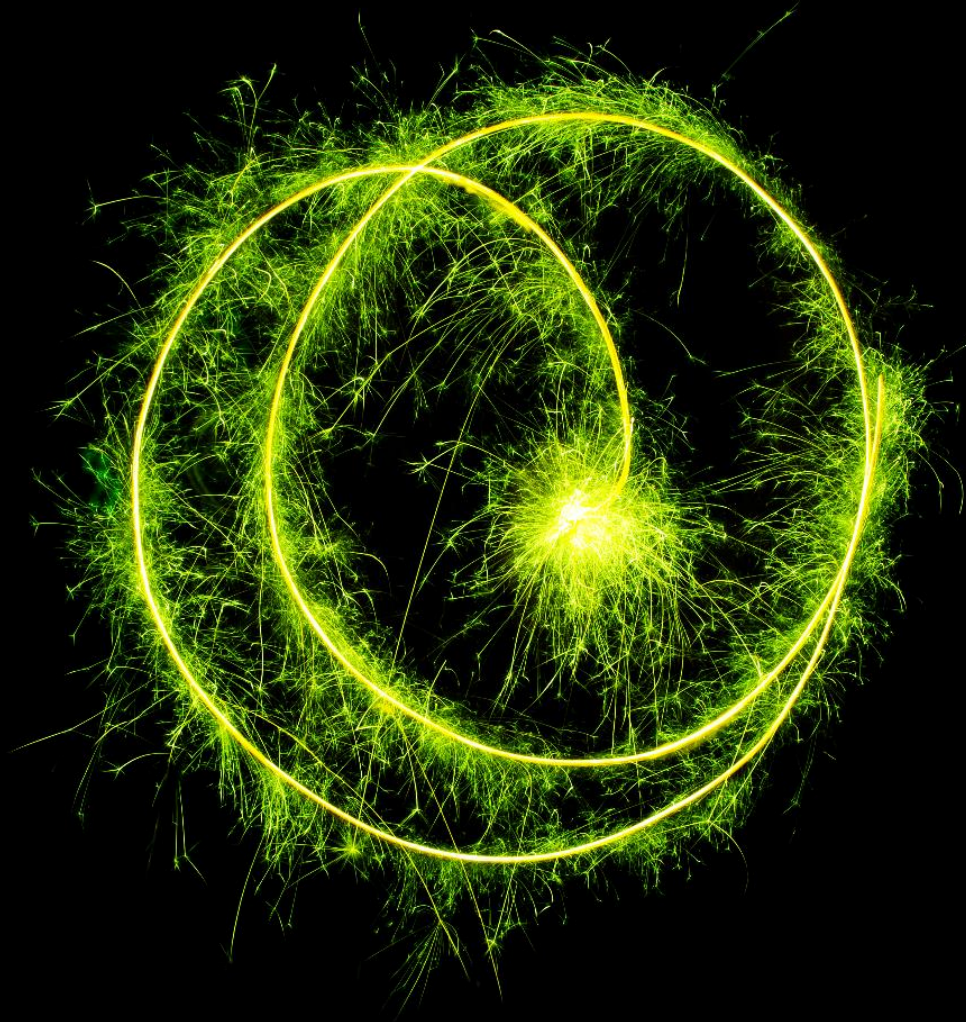


# Incorporation of Companies



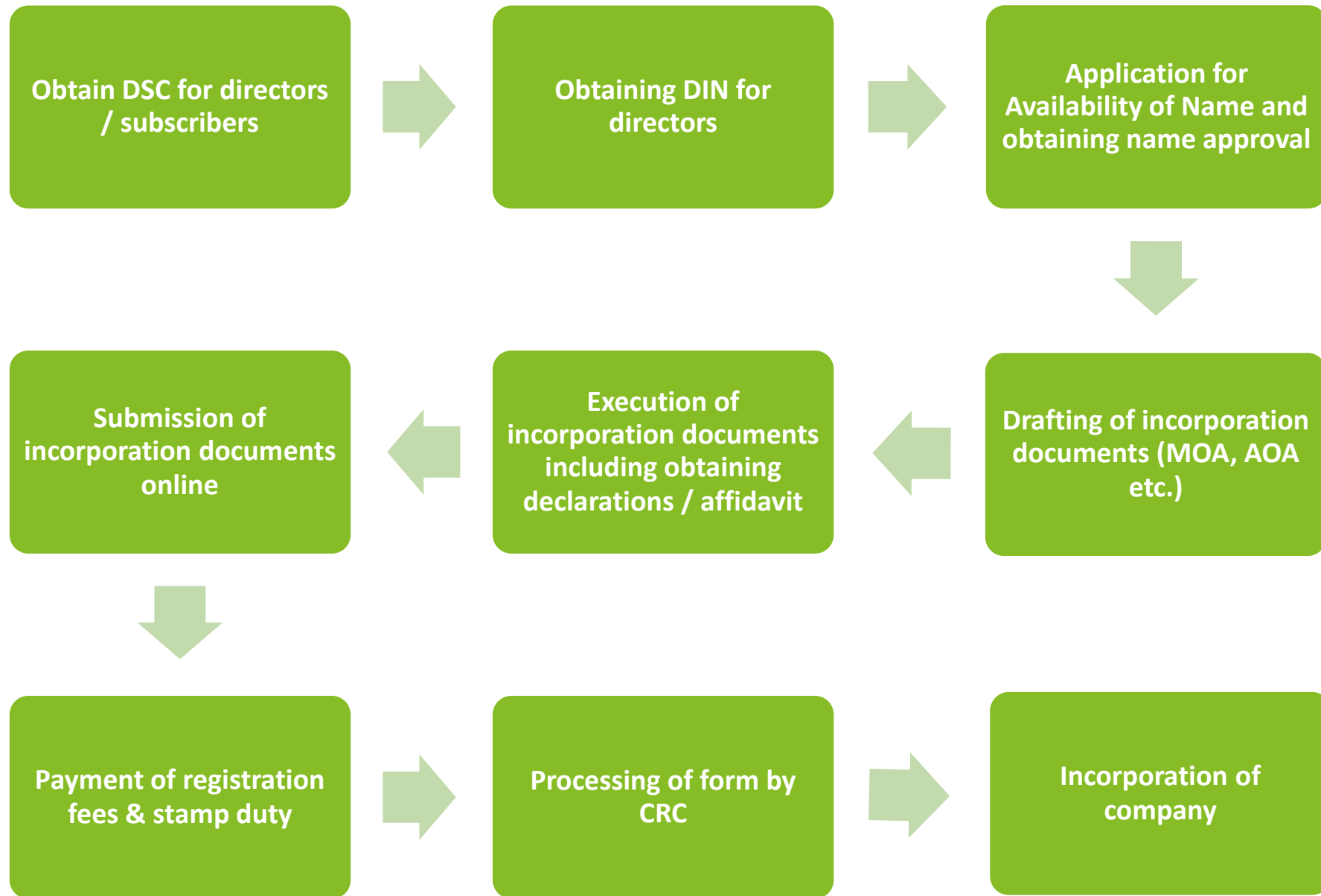
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# Overview of incorporation process



# Applicable law

## **No. of members**

- Private company – Minimum 2, Maximum - 50
- Public Company – Minimum 7, No upper limit
- OPC – 1 member only

## **Types of companies**

- Limited by shares
- Limited by Guarantee
- Unlimited Company

Name of company to contain words "Private Limited", "Limited", "(OPC) Private Limited", "Producer Company Limited", or "Unlimited"

# Application for DIN

- Every individual intending to be appointed as director of a company shall make an application for allotment of DIN
- Application to be made in e-form DIR-3 with a fee of INR 500
- e-Form DIR-3 is required to be signed by the applicant and by either practicing professional or company secretary in whole time employment/director of the existing company
- STP processing of DIN application
- Provisional DIN generated in case the details have been found as potential duplicate
- Attachments to e-form DIR-3:
- Proof of Identity of applicant
  - In case of Indian nationals, PAN is mandatory
  - In case of foreign nationals, passport is mandatory
  - Proof of identify should also contain date of birth of the applicant
- Proof of residence of applicant
  - Passport, election (voter identity) card, and ration card, driving license, electricity bill, telephone bill or Aadhaar
- Validity of documents and attestation requirements
- Translation of documents in English required for documents in languages other than English / Hindi

# Application for reservation of name

- Application to be made in e-form INC-1 with a fee of INR 1,000 or with e-form SPICe INC-32
- Proposed name should not:
  - Be identical with or resemble too nearly to the name of an existing company or LLP.
  - Should not constitute an offence under any law for the time being in force
  - Be undesirable in the opinion of the Central Government
  - Not give the impression that of being connected with, or having the patronage of, the Government or body constituted by the Government
- Undesirable names:
  - Contravention of Emblems and Names (Prevention and Improper Use) Act, 1950
  - Includes the name of a trademark – either registered or subject of an application for trademark – consent of owner of trademark required
  - Should not include words which are offensive to any section of the people
  - Includes words indicative of separate type of business constitution e.g. co-operative, sehkari, trust, LLP, partnership, society, proprietor, HUF, firm etc.
  - Contains the words 'British India'
  - Implies association or connection with embassy or consulate or a foreign government

# Application for reservation of name

- Undesirable names:
  - Includes or implies association or connection with or patronage of a national hero or any person held in high esteem
  - Identical to the name of a company dissolved by liquidation proceeding and 2 years have not elapsed from the date of such dissolution
  - Identical with the name of a company which is struck off by ROC, then the same shall not be allowed before the expiry of 20 years from strike-off notification being published in Official Gazette
  - Include words such as 'Insurance', 'Bank', 'Stock Exchange', 'Venture Capital', 'Asset Management', 'Nidhi', 'Mutual fund' etc., unless a declaration is submitted by the applicant that the requirements mandated by the respective regulator, such as IRDA, RBI, SEBI, MCA etc. have been complied with by the applicant
  - Includes the word "State", the same shall be allowed only in case of government company
  - Containing only name of a continent, country, state, city such as Asia limited, Germany Limited, Haryana Limited etc.
  - Generic names such as Cotton Textile Mills Ltd. (vs. ABC Cotton Textiles Mills Ltd.)
  - Includes name of any foreign country or any foreign city, the same shall be allowed if the applicant produces proof of significance of business relations with such foreign country like Memorandum Of Understanding with a company of such country

# Application for reservation of name

- Applicant to declare whether proposed name has been used in the last 5 years in any other business form, viz., proprietorship, partnership etc.
- Use of certain words to require prior Central Government approval, viz., Board, Commission, Union, Central, Republic, President, Prime Minister, Chief Minister, Court or Judiciary, Governor etc.
- Section 8 companies to include the words Foundation, Forum, Association, Federation, Chambers, Confederation, council, Electoral trust and the like etc.
- Names released on change of name by any company to remain in MCA data base and shall not be allowed to be taken by any other company including the group company of the company which has changed the name for 3 years from the date of change subject to specific direction from the competent authority in the course of compromise, arrangement and amalgamation.
- Form to be digitally signed by applicant
- Name reservation application to be processed by Central Registration Centre (CRC)
- Reserved name available for 60 days from date of application. Can be renewed subsequently.
- Supporting documents with e-form INC-1:
  - Consent of owner of trademark for use of trademark
  - In principle approval from the concerned regulator, if applicable
  - NOC from the sole proprietor/partners/other associates if the promoters are carrying on any partnership firm, sole proprietary or unregistered entity in the name as applied for
  - NOC by way of board resolution in case name is similar to any existing company or to the foreign holding company
  - Resolution passed by foreign company – mandatory for foreign holding company



# Drafting of MOA / AOA

- MOA to be in form specified for respective type of company in Schedule I of the 2013 Act:-
  - Table A – Company limited by shares
  - Table B – Company limited by guarantee, not having share capital
  - Table C – Company limited by guarantee, having share capital
  - Table D – Unlimited company not having share capital
  - Table E – Unlimited company having share capital
- e-MOA now available in e-form INC-33
- Clauses of MOA
  - Name Clause
  - Domicile Clause
  - Objects Clause
    - Objects to be pursued on incorporation
    - Matters which are necessary for furtherance of the objects
  - Liability Clause
  - Capital Clause
  - Subscription Clause
- Alteration of any clause (other than capital clause) by way of special resolution

## Drafting of MOA / AOA

- AOA – regulations for management of the Company
- AOA to be in form specified for respective type of company in Schedule I of the 2013 Act:-
  - Table F – Company limited by shares
  - Table G – Company limited by guarantee, having share capital
  - Table H – Company limited by guarantee, not having share capital
  - Table I – Unlimited company having share capital
  - Table J – Unlimited company not having share capital
- e-AOA now available in e-form INC-34
- Doctrine of constructive notice vs. doctrine of indoor management
- Entrenchment of AOA – new concept under 2013 Act - specified provisions of AOA may be altered only if conditions or procedures as that are more restrictive than those applicable in case of a special resolution are met or complied with
- Entrenchment possible either on incorporation, or by an amendment to the AOA agreed to by all members in case of a private company and by a special resolution in case of a public company
- Alteration of AOA by way of special resolution
- Act to override MOA and AOA

## Signing of MOA / AOA

- Subscribers to mention name, address, description and occupation, if any, in the presence of at least 1 witness who shall attest the signature and shall likewise sign and add his name, address, description and occupation, if any
- Witness shall state that "I witness to subscriber/subscriber(s), who has/have subscribed and signed in my presence (date and place to be given); further I have verified his or their Identity Details (ID) for their identification and satisfied myself of his/her/their identification particulars as filled in"
- Thumb impression for illiterate subscribers
- Where the subscriber is a body corporate, MOA and AOA to be signed by **director, officer or employee of the body corporate** duly authorized by a resolution of the board
- Where the subscriber is a Limited Liability Partnership, MOA and AOA to be signed by a **partner of the Limited Liability Partnership**, duly authorized by a resolution approved by all the partners

### ***Person authorized shall not at the same time be a subscriber***

- Attestation / legalization requirements where subscriber is a foreign national residing outside India:
  - Notarization for Commonwealth members
  - Apostille for Hague convention members
  - Authentication by Diplomatic or Consular Officer, embassy if neither member of Commonwealth nor Hague convention
  - Business visa required if foreign national visits India and executes documents
  - Business visa not required for PIO or OCI card-holder

# Application for incorporation and supporting documents / information

- Application to be made in e-form INC-32 (SPICe) or e-form INC-7
- MOA / AOA – either physical or electronic form
- Declaration in form INC-8 from practicing professional and by a person named in the articles as a director, manager or secretary regarding compliance with the requirements of 2013 Act and incidental matters
- Affidavit in form INC-9 from directors and first subscribers that they are not convicted of any offence in connection with formation or management of any company, and that they are not 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 preceding 5 years and that all the documents filed with ROC for registration of the company contain information that is correct and complete and true to the best of their knowledge and belief
- Stamping requirement for INC-9
- Correspondence / registered office details supported by registered title document / lease deed and rent receipt of previous month, NOC from owner / occupant of premises, utility bill not older than 2 months
- Particulars of first subscribers:
  - Name and recent photo
  - Father's and mother's name
  - Nationality
  - DOB
  - Place of birth
  - Educational qualification
  - Occupation
  - PAN (undertaking required if subscriber does not have PAN)
  - Permanent and present residential address

# Application for incorporation and supporting documents / information

- Particulars of first subscribers:
  - Place of birth
  - e-mail ID, phone and fax, if any
  - ID proof (PAN mandatory for Indian national, Passport mandatory for foreign national),
  - Residence proof
  - Proof of nationality for foreign subscribers
  - Interest (as director / promoter) in other companies

## **For bodies corporate:**

- CIN / GLN
- Name
- Registered office
- e-mail
- Board resolution containing:
  - Authorization to subscribe and to make investment in the proposed company
  - Number of shares proposed to be subscribed,
  - Name, address and designation of the person authorized to subscribe
- Above particulars for individual subscribing for the body corporate

## **For foreign bodies corporate (Additionally):**

- COI of foreign body corporate
- Registered office address

# Application for incorporation and supporting documents / information

- Particulars of first directors:
  - Names, including surnames or family names
  - DIN
  - Residential address
  - Nationality
  - Interest in other firms or bodies corporate
  - Consent to act as directors in form DIR-2
- Declaration regarding acceptance of deposits only after compliance with 2013 Act, RBI Act, 1934 and SEBI Act, 1992
- Above documents to be maintained at registered office of the Company
- AO details for PAN / TAN application along with sources of income code
- Payment of stamp duty and ROC fee – online or offline challan (only for payment > INR 50,000)
- Processing of form by CRC
- Resubmission(s) if applicable – clarification etc.
- Issue of COI with PAN

## Recent / proposed changes in incorporation process – ease of doing business!

Integrated Incorporation form - SPICe (Simplified Proforma for Incorporating Company Electronically) - INC-32 – possible to apply for DIN, Name Reservation, Incorporation, PAN, TAN, ESIC, EPF and IEC simultaneously

e-MOA and e-AOA

No need to fill and submit form 49A and 49B separately for PAN and TAN application

Certificate of Commencement of business done away with

Common seal made optional

ID and residence proof not required again for directors and subscribers having valid DAN, subject to declaration to this effect

Affidavits proposed to be replaced by simple declaration – Companies Amendment Bill, 2017

# Practical Issues

- Whether to apply for integrated services – DIN, name reservation, IEC etc. in SPICe e-form INC-32 or separately?
- Whether to use e-MOA and AOA or physical MOA and AOA?
- Communication with CRC
- File size of e-forms
- Only 1 proposed name currently allowed in SPICe e-form INC-32
- Attestation requirements
- Resubmission of forms







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