INCORPORATION OF COMPANY

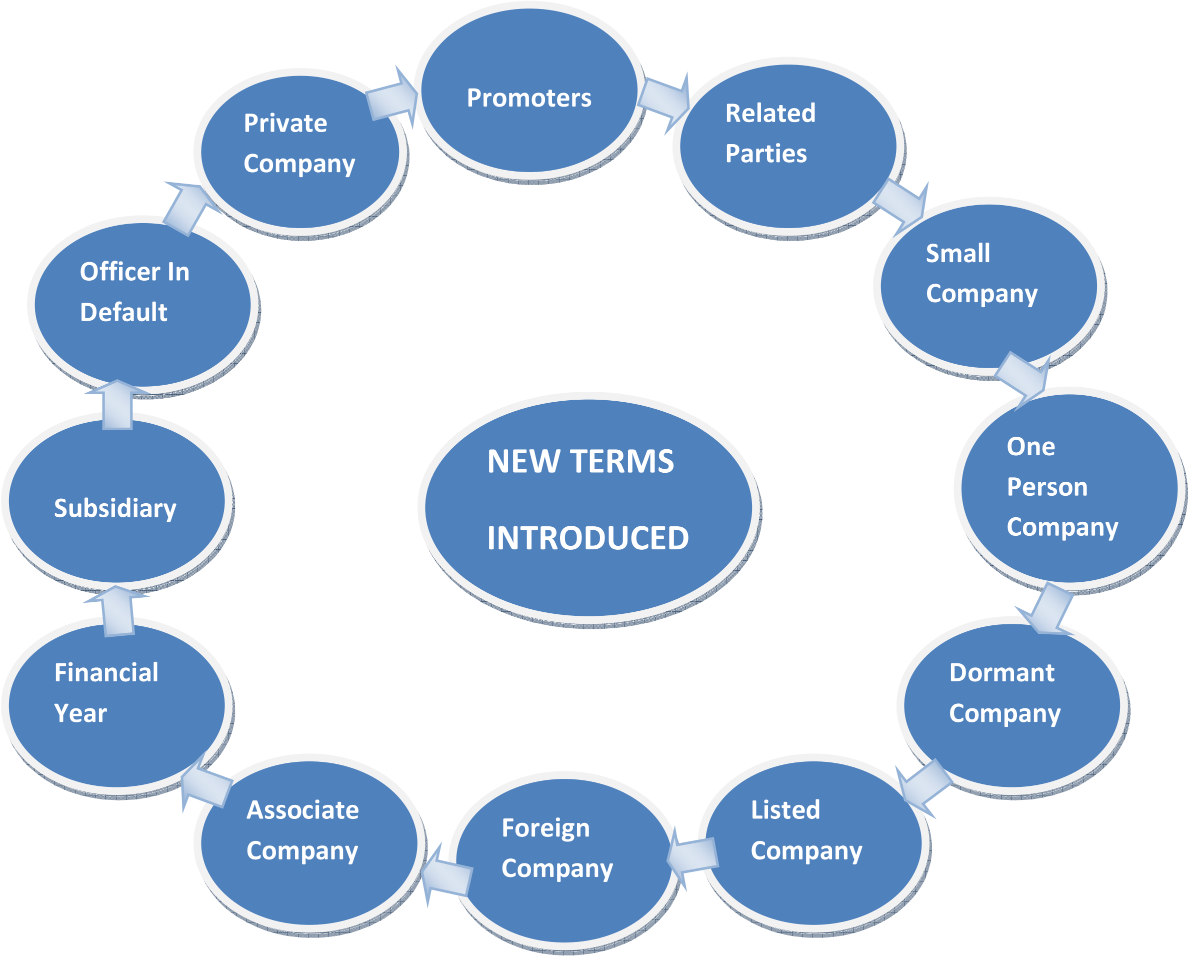
Introduction & Background

This article is aimed to highlight the Procedure for Incorporation of:

1. One Person Company
2. Private Company
3. Public Company
4. Companies with charitable objects (Section 8 companies)

as per Companies Act, 2013.

All the provisions, information and necessary details have been explained in a simplified manner for easy understanding. Attempt is made to simplify the intricacies of provisions on incorporation of different types of companies which are scattered between the Act and the Rules.



New definitions:

1. Companies

1.1 One-person company: The 2013 Act introduces a new type of entity to the existing list i.e. apart from forming a public or private limited company, the 2013 Act enables the formation of a new entity a 'one-person company' (OPC). An OPC means a company with only one person as its member [section 3(1) of 2013 Act].

1.2. Private company: The 2013 Act introduces a change in the definition for a private company, inter-alia, the new definition provides for increase in the upper limit of the number of members from 50 to 200. [Section 2(68) of 2013 Act].

1.3. Small company: A small company has been defined as a company, other than a public company.

(i) Paid-up share capital of which does not exceed 50 lakh INR or such higher amount as may be prescribed which shall not be more than five crore INR, or:

(ii) Turnover of which as per its last profit-and-loss account does not exceed two crore INR or such higher amount as may be prescribed which shall not be more than 20 crore INR:

As set out in the 2013 Act, this section will not be applicable to the following:

- A holding company or a subsidiary company
- A company registered under section 8
- A company or body corporate governed by any special Act [section 2(85) of 2013 Act]

1.4. Dormant company: The 2013 Act states that a company can be classified as dormant when it is formed and registered under this 2013 Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction. Such a company or an inactive one may apply to the ROC in such manner as may be prescribed for obtaining the status of a dormant company.[Section 455 of 2013 Act]

Incorporation of a company

1. Incorporation of company

The 2013 Act mandates inclusion of declaration to the effect that all provisions of the 1956 Act have been complied with, which is in line with the existing requirement of 1956 Act.

Additionally, an affidavit from the subscribers to the memorandum and from the first directors has to be filed with the ROC, to the effect that they are not convicted of any offence in connection with promoting, forming or managing a company or have not been found guilty of any fraud or misfeasance, etc., under the 2013 Act during the last five years along with the complete details of name, address of the company, particulars of every subscriber and the persons named as first directors.

The 2013 Act further prescribes that if a person furnishes false information, he or she, along with the company will be subject to penal provisions as applicable in respect of fraud i.e. section 447 of 2013 Act [section 7(4) of 2013 Act; Also refer the chapter on other areas]

2. Memorandum of association

The 2013 Act specifies the mandatory content for the memorandum of association as per Table A which is similar to the existing provisions of the 1956 Act and refers inter-alia to the following:

- Name of the company with last word as limited or private limited as the case may be
- State in which registered office of the company will be situated
- Liability of the members of the company

However, as against the existing requirement of the 1956 Act, the 2013 Act does not require the objects clause in the memorandum to be classified as the following:

(i) The main object of the company

(ii) Objects incidental or ancillary to the attainment of the main object

(iii) Other objects of the company [section 4(1) of 2013 Act]

The basic purpose in the 1956 Act for such a classification as set out in section 149 of the 1956 Act, is to restrict a company from commencing any business to pursue 'other objects of the company' not incidental or ancillary to the main objects except on satisfaction of certain requirements as prescribed in the 1956 Act like passing a special resolution, filing of declaration with the ROC to the effect of resolution.

Therefore, the 2013 Act would require only 'main objects'. MOA therefore would be a crisp document as compared to MOA under 1956 Act.

Reservation of name: The 2013 Act incorporates the procedural aspects for applying for the availability of a name for a new company or an existing company for alteration of name in sections 4(4) and 4(5) of 2013 Act.

3. Articles of association

The 2013 Act introduces the entrenchment provisions in respect of the articles of association of a company. An entrenchment provision enables a company to follow a more restrictive procedure than passing a special resolution for altering a specific clause of articles of association. A private company can include entrenchment provisions only if agreed by all its members or, in case of a public company, if a special resolution is passed [section 5 of 2013 Act]. How do you demonstrate- agreed by all the members- is it a case of special resolution with 100% consensus?

4. Formation of a company with charitable objects

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;

(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.

5. Commencement of business, etc

The existing provisions of the 1956 Act as set out in section 149 which provide for requirement with respect to the commencement of business for public companies that have a share capital would now be applicable to all companies.

The 2013 Act empowers the ROC to initiate action for removal of the name of a company in case the company’s directors have not filed the declaration related to the payment of the value of shares agreed to be taken by the subscribers to the memorandum and that the paid-up share capital of the company is not less than the prescribed limits as per the 2013 Act, within 180 days of its incorporation and if the ROC has reasonable cause to believe that the company is not carrying on business or operations [section 11 of 2013 Act].

INCORPORATION OF A COMPANY LIMITED BY SHARES UNDER THE COMPANIES ACT, 2013

PROCEDURE-

To register a company, you need to first apply for a Director Identification Number (DIN) which can be obtained by filing e-Form for acquiring the DIN. Form DIR 3.

⇩

Acquire or register for DSC and register yourself as a user in the relevant user category, such as registered and business user.

⇩

Apply for the name of the company to be registered by filing Form INC-1 for the same.

⇩

After receiving the letter of name approval from the MCA fill the form INC-7 (other than OPC)for application or declaration for incorporation of a company. Documents to be attached- MOA Table A , AOA table F , Declaration by Professionals in INC-8 ,Affidavit from Subscribers and first directors in INC 9, Verification of signature of subscribers in Form INC 10, Proof of residential address.

⇩

After Receiving the Certificate Of Incorporation fill the form INC-22 within 30 days of incorporation for giving notice of situation of registered office. Attachments – Address Proof like electricity or telephone bill and NOC of use of property.

⇩

Fill Form DIR -8 for particulars of appointment of Directors and the key managerial personnel. Once the form has been approved by the concerned official of the Ministry, you will receive an email regarding the same and the status of the form will get changed to Approved.

A company having a share capital shall not commence any business or exercise any borrowing powers unless—

a declaration is filed by a director in form INC10and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him and the paid-up share capital of the company is not less than five lakh rupees in case of a public company and not less than one lakh rupees in case of a private company on the date of making of this declaration;

Such Declaration has to be filed in Form INC-21 within 180 days of receiving the Certificate of Incorporation.

One Person Company

FEATURES OF ONE PERSON COMPANY

A One Person Company is a company that has single member. It is mandatory for every OPC to mention the word "OPC" at the end of their name e.g. - XYZ Private Ltd (OPC). It is mandatory to file nomination with the registrar at the time of Incorporation and this has to be the part of the MOA of the One Person Company.
In case the paid up share capital of an OPC exceeds fifty lakh rupees or its average annual turnover exceeds during the relevant period exceeds two crore rupees, then the OPC has to mandatorily convert into private or public company.
A One person Company (OPC) Private Limited has many advantages as compared to Proprietorship firm.

Memorandum of Association:

The table A of the Companies Act,2013 shall apply to the Companies limited by Shares.
However, Para 6 of the table is not applicable to OPC. There are few charges in the 5th Para (Capital Clause) of Table A for OPC.
Para 7 and Para 8 have been newly introduced for OPC.

Articles of Association:

The table F of the Companies Act, 2013 is applicable to Companies Limited by Shares. Table F Contains Articles II (27), II (48) and II (76) specifically dealing with OPC.

The OPC has some distinguishing features, which in comparison with Sole Proprietorship offers many advantages-

OPC is a ***separate legal identity*** different from owner whereas in case of proprietorship both of these merge into one. Arguably, the most important feature is that in case of OPC the ***liability of the owner is limited*** whereas a sole proprietor is liable for all the liabilities of the business entity he creates. It secures the personal assets of the owner, if the business lands up in crises. This means any loss or debts which is purely of business nature will not impact, personal savings or wealth of an entrepreneur.

One Person Company is a Private Limited Structure; this is the most popular business structure in the world. OPC gives suppliers and customers a sense of confidence in business. Large organizations prefer to deal with private limited companies instead of proprietorship firms.

Pvt. Ltd. business structure enjoys corporate status in society which helps the entrepreneur to attract quality workforce and helps to retain them by giving corporate designations, like directorship. These designations cannot be used by proprietorship firms.

OPC COMPARATIVE ADVANTAGES

Tax flexibility and savings- vis a vis proprietorship concern it is disadvantageous, as OPC will have to pay DDT.

PROCEDURE FOR FORMATION OF OPC

To register a company, you need to first apply for a Director Identification Number (DIN) which can be obtained by filing e-Form for acquiring the DIN. Form DIR 3.
Time frame – 1 Working Day

⇩

Acquire or register for DSC and register yourself as a user in the relevant user category, such as registered and business user.

Time Frame- 1 Working Day.

⇩

Preparation of Main Object & Search Name Availability-

Prepare the Main Object of the company. The Promoters have to provide atleast 4-6 names in the order of priority

⇩

Application for Name Availability

Filing of Form INC 1 with the ROC. Time Frame – 5 working days

Incorporation Process:

After ROC's approval for name of the Company, file all the Incorporation documents with the ROC in e- form INC 2. Pay the registration Fees and receive the Certificate of Incorporation. Time Frame- 5 days. Documents required-

- **MOA**
- **AOA**
- **Proof of Identity of the member and the nominee**
- **Residential proof of the nominee and the member**
- **Copy of Pan Card of the member and the nominee**
- **Consent of Nominee in form INC -3 Duly signed.**
- **Affidavit from the subscriber and first Director to the Memorandum in Form NO. INC-9.**

Application for Commencement of Business Certificate

- **Providing Proof of Subscription Money/Capital paid by Subscriber/shareholder to Company**
- **Online uploading of e-Form INC 21**
- **Receiving Commencement Certificate form ROC**
  Form can be filed within 180 days of Incorporation.

  Documents- Specimen signature in Form No. INC-10

FORMATION OF COMPANIES WITH CHARITABLE OBJECTS

The company registered under this section shall enjoy all the privileges and be subject to all the obligations of limited companies.

LICENCE UNDER SECTION 8 FOR NEW COMPANIES WITH CHARITABLE OBJECTS ETC. [RULE 19]

File Form INC 1 for Reservation of name.

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An Application shall be made in Form INC 12 for obtaining the license under section 8 of the Companies Act.

Attachments:

1. **Draft Memorandum of Association as per Form INC 13**
2. **Draft Articles of Association**
3. **Declaration as per Form INC 14**
4. **Declaration as per Form INC 15**
5. **Estimate Income and Expenditure for next 3 years.**