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

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Moving from the Companies Act 1956 to the Companies Act 2013 is like shifting from your old house to a new one. In the old house, where you have stayed for years, everything would have found its own place – the shoes, the clothes, umbrella, first aid, brooms, and whatever else you need in your household. Your legs can find their own way, even in pitch dark of night – they know the way to the bathroom, to the stairs, they even know where the stairs end.

As you move into the new house, first, there is a huge process of "getting used to" – which is anyway usual for any such shifting. But the biggest issue is – we get to realise several shortcomings that we did not realize until we shifted. This might include silly things such as an electric point that we missed, or a water outlet that is not working, and so on. In case of the new house, all these are our own follies, or those of the architect – so we go ahead and get them fixed. In case of the new Act – the fixing process is the long trail of amending the law, and in the meantime, you have the 6-months-in-jail staring at you all the time!

PROCEDURE

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This Article is for those people, applying for Company Incorporation after 1st April, 2014. Form INC-22 and form INC-7 are being rejected by the ROC Authorities, as many people are using the same old AOA formats for incorporating company.

The first thing to take care of under the new Companies Act, 2013 is to follow a changed procedure for giving birth to a Company. This article speaks of only Public and Private Limited Companies and does not cover One Person Companies.

Various methods of forming a Private Limited Company:

A: There are three methods Section 3(1) (a,b,c) in which a Private Limited Company could be formed

a. A Company limited by shares; or

b. A Company limited by guarantee; or

c. An Unlimited company.

Step Wise Formalities for Formation of A New Company:

Persons desirous of forming a company must adhere to the step by step procedure as discussed below:—

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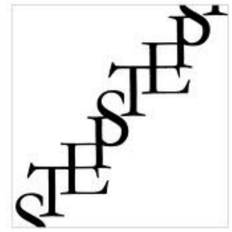
I. Selection of type of the company.
II. Selection of name for the proposed company.
III. Apply for Directors Identification Number and Digital Signatures, if does not have
IV. Drafting of Memorandum and Articles of Association.
V. Stamping, digitally signing and e-filing of various documents with the Registrar.
VI. Payment of Fees.
VII. Obtaining Certificate of Incorporation.
VIII. Obtaining Certificate of Commencement of business (in case of public limited Companies).



WHAT DOES THE ACT SAY REGARDING PRE INCORPORATION AND POST INCORPORATION?

<u>PRE INCORPORATION:</u>

- At Least 2 Promoters: Promoters who will promote/ incorporate the company. Promoters may be individual or body corporate.
- At Least 2 Directors: Directors should be individual only. No Body corporate/ HUF or Partnership Firm can be appointed as Directors.
- Generally, in most of the cases, Promoters and Directors are the same in Private Limited Companies.
- Directors must have DIN (Directors Identification Number)- **Process Given Below**:
- One of such two directors must have DIGITAL SIGNATURE who can apply with any of DSC Vender i.e. E Mudra/ Siffy/ TCS etc.

After this Process:
Process for Name Approval

- The promoters should apply for the name of the company to be approved with the concerned ROC of the State where the company has to be formed in E Form- INC- 1 by payment of Rs. 1000 through Credit Card or Net Banking.

- One of the Promoters should fill up e-form INC-1, digitally sign by Promoter and Professional and then upload the e-Form on the MCA21 Portal. Before doing so, the following three points have to be complied with:

  a. All the Promoters should have their DIN No.
  b. Atleast one Promoter should have the DSC. (Class 2 Digital Signature)
  c. The proposed names selected should fall in guidelines prescribed.

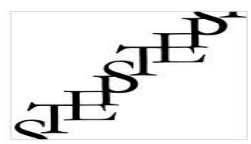
- Info. Require to give in form INC-1 (Describing the Capital of Company, Main Objects, State In Which The Company is to be Incorporated and to Affix the Digital of Applicant.

- The reservation by the Registrar of name applied for is valid for 60 days from the date of application. Hence if a company is proposed to be registered with the said name referred to above, the promoters shall produce the documents to the Registrar for registration with in a period of 60 days from the date of application for name. If Promoters fail to file all the relevant form for incorporation within 60 days, then name will not be Available for you, Promoter have to file form INC-1 again for approval of Name.

After Name approval Process:

Process - Pre Incorporation:

Once Name is approved by ROC, following are the **Pre-Incorporation Steps**:



STEP-I
Application for incorporation of company-rule 13 of the companies (Incorporation Rules, 2014):

Drafting For the purpose of Sub-section (1) of Section 7, an application shall be filed, with the Registrar within whose jurisdiction the registered office of the company is proposed to be situated in form No. INC-7 along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 for registration of company.

STEP-II

Drafting of Memorandum of Association (MOA) and Article of Association (AOA) is generally a step subsequent to the availability of name made by the registrar It should be noted that the main objects should match with the objects shown in e-Form INC-1 and must reflect in the name of company (Name should be like that a lay man can estimate the objects of company by Name of Company).

These two documents are basically the charter and internal rules and regulations of the company. Therefore, it must be drafted with utmost care and with the advice of the professional. The Directors/ promoters with the help of professional draft MOA and AOA.

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AOA (Draft Attached at the end):

AOA should be followed by the tables **F,G,H,I & J** prescribed in **SCHEDULE- I** to be signed by subscribers in Articles all the bye laws of the company corresponding to Companies Act, 2013 have to be considered. The names of First Director are mandatory to be given in AOA.

MOA (Draft Attached at the end)

MOA should be followed by the tables **A,B,C,D & E** prescribed in **SCHEDULE- I** to be signed by subscribers -

There are 5 clause mainly i.e.

- Name Clause;
- Registered Office Clause,
- Object Clause (Furtherance of Object)
- Liability clause
- Capital Clause
- Subscribers Clause will have to take into consideration and mention following.
  - Name
  - Fathers name
  - Occupation
  - Resident Address
  - Share subscribed
  - Affix one Passport Size Photo graph
  - Signed in given colloum.

One person who will act as witness and will sign in the witness column and mention:

"I hereby witnessed that subscribers signed in my presence on Date ____________, at ____________.further I have verified their identity details (Through ID)for their identification satisfy myself of their identification particular as filled in"

Below this witness must mention:

- Name
- Address
- Description
- Signature

Subscriber sheet must be mentioned Date & Place at the end. The word subscribers here used is because of the reason that these subscribers will subscribe for the shares in the company at time of incorporation and will invest the minimum capital i.e. Rs. 1, 00, 000. They will contribute the amount by way of cash or cheque when the company gets incorporated and shares will be allotted to them followed by the share certificates.

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STEP-III
DECLARATION BY PROFESSIONALS IN INC- 8 – FORMAT ATTACHED

Pursuant to section 7(1) (b) and rule 14 of the Companies (Incorporation) Rules, 2014:
Require to take a Declaration from Professionals Like: (CS-CA-CWA), Giving declaration that, all the requirements of Companies Act, 2013 and the rules made there-under relating to registration of the company under the Act and matters precedent or incidental thereto have been complied with. **On Stamp Paper**, Value of Stamp Paper as per the State stamp Act (State: Where register office of Company will be situate). In DELHI value of Stamp paper is Rs.10 /-. (ATTACHED LIST BELOW).
Professional will sign the declaration and will mention Date, Place and Membership No.

STEP-IV
AFFIDAVIT FROM SUBSCRIBERS AND FIRST DIRECTORS IN INC 9
FORMAT ATTACHED

[Pursuant to section 7(1)(c) of the Companies Act, 2013 and rule 15 of the Companies (Incorporation) Rules, 2014:
Requires to take affidavit from Subscribers and First Directors of Company. Giving Declaration That,
- I have not been convicted of any offence in connection with the promotion, formation or management of any company during the preceding five years; and
- I have not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years; and
- All the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of my knowledge and belief.

On Stamp Paper, Value of Stamp Paper as per the State stamp Act (State: Where register office of Company will be situated). In DELHI value of Stamp paper is Rs.10 /-. (ATTACHED LIST BELOW).
Declaration should be signed, Dated and Place.

STEP-V
FORM FOR VERIFICATIONOF SIGNATUREOF SUBSCRIBERS IN INC-10
FORMAT ATTACHED:

The Specimen signature and latest photograph duly verified by the Banker or Notary shall be in form INC-10.

PURSUANT TO RULE16 (1) (Q) OF COMPANIES (INCORPORATION) RULES, 2014:

STEP-VI
Documents Require From First Director:
- **As per section 152 Rule (8) of Chapter XI-** Every person before appointment furnish to the company a consent in writing to act as such in form – **DIR-2.**
  FORMAT ATTACHED:

- **As per Section 164 rule 14 of Chapter XI-** Director will inform to company in **Form DIR-8** at the time of appointment and re-appointment.
  FORMAT ATTACHED:

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- **<u>As per Section 184(1) rule 9 of Chapter XII-</u>**Director will disclose his/ her interest in any company, companies or bodies corporate (Including Shareholding Interest), firms or other associates of individuals , by giving a notice in writing in **<u>form MBP-1.</u>**
  <u>FORMAT ATTACHED:</u>

<u>STEP-VII:</u>
<u>REGISTERED OFFICE OF COMPANY:</u>

As per section 12(1) and rule 25 of Chapter II- Company shall have a place as its registered office in the State stated in the Memorandum on and from the 15th Day of its Incorporation. (Practically from the date of incorporation).

<u>Verification of Registered Office:</u>

- Verification of Registered office filed in form **<u>INC-22.</u>**
  <u>There shall be attached to said Form**, any of the following documents**, namely :-</u>
  - The <u>Registered Document Of The Title</u> of the premises of the registered office in the name of the company; or
  - The **<u>Notarized Copy Of Lease Or Rent Agreement</u>** in the name of the company along with a copy of rent paid receipt not older than one month;
  - The **<u>Authorization From The Owner Or Authorized Occupant Of The Premises</u>** along with proof of ownership or occupancy authorization, to use the premises by the company as its registered office; and
  - The **<u>Proof Of Evidence Of Any Utility Service</u>** likes: **Telephone, Gas, Electricity**, etc. depicting the address of the premises in the name of the owner or document, as the case may be, **<u>which is Not Older Than Two months</u>**.

<u>STEP-VIII:</u>

<u>Following documents are required to file with Registrar:-</u> Forms will be filled **<u>as per sequence</u>** given below.

- **Memorandum of Association + Article of Association+ INC-8+INC-9+INC-10**
  <u>(Attached in e-form- INC-7) FORMAT ATTACHED</u>
- **DIR-2+DIR-8**
  <u>(Attached in e-form- DIR-12) FORMAT ATTACH</u>
- **Verification Documents as mention above**
  <u>(Attached in e-form- INC-22) FORMAT ATTACH</u>

<u>Other Documents Require to File WITH ROC</u>:

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- POA, if any, executed by any subscriber authorizing a person to sign the Memorandum and Articles on his behalf. FORMAT ATTACHED

- Where subscriber is body corporate, Certified True Copy (CTC) of resolution of the Board of Directors authorizing a person to sign the Memorandum and Articles on its behalf.

- POA in favour of person (professional) authorizing to make any correction at the time of registration. FORMAT ATTACHED.

STEP-IX:
Procedure for filling of e-forms with ROC/MCA:

After Preparation of documents mention at Step-I to Step-VII require to file these documents with ROC as per STEP- VIII:

- Prepare all 3 (three) above mentioned e-forms (Attach the STEP-I to VII documents to the e-Form mention with STEP-VIII).
- After preparation put DSC of one director and Professional (CS, CA & CWA)
- Then press prescrutiny button of e-form.
- Now your form is ready for filling.
- Go to MCA portal. (Link Given: http://www.mca.gov.in)
- Access the My MCA on link. (http://www.mca.gov.in/DCAPortalWeb/)
- The applicant or a representative of the applicant will then submit the duly signed documents electronically.
- The system will calculate the fee, including late payment fees, if applicable.
- Payments will have to be made through appropriate mechanisms - electronic (credit card, Internet banking) or traditional means (at the bank counter).
- The payment will be exclusively confirmed for all online (Internet) payment transactions using payment gateways.
- Acceptance or rejection of any transaction will be explicitly communicated to the applicant (including facility to print a receipt for successful transactions).
- MCA21 will provide a unique transaction number (SRN), which can be used by the applicant for enquiring status pertaining to that transaction.
- Filing will be complete only when the necessary payments are made.
- In case of a rejection, helpful remedial tips will be provided to the applicant.
- The applicants will be provided an acknowledgement through e-mail or alternatively they can check the MCA portal.

STEP-IX is the last Step of Pre-Incorporation. After Filling e-form as given above now

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ROC will process the Form check the particulars and Attachments of e-from. If ROC found everything is as per requirement of Act and the Rules in respect of registration. He shall registered in the Register all the documents and information as given and issue

ISSUE CERTIFICATE OF INCORPORATIONS in form INC-21.
The Effect that company is incorporated under the Act.

ABOVE MENTION ARE IX STEPS FOR PRE INCORPORATION OF A COMPANY!

POST INCORPORATION:

Once you get Certificate of Incorporation in form INC-21. You company Name and Details of Directors will be available on MCA Web-Site. Now a Company having share capital required to obtain a separate **CERTIFICATE OF COMMENCEMENT** of business according to section 11 of the Companies Act, 2013.

CERTIFICATE OF COMMENCEMENT OF BUSINESS:

- Declaration from Director in e-form INC-21. (On stamp paper)

WORDS REQUIRE TO BE DONE AFTER INCORPORATION WILL BE PROVIDE IN NEXT ARTICLE.

(Author – CS Divesh Goyal, ACS is a Company Secretary in Practice from Delhi and can be contacted at csdiveshgoyal@gmail.com) Disclaimer: The entire contents of this document have been prepared on the basis of relevant provisions and as per the information existing at the time of the preparation. Though utmost efforts has made to provide authentic information, it is suggested that to have better understanding kindly cross-check the relevant sections, rules under the Companies Act, 2013. The observations of the author are personal view and the authors do not take responsibility of the same and this cannot be quoted before any authority without the written consent of the author

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SUGGESTIONS, COMMENTS AND QUERIES SOLICITED.

PROCEDURE OF OBTAINING DIN

Section and Rule Number(s)

eForm DIR-3 is required to be filed pursuant to Section 153 of the Companies Act, 2014 & Rule 9(1) of the Companies (Appointment and Qualification Of Directors) Rules, 2014 which are reproduced for your reference.

Section 153:

Every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number to the Central Government in such form and manner and along with such fees as may be prescribed.

Rule 9(1):

Every individual, who is to be appointed as director of a company shall make an application electronically in Form No. DIR-3, to the Central Government for the allotment of a Director Identification Number (DIN) along with such fees as provided in the Companies (Registration Offices and Fees) Rules, 2014.

Purpose of the e-form

Any person intending to become the director in a company is required to make an application to MCA for allotment of a unique identification, namely, Director Identification Number (DIN) through this e-Form.

- Any person intending to apply for DIN shall have to make an application in e-Form DIR-3 and should **follow the following procedure:**
- Download Form- DIR-3 from MCA Portal by given link.
  http://www.mca.gov.in/MinistryV2/Download_eForm_choose.html
- Fill the given Particulars in e-form.
- Attach the photograph (JPEG).

- Attach scanned copy of supporting documents (Proof of Identity, Proof of Residence of Applicant and DIR-4): **List Attached Below**

- Physical documents are not required to submit at DIN cell.

- The e-Form shall have to be digitally signed and shall be uploaded on MCA21 portal.

- Form DIR-3 is mandatorily to be signed by an Applicant and a practicing professional or secretary (who is a member of ICSI) in whole time employment or the Director of the existing company.

- The applicant is required to get himself/herself registered on the MCA21 Portal to obtain login id, which is necessary for payment of the fees or the Professional is required to get himself/herself registered on the MCA21 Portal to obtain login id, which is necessary for payment of the fees

- After obtaining the login-id, Login to the MCA21 portal and click on 'e-Form upload' link available under the 'e-Forms' tab for uploading the e-Form DIR-3.

- Upon upload, pay the fees for e-Form DIR-3.

- Only electronic payment of the fees shall be allowed (I.e. Net banking / Credit Card). No challan payment will be accepted under revised procedure of DIN allotment.

- e-Form DIR-3 will be processed only after the DIN application fee is paid.

- Approved DIN shall be generated in case the form is being signed by a practicing professional and details have not been identified as potential duplicate. Provisional DIN shall be generated in case form is signed by secretary in whole time employment or Director of existing company and details have been found as potential duplicate. A suitable informational message and an email shall be provided to the user that the DIN shall be approved after due verification by the DIN cell.

- Processing of e Form DIR-3.

- In case, DIR-3 gets certified by the professional (i.e. CA (in whole time practice)/ CS (in whole time practice)/ CWA (in whole time practice)/, the DIN will be approved by the system immediately online (in case it is not potential duplicate).

- Post-approval changes in particulars of Form DIR-3.

- If there is any change in the particulars submitted in e-form DIR-3, applicant can submit e-form DIR-6 online. For instance in the event of change of address of a director, he/ she is required to intimate this change by submitting e-form DIR-6 along with the required attested documents.

FAQ's

1. **Why to get e-form DIR-3 attested from Professional?**

Answer:

- If eForm is digitally signed by a Chartered Accountant (CA) or Cost Accountant (CWA) or Company Secretary (CS) (in whole time practice) then the supporting documents attached shall be self-attested by the applicant.

- If eForm is digitally signed by secretary (who is member of ICSI), in whole time employment or director of existing company then the supporting documents attached shall be either self-attested by the applicant or duly attested by either Public Notary or a Gazette Officer of a Government. {<u>The attesting authority must indicate the following while attesting the documents:- (i) Signatures; (ii)Name in full in Capitals; (iii) Registration No.; and (iv) Seal/ Stamp. }</u>

- In case, the director/ designated partner **<u>is residing outside India</u>**, then the attached supporting documents should be attested by the Consulate of the Indian Embassy, Foreign public notary. In case of director, supporting documents can also be attested by Company secretary in full time employment /CEO / Managing director of the Indian company in which he / she proposed to be a director.

2. List of Mandatory Attached Documents:

The following are the mandatory attachments to be filed in all cases:

A. <u>Proof of Identity of Applicant</u>

- In case of <u>Indian nationals</u>, **<u>Income-tax PAN</u>** is a <u>mandatory</u> requirement for proof of identity.
- In case of <u>foreign nationals</u>, **passport is a mandatory** requirement for proof of identity.
- Proof of identify enclosed with e-Form DIR-3 should also contain the date of birth of the applicant and the same should match the date of birth filled in the application form. In case the proof of identify does not indicate the Date of Birth then additional proof of Date of Birth, duly certified/ attested, should be attached.

B<u>. Proof of residence of applicant</u>

- Address proofs like: Passport, Election (Voter Identity) Card, and Ration Card, Driving License, Electricity Bill, Telephone Bill or Aadhar shall be attached and should be in the name of applicant only.
- In case of <u>Indian applicant</u>, documents <u>should not be older than 2 months</u> from the date of filing of the e-Form.

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- In case of foreign applicant, address proof should not be older than 1 year from the date of filing of the e-Form

C. Copy of verification by the applicant as per e-Form No. DIR-4- DIR-4 shall contain the Name, Father's name, date of birth and text of declaration and physical signature of the applicant)

In case of proofs which are in languages other than Hindi / English, the proofs should be translated in Hindi / English from professional translator carrying his details (name, signature, address) and seal. In the case of foreign nationals, translation done by the notary of home country is also acceptable.
Any other information can be provided as an optional attachment(s).

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

PROCEDURE

1. 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.
2. Acquire or register for DSC and register yourself as a user in the relevant user category, such as registered and business user.
3. Apply for the name of the company to be registered by filing Form INC-1 for the same.
4. After receiving the letter of name approval from the MCA fill the form INC-7 for application or declaration for incorporation of a company.
   - **Documents to be attached-**
     a. MOA Table A
     b. AOA table F ,
     c. Declaration by Professionals in INC- 8
     d. Affidavit from Subscribers and first directors in INC 9
     e. Verification of signature of subscribers in Form INC 10, Proof of residential address.
5. Fill the form INC-22 within 30 along with form INC-7 for giving notice of situation of registered office. Attachments –
   - Address Proof like electricity or telephone bill and NOC of use of property.
6. Fill Form DIR -12 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.

7. 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 INC10 and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid

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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 th Certificate of Incorporation.

(Author – CS Divesh Goyal, ACS is a Company Secretary in Practice from Delhi and can be contacted at csdiveshgoyal@gmail.com) Disclaimer: The entire contents of this document have been prepared on the basis of relevant provisions and as per the information existing at the time of the preparation. Though utmost efforts has made to provide authentic information, it is suggested that to have better understanding kindly cross-check the relevant sections, rules under the Companies Act, 2013. The observations of the author are personal view and the authors do not take responsibility of the same and this cannot be quoted before any authority without the written consent of the author

Regards,
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DRAFTS WILL BE PROVIDE IN MY NEXT ARTICLE.

To be continue……………………..