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## **SECTION 3 OF THE COMPANIES ACT, 2013: FORMATION OF COMPANY**

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### **ABSTRACT**

There are over 20 Lakh private limited companies in India, making them the most popular business entities in India. All of these companies are regulated by the Department of the Ministry of Corporate Affairs under the guidelines of the Companies Act 2013. The Indian government has greatly simplified the registration of the companies. In this paper, we will take an in-depth look at the process of company registration in India. according to sec.2(20) of the companies act, 2013 “company” means“a company incorporated under this act or under any previous company law”. At least 7 persons in case of a joint stock company, at least 2 persons in case of a private company, and 1 person in case of a private company, the company to be incorporated shall be a single company, i.e. a partnership. Starting a business in India involves steps from creating a business idea to that point. A company that is legally ready for admission is called the formation stage of the company. The people who take these steps and the risk areas that come with them are known as promoters.

## INTRODUCTION

What is a company? A company is a natural legal entity made up of a body or group of people working together to achieve a common goal. It can be a commercial or industrial company. Different types of businesses are taxed at different tax rates. Therefore, corporate tax defines its nature. Different types of businesses are taxed differently. Therefore, corporate taxation defines its nature. according to sec.2(20) of the companies act, 2013 “company” means “a company incorporated under this act or under any previous company law”. The word “company” is derived from two Latin words that are “com” and “panis” which means “together” and “bread” respectively. the concept of the company act is taken from the English Companies act 1844<sup>1</sup>. The first company legislation in India was passed in 1850 known as the joint stock companies act. Provisions of the Companies Act 1956 govern the incorporation of a company. The Company form of organization is becoming increasingly preferred by businesses as it is particularly suitable for incorporating medium and large-sized organizations. Setting up a company in India requires a few steps. Starting a business in India involves steps from creating a business idea to that point. A company that is legally ready for admission is called the formation stage of the company. The people who take these steps and the risk areas that come with them are known as promoters. When setting up a company it is recommended to use the services of an Indian corporate lawyer.

## FORMATION OF A COMPANY

According to section 3 of the companies act<sup>2</sup>, 2013 (1) A company may be formed for any lawful purpose by —

- (a) seven or more persons, where the company to be formed is to be a public company;
- (b) two or more persons, where the company to be formed is to be a private company;
- (c) one person, where the company to be formed is to be One Person Company, that is to say, a private company,

Following are the steps for the formation of the company:

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<sup>1</sup> Vineeta, *Origin and Development of Company Law in India*, Legal Service of India E-journal, Aug. 30, 2022, 4:18PM), <https://www.legalserviceindia.com/legal/article-7931-origin-and-development-of-company-law-in-india.html#:~:text=History%3A,for%20the%20first%20in%20India>

<sup>2</sup> Ministry of corporate affairs, *the companies act, 2013*, CompaniesAct2013.Pdf, (Aug. 30, 2022, 5:09 PM) <https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>.

1. Name of the company and location of the registered address Company.
2. Preparation of the Memorandum of Association (MOA) u/s 4 and Article of Association (AOA) u/s 5.
3. Registration of the company according to ( sec.7) of the companies act.
4. The capital subscription must be raised and thereafter allotment of the shares must be made.
5. Then the prospectus must be issued and registered with registrar.
6. Arrangement of financial assistance from other financial institutions.
7. To obtain a certificate of incorporation (FORM NO. INC 11) of the business from the registrar.

## PROMOTERS

Formation of a company, the foremost steps required is promotion of a company. Promoter<sup>3</sup> of a company is a person or a group of persons who came together of the objective of setting up a business. A Promoter may be an individual, a corporation, or an artificial legal entity. It is not necessary or compulsory to be a business founder to be a promoter. A person who raises money and backs other important work can likewise be considered a "promoter of a company." there are types of Promoters:

- **Professional promoters:** Professional promoters are the experts in the promotion of companies. They give companies to the shareholders when the business starts.
- **Occasional promoters:** they don't do promotional work on a regular basis. They usually take interest in floating some companies. For example - lawyer, engineers may float companies.
- **Financial promoters:** some banks can take up the company's promotion during a favorable financial environment.
- **Managing agents as promoters:** These agents used to float new companies in India in exchange for rights as managing agents. However, it is important to note that this support system is largely gone from our country.
- **Entrepreneurial promoters:** they conceive the idea of the new business unit, do the groundwork to establish it, and may subsequently become part of the management.

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<sup>3</sup> Mayank Bansal, *who are promoters of a company under companies act*, Legal study Material, (sep 1,2022, 2:48 AM) <https://legalstudymaterial.com/promoters-of-a-company-under-companies-act>.

## **CERTIFICATE OF INCORPORATION**

A certificate of Incorporation is issued when the registrar is satisfied with the documents provided. The certificate validates the establishment of the company in the records.

## **CERTIFICATE OF COMMENCEMENT OF BUSINESS**

A certificate of commencement of business is required for the establishment of a public company to start doing business, while a private company can start a business once it has received a certificate of Incorporation.

## **LEGAL POSITION OF A PROMOTER**

According to Company law, promoters don't get any legal position<sup>4</sup>. A promoter is not an agent or trustee of the company as it is not a legal entity prior to its incorporation. The company is established under the direction and supervision of the promoter. The founder establishes and establishes the company. The promoter's duty is to bring the maximum benefit to the business, and he himself must not take any hidden profit from the business. Promoters must declare an interest in the property they own when selling such property to the Company.

## **HOW TO REGISTER A COMPANY**

The process of company registration is what makes business legally valid and independent as an entity in India. In most cases, to register a company in India a company requires minimum two person to act as shareholders and directors. To begin with process of the company registration, the directors will have to obtain digital Signature Certificates and director identification numbers. Next, the entrepreneurs will need to obtain a company PAN Card, address proof documents, and financial statements. Once the entrepreneurs have the required documents they may file application to register the company after finding a suitable name for their business venture. The ministry of Corporate affairs then reviews the application and supporting documents to verify the company. If the officials are satisfied, the entrepreneur will receive Certificate of registration in about a week or two.

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<sup>4</sup> Manisha Singh, *Promoter of a Company - Meaning Characteristic, rights, duties and legal position*, Law Corner, ( sep 06, 2022, 3:08 PM), [https://lawcorner.in/promoter-of-a-company-meaning-characteristics-rights-duties-and-legal-position/#LEGAL\\_POSITION\\_OF\\_A\\_PROMOTER](https://lawcorner.in/promoter-of-a-company-meaning-characteristics-rights-duties-and-legal-position/#LEGAL_POSITION_OF_A_PROMOTER).

## **STEPS REQUIRED FOR INCORPORATION OF COMPANY**

Incorporation is the legal process used to form a legal entity or corporation Company. It involves drafting a legal document listing the main objectives. Company name and location, number and type of shares.

The companies act 2013 lays down the rules for the incorporation of both private and public companies. As per section 3 of the Companies Act 2013, in the case of private companies at least 2 members are required whereas in public companies 7 members are required and in one personal company, 1 member is required.

### **STEP - 1**

#### **FILING THE NAME OF THE COMPANY**

According to section 4(2) of the companies act, the company cannot be registered with an identical name or resembling the name of the existing company registered under the act.

Under section 4(4) of the Act, a person can make an application to propose the name of the company to be registered with fees as may be prescribed.

Upon receipt of the application, the Registrar on the basis of the information, and documents attached with the application, may reserve the name for a period of 20 days from the date of approval of the request. However, in case of a change of name by any existing companies, the registrar may reserve the name for 60 days from the date of approval.

### **STEP - 2**

#### **DIGITAL SIGNATURE**

Once your company name has been approved and registered by the MCA, the next step is to obtain a digital signature certificate for your limited liability company.

A digital signature certificate is a form of a digital key that contains all important information about the registered signer, such as name, address, email, phone number, and the authority that provided the certificate. A registered company's digital signature allows authorized signers to prove their identity and sign documents electronically. A digital signature certificate is a mandatory requirement for electronic filing.

**STEP - 3****IDENTIFICATION NUMBER**

As per Section.153 of the Act, every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number in form DIR 3 to the central government with prescribed fees.

**STEP - 4****SELECTION OF NAME**

The company must have to select the person who will act as Director.

**STEP - 5****DRAFTING OF MOA**

The Memorandum of Association<sup>5</sup> is a Constitution of companies. It should contain basic company information.

The purpose of MOAs is intended to enable members of the company, its creditors, and the public to recognize what their powers are.

As per rule 13 of the companies (incorporation) Act 2013. The signature of the association must be signed by each subscriber along with their address. Description, occupation, if any, in front of at least one witness certify the signature, sign it, his name, address, description and profession.

**STEP - 6****DRAFTING OF AOA**

Articles of Association (AOA) is important business document of a company.

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<sup>5</sup> Ministry of Corporate Affairs, *steps to be Taken To incorporate A new company*, Ministry of Corporate Affairs, (sep 9, 2022, 3:40 PM) [https://www.mca.gov.in/MinistryV2/stepstoformanewcompany.html#:~:text=Particulars%20of%20the%20Director%27s%2C%20Manager%20or%20Secretary%20%2D%20Form%2D32.&text=After%20processing%20of%20the%20Form,Certificate%20of%20Incorporation%20from%20RoC.&text=File%20a%20declaration%20in%20eForm%2019%20and%20attach,\(Schedule%20II\)%20to%20it.&text=Obtain%20the%20Certificate%20of%20Commencement%20of%20Business.](https://www.mca.gov.in/MinistryV2/stepstoformanewcompany.html#:~:text=Particulars%20of%20the%20Director%27s%2C%20Manager%20or%20Secretary%20%2D%20Form%2D32.&text=After%20processing%20of%20the%20Form,Certificate%20of%20Incorporation%20from%20RoC.&text=File%20a%20declaration%20in%20eForm%2019%20and%20attach,(Schedule%20II)%20to%20it.&text=Obtain%20the%20Certificate%20of%20Commencement%20of%20Business.)

Every company needs a set of rules and regulations to govern its internal affairs, and the AOA sets the company's internal rules.

The AOA Companies Act 2013 sets out the articles of incorporation of companies in simple terms and requires directors and other members to perform their duties.

As per section 2(5) of the Act, “Articles<sup>6</sup>” 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.

## **STEP - 7**

### **REGISTERED OFFICE**

As per section 12 of the companies (amendment) Act, 2017, the company on and from 30 days of its incorporation and at all times thereafter must have a registered office that receives and acknowledges all notices and notices that may be addressed to them. the company should Submit proof of registration office to the Registrar within 30 days of its incorporation in such a manner as may be prescribed.

## **STEP - 8**

### **APPLICATION FOR INCORPORATION OF A COMPANY**

Once all the documents are ready and completed the applicant may file for the incorporation of a company under section 7 of the Companies Act, 2013 the application should be filed with the registrar under whose jurisdiction the company’s address is located.

Applications for company registration can be made using the SPICe e-Form and the SPICe MOA and AOA. Once the proper formalities have been completed, the Registrar of Companies will issue the Articles of Incorporation certifying the existence of the company.

### **CERTIFICATE OF INCORPORATION OF A PRIVATE LIMITED COMPANY HAS THREE CRITICAL INFORMATION :**

1. Company Identification Number
2. PAN

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<sup>6</sup> Government of India, The Companies Act, 2013, pg.15, (Lexis Nexis,2019).

3. Director Identification Number.

## **THINGS TO KNOW ABOUT REGISTRATION OF COMPANY**

1. Entrepreneurs have several options to choose from when starting a business in India. Some of the most popular options are partnership companies, private or public limited companies, limited liability partnerships, sole proprietorships, and sole proprietorships.
2. On average, the company registration process takes about 10-15 days if all documents are in order. Similarly, processing time typically depends on the number of documents the business owner has and the number of applications the government official needs to process.
3. The Ministry of Corporate Affairs provides the certificate of Incorporation in PDF format from its official website. Companies can download a soft copy of the certificate and use the hard copy as their hard copy.
4. Entrepreneurs should do an online name search before submitting an application to ensure that the proposed name is unique and original. All applicants may enter up to two names on the registration application. If these are rejected by the MCA, the applicant can resubmit the application under two new names.
5. It is important for entrepreneurs to register their companies in India as they can open a current bank account to conduct commercial transactions. Most banks require a certificate of incorporation and a memorandum of association (MOA) to confirm the legal status of the company.

## **MEMORANDUM OF ASSOCIATION (MOA)**

A company's memorandum of association (MOA) describes the company's formation and scope of powers. In Simple words, the MOA table is the foundation upon which the enterprise relies. An MOA is a legal memorandum created during the company registration process.

A company may only carry out the activities described in the Memorandum of Association. In other words, the Articles of Incorporation set limits within which the company's actions must not exceed. MOA helps creditors, shareholders, and everyone who interacts and does business with the company understand the company's power and goals. Additionally, MOA content helps potential shareholders make the right decisions when investing in a company.

## FORMAT OF MOA

As per Section 4 of the Companies Act, 2013, companies shall form MOA<sup>7</sup> as specified in Tables A to E in Schedule I of the Act. The company shall adopt a Table applicable to it as there are various tables of moa for different companies. Here is the list of forms with their details:

- Table A of MOA: MOA Form of the company limited by shares.
- Table B: MOA Form of the company limited by guarantee and not having a share capital.
- Table C: MOA Form of the company limited by guarantee and having a share capital.
- Table D: MOA Form of an unlimited company.
- Table E: MOA Form of an unlimited company and having a share capital.

## CONTENTS OF MEMORANDUM OF ASSOCIATION

1. **NAME CLAUSE** - This clause contains the company name. The company name cannot be the same as an existing company. Private companies must end with the words "Private Limited". Also, if you are a public company, you must add the word "Limited" to the end of your company name. For example, ABC Private Limited for individuals and ABC Ltd for public companies.
2. **REGISTERED OFFICE CLAUSE** - This clause indicates the name of the state in which the company's registered office is located. This helps determine the jurisdiction of the Registrar of Companies. A company must notify the Registrar of Companies of the location of its registered office on the date of incorporation of the company or within 30 days from the date of incorporation.
3. **LIABILITY CLAUSE** - It states the legal responsibility of the participants of the organization. In the case of a limitless organization, the legal responsibility of the participants is limitless while in the case of an organization restricted through shares, the legal responsibility of the participants is limited through the quantity unpaid on their share. For an organization restricted through a guarantee, the legal responsibility of the participants is limited by the quantity every member has agreed to contribute.

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<sup>7</sup> Prakash matre, *Memorandum of Association (MOA)*, Masters India (sep 10, 2022, 3:58 PM) <https://www.mastersindia.co/blog/memorandum-of-association-moa/>

4. **CAPITAL CLAUSE** - The most capital that a business enterprise can enhance which is likewise referred to as the authorized/nominal capital of the business enterprise. This additionally explains the department of such capital quantity into the range of stocks of a hard and fast quantity each.

5. **OBJECT CLAUSE** - This clause states the purpose for which the company was founded. Goals can be further categorized into his three subcategories:

- Primary objective - it states the main business of the company.
- Incidental objective - These are sub-goals to achieve the company's main goals.
- Other objectives - any other objectives which the company may pursue.

### **ARTICLES OF ASSOCIATION (AOA)**

Articles of Association are documents that set out the purpose of a corporation and set out the rules for its operation. This document describes how duties are performed within the organization, including the preparation and maintenance of financial records and the process of appointing directors.

The Articles of Association usually set out how the company will issue shares, pay dividends and maintain financial records. This document is focused on providing readers with information on the methods companies use to achieve their daily, monthly, and yearly goals.

The law is relatively similar in all parts of the world, but the exact terms and points vary by jurisdiction. It generally includes:

**Provision of the company Name** - A company must adopt an official name as a legal entity. It must be stated in the Articles of Association. The following suffixes "Inc" or "Ltd" are commonly used to indicate that an entity is a company. Please note that different countries have different jurisdictions and therefore different rules for company names. The words "government" or "church" cannot be used as names, as they may confuse the general public. Offensive and vulgar language is also prohibited

**Purpose of the company** - Businesses are created for a reason, pursuing a specific goal by providing value to society is, first and foremost, a reason for generating profits. The purpose of the organization must be clearly stated in the Articles of Association. Some jurisdictions allow very broad purposes, such as "administration," while others require more specific purposes for the entity. "Operating and Growing a Restaurant Chain".

**Share Capital** - The Articles of Association determine the number and types of shares that make up the company's capital. There will usually always be at least one form of common stock that constitutes its capital. In addition, you can also look at different types of preferred stock. If there is information about shares in the Articles of Association, this means that the company can issue shares if necessary.

**Organization of the company** - This document contains legal information about the company, including its registered address, number of directors and employees, and the identity of its founders and original shareholders. Legal advisors and accountants may also appear here, depending on the type of company and jurisdiction of the country.

**Provision of the shareholder's meetings** - the first general shareholder meeting provisions are listed in the shareholder meeting section. Notices, resolutions, and votes are detailed as well in the section governing subsequent annual shareholder meetings.