act, 2013 vide notification dated June 5, 2015.

Example in case of Public Company: Wipro Ltd.

Example in case of Private Company: Lifestyle & Media Broadcasting Limited

Example in case of Section 8 Company: Tata Foundation

Example in case of Section 8 Company: Truffle House (OPC) Private Limited

According to section 4(2), the name stated in the memorandum shall not –

- (a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or
- (b) be such that its use by the company –
 - (i) will constitute an offence under any law for the time being in force; or
 - (ii) is undesirable in the opinion of the Central Government.

Identical Names

Rule 8 of the Companies (incorporation) Rules, 2014, provides that before granting any name, it will be examined whether name is identical with name of any other company/LLP or any other name already allowed to a company/LLP. To determine whether a proposed name is identical with another, the differences which are arising on account of the following are to be disregarded:

- a) the words like Private, Pvt, Pvt., (P), OPC Pvt. Ltd., IFSC Limited, IFSC Pvt. Limited, Producer Limited, Limited, Unlimited, Ltd, Ltd., LLP, Limited Liability Partnership, company, and company, & co, & co., co., co, corporation, corp, corpn, corp or group;
- b) the plural or singular form of words in one or both names;

Illustrations

- (i) Green Technology Ltd. is same as Greens Technology Ltd. and Greens Technologies Ltd.
- (ii) SM Computers Ltd. is not same as SMS Computers Ltd.

- c) type and case of letters, spacing between letters, punctuation marks and special characters used in one or both names;

Illustration

ABC Ltd. is same as A.B.C. Ltd. and A B C Ltd.

- d) use of different tenses in one or both names;

Illustration

Ascend Solutions Ltd. is same as Ascended Solutions Ltd. and Ascending Solutions Ltd.

- e) use of different phonetic spellings including use of misspelled words of an expression;

Illustration

Chemtech Ltd. is same as Chemtec Ltd., Chemtek Ltd., Cemtech Ltd., Cemtek Ltd., Kemtech Ltd., and Kemtek Ltd.

- f) use of host name such as 'www' or a domain extension such as 'net', 'org', 'dot' or 'com' in one or both names;

Illustration

Ultra Solutions Ltd. is same as Ultrasolutions.com Ltd.

- g) the order of words in the names;

Illustration

Ravi Builders and Contractors Ltd. is same as Ravi Contractors and Builders Ltd.

- h) use of the definite or indefinite article in one or both names;

Illustration

Congenial Tours Ltd. is same as A Congenial Tours Ltd. and The Congenial Tours Ltd.

- i) a slight variation in the spelling of the two names including a grammatical variation thereof;

Illustration

Color Technologies Ltd. is same as Colour Technologies Ltd.

- j) complete translation or transliteration, and not part thereof, of an existing name, in Hindi or in English;

Illustration

National Electricity Corporation Ltd. is same as Rashtriya Vidyut Nigam Ltd.

- k) addition of the name of a place to an existing name, which does not contain the name of any place;

Illustration

If Salvage Technologies Ltd. is an existing name, it is same as Salvage Technologies Delhi Ltd and Salvage Delhi Technologies Ltd.

- l) addition, deletion, or modification of numerals or expressions denoting numerals in an existing name, unless the numeral represents any brand;

Illustration

Thunder Services Ltd is same as Thunder11 Services Ltd and OneThunder Services Ltd.

Undesirable Names

Rule 8A of the Companies (incorporation) Rules, 2014, provides that the Undesirable names are those names which in the opinion of the Central Government are:

1. Prohibited under the Provisions of Section 3 of Emblems and Names (Prevention and Improper Use) Act, 1950.
2. The name includes a trade mark registered under the Trade Marks Act, 1999.

3. Name is identical with or too nearly resembles the name of a limited liability partnership.
4. The name includes any word or words which are offensive to a section of people.
5. The proposed name contains the words 'British India'.
6. The proposed name includes the word "State", in case the company is not a Government company.
7. The proposed name is containing only the name of a continent, country, State, city such as Asia limited, Germany Limited, Haryana Limited or Mysore Limited.

Word or expression which can be used only after obtaining previous approval of Central Government.

Rule 8B of the Companies (incorporation) Rules, 2014, provides that, the following words and combinations thereof shall not be used in the name of a company in English or any of the languages depicting the same meaning unless the previous approval of the Central Government has been obtained for the use of any such word or expression:-

- Board
- Commission
- Authority
- Undertaking
- National
- Union
- Central
- Federal
- Republic
- President
- Rashtrapati
- Small Scale Industries
- Khadi and Village Industries Corporation
- Financial Corporation and the like
- Municipal
- Panchayat
- Development Authority
- Prime Minister or Chief Minister
- Minister
- Nation
- Forest corporation
- Development Scheme
- Statute or Statutory
- Court or Judiciary

- Governor
- the use of word Scheme with the name of Government (s), State, India, Bharat or any Government authority or in any manner resembling with the schemes launched by Central, State or local Governments and authorities
- Bureau.

Precautions to be taken care before applying for the proposed name

One should be very careful while applying for the name, there can be rejection of name approval application in the following cases:

- a) Proposed Name exactly identical/resembled/phonetically to the name of an existing company/ LLP.
- b) Proposed Name includes words which are registered under Trademark Act with a specific class(es).
- c) Wrong Class/Category/Sub-Category of the Proposed Company is mentioned in web form.
- d) Industrial Activity Code of NIC is not found in consonance with the attached objects of the Company in SPICe+ PART A.
- e) Proposed Name is found Descriptive i.e. it contains commonly used words. (proper pre- fix or suffix not used in name)
- f) No significance about Abbreviations used in proposed name.
- g) Proposed Name indicates words Finance/Investment/Capital/ Holding/ Insurance etc whereas the proposed objects of the Company do not indicate such activities.
- h) Objects mentioned in the form are vague and the TM cannot be ascertained. (E.g. manufacturing / development / producing of all type of goods etc.)
- i) Name contain words viz Board, National, Commission etc as given in Rule 8B of the Companies (Incorporation) Rules, 2014 for which previous approval of the Central Government is required.
- j) Application made with Restricted and Undesirable names. (System may not allow filing of such applications)
- k) Proposed name if resembles closely the popular or abbreviated description of an existing company or limited liability as per rule 8A(1)(h) of Companies (Incorporation) Fifth Amendment Rules, 2019.
- l) Previous approval of the Central Government has not been obtained and attached with application Where any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Government, or any local authority, corporation or body constituted by the any Government.
- m) If the proposed name contains the name a foreign country/city/town etc. then applicant has to attach any proof of significance of business relations with such foreign country like MOU with a company of such country. In case proposed name includes name of India and a foreign country (e.g. India Japan or Japan India) in such cases name shall be allowed if, there is Government to government participation or patronage and no company shall be incorporated using the name of enemy country.

Reservation of Name

As per section 4(4) a person may make an application, in web-based service SPICe+ (Simplified Proforma for Incorporating Company Electronically Plus: INC-32) and for change of name by web service RUN (Reserve Unique Name) form in prescribed manner and accompanied by prescribed fee to the Registrar for the reservation of a name set out in the application as –

- (a) The name of the proposed company; or
- (b) The name to which the company proposes to change its name.

Reservation of Name for 20 days

Section 4(5) (i) lays down that upon receipt of an application under sub-section (4), the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of 20 days from the date of approval.

In case of an application for reservation of name or for change of its name by an existing company, the Registrar may reserve the name for a period of sixty days from the date of approval.

Common reasons for rejection of name:

- Proposed name is not according to the activities described in Main Objects.
- Proposed Name is not available in view of the existence of identical or closely resembling companies.
- Proposed name is too general without any distinct word or identity.
- Keywords like Industry/ Udyog, Enterprises, Products, Business, manufacturing may be considered when the company proposes to deal in various business activities. In case business activity is in particular trade said keywords cannot be allowed.
- Words like International, Hindustan, India, Bharat, Continental, Asiatic, Corporation will not be allowed unless the scope and scale of business of the proposed company justify the use of words.
- Proposed name includes words like National, Central, Union, Federal etc which are considered as undesirable.

Section 4(5)(ii) provides that giving wrong or incorrect name information in the name reservation application is wrong and if it is found that name was applied by furnishing wrong or incorrect information, then the reserved name shall be cancelled and the person making name reservation application shall be liable to a penalty which may extend to one lakh rupees.

Further, if the company has been incorporated, the Registrar may, after giving the company an opportunity of being heard—

- either direct the company to change its name within a period of three months, after passing an ordinary resolution;
- take action for striking off the name of the company from the register of companies; or
- make a petition for winding up of the company.

- (b) **Situation Clause:** The name of the State in which the registered office of the company is to be situated must be given in the memorandum. But the exact address of the registered office is not required to be stated therein. According to section 12 of the Act within thirty (30) days of company's incorporation, and at all times thereafter, the company must have a registered office to which all communications and notices may be sent.

Verification of registered office: The Company must also furnish to the Registrar verification of its registered office within a period of 30 days of its incorporation in such manner as may be prescribed (e-form INC-22). However, it may be noted that e- Form INC 22 is not required to be filed with SPICe+, if a company is registered with the same address as the address for correspondence. In case the registered address is different, INC-22 is required to be filed within 30 days of its incorporation, for intimating the registered office address.

Obligation of the company regarding the registered office: According to Section 12(3) of the Act, every company is required to display its name and address in legible letters in conspicuous position and in all its business letters, bill heads, and letter papers. Accordingly, the company shall –

- (a) paint or affix its name, and the address of its registered office, and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in legible letters, and if the characters employed therefor are not those of the language or of one of the languages in general use in that locality, also in the characters of that language or of one of those languages;
- (b) have its name engraved in legible characters on its seal, if any;
- (c) get its name, address of its registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications;
- (d) have its name printed on negotiable instruments such as hundies, promissory notes, bills of exchange and such other document as may be prescribed;
- (e) If it has a website for conducting online business or otherwise, shall disclose/publish its name, address of its registered office, the Corporate Identity Number, Telephone number, fax number if any, email and the name of the person who may be contacted in case of any queries or grievances on the landing/home page of the said website.

However, where a company has changed its name or names during the last two years, it shall paint or affix or print, as the case may be, along with its name, the former name or names so changed during the last two years.

Further, in case of One Person Company, the words “One Person Company” shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

The Ministry of Corporate Affairs (MCA) vide its notification dated August 18, 2022 has notified “The Companies (Incorporation) Third Amendment Rules, 2022” which has come into force on the date of its publication in the Official Gazette. According to the amendment, rule 25B is inserted in the Companies (Incorporation) Rules, 2014, stating physical verification of registered office of the company by the Registrar in terms of section 12(9) of the Companies Act, 2013 in presence of two witnesses of the locality.

The Registrar shall carry the documents as filed on MCA 21 in support of address of the registered office of the company for the purposes of physical verification and take a photograph of the registered office. Further a report of physical verification of the registered office of the company is also required to be in the prescribed format.

- (c) **Object Clause:** The third compulsory clause in the memorandum sets out the objects for which the company has been formed. Under section 4(1) (c) of the Act, all companies must state in their memorandum the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof. It indicates the purpose for which the company has been set up and its actual capability, besides its sphere of activities. It states affirmatively the ambit and

extent of powers of the company and, stated negatively, that nothing should be done beyond that ambit and that no attempt shall be made to use the company for any other purpose than that which is specified. The purpose of the objects clause is to enable the persons dealing with the company to know its permitted range of activities. The acts beyond this ambit are ultra vires and hence void. Even the entire body of shareholders cannot ratify such acts. The subscribers to the memorandum of association enjoy almost unrestricted freedom to choose the objects. The only restriction is that objects should not be illegal and against the provisions of the Companies Act, 2013.

The objects are divided into two sub-categories:

1. Main Objects;
2. Any matter considered necessary in furtherance thereof.

The main objects of the MOA give a brief about the activities that are decided to be carried by the company. The main objects of the company generally include the activities like manufacturing, trading or providing any kind of services by the company. Further, another sub clause (any matter considered necessary in furtherance thereof) describes the activities incidental to the main objects. Also, it can contain the activities related to the business keeping in mind the diversification needs of future and to avoid alteration in future.

- (d) **Liability Clause:** The liability of members of the company, whether limited or unlimited, and also state,—
- (i) in the case of a company limited by shares, that liability of its members is limited to the amount unpaid, if any, on the shares held by them; and
 - (ii) in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute —
 - A. to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and
 - B. to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves.

For Example:

In the MOA of Tata Consultancy Services Limited, it is provided that a Company Limited by Shares.

The Liability Clause illustrates the kind of liabilities one may have if he became a member of a company. Here are some essential categories of the Liability clause:

1. **Limited by Shares:** The first type is Liability limited by shares. In the case of a company whose Liability is limited by shares, the Liability of the members in case the company goes for winding up is limited by the number of shares that have been purchased and to the extent unpaid by the members.
2. **Limited by Guarantee:** The second kind is Liability limited by Guarantee. In this case, every member beforehand guarantees a certain amount that they will pay in case the company moves for winding up.
3. **Unlimited Liability:** In the case of an unlimited company, every member of the company is liable to pay for an unlimited amount if the company moves for winding up. The liability of members can be for an amount as large as can be and extends to members' personal property as well.

- (e) **Capital Clause:** in the case of a company having a share capital, the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount. This clause shall state the amount of the capital with which the company is registered. The shares into which the capital is divided must be of fixed value, which is commonly known as the nominal value of the share. The capital is variously described as “nominal”, “authorized” or “registered”. The amount of nominal capital is determined having regard to the present as well as future requirements of the company with reference to its objects.

The usual way to state the capital in the memorandum is: “The share capital of the company is 10,00,000 rupees divided into 1,00,000 equity shares of 10 rupees each”. This amount lays down the maximum limit beyond which the company cannot issue shares without altering the memorandum as provided by Section 61 of the Companies Act, 2013.

If there are both equity and preference shares, then the division of the capital is to be shown under these two heads. A company is not authorized to issue capital beyond its authorized/nominal/registered capital. If it receives applications for shares beyond the shares covered by the authorized capital, the amount received on excess number of shares should be returned.

Out of the issued capital, the total amount actually subscribed or agreed to be subscribed is known as subscribed capital, and this subscribed capital again may be wholly paid or partly paid, in which latter case the balance would be payable on future calls when made. The amount actually paid by the shareholders is called the paid-up capital.

(f) **Subscription Clause:**

- (i) the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share; and
- (ii) the number of shares each subscriber to the memorandum intends to take, indicated opposite his name.

In the case of a One Person Company, the name of the person who, in the event of the death of the subscriber, shall become the member of the company.

The subscriber sheet to the Memorandum of Association is a vital document that is required to be submitted along with the Memorandum of Association during the company registration process. It provides the details of the first members of the company.

The required details include:

- The name of the subscribers.
- The details of the father or spouse of the subscribers.
- The complete address of the subscribers with a valid pin code.
- The pan card number and occupation of the subscribers.
- Signatures of the subscribers.
- The subscription sheet needs to mention the total number of shares that have been subscribed to by each subscriber.
- If a subscriber is a Company or corporate body, its director or partner’s signature on behalf of the company.
- The witness authenticates details of the subscriber sheet.

Provision in the memorandum or articles is void

According to section 4(7), any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.

The above clauses are compulsory and are designated as “conditions” prescribed by the Act, on the basis of which a company is incorporated.

It is to be noted that the Companies Act, 2013 shall override the provisions in the memorandum articles, agreement or resolution of a company, if the latter contains anything contrary to the provisions in the Act (Section 6).

ARTICLES OF ASSOCIATION

According to Section 2(5) of the Companies Act, 2013, ‘articles’ means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act. It also includes the regulations contained in Table A in Schedule I of the Act, in so far as they apply to the company. In case of a private company, the provisions of Table A may be altered to suit the specific requirements of the company, provided that any such alteration should not be contrary to the provisions of the Companies Act, 2013.

The general functions of the articles have been aptly summed up by Lord Cairns, L.C. in *Ashbury Railway Carriage and Iron Co. Ltd. v. Riche*, (1875) L.R. 7 H.L. 653 as follows:

“The articles play a part that is subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, rights and powers of the governing body as between themselves and the company at large, and the mode and form in which business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made... The memorandum, is as it were... the area beyond which the action of the company cannot go; inside that area shareholders may make such regulations for the governance of the company as they think fit”.

Thus, the memorandum lays down the scope and powers of the company, and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members. But they must keep within the limits marked out by the memorandum and the Companies Act.

The articles of a company are subordinate to and subject to the memorandum of association and the Act. Any clause in the Articles going beyond the memorandum will be ultra vires. But the articles are only internal regulations, over which the members of the company have full control and may alter them according to what they think fit. Only care has to be taken to see that regulations provided for in the articles do not exceed the powers of the company as laid down by its memorandum [*Ashbury v. Watson*, (1885) 30 Ch. D 376 (CA)]. Articles that go beyond the company’s sphere of action are inoperative, and anything done under the authority of such article is void and incapable of ratification.

Section 7(1) provides that at the time of incorporation of a company the company shall file with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the memorandum and articles of the company duly signed by all the subscribers to the memorandum in the prescribed manner.

Every type of company whether public or private and whether limited by shares or limited by guarantee having a share capital or not having a share capital or an unlimited liability company must register their articles of association.

Entrenchment provisions of Articles

The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution, are met or complied with. [Section 5 (3)]

The provisions for entrenchment referred to in section 5(3) shall be made either (a) on formation of a company, or (b) by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company. [Section 5 (4)]

Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar in Spice+ form at the time of the incorporation of the Company or E-form MGT-14 in case of existing Companies. The articles must be printed, divided into paragraphs, numbered consecutively, stamped adequately, signed by each subscriber to the memorandum and duly witnessed and filed along with the memorandum. The articles must not contain anything illegal or ultra vires the memorandum, nor should it be contrary to the provisions of the Companies Act 2013.

Contents of Articles

The articles set out the rules and regulations framed by the company for its own working. The articles should contain generally the following matters:

1. Exclusion wholly or in part of Table F, G, H, I or J.
2. Adoption of preliminary contracts.
3. Share Capital and variation of rights, if any.
4. Terms governing issue and redemption of preference shares.
5. Allotment of shares.
6. Calls on shares.
7. Lien on shares.
8. Transfer and transmission of shares.
9. Nomination.
10. Forfeiture of shares.
11. Alteration of capital.
12. Buy back.
13. General meetings, proceedings at general meetings, adjournment of meeting.
14. Share certificates.
15. Dematerialization.
16. Conversion of shares into stock.
17. Voting rights and proxies.
18. Meetings and rules regarding committees of the Board.
19. Directors, their appointment and delegations of powers.
20. Nominee directors.
21. Issue of Debentures and stocks.
22. Audit committee.

23. Managing director, Whole-time director, Manager, Secretary, Chief Executive Officer and Chief Financial Officer.
24. Additional directors.
25. Seal.
26. Remuneration of directors.
27. General meetings, proceedings at general meetings, adjournment of meeting.
28. Board of Directors, Proceedings of the Board meetings.
29. Borrowing powers.
30. Dividends and reserves.
31. Accounts and audit.
32. Winding up.
33. Indemnity.
34. Capitalization of profits, reserves.
35. Secrecy.

Utmost caution must be exercised in the preparation of the articles of association of a company. At the same time, certain provisions of the Act are applicable to the company “notwithstanding anything to the contrary in the articles”. Therefore, the articles must contain provisions in respect of all matters which are required to be contained therein so as not to hamper the working of the company later.

Drafting of Articles of Association

Section 5 of the Act provides that the articles of association should be in any one of the Forms as specified in Tables F, G, H, I or J of Schedule I to the Companies Act, 2013.

1. the form in Table F is applicable to company limited by shares
2. the form in Table G shall be applicable to company limited by guarantee and having share capital
3. the form in Table H shall be applicable to company limited by guarantee and not having share capital
4. the form in Table I shall be applicable to unlimited company and having share capital
5. the form in Table I shall be applicable to unlimited company and not having share capital

Precautions to be taken while framing the articles of association :

- Articles of association must be divided into paragraphs and numbered consecutively.
- It shall not contain something that is contrary to the memorandum.
- Anything that would be stated or amended in the articles shall be in accordance with the Companies Act.

For Example, Section 272 of the Companies Act, 2013 states contributory right for presentation of petition of winding up of a company, in any circumstance this right cannot be limited by the articles.

- The Articles shall be signed by each subscriber of the memorandum of association who shall add his address, description and occupation.
- Subscribers shall sign the Articles in the presence of at least one witness who shall attest the signature and shall likewise add his address, description and occupation.

FORMATION AND REGISTRATION OF CORPORATE ENTITIES

As part of Government of India's Ease of Doing Business (EODB) initiatives, the Ministry of Corporate Affairs has notified & deployed a new Web Form 'SPICE+' (pronounced 'SPICE Plus') replacing the existing SPICE form. SPICE+ offer 11 services by 3 Central Government Ministries & Departments. (Ministry of Corporate Affairs, Ministry of Labour & Department of Revenue in the Ministry of Finance) and three State Govt.(Maharashtra, Karnataka and West Bengal), thereby saving as many procedures, time and cost for Starting a Business in India and would be applicable for all new company incorporations w.e.f 23rd February, 2020.

Features of SPICE+:

SPICE+ is an integrated web form replacing the earlier version of the e-forms, the form is divided in to two parts viz.:

Part A - for Name reservation for new company and

Part B - offering a bouquet of services viz.

- Incorporation
- DIN allotment
- Mandatory issue of PAN
- Mandatory issue of TAN
- Mandatory issue of EPFO registration
- Mandatory issue of ESIC registration
- Mandatory issue of Profession Tax registration (Maharashtra, Karnataka and West Bengal)
- Mandatory Opening of Bank Account for the Company and
- Allotment of GSTIN (if so applied for)
- Allotment of Shops and Establishment Registration Number (only for Delhi location).

For the incorporation of company the user may either choose to submit Part-A for reserving a name first and thereafter submit Part B for incorporation & other services or file Part A and B together at one go for incorporating a new company and availing the bouquet of services as listed above. In case SPICE+ Part A is submitted individually for name reservation, Part B and all other linked forms shall be enabled only after the SRN of SPICE+ Part A is 'Approved' i.e. the name is reserved. Incorporation applications (Part B) after name reservation (In Part A) can be submitted as a seamless process in continuation of Part A of SPICE+. In form Spice+, stakeholders will not be required to even enter the SRN of the approved name as the approved name will be automatically displayed on the dashboard and a click on the same will take the user for continuation of the application through a hyperlink that will be available on the SRN/ application number in the new dashboard.

It may be noted that from 23rd February 2020 onwards, RUN service is applicable only for 'change of name' of existing company and the new web form facilitates on-screen filing and real time data validation for seamless incorporation of companies. The approved name and related incorporation details as submitted in Part A, would be automatically pre-filled in all linked forms also viz., AGILE-PRO, eMoA, eAoA, URC1, INC-9 (as applicable)

All Check form and Pre-scrutiny validations (except DSC validation) happen on webform itself. Once the SPICE+ is filled completely with all relevant details, the same would then have to be converted into pdf format, with just a click of the mouse button, for affixing DSCs. All digitally signed applications can then be uploaded along with

the linked forms as per the existing process. Changes/modifications to SPICe+ (even after generating pdf and affixing DSCs), can also be done by editing the same web form application which has been saved, generating the updated pdf affixing DSCs and uploading the same.

Registration for EPFO and ESIC shall be mandatory for all new companies incorporated w.e.f 23rd February 2020 and no EPFO & ESIC registration numbers shall be separately issued by the respective agencies. However, the Registration for Profession Tax shall also be mandatory for all new companies incorporated in the State of Maharashtra w.e.f 23rd February, 2020.

All new companies incorporated through SPICe+ (w.e.f 23rd February 2020) also be mandatorily required to apply for opening the company's Bank account through the AGILE-PRO linked web form.

Declaration by all Subscribers and first Directors in INC-9 is auto-generated in pdf format and would have to be submitted only in electronic form in all cases, except where:

- (i) Total number of subscribers and/or directors is greater than 20 and/or
- (ii) Any such subscribers and/or directors has neither DIN nor PAN.

STEP – I: Apply For Name Approval

A. Login on MCA Website

Applicant has to login into their account on MCA Website. (Pro-existing users can use earlier account or new users have to create a new account.)

After Login, user has to click on the icon SPICe+ in MCA Service. An online form shall be opened. Applicants have to fill the information online. (This form cannot be downloaded).

The screenshot shows the MCA21 website interface. At the top, there is the logo of the Ministry of Corporate Affairs, Government of India, with the tagline 'EMPOWERING BUSINESS, PROTECTING INVESTORS' and 'REGULATOR • INTEGRATOR • FACILITATOR • EDUCATOR'. A search bar is located on the right. Below the header is a navigation menu with options: Home, About MCA, Acts & Rules, My Workspace, My Application, MCA Services, Data & Reports, and E-Consultation. The main content area shows 'MCA Services' and a breadcrumb trail 'Home > MCA Services > MCA Login'. A link 'To View The Step-By-Step Video Of Filing Linked Eform. Click Here.' is present. The 'User Login' section has a checkbox for 'External Agency/Bank/Nodal Officials/Business Users', a 'Forgot Password?' link, and a CAPTCHA image with the word 'looges'. There are 'Clear' and 'Sign In' buttons. A notice at the bottom right states: 'To download and install latest DSC web socket installer [click here](#). Form DIR-3 KYC Web, DIR-3 KYC e-form, CHG-1, CHG-4, CHG-6, CHG-8, CHG-9, DPT-3 and DPT-4 will not be available for filing from 15.08.2022, 12:00 AM till 30.08.2022, 11:59 PM.'

B. Details required to be mentioned in online form:

New fields introduced in Part A of SPICe+ are:

- (i) Type of company
- (ii) Class of company
- (iii) Category of company

- (iv) Sub-Category of company
- (v) Main division of industrial activity of the company
- (vi) Description of the main division.

C. Choose File:

This option is available to upload the PDF documents. If applicant want to attach any file, it can be uploaded at this option.

D. Submission of Form on MCA Website:

After completion of above steps user shall submit the Form with MCA website.

E. Validity of Reserved Name:

Reserved name shall be valid for 20 days from the date of approval of name, whereas for change of name of existing company, the validity period of new name would be 60 days from the date of approval.

STEP – II: Preparation of Documents for Incorporation of Company

After approval of name or for Incorporation of Company, applicant has to prepare the below mentioned documents:

- INC-9 – Declaration by Subscriber(s) and director(s).
- DIR-2- Declaration from the proposed Directors along with Copy of Proof of Identity and residential address.
- Form MBP-1-Disclosure of interest in other entities.
- NOC from the owner of the property, where the registered office of the company will be located.
- Proof of Office address (Conveyance/ Lease deed/ Rent Agreement etc. along with rent receipts).
- Copy of the utility bills which should not be older than two months.
- In case of subscribers/ Director does not have a DIN, it is mandatory to attach: Proof of identity and residential address of the subscribers.
- All the Subscribers should have Digital Signature.
- Copy of PAN from the subscribers along with Proof of Identity and residential address.

STEP – III: Fill the Information in Form

Once all the above mentioned documents/ information are available, applicant has to fill the information in the form “Spice+ Part -B.

Features of SPICe+ (Inc-32) form:

- Maximum details of subscribers are SEVEN (7). In case of more subscribers, physically signed MOA & AOA shall be attached to the Form.
- In case of a company having share capital, minimum authorized and subscribed share capital required for an OPC is Rupee one , for a private company having share capital is Rupees two and in case of a public company, Rupees seven. (as per Instruction Kit).

- Maximum details of directors are TWENTY (20).
- Maximum THREE (3) directors are allowed for filing application of allotment of DIN while incorporating a Company, other than a Producer Company.
- Person can apply for the name also in this form. (In SPICe+ Part A)
- By affixation of DSC of the subscriber on the INC-33 (MOA) date of signing will appear automatically in the form.
- Applying for PAN / TAN will be compulsory for all fresh incorporation applications filed in the new version of the SPICe form.
- Company can apply for Application for Goods and services tax Identification number, Employees State Insurance Corporation registration (ESIC), Employees Provident Fund Organization (EPFO) registration, and Professional tax Registration (in Maharashtra, Karnataka and West Bengal) and Opening of bank account through AGILE-PRO form.
- In case of companies incorporated, with effect from the 26th day of January, 2018, with a nominal capital of less than or equal to rupees fifteen lakhs or in respect of companies not having a share capital whose number of members as stated in the articles of association does not exceed twenty, fee on INC- 32 (SPICe+) shall not be applicable.

SPICe+ (INC-32)-a Single Window Form for Incorporation of Company

Earlier if a Person wants to incorporate a company , then it has to apply for the DIN for the proposed directors, seek approval for availability of name , separate form for first Director, Registered office address, PAN, TAN etc. Now, this form is a single window for Incorporation of Company.

This form can be used for the following purposes:

- Application of DIN (upto 3 Directors)
- Application for Availability of Name– SPICe+ - Part A
- No need to file separate form for first Director (DIR-12)
- No need to file separate form for address of registered office (INC-22)
- No need to file separate form for PAN & TAN
- No need to file separately for GSTN.

Points to Remember

- In case of incorporation of a company having more than 7 subscribers, MOA & AOA shall be filed with SPICe+(INC 32) as Physical attachment in the respective format as specified in Table A to J in Schedule I without filing form INC 33 and INC 34 as Physical attachment of MOA & AOA in e-form INC 32.
- In case of incorporation of a company where any of the subscribers of the MOA/AOA is a foreign national, MOA & AOA shall be filed with INC 32 in the respective format as specified in Table A to J in Schedule I along with valid Business Visa (In case of Individual) and apostilled MOA and AOA (In case business Visa is not available) and in such cases E-MOA (INC-33) and E-AOA (INC-34) are not required .Company has to pay the Stamp Duty in case of incorporation of Company with authorized Capital of Rs. 15 Lakh or below because Stamp Duty is a state matter. Companies Act has given exemptions for the ROC fees not for the stamp duty.
- Maximum 3 (Three) DIN can be applied through SPICE form. If applicant want to incorporate a Company

with more than 3 Directors, applicant have to initially incorporate the Company with 3 Directors and have to appoint new directors later on after incorporation.

- Only one (1) Name can be applied for through SPICE+ form. After filing of e-form, if the name is not available, the applicant has to propose new name and have to alter the name on all the attachments of the Form.

STEP – IV: Preparation of MOA & AOA (Electronic or Physical)

- After proper filing of SPICE+ Pat B form, applicant has to download the e-form INC-33 (e-MOA) and INC-34 (e-AOA) form the MCA site. After downloading of form as per requirement of Table A to J of Schedule I, fill in the form (it's a web form), convert to pdf and affix the DSC.
- After completely filling up of the form, affix DSC of all the subscribers, witness and professional on subscriber sheet of the MOA & AOA.

STEP – V: Fill details of PAN & TAN

It is mandatory to mention the details of PAN & TAN in the SPICE+ Form INC-32. Link to find out Area Code to file PAN & TAN are given in Help Kit of SPICE+ Form.

STEP – VI: Fill details of GST, IEC in AGILE-PRO

If Company wants to apply for GST ESIC, EPFO, Professional Tax registration (State of Maharashtra, Karnataka and West Bengal), Opening Bank Account and Shops Establishment Registration or Import Export Code (IEC), it has to select YES in the form and fill the information in the form.

STEP – VII: Submission of INC-32, 33, 34, AGILE-PRO-S on MCA

Once all the 4 forms are ready with the applicant, upload all four document as Linked form on MCA website and make the payment for the same. Where the Registrar on examining SPICE+ finds that it is necessary to call for further information or finds such application or document to be defective or incomplete in any respect, he shall give mark the application for resubmission. Only 2 (Two) resubmissions are allowed for SPICE+ forms. Each resubmission has to be replied within 15 (fifteen) days from the date of intimation given by the Registrar failing which the form will be liable for rejection.

STEP – VIII: Certificate of Incorporation

Incorporation certificate shall be generated with CIN, PAN & TAN in Form INC-11.

Commencement of Business

Under Section 10A, every company incorporated having a share capital shall not commence any business or exercise any borrowing powers unless

- a declaration in form INC-20A is filed by a director within a period of one hundred and eighty day of the date of incorporation of the company in such form and verified by a Company Secretary or a Chartered Accountant or a Cost Accountant in practice with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration; and
- The company has filed with the Registrar a verification of its registered office in form INC-22 as provided in sub-section (2) of section 12.

Precaution to be taken by Professionals

1. **Obtain engagement letter from subscriber:** – As per certification in e-form DIR-12 & INC-22, a professional declares that he has been engaged for the purpose of certification. Therefore, the professional should take engagement letter from the promoters.
2. **Verification of original records pertaining to registered office:** – As per certification in e-form INC-22, a professional declares that he has verified all the particulars (including attachments) from original records.
3. **Ensure all attachments are clear enough to read:** – As per certification in e-form DIR-12 & INC-22, a professional declares that all attachments are completely and legibly attached.
4. **Ensure registered office of the company is functioning for the business purposes of the company:**
As per certification in e-form INC-22, a professional declares that he has personally visited the registered office.
5. Take a declaration to the effect that all the original documents have been handed over after incorporation. Since as per section 7(4) copies all documents/information as originally filed should be preserved at the registered office of the company. Therefore, a professional should take a declaration while handing over the incorporation documents.
6. **MCA Circular 10/2014:** – According to this circular ROC/RD in case of omission of material fact or submission of false/incomplete/ misleading information, the Ministry can after giving opportunity of being heard, refer the matter to the e-governance division of MCA, which in turn may initiate proceedings under section 447 and/ or ask the respective professional institute to take requisite disciplinary action.

PROCESS OF INCORPORATION OF A PUBLIC LIMITED COMPANY

Requirement of minimum number of directors and shareholders:

There is a minimum requirement of directors and shareholders, as mentioned below:

- (A) Public Company
- Minimum Shareholders: 7 (Seven)
 - Minimum Directors: 3 (Three)

Statutory compliances

A public or private company will have to comply with all the laws, rules and regulations as applicable, including but not limited to the Companies Act, 2013, Foreign Exchange Management Act, 1999, Shops and Establishment Act, Income Tax Act, etc., failing which, it may be subjected to penal action.

- There must be at least seven members to start a public company.
- There is no ceiling on the maximum number of members in a public company.
- A public company should have at least three directors.
- In a Public Limited Company, there must be at least five members, personally present at the General Meeting for constituting the requisite quorum.
- The shareholders of a public company can freely transfer their shares.
- A public company can invite the general public for subscribing to shares of the company.
- The shares of a public company can be listed on a recognized stock exchange and traded publicly.

STEPS FOR INCORPORATION OF PUBLIC COMPANY

The Incorporation procedure for a public company is **similar** to the private company. However, it is to ensure that the proposed company is in compliance with the minimum requirement of the members and directors in a public company and the Articles and Memorandum of Association are drafted as per the requirement of the Act. The name shall be suffixed by the word “Limited”. If there are any entrenchment clauses in the articles of the company, then such entrenchment shall be in compliance with the Act.

PROCESS OF INCORPORATION OF A ONE PERSON COMPANY (OPC)

Section 2(62) of the Companies Act, 2013 define “One Person Company” as a company which has only one person as member. OPC is a type of Private Company as per Section 2(68) and Section 3(1) (c) of the Act.

Rule 3(1) of the Companies (Incorporation) Rules 2014 say, only a natural person who is an Indian citizen and resident in India:-

- (a) shall be eligible to incorporate a One Person Company;
- (b) Shall be a nominee for the sole member of a One Person Company.

“Resident in India” means a person who has stayed in India for a period of not less than one hundred and twenty days during the immediately preceding financial year.

(2) A natural person shall not be member of more than one One Person Company at any point of time and the said person shall not be a nominee of more than one One Person Company.

(3) Where a natural person, being member in One Person Company in accordance with this rule becomes a member in another such Company by virtue of his being a nominee in that One Person Company, such person shall meet the eligibility criteria specified in sub rule (2) within a period of one hundred and eighty days.

(4) No minor shall become member or nominee of the One Person Company or can hold share with beneficial interest.

(5) Such Company cannot be incorporated or converted into a company under section 8 of the Act.

(6) Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of anybody corporates.

A natural person can be member of only one “One Person Company”, at any point of time and the said person shall not be a nominee of more than a One Person Company. The subscriber to the memorandum of a One Person Company shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber’s death or his incapacity to contract, become the member of that One Person Company.

The name of the person nominated shall be mentioned in the memorandum of One Person Company and such nomination details along with consent of such nominee shall be filled in Form No. INC-32 (SPICe+) as a declaration and the said Form alongwith fee as provided in the Companies (Registration offices and fees) Rules, 2014 shall be filed with the Registrar at the time of incorporation of the company along with its e-memorandum and e-articles.

PROCESS OF INCORPORATION OF NIDHI

- (1) A Nidhi shall be a public company and shall have a minimum paid up equity share capital of ten lakh rupees.
- (2) Nidhi shall not issue preference shares, debentures or any other debt instruments.

- (3) If preference shares had been issued by a Nidhi before the commencement of the Companies Act, 2013, such preference shares shall be redeemed in accordance with the terms of issue of such shares.
- (4) No Nidhi shall have any object in its Memorandum of Association other than the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit.
- (5) Every "Nidhi" shall have the last words 'Nidhi Limited' as part of its name.

Under Nidhi (Amendment) Rules, 2022, the Central Government, on receipt of application (in Form NDH-4 along with fee thereon) of a public company for declaring it as Nidhi and on being satisfied that the company meets the requirements under these rules, shall notify the company as a Nidhi in the official Gazette. Thus, prior to this amendment, a public company could directly get incorporated as a Nidhi by the Registrar. After this amendment, in addition to following the procedure for incorporating a public company, the Central Government on receipt of NHD-4 will have to satisfy itself and notify the company as a Nidhi in the Official Gazette.

Requirements for Minimum Number of Members and Net Owned Funds

Nidhi (Amendment) Rules, 2022 deals with requirements for minimum number of members, net-owned fund etc. It provides that:

- (1) Every Nidhi shall, within a period of 120 days from the date of its incorporation, ensure that it has filed –
 - (a) E-form NDH-4;
 - (b) Net Owned Funds of 20 lakh rupees or more;
 - (c) minimum of 200 persons as members;
 - (d) unencumbered term deposits of not less than ten per cent of the outstanding deposits as specified in rule 14; and
 - (e) ratio of Net Owned Funds to deposits of not more than 1:20.

It may be noted that "Net Owned Funds" means the aggregate of paid up equity share capital and free reserves as reduced by accumulated losses and intangible assets appearing in the last audited balance sheet. Further, the amount representing the proceeds of issue of preference shares shall not be included for calculating Net Owned Funds.

If a Nidhi is not complying with clauses (a) or (d) of sub-rule (1) above mentioned, it shall within thirty days from the close of the first financial year, apply to the Regional Director in Form NDH-2 along with fee specified in Companies (Registration Offices and Fees) Rules, 2014 for extension of time and the Regional Director may consider the application and pass orders within thirty days of receipt of the application.

Provided that the Regional Director may extend the period upto one year from the date of receipt of application.

Where the failure to comply with sub-rule (1) above mentioned extends beyond the second financial year, Nidhi shall not accept any further deposits from the commencement of the second financial year till it complies with the provisions contained in sub-rule (1), and gets itself declared under sub-section (1) of section 406 besides being liable for penal consequences as provided in the Act.

Return of Statutory Compliances by Nidhi

Within ninety days from the close of the first financial year after its incorporation and where applicable, the second financial year, Nidhi shall file a return of statutory compliances in Form NDH-1 along with such fee as provided in Companies (Registration Offices and Fees) Rules, 2014 with the Registrar duly certified by a company secretary in practice or a chartered accountant in practice or a cost accountant in practice.

However, the above mentioned compliance is not applicable for companies incorporated on after the commencement of Nidhi (Amendment) Rules, 2022.

General restrictions or prohibitions

In terms of Rule 6, Nidhi shall not –

- (a) carry on the business of chit fund, hire purchase finance, leasing finance, insurance or acquisition of securities issued by any Body corporate;
 - (b) issue preference shares, debentures or any other debt instrument by any name or in any form whatsoever;
 - (c) open any current account with its members;
 - (d) acquire or purchase securities of any other company or control the composition of the Board of Directors of any other company in any manner whatsoever or enter into any arrangement for the change of its management;
 - (e) carry on any business other than the business of borrowing or lending in its own name. Nidhis which have adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding twenty per cent of the gross income of the Nidhi at any point of time during a financial year;
 - (f) accept deposits from or lend to any person, other than its members;
 - (g) pledge any of the assets lodged by its members as security;
 - (h) take deposits from or lend money to any Body corporate;
 - (i) enter into any partnership arrangement in its borrowing or lending activities;
 - (j) issue or cause to be issued any advertisement in any form for soliciting deposit;
- It may be noted that private circulation of the details of fixed deposit Schemes among the members of the Nidhi carrying the words “for private circulation to members only” shall not be considered to be an advertisement for soliciting deposits.
- (k) pay any brokerage or incentive for mobilizing deposits from members or for deployment of funds or for granting loans;
 - (l) raise loans from banks or financial institutions or any other source for the purpose of advancing loans to members of Nidhi.

PROCESS OF INCORPORATION OF SECTION-8 COMPANY

The procedure for registration of a Section 8 company is slightly different than incorporation of a private or public company. It involves two steps, namely:

- (i) obtaining of licence under section 8(1) of the Companies Act, 2013; and
- (ii) obtaining certificate of incorporation.

Before formation of the company, the promoters must decide on the following:

- (a) the proposed name to be applied;
- (b) objects to be carried by the Company;
- (c) proposed registered office address;
- (d) authorized capital;
- (e) Number of promoters, number of directors, and number of shares to be subscribed by each promoter.

In deciding the proposed name, the following rules have to be borne in mind:

- (i) The name of the company should be in consonance with the principal objects of the company as set out in the memorandum of association. Every name need not be necessarily indicative of the objects of the company, but when there is some indication of objects in the name, then it shall be in conformity with the objects mentioned in the memorandum. [Rule 8(2)(b)(ii) of Companies (Incorporation) Rules, 2014].
- (ii) The proposed name should not fall in the ambit of undesirable names specified in Rule 8 of Companies (Incorporation) Rules, 2014.
- (iii) Name of Section 8 Company shall include the words Foundation, Forum, Association, Federation, Chambers, Confederation, Council, Electoral trust and the like words. [Rule 8(7) of the Companies (Incorporation) Rules, 2014].
- (iv) There is no requirement to add the word Limited or Private Limited to its name. [Proviso to Section 4(1) (a) and Section 8(1)]

After deciding on the name and the structure of the proposed company, the following steps will be taken:

1. It has to be ensured that all the proposed directors should have valid DIN. If not, steps are to be taken for applying for DIN and obtaining the same.
2. Digital Signature for any one of the Directors is required to digitally sign the E-Forms to be submitted with the Registrar of Companies.
3. Memorandum of Association and Articles of Association have to be drafted. MOA of the Section 8 Company must be in form INC-13 (Rule 19) and AOA must be in the form INC-31 are must be taken to ensure see that:
 - (a) Objects of Section 8 Company must be the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object. [Section 8(1)(a)]
 - (b) the proposed company should intend to apply its profits, if any or other income in promoting its objects. [Section 8(1)(b)]
 - (c) It should intend to prohibit the payment of dividend to its members. [Section 8(1)(c)].
4. The following provisions have to be noted before incorporation:
 - (a) There must be at least 2 or 3 subscribers to the memorandum in case company is proposed to be incorporated as private company or public company respectively. [Section 3(1)(a) and Section 3 (1) (b)]
 - (b) Minimum number of Directors required is 2 Directors or 3 Directors, in case company is proposed to be incorporated as private company or public company respectively with a maximum limit of up to 15 Directors. A Company may appoint more than 15 directors after passing a special Resolution in a general Meeting. [Section 149(1)(a) (b)]
 - (c) Section 8 company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days during the financial year. [(Section 149(3)]

Application for Incorporation

The incorporation procedure can be carried out through eForm SPICe+ which is a single application for reservation of name, incorporation of a new company and/or application for allotment of DIN and/or application for PAN and TAN. This eForm is accompanied by supporting documents including details of Directors & subscribers,

MOA and AoA etc. It is to be noted that e-MOA (INC-33) and e-AOA (INC-34) is not applicable to Section 8 companies and physical copies of MOA and AOA are to be attached with the form SPICe+.

Once the e-Form is processed and found complete, company would be registered and CIN would be allocated. Also, DINs would be issued to the proposed Directors who do not have a valid DIN. Maximum three Directors are allowed for using this integrated form for filing application of allotment of DIN while incorporating a company. Also, PAN and TAN would get issued to the Company.

Earlier there were 2 Steps in the process of Incorporation of a Section 8 Company. First an application had to be made to the Central Government for the licence and once the licence was granted the Company could apply to the Registrar for Incorporation process.

In order to encourage the concept of 'Ease of Doing Business', the Form SPICe+ was introduced where both licence and the Certificate of Incorporation can be obtained by applying through a single form.

Incorporation application is filed in Form e forms SPICe+ along with the following attachments:

1. Memorandum of Association;
2. Article of Association;
3. Declaration by professional (Rule 19 (3) (b) of Companies (Incorporation) Rules, 2014) that the Memorandum and Articles have been drawn up in conformity with the provisions of Section 8 and rules made thereunder and all other requirements of the act relating to incorporation of a Section 8 Company have been complied with ;
4. Declaration by each of the persons making the application;
5. Declaration by First Directors and Subscribers;
6. Address Proof of the subscribers;
7. Identity proof of subscribers;
8. An estimate of the future annual income and expenditure of the company for next three years, specifying sources of income and the objects of the expenditure;
9. The verification of the registered office shall be filed in Form No. INC. 22 (when address for correspondence is the address of registered office of the company) and the following documents shall be attached thereto:
 - (a) the registered document of the title of the premises of the registered office in the name of the company; or
 - (b) the notarized copy of lease or rent agreement in the name of the company along with a copy of rent paid receipt not older than one month;
 - (c) the authorization from the owner or authorized occupant of the premises along with proof of ownership or occupancy authorization, to use the premises by the company as its registered office; and
 - (d) the proof of evidence of any utility service like telephone, gas, electricity, etc. depicting the address of the premises in the name of the owner or document, as the case may be, which is not older than two months.

(Note: This is not required if the correspondence address given in the SPICe+ Form is the registered office of the Company as per Rule 38(8) of Companies (Incorporation) Rules, 2014.

10. Appointment of directors of the company in Form DIR - 12 along with the following attachments:
- Consent to act as Directors in Form DIR- 2.
 - Affidavit by the Directors for Not accepting Deposits (On Non- judicial stamp paper of Rs. 100/- and duly notarised).
 - Declaration by each Subscriber to Memorandum of Association (On Non- judicial stamp paper of Rs. 100/- and duly notarised) in Form INC-9.
 - AGILE-PRO-S is applicable for incorporation of Section 8 Companies.

Certificate of Incorporation

If the Concerned Registrar of Companies is satisfied that all the requirements of the Companies Act, 2013 have been complied with, a Certificate of Incorporation is issued which carries a unique Company Identification Number (CIN) in form INC-11, along with the license issued by the Central Government.

LESSON ROUND-UP

- From the point of view of incorporation, companies can be classified as chartered companies, statutory companies and registered companies. Companies can be categorized as unlimited companies, companies limited by guarantee and companies limited by shares. Companies can also be classified as public companies, private companies, one person companies, small companies, associations not for profit having license under Section 8 of the Act, government companies, foreign companies, holding companies, subsidiary companies, associate companies, investment companies, Nidhi and Producer Companies.
- A private company has been defined under Section 2(68) of the Companies Act, 2013 as a company which has a minimum paid-up capital as may be prescribed, and by its articles restricts the right to transfer its shares, limits the number of its members to two hundred, and prohibits any invitation to the public to subscribe for any securities of the company.
- A private company can be further classified into a One Person Company and Small Company.
- “One Person Company” means a company which has only one person as a member.
- A public company is a company which (a) is not a private company (b) has a minimum paid-up share capital as may be prescribed.
- Foreign Company means any company or body corporate incorporated outside India which (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and (b) conducts any business activity in India in any other manner.
- A Producer Company is a body corporate having objects or activities specified in Section 378B(1) and which is registered as such under the provisions of the Act. Section 378B (1) of the Companies Act, 2013 provides the objects for which a producer company may be registered under the Act.
- “Nidhi” means a company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit, and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies. According to section 406 of Companies Act, 2013, “Nidhi” or “Mutual Benefit Society” means a company which the Central Government may, by notification in the Official Gazette, declare to be a Nidhi or Mutual Benefit Society, as the case may be.

- The Memorandum of Association is a document which sets out the constitution of the company and is the foundation on which the structure of the company stands. It defines as well as confines the powers of the company. If the company enters into contract or engages in any trade or business which is beyond the powers conferred on it by the memorandum, such a contract or the act will be ultra vires the company and hence void.
- Articles means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act. It also includes the regulations contained in Tables F to J in Schedule I of the Act, in so far as they apply to the company.
- The memorandum lays down the scope and powers of the company and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members.
- The memorandum and articles, when registered, bind the company and its members to the same extent as if they have been signed by the company and by each member to observe and be bound by all the provisions of the memorandum and of the articles.
- As part of Government of India's Ease of Doing Business (EODB) initiatives, the Ministry of Corporate Affairs has notified & deployed a new Web Form 'SPICe+' (pronounced 'SPICe Plus') replacing the existing SPICe form.
- A company incorporated under Section 8 of the Companies Act, 2013 is a company incorporated for promoting commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object, provided the profits, if any, or other income is applied for promoting only the objects of the company.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. State in brief the various kinds of companies which can be registered under the Companies Act, 2013.
2. Define a private company and state the exemptions which it enjoys under the Companies Act, 2013.
3. Define a public company and distinguish it from a private company.
4. State the consequences in each of the following cases giving reasons for your answers:
 - (a) A Private Company has 210 members in total of which 10 are the employees of the company. Five of these employees leave the employment of the company.
 - (b) A private firm has 20 partners, including a private company which is having 30 shareholders.
5. Write short notes on:
 - (a) Small Companies
 - (b) One Person Companies
 - (c) Nidhi
 - (d) Producer Companies

