

# Incorporation of Company/LLP in India

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## FAQs



March 2019



## About Swift

Swift India Corporate Services LLP (**"Swift"/"We"**), a sister concern of Nishith Desai Associates, an India centric international law firm, started in the year 2005. We are a team of professionals with corporate, legal and secretarial backgrounds. We are a premier corporate compliance firm that caters to the needs and demands of global clients. Swift aims to provide quick and pragmatic solutions and high quality solutions and compliances.

## What we do

Our team of qualified professionals work closely with clients in understanding the requirements and providing different solutions that would meet the desired results. At Swift, we take pride in serving our clients and ensure that they are compliant. As of December 31, 2018, we have incorporated over 220 companies and LLPs and have won the title of "Overall Company Formation Firm of the Year - Start Up" as awarded by Acquisition International Magazine. We are providing corporate compliance services on retainer basis to more than 100 Companies/Limited Liability Partnerships majority of which are foreign owned entities.

Our team of skilled and qualified professionals ensures unbeatable turnaround time, maintaining confidentiality and integrity. We provide end to end solutions that are client centric as well as dynamic. As the name suggests we swiftly ensure that you are compliant!!

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## Executive Summary

India has already marked its presence as one of the fastest growing economies of the world and emerged as the fastest growing investment destination for inbound investments. The measures taken by the Government are directed to open new sectors for Foreign Direct Investment (“**FDI**”), increase in the sectoral limit of existing sectors and simplifying other conditions of the FDI policy as a part of ease of doing business in India.

There are certain common queries raised by promoters or anyone interested in setting up of a business in India while initiating a discussion on formation of a Company and LLP in India.

This booklet intends to provide the basic answers to the queries, raised by the promoters or anyone interested in setting up of a business in India, towards formation of Company/LLP in India. It is intended to act as a broad guide to aid your decision making process when deciding to start and carry on operations in India.

Please note that the answers to the questions given here are generic in nature. It should not be treated as a legal view on any specific queries. The laws referred herein are subject to amendments from time to time.

We would recommend you to take proper advice including the tax and implications of other applicable regulations before you take any decision as to formation of business entity in India. However, we would be happy to assist in this regard as well.

Should you require any further information/clarification or any advice, we would be happy to assist you.

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# 1. What Are The Different Forms Of Entities For Doing Business In India?

## I. LLP

A corporate business vehicle that enables professional expertise and entrepreneurial initiative to combine and operate in flexible, innovative and efficient manner. LLP is a body corporate and a legal person separate from its partners. Earlier, Foreign Direct Investment (“**FDI**”) in LLP’s was permitted only through the government approval route and LLP’s were also not allowed to make downstream investments. However, FDI is now permitted under automatic route in LLPs operating in sectors/activities where 100% FDI is allowed through automatic route and there are no FDI – linked performance conditions.

In addition to the above, LLPs receiving FDI are also allowed to make downstream investment in other companies/LLPs operating in those sectors where 100% FDI is permitted through automatic route.

## II. Indian subsidiary company either as – Private Limited Company or Public Limited Company.

- a. **Private Limited Company:** A private limited company is the most popular form of business entity used by the foreign investors in India. A private limited company has certain distinguishing characteristics. There are various requirements for forming a private limited company in India which are further discussed in this document.
- b. **Public Limited Company:** A public limited company is defined as a company which is not a private limited company (but includes a private limited company which is subsidiary of a public limited company). A public limited company shall have minimum of 7(seven) members (no limit on maximum number of members), free transferability of securities and may invite public to subscribe to its securities. A public limited company may also list its securities on a recognized stock exchange by way of an Initial Public offering (“**IPO**”).

**Note:** For different forms of incorporated and to be incorporated entities for doing business in India please refer to our research paper on “Doing Business in India” in the web link<sup>1</sup>

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1. [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Papers/Doing\\_Business\\_in\\_India.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Doing_Business_in_India.pdf)

## 2. What Are The Laws Applicable For Doing Business In India Through Company/LLP?

### I. The Companies Act, 2013 (“CA 2013”) and rules made thereunder

Companies in India are regulated and governed by the provisions of the CA 2013 and rules made thereunder. The authority that oversees companies and their compliances is the Registrar of Companies (“**RoC**”). CA 2013 facilitates incorporation of companies and regulates management operational and administration functions.

### II. The Limited Liability Partnership Act, 2008 (“LLP Act”) and rules made thereunder

The LLPs in India are regulated and governed by the provisions of LLP Act. The LLP Act contains provisions for the formation and regulation of LLPs and matters connected therewith or incidental thereto. The LLP Act specifically relates to the incorporation of LLPs in India. The authority that oversees LLP and its compliances is the RoC.

### III. Foreign Exchange Management Act, 1999 (“FEMA”) and rules made thereunder

FDI in business entities such as company or LLP is regulated in India by FEMA. While 100% FDI is allowed in many of the sectors under the automatic route, however there are few restricted sectors in which FDI is not allowed under the automatic route and requires prior approval of Government of India.

FDI in sectors/activities to the extent permitted under automatic route does not require any prior approval either by the Government of India or Reserve Bank of India (“**RBI**”). The investors are only required to intimate and file documents, disclosing the investment with the concerned regional office of RBI within 30 days of issue of shares to foreign investors. FEMA also provides list of negative sectors, where FDI is either totally prohibited or may require a prior approval of the Government or concerned Ministry.

### IV. Income Tax Act, 1961 (IT Act) and rules made thereunder

Any person investing or doing business in India should consider various direct (income) and indirect (consumption) taxes which are levied and collected by the Central Government and the State Governments. Corporate houses, be it domestic or foreign, are required to pay taxes in India under the IT Act. The various taxes levied by the Government includes:

- a. Corporate tax levied on both domestic as well as foreign companies. It is levied on the profits of the company as per applicable tax rate;
- b. Dividend distribution tax is tax paid by corporates on the dividend that they distribute to their shareholders;
- c. Capital gain tax is paid on gains made on transfer of capital assets. The capital gain tax may be short term or long term depending upon the period of holding capital asset.



- d. Indirect taxes levied like Goods and Service Tax ("**GST**"), Excise Duty, Customs Duty/Octroi or any applicable taxes based on the business of the entity.

Investments into India are often structured through holding companies in various jurisdictions for number of strategic and tax reasons. For instance, Investors from the United States of America ("**USA**") investing directly into India may face difficulties in claiming credit of Indian capital gains tax on securities against tax applicable in the USA taxes, due to the conflict in source rules between the USA and India. In such a case, the risk of double taxation may be avoided by investing through an intermediary holding company. Hence, anyone interested in investing in India should consider various tax treaties and regulations amongst the country of origin and India, if any.

## V. Sector specific legislations as may be applicable

Depending upon the business activity of the entity, various sector specific laws may become applicable. Accordingly, the entity will be required to obtain necessary local and business registrations from the sector specific regulator in addition to the compliance with the above-mentioned laws.

## 3. How To Incorporate A Company?

### I. Introduction - Private limited company/Public limited company

#### A. What is a private limited company?

Private limited company is an entity, in which the shares are closely held by group of persons or by group entities. Private limited company requires minimum of 2 (two) members and 2 (two) directors, one of whom should be a resident director<sup>2</sup>. It restricts/prohibits 3 (three) key aspects in its articles and they are:

- a. Restriction on number of members to 200 (two hundred) (excluding the present and former employees of the company who holds shares);
- b. Restriction on transfer of shares; and
- c. Prohibition on offering securities to public.

#### B. Does private limited company enjoy any privileges or exemptions from compliances of various provisions of the CA 2013?

Yes, a private limited company, enjoys certain privileges and exemptions when compared to a public limited company with regard to compliances of certain provisions of the CA 2013. Some of the privileges enjoyed by a private limited company are:

- a. Certain exemptions are granted with respect to borrowing monies from members up to aggregate limit of paid-up share capital & free-reserves<sup>3</sup>
- b. The articles of association of the private limited company may override certain provisions of CA 2013 with respect to conducting shareholders meeting<sup>4</sup>
- c. Directors can vote on a contract in which they are interested upon disclosing their interest
- d. It is exempted from filings of certain board resolutions with RoC<sup>5</sup>
- e. Certain provision related to remuneration of managing director and whole time-director and the terms and conditions of appointment are not applicable to private limited companies<sup>6</sup>
- f. The transactions entered with Holding, Subsidiary, Associate Company of a private limited company does not fall within the purview of the related party transactions<sup>7</sup>
- g. Private limited company can grant loans/guarantee/security to a director and person in whom he is interested subject to the fulfilment of the certain conditions<sup>8</sup>

2. Refer Sec 149(3) of the Companies Act which mandates the requirement of at least one resident director

3. Refer Sec 73(2)(a) to (e) read with [https://www.mca.gov.in/Ministry/pdf/Exemptions\\_to\\_private\\_companies\\_05062015.pdf](https://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf)

4. Refer Sec 101 to 107 & 109 read with [https://www.mca.gov.in/Ministry/pdf/Exemptions\\_to\\_private\\_companies\\_05062015.pdf](https://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf)

5. Refer Sec 179 read with rule 8 of Companies (Meeting of Board & its power) Rules, 2014 and [https://www.mca.gov.in/Ministry/pdf/Exemptions\\_to\\_private\\_companies\\_05062015.pdf](https://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf)

6. Refer Sec 196 and [https://www.mca.gov.in/Ministry/pdf/Exemptions\\_to\\_private\\_companies\\_05062015.pdf](https://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf)

7. Refer Sec 2(76) and 188 of the Companies Act and [https://www.mca.gov.in/Ministry/pdf/Exemptions\\_to\\_private\\_companies\\_05062015.pdf](https://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf)

8. Refer Sec 188 of the Companies Act and [https://www.mca.gov.in/Ministry/pdf/Exemptions\\_to\\_private\\_companies\\_05062015.pdf](https://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf)

- h. The restrictions on the powers of the board with respect to borrowings exceeding paid up capital & free reserves and the sell/lease/dispose off undertaking does not apply to private limited companies and the same can be approved only by way of the board's approval<sup>9</sup>
- i. For rights issue, certain provisions of the section which deals with the time limits has been relaxed. Thus, reducing the overall time to complete the rights issue process.<sup>10</sup>
- j. The candidature is not required for the appointment of director in a general meeting.<sup>11</sup>

## C. What is Public Limited Company?

A public limited company is a company, which is not a private limited company. Public limited company requires minimum 7 (seven) members and 3 (three) directors. Further, its securities are freely transferable subject to certain contractual restrictions between the members, if any. A public limited company can issue and allot shares to any number of persons. However, if the offering exceeds certain number of person at a time, then it should offer it by way of public offering.

## D. What are the requirements for incorporation of private limited company?

- a. Identify the initial subscribers (minimum two) to the proposed entity;
- b. Identify individuals who give consent and act as first directors of the company (minimum two);
- c. Identify one director who should be a resident of India;
- d. Obtain Digital Signature Certificate ("**DSC**") for proposed directors of the company;
- e. Obtain DSC for identified subscribers of the company (to be obtained wherever the subscribers are Indian residents.)
- f. Obtain Directors Identification Number ("**DIN**") for proposed directors of the company;
- g. Conduct name and trademark search for the propose names and ensure the propose names are not identical or undesirable with existing names available for incorporation<sup>#</sup>. Post availability finalize two<sup>12</sup> name for the proposed Indian company;
- h. Provide the objects and the proposed business actions;
- i. Finalize the Authorized Share Capital ("**ASC**") and the Paid-up Share Capital ("**PSC**") requirement of the company;
- j. Filing of name reservation application through the web service available at [www.mca.gov.in](http://www.mca.gov.in) by using RUN (**Reserve Unique Name**) application along with fee as provided in the Companies (Registration offices and fees) Rules, 2014, which may either be approved or rejected subject to one re-submission opportunity as the case may be, by the Registrar, Central Registration Centre];<sup>13</sup>

9. Refer Sec 180 of the Companies Act and [https://www.mca.gov.in/Ministry/pdf/Exemptions\\_to\\_private\\_companies\\_05062015.pdf](https://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf)

10. Refer Sec 62(1)(a) & 62(2) of the Companies Act and [https://www.mca.gov.in/Ministry/pdf/Exemptions\\_to\\_private\\_companies\\_05062015.pdf](https://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf)

11. Refer Sec 160 of the Companies Act and [https://www.mca.gov.in/Ministry/pdf/Exemptions\\_to\\_private\\_companies\\_05062015.pdf](https://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf)

12. Refer: E-form RUN introduced through The Companies (Incorporation) Second Amendment Rules, 2018 for making an application for the name reservation

13. Refer: Rule 9 of the Companies (Incorporation) Amendment Rules, 2018

# Refer Rule 8 of The Companies (Incorporation) Rules, 2014

An approved name is valid for a period of 20 (twenty) days from the date of approval. The approval of name is sole discretion of the Central Registration Centre;

- k. Identify the place of the registered office of the company. *(Please note that the registered office of the company should be a physical office space where the employees shall be stationed for carrying out the business operations. There is no concept of virtual office with post box facility in India);*
- l. Finalize memorandum and articles of association (By-laws), along with other necessary documents and pay stamp duty on all the documents as may be required;
- m. File all incorporation forms and documents online, including the Memorandum and Articles of Association through e-form SPICe<sup>14</sup> which is a single window form for incorporating companies.

## E. What are the charter documents with respect to a private limited company?

Memorandum of Association (**MoA**) and Articles of Association (**AoA**) are the two charter documents of private limited company.

## F. What is MoA?

MoA contain the objectives to be pursued by the company to operate and is considered as the supreme document of the company which is submitted to the RoC at the time of the incorporation of the company. The purpose of this is to enable shareholders, creditors, and others who deal with company to know its permitted range of activities and the business that they intend to carry out.

## G. What is AoA?

AoA is a document containing all the rules and regulations defining the framework that governs a company. It defines the responsibilities of the directors, and the means by which the shareholders exert control over the Board of Directors. For a private limited company, its AoA must have following three restrictions which are as follows.

- a. Restricts number of members to 200 (two hundred) (excluding the present and former employees of the company who holds shares);
- b. Restricts transfer of shares; and
- c. Prohibits offering securities to public.

## H. Is there any requirement of minimum ASC and PSC for the incorporation of private limited company in India?

Currently, there is no requirement of having minimum ASC and PSC for the incorporation of Private Limited Company in India. However, while determining the ASC and PSC, it is suggested to keep in mind the immediate working capital requirements which the company would need for conducting its initial operations and before it start generating the revenue in India and the requirement of minimum net

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14. Ministry of Corporate Affairs on October 01, 2016 has introduced an e-form SPICe which is an integrated form and includes the facilities of applying DIN, Name reservation application, application for incorporation and application for allotment of PAN and TAN at one go. This simplified version of the form for incorporation is single window clearance for incorporating company in India

owned fund for certain categories of companies as raising of capital by way of issuance of shares is subject to valuation (in case of entity with FDI) and allied compliances.

ASC is the maximum share capital allowed to be issued by the company. ASC can be further enhanced after incorporation of the company, considering future fund requirements.

PSC is the amount which the shareholders will invest in the capital of the company.

## **I. What are the requirements for incorporation of public limited company?**

Except that there is a requirement of minimum 7 (seven) shareholders and minimum 3 (three) directors, one of whom should be a resident director, all the requirements for the Incorporation of a private limited company are also applicable to a public limited company.

## **J. What are the charter documents with respect to a public limited company?**

In general, the charter documents of public limited company are same as of private limited company. Except that the AoA of a public limited company shall not contain the restriction applicable to a private limited company. Charter documents which are explained in 6 and 7 above are the charter documents for the companies.

## **II. Directors**

### **A. Can a person resident outside India and citizen of other country become a director of an Indian entity?**

Yes, except for citizen of a certain countries, any person, being a citizen of any other country can become a director subject to obtaining DIN as mentioned below.

### **B. Can a body corporate or company be a director of an Indian entity?**

No. Except a natural person, CA 2013 does not allow any body corporate or a company to be a director.

### **C. What is a DSC?**

Digital Signature is a digital code (in form of USB token) created for affixing it on the digital documents electronically. The Information Technology Act, 2000 in India has made provisions for use of digital signatures on the documents submitted in electronic form to ensure, security and authenticity of the documents filed electronically. DSC is a hardware in the form of USB token and is password protected which can be changed by the DSC holder at any point of time. Password of DSC is accessible to only those who have applied for DSC.

## D. What is the use of DSC?

DSC is used for filing documents and e-forms with the Ministry of Corporate Affairs (“**MCA**”) under the CA 2013, tax returns and eforms under different regulations as applicable to the entity. The filings with many other Government authorities may also be carried out by electronic filings using DSC.

## E. Who issues DSC in India?

The office of Controller of Certifying Authorities, issues certificate to the certification agencies which are the trusted entities and are responsible to issue DSC to the end user. Upon submission of application and identity and address proofs, it takes around 2-3 days for obtaining the DSC.

## F. What is the process to obtain DSC?

- i. Apply to a registered authority in prescribed application form;
- ii. With application form, provide the following documents –
- iii. In case of Indian Nationals:
  - Proof of Identity - PAN is Mandatory for Indian National,
  - Proof of Resident - driving license, passport (if it has address) or utility bill like gas or electricity or bank statement;
  - Photograph to be affixed on DSC application form;
  - In case of Indian national, all the documents are required to be self-certified by applicant and attested by bank manager.
- iv. In case of Foreign Nationals:
  - Proof of Identity - Attested copy of Applicant Passport, Attested copy of VISA (If applicant is out of native country) and Attested copy of Resident Permit certificate (If applicant is in India)
  - Proof of Resident - Attested copy of Applicant Passport, Attested copy of any other Government issued Address Proof
  - For foreign national, all documents are required to be notarized and apostilled/consularized;
  - The identity and address proof of foreign nationals must be attested by the following authorities:
    - Embassy of Native Country (If applicant is out of native country)
    - Apostilled by Native Country, after Public Notary (if country is in Hague Convention)
    - Consularized by Native Country, after Public Notary (if country is not in Hague Convention)
- v. To file the form in original with all the above-mentioned supporting documents with authority
- vi. Authority verifies the information and process the same.
- vii. Upon successful process, the applicant should do tele-verification and video-verification.
- viii. Only upon completion of the above verifications, the authority issues DSC to the end user.

The above process is indicative in nature and requirement may change based on the nationality/citizenship of the applicant and subject to change in process as be amended from time to time under applicable laws.

## G. What is DIN?

DIN is a unique identification number allotted to an individual, who is proposed to be appointed as director of a Company and it is compulsory for every individual intending to be a director to obtain this number. Upon submission of necessary documents in e-form DIR 3, DIN would be allotted instantly subject to submission of sufficient and legible documents.

## H. Can I use same DIN for being appointed as Designated Partner in LLP?

Yes, DIN can be used for being appointed as Designated Partner in any LLP. One individual can have only one DIN and it is valid for lifetime.

## I. How can I acquire DIN and what is its process?

### ■ Obtain DIN for a director in case of incorporation of new company

Any person proposed to become a first director in a new company shall have to make an application through FORM No. INC-32 (SPICe). An application for allotment of DIN up to three Directors, shall be filed in FORM No. INC-32 (SPICe), with the Registrar, in case of proposed directors not having approved DIN.<sup>15</sup>

### ■ Obtain DIN for director in an existing Company

Any person intending to become a director in an existing company and who does not have a valid DIN shall make an application in e-Form DIR-3 along with copies of identity and address proof and copy of Board resolution proposing the appointment of such person as a director from that company in which person is intending to become a director.

## J. What are the documents required for obtaining DIN?

**DIN can be obtained by filing the supporting documents as follows:**

### 1. In case of Indian Nationals

- a. ID Proof of the Applicant: any one of, Passport, PAN, Driving license or Aadhaar Card.
- b. Address Proof of the Applicant: Any one of the following documents would suffice as proof:
  - i. Utility Bill in the name of the applicant
  - ii. Driver's License of the applicant
  - iii. Bank Statement in the name of the applicant.

All the above documents are required to be self-attested in case of an Indian resident.

### 2. In case of Foreign Nationals: In addition to the documents mentioned above for Indian Nationals, following documents will be required in case of Foreign National:

- a. Certified copy of passport.

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15. Refer: Rule 38 of The Companies (Incorporation) Amendment Rules, 2018

- b. All supporting documents including photograph should be certified by the Indian Embassy or a notary in the home country of the applicant or by the Managing Director/CEO /Company Secretary of the company registered in India, in which applicant is a director. If a foreign director has a valid multiple-entry Indian visa or Person of Indian Origin card or Overseas Citizen of India card, then the attestation could also be done by Public Notary/Gazetted Officer in India or practicing CA/CS /CWA.

### i. Is there is any requirement of KYC of a director

Yes, as per the amended rules, every individual who has been allotted a DIN as on 31st March of a financial year shall submit e-form DIR 3 KYC to the Central Government on or before 30th April of immediate next financial year. Hence each individual possessing DIN needs to update his KYC details annually within prescribed timelines for retaining his DIN in 'Active' status.

### ii. What are the supporting documents to file DIR-3 KYC

#### 1. In case of Indian Nationals:

- a. ID Proof of the Applicant: any one of, Passport, PAN, Driving license, Election (voter identity) card, Ration card or Aadhaar Card. (If the applicant holds Aadhaar and Passport both, in that case both the documents are mandatory);
- b. Address Proof of the Applicant: Any one of the following documents would suffice as proof:
- i. Electricity or Telephone Bill in the name of the applicant
  - ii. Driver's License of the applicant
  - iii. Bank Statement in the name of the applicant.

All the above documents are required to be self-attested in case of an Indian resident.

#### 2. In case of Foreign Nationals:

In addition to the documents mentioned above for Indian Nationals, for Foreign National certified copy of passport is required.

All supporting documents including photograph should be certified by the Indian Embassy or a notary in the home country of the applicant or by the Managing Director/CEO /Company Secretary of the company registered in India, in which applicant is a director. If a foreign director has a valid multiple-entry Indian visa or Person of Indian Origin card or Overseas Citizen of India card, then the attestation could also be done by Public Notary/Gazetted Officer in India or practicing CA/CS / CWA.

### iii. What if the director fails to file his KYC?

In case if the individual fails to file KYC with the MCA within prescribed timelines, then the DIN of the said individual shall be de-activated. The de-activated DIN shall be re-activated only after e-form DIR-3-KYC is filed with ROC along with the fee as prescribed under law.\*

## K. Does a director needs to obtain DIN for each company where he may be appointed as a director?

No. DIN is a unique number allotted to each individual who has applied for DIN. A person can be a director / designated partner in any number of companies or LLPs (subject to maximum number permissible in CA 2013 or LLP Act) with same DIN. The CA 2013 does not allow a person to have more



than one DIN and if any person obtains more than one DIN, it is a punishable offence under the CA 2013 and shall need to surrender his DIN.

### **L. What is the minimum and maximum number of directors required for forming a private limited company?**

There should be at least 2 (two) directors and maximum up to 15 (fifteen) in a private limited company. To appoint more than 15 (fifteen) directors, approval of shareholders would be necessary.

### **M. What is the minimum and maximum number of directors required for forming a Public Limited Company?**

There should be at least 3 (three) directors and maximum up to 15 (fifteen) in a Public Limited Company. To appoint more than 15 (fifteen) directors, approval of shareholders would be necessary.

### **N. Is there a requirement of having resident director for forming a Private Limited Company and Public Limited Company?**

There should be at least 1 (one) director who stays in India for a period of not less than 182 (One hundred and eighty two) days during each financial year. In case of a newly incorporated company, the requirement shall apply proportionately at the end of the financial year in which it is incorporated.<sup>16</sup>

### **O. Are there any disqualifications for appointment of a director?**

A person is not<sup>16</sup> eligible for appointment as a director if

- i. he is of unsound mind;
- ii. he is an undischarged insolvent;
- iii. he has applied to be adjudicated as an insolvent;
- iv. he has been convicted by a court of any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than 6 (six) months and a period of 5 (five) years has not elapsed from the date of expiry of the sentence;
- v. an order passed by the court or tribunal for disqualifying him for appointment as a director and the same is in force till date;
- vi. he has not paid any calls in respect of any shares of the company held by him, either individually or jointly, and 6 (six) months have elapsed from the last day fixed for the payment of the call;
- vii. he has been convicted of the offence dealing with related party transactions<sup>17</sup> at any time during the last preceding 5 (five) years;
- viii. if he does not hold valid DIN;
- ix. he has not complied with the provisions of number of directorship

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16. Refer Sec 164 of the Companies Act, 2013

17. Refer section 188 of the Companies Act, 2013

In furtherance to the above, no person who is or has been already a director of a company shall be eligible for appointment if -

- i. such company in which he is a director has not filed financial statements or annual returns for any continuous period of 3 (three) financial years;
- ii. has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for 1 (one) year or more.

### III. Shareholders

#### A. What is the minimum and maximum number of shareholders required for forming a private limited company?

There should be at least 2 (two) shareholders<sup>18</sup> with a maximum of 200 (two hundred) shareholders (excluding the present and former employees of the company who holds shares) in a private limited company.

#### B. How can one become a shareholder of private limited company / public limited company?

A person can become shareholder of a private limited company / public limited company by -

- i. Subscribing to memorandum of association;
- ii. By acquiring shares subsequently either, by direct purchase from company or transfer from existing shareholders;
- iii. By holding shares and whose name is entered as a beneficial owner in the records of a depository.

#### C. Can one own 100% shareholding of private limited company/public limited company?

Yes, a body corporate can hold 100% shareholding of a company. This concept is popularly known as Wholly Owned subsidiary (**WoS**). However, for a Private Limited Company there should be at least 2 (two) (and for public limited company, at least 7 (seven) shareholders, therefore, one person can hold all the shares in his name except nominal amount of share(s). The nominal share(s) can be held by a nominee shareholder. The holding of such shares as a nominee i.e. a registered holder requires proper disclosure at the time of formation of a company and required to complete certain filings with the RoC, post the incorporation of the company and the beneficial interest in such nominal share(s) shall be retained with the parent/majority shareholder.

#### D. What are the minimum and maximum shareholders for Public Limited Company?

There should be at least 7 (seven) shareholders<sup>19</sup> and there is no limit for a maximum number of a shareholder(s) for a Public Limited Company.

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18. Refer section 3(1)(b) of the Companies Act, 2013

19. Refer section 3(1)(b) of the Companies Act, 2013

## E What are the different classes of shares?

There are two kinds of shares as follows:

- i. Equity shares; and
- ii. Preference shares

## F. Can the Company be incorporated with only preference share capital?

No, the Company cannot be incorporated with only preference share capital, as preference shares are redeemable in nature which may tantamount to diminution of the share capital of the company in the event of redemption of this share capital. Also, the feature of the Company being an artificial person and having perpetual succession; equity share capital should always form part of the share capital of the Company.

## G. What is ASC and PSC?

- i. Authorized Share Capital:<sup>20</sup> It means such capital as is authorized by the memorandum of a company to be the maximum amount of share capital of the company. The payment of the registration fees and the stamp duty fees on the incorporation of the company depends upon the amount of the authorized share capital.
- ii. Paid up Share Capital:<sup>21</sup> It means such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called.

## IV. Incorporation Process

### Name Reservation and Incorporation Application

#### A. How to incorporate a company?

Two-step process is followed for incorporating a company in India -

- i. File an application for reservation of name; and
- ii. Once the name is reserved, file a separate application under single form for obtaining DIN and filing incorporation documents.

#### B. How to apply for name for proposed Private Limited Company with the Central Registration Centre (“CRC”)?

The name reservation application can be made with the CRC by the applicant through **web form RUN (RESERVE UNIQUE NAME)**<sup>22</sup> RUN:

Through this e-form the applicant can propose two names for Private Limited Company and upon approval of the name from the RoC, the incorporation application is required to be applied for within 20 (twenty) days from the date of approval of the name reservation application. The approval of name is sole discretion of the CRC.

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20. Ref section 2(8) of the Companies Act, 2013

21. Refer section 2(64) of the Companies Act, 2013

22. Refer: Rule 9 of The Companies (Incorporation) Amendment Rules, 2018

## C. What are the documents required for filing name reservation application (web form RUN) with the RoC?

As such no documents are required to file name reservation application. However, it is mandatory to attach relevant documents and No Objection Certificates (**NOCs**) only when a name which requires the approval of a sectoral regulator or NoC, etc. in terms of Companies (Incorporation) Rules, 2014.

In case the name of the proposed company is similar to name of the parent company, then following documents are required.

- i. In case of body corporates, certified true copy of board resolution approved by the body corporate shareholders along with the charter documents of such body corporates;
- ii. NoC from the foreign body corporate, if the name is similar to that of the parent company;
- iii. If the proposed name is linked to a registered trademark, NoC from the trade mark owner;
- iv. List of main objects.

**Note:** In case all the aforesaid documents are being executed outside India including identity and address proofs of foreign nationals, the same needs to be notarized, apostilled/ consularized, in the home country, as may be applicable.

## D. What next after name reservation?

Once, the name has been approved, execute the various Incorporation documents like MoA, AoA, and file along with the e-form titled "SPICe" for incorporating a company.

## E. What is SPICe? What are its salient features?

SPICe stands for "Simplified Proforma for Incorporating Company Electronically". This is another initiative by the MCA with specific objective of providing speedy incorporation related services within stipulated time frames, which are in line with international best practices.

SPICe will be the sole, simplified and versatile form available for incorporation of companies in India. It is a single application for -

- i. Application for allotment of DIN for first directors (not exceeding 3);
- ii. Incorporation application;
- iii. Obtaining PAN and TAN for the proposed entity.

If the applicant provides the details pertaining to its registered office in the Incorporation form, then it is not required to file Form INC-22 separately for intimating the Registrar about its registered office.

## F. Whether it is compulsory for the company to have a physical registered office?

Yes, the registered office of the company should be a physical office space where the employees shall be stationed for carrying out the business operations and is available for physical inspection, verification and for obtaining registrations under the laws applicable to the company. There is no concept of virtual office in India. In the event if the authorities have reasonable cause to believe that the company is not carrying on any business or operations, the authorities may cause a physical verification of the registered office of the company in such manner as may be prescribed. Further pursuant to the amended rules, if any default is found to be made in complying with the requirements as mentioned above he may

initiate action for the removal of the name of the company from the register of companies and has power to strike-off a company if the address of registered office address is found to be bogus or incomplete/improper address.

## G. What are the documents required for filing incorporation application (e-form SPICe) with the RoC?

Following documents are to be filed on the MCA online portal along with the following documents:

- i. Copy of MoA and AoA;
- ii. Resolution passed by promoter body corporates approving incorporation of subsidiary company
- iii. In case the proposed name is similar to any existing/parent company, no-objection in form of resolution passed by such existing/parent company;
- iv. Declarations by first directors & subscribers;
- v. Proof of identity and residential address of the subscribers;
- vi. Disclosure of interest in other entities by the first Directors in prescribed form;
- vii. Declaration by representative of corporate promoters;
- viii. Undertaking on non-holding of PAN<sup>23</sup>
- ix. If the subscriber does not have a DIN, identity and address proof of subscribers including those of the witness;
- x. Where the directors (including subscriber cum director, not exceeding 3 (three) in no's) do not have a DIN, identity and address proof of such director [including VISA copy (if any)];
- xi. Proof of office address and utility bill of the registered office of the company, including NOC from owner of the premises as required. Also in case of leased premises or the rented premises the authorization from the owner and authorized occupant of the premises along with proof of ownership or occupancy authorization is required to be submitted;
- xii. If the proposed name require approval of the central government or is based on the registered trademark the copy of approval received from the central government or from the owner of the trademark (including certificate of trademark) respectively; and
- xiii. Copy of any specific/in-principle approval obtained from any sectoral regulator.

## H. Does the “ease of doing business in India” also allow to apply for obtaining tax registration number (PAN and TAN) at the time of filing for incorporation of a company?

Yes, as a part of scheme of ease of doing business in India, the company can simultaneously obtain registration of **PAN** and **TAN** at the time of the filing of the application for incorporation of the company under e-form SPICe. This reduces the time limit for starting business post incorporation of the company by 15-20 days.

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23. Every proposed foreign director who does not hold PAN in India at the time of making incorporation application shall submit a written undertaking stating that he is not required to hold PAN under Income Tax law and that, he will apply for and update PAN details as soon as it becomes applicable to him.

## I. How is approval process undertaken for incorporation?

Once e-form SPICe is processed and found complete and in order, Registrar at Central Registration Center will register the incorporation application and issue following approvals:

- i. Approve and allot the proposed name of the company;
- ii. Allot DIN for the proposed first directors (not exceeding 3) not having DIN;
- iii. Corporate Identification Number (“**CIN**”) will be generated and a Certificate of Incorporation (“**COI**”) in form INC-11 is issued electronically which will also include the PAN and TAN of the company
- iv. Takes on record, appointment of first directors;
- v. Takes on record, registered office address of the company
- vi. PAN & TAN is issued with COI. It also communicated to the applicant electronically.

Once COI is issued by the RoC, it serves as an evidence of incorporation of the company.

## J. What is the time frame for incorporating a company under SPICe?

Excluding the time required in the documentation, ideally, it takes 3-4 working days’ to complete the incorporation process and obtain certificate of incorporation from the Registrar. This also includes obtaining tax registration PAN and TAN, thereby reducing the time limit by 15-20 days’ post obtaining certificate of incorporation.

## K. Whether the COI issued by the RoC will have any validity period?

The registration is permanent and is valid until the time, the company winds up its affairs on its own or is being struck-off by the Registrar.

## L. Are the documents filed on the MCA Portal <http://mca.gov.in/> for incorporation of Company or LLP be available on the public domain?

While the incorporation application of Company or LLP is not available in the public domain, the certain basic details in form of Master data including details of directors details, registered office address email id for correspondence etc ., shall be made available on the public domain of MCA

## V. Post-incorporation Compliances

### A. What are the immediate post-incorporation compliances applicable for a private limited company?

The immediate post-incorporation compliances are as follows:

- a. To hold first Board meeting for initial corporate actions as required under the CA, 2013;
- b. Opening of Bank account and infusion of funds by Initial subscribers in the bank account;
- c. Apply and obtain other statutory registrations such as Goods and Service Tax, Shops & Establishments, Professional Tax, EPF, ESI, etc.;
- d. On receipt of FDI to undertake FEMA reporting actions and compliances with the RBI;
- e. Issue stamped share certificates to the initial subscribers within 60 (sixty) days from the date of incorporation;
- f. Appointment of Auditor within 30 (thirty) days of Incorporation.
- g. Director to file a declaration within a period of 180 (one eighty) days from the date of incorporation of the company in form INC 20A that every subscriber to the memorandum has paid the value of the shares as agreed for;

## 4. How to incorporate Limited Liability Partnership (“LLP”)

### I. Introduction

#### A. What is an LLP?

LLP is defined as partnership formed and registered under the LLP Act. It is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership. LLP can continue its existence irrespective of changes in the partners. It can enter contracts and holding property in its own name. LLP is a separate legal entity. The liability of the LLP shall be met out of the property of the LLP but liability of the partners is limited to their agreed contribution in the LLP.

No partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct.

#### B. What are the applicable Acts / provisions that govern an LLP?

LLP is primarily governed by the LLP Act, 2008 and the rules framed thereunder, the FEMA, the Income Tax Act and other legislation as may be applicable based on the business of the LLP.

### II. Partners

#### A. Who can be Partners?

Any individual or a body corporate can be a partner in a LLP

### III. Designated Partners

#### A. Who are Designated Partners?

Designated Partner mean any partner designated as such pursuant to Section 7 of the LLP Act. Designated Partner, is a term used in the LLP who have been designated as such for doing the duties and discharging the liabilities of such partners under the LLP Act

The Designated Partners are responsible for the management and the execution of all the acts and things required to be carried out by the LLP including compliance of the provisions such as filing of documents/returns/statements as required by the LLP Act.

#### B. What are the requirement to become a Partner or Designated Partner in an LLP?

A person, who is proposed to be appointed as Designated Partner, needs to obtain a valid DSC and DIN. A partner who is not a DP need not have any identification number.



### C. What are the minimum and maximum number of Partners and Designated Partners in an LLP?

There must be minimum of 2 (two) partners for formation of an LLP. There is no limit to the maximum number of partner, however there must be 2 (two) Designated Partners

### D. What are the requirement to become a Partner or Designated Partner in an LLP?

- Any individual or body corporate may be a partner in a LLP. However an individual shall not be capable of becoming a partner of a LLP, if
  - a. has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;
  - b. is an undischarged insolvent; or
  - c. he has applied to be adjudicated as an insolvent and his application is pending.
- Only an individual can be appointed as a 'Designated Partner' and at least one of the Designated Partner shall be a resident of India. In case of a LLP in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such LLP or nominees of such bodies corporate shall act as designated partners. A person, who is proposed to be appointed as Designated Partner, needs to obtain a valid DSC and DIN. A partner who is not a DP need not have any identification number.

### E. Can existing partnership firm or a private limited company be converted into an LLP?<sup>24</sup>

Yes, an existing partnership firm or a private limited company can be converted into an LLP by complying with the applicable provisions of LLP Act, CA 2013 and any other rules made thereunder and by filing requisite e-forms with the RoC.

### F. What are the ways to make contribution by the Partners?<sup>25</sup>

A partner's contribution may consist of both tangible and/or intangible property and any other benefit to the LLP. The monetary value of contribution of each partner is accounted for and disclosed in the books of accounts of the LLP in the manner as may be prescribed in the rules. However, contribution by foreign nationals should be in the form of tangible only.

### G. What is the nature and extent of liability of partner of an LLP?<sup>26</sup>

Every partner of an LLP, for the purpose of the business of the LLP, is an agent of the LLP but not of the other partners.

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24. Refer Section 55 and 56 of the LLP Act, 2008

25. Refer Section 32 of the LLP Act, 2008

26. Refer Section 28 of the LLP Act, 2008

Liability of partners is limited except in case of unauthorized acts, fraud and negligence. But a partner is not personally liable for the wrongful acts or omission of any other partner. An obligation of LLP whether arising in contract or otherwise, is solely the obligation of the LLP. The liabilities of LLP are met out of the property of the LLP.

## IV. Incorporation Process <sup>27</sup>

### A. What are the steps involved in formation of an LLP?

**Procure DSC and DIN:** Procure DSC and DIN for the individuals acting as Designated Partners of LLP. A person, who already has a DIN, is not required to obtain any new DIN. Existing DIN to be used for Designated Partner (However, DIN should have all latest details such as resident of India, name, address etc.). Any person proposed to become the Designated Partner in a new LLP shall have to make an application through eform FiLLiP. An application for allotment of DIN up to two Designated Partners, shall be filed in eform FiLLiP with the Registrar, in case of proposed Designated Partners not having approved DIN.

**Name reservation:** The first step in incorporation of an LLP is reservation of name of the proposed LLP. There are two ways of reserving name of the proposed LLP.

- i. File an application under LLP-RUN for ascertaining availability and reservation of the name of an LLP
- ii. Name can be proposed in eform FiLLiP, an application for incorporation of LLP

**Incorporate LLP:** After reserving a name under LLP-RUN, applicant should file eform FiLLiP for incorporating a new LLP. eform FiLLiP contains the details of LLP proposed to be incorporated, Partners'/ Designated Partners' details and consent of the Partner/ Designated Partners to act as Partners/ Designated Partners. On approval of the form, the RoC will issue the certificate of incorporation.

**LLP Agreement:** After incorporation of LLP, the partners should execute LLP Agreement and a copy of executed agreement is required to be filed with the RoC in e-form 3 within 30 (thirty) days from the date of incorporation of LLP.

### B. What are the documents required for filing name application (FiLLiP) with the Registrar?<sup>28</sup>

- i. Consent of partners;
- ii. In case of partners are body corporates, certified true copy of board resolution passed by such body corporate partners;
- iii. Proof of address of registered office of LLP;
- iv. Subscribers' sheet including consent;
- v. Detail of LLP(s) and/ or company(s) in which partner/ designated partner is a director/ partner;
- vi. Copy of approval obtained from any sectoral regulator/in-principle approval;
- vii. Identity and address proof of individuals acting as Partner and/or Designated Partner;
- viii. List of main objects of an LLP;
- viii. If the name proposed is linked to registered trademark, NoC from the trade mark owner;

27. Refer Section 11 of the LLP Act, 2008

28. Refer Section 16 of the LLP Act, 2008

- viii. NOC of foreign body corporate for usage of name (In case of foreign entities intending to incorporate LLPs in India).

**Note:** All the aforesaid documents executed outside India including identity and address proofs of foreign nationals should be duly executed and required to be notarized, apostilled /consularized.

## C. How many names can be proposed during filing of Name Reservation Application with the Registrar?

There are two ways of reserving name of the proposed LLP:

- i. Two names can be reserved in an application under LLP-RUN;
- ii. One name can be proposed in eform FILLIP in application for incorporation of LLP

## D. Whether LLP requires a registered office? <sup>29</sup>

Yes, an LLP requires a registered office and the same is required to be specified in the incorporation document of an LLP. The registered office of an LLP should be a physical office space where the employees shall be stationed for carrying out the business operations and is available for physical inspection, verification and for obtaining registrations under the laws applicable to an LLP. There is no concept of virtual office in India.

## E. What are the key details an LLP Agreement would consists of? <sup>30</sup>

The LLP Agreement should contain following details in addition to other information:

- i. Name of LLP and names of Partners and Designated Partners;
- ii. Details of agreed profit and loss sharing ratio of the Partners' contribution;
- iii. Rights & duties of the Partners and Designated Partners;
- iv. Procedures to be followed by the Partners and Designated Partners in decision making and convening of meetings;
- v. Specific provisions governing day to day management of affairs of LLP;
- vi. Terms related to admission and cessation of Partners and Designated Partners;
- vii. Terms related to keeping of books of accounts and audit norms;
- viii. Terms related to liability of Partners and Designated Partners and consequences of breach of agreement etc.

An executed copy of the LLP Agreement will be filed with the registrar through filing LLP e-form 3 within 30 (thirty) days from the date of incorporation.

## F. What is the time frame within which an LLP can be formed?

Formation of an LLP has two parts. In first part, it has to apply for name reservation followed by formal incorporation of an LLP. Once LLP is incorporated, within 30 (thirty) days, it should file the LLP Agreement

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29. Refer Section 13 of the LLP Act, 2008

30. Refer Section 23(2) of the LLP Act, 2008

## V. Applicability of FEMA for LLP

### A. Whether foreigners can incorporate LLP?

Yes, the LLP Act allows foreign nationals including foreign companies & LLPs to incorporate an LLP in India provided at least 1 (one) designated partner is resident of India. However, the LLP/partners have to comply with all relevant foreign exchange laws/rules/ regulations and guidelines.

### B. Whether FDI is permitted in LLP?

Yes, FDI is permitted in LLP. The LLP with FDI can undertake or operate only in those sectors/ activities where 100% FDI is allowed under automatic route of FDI scheme.

## VI. Post-incorporation Compliances

### A. What are the initial post-incorporation compliances applicable to an LLP?

The compliances to be undertaken post incorporation of an LLP are –

- i. Procure of PAN and TAN;
- ii. Open Bank account;
- iii. Other statutory registrations such as Goods and Service Tax, Shops & Establishments, Professional Tax, EPF, ESI, GST, etc.;
- iv. On receipt of FDI, to undertake reporting actions with the RBI.

## 5. Conclusion

With the initiatives taken by the government of India towards the “Ease of doing business in India” an entrepreneurial revolution is happening in India. Among other initiatives, MCA has introduced a single e-form, which is an integrated application covering securing DIN for Director, Certificate of Incorporation and getting the mandatory tax registration numbers. Such steps taken by the ministry does ensure that the time taken to register a new company is significantly reduced, which has resulted in incorporation of the company at a faster pace.

The CA, 2013 has ushered in a new era of corporate democracy making a shift from “government control” to “self-governance”. With the automated process kicking in, government also intends to further reduce the number of steps, and ensure that an entrepreneur faces minimum hassle while starting a new company.

While on the other hand since the introduction in 2008, LLPs have been looked upon as an attractive vehicle for undertaking business in India. An LLP is a form of business entity which is preferred due to its simple process for formation /unwinding and does not involve too many legal formalities. Also with the easing out of the FDI norms for the LLPs by the government, which now allows foreign investment in LLPs under the automatic route (without approval), the LLP structures amongst multinationals are gaining high acceptance.

With these new reforms being introduced, Indian and foreign entrepreneurs would truly find ease in starting their businesses in India.





# Swift India

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