

INCORPORATION AND FORMATION OF COMPANIES

FORMATION/INCORPORATION/REGISTRATION OF A COMPANY

In terms of Section 3(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; or
	(c) One person, where the company to be formed is to be one person company that is to say, a private company, by subscribing their names or his name to a memorandum and complying with the requirements of this act in respect of registration.

A company formed under section 3(1) may be either—

- (a) A company limited by shares; or
- (b) A company limited by guarantee; or
- (c) An unlimited company.

PROCEDURAL ASPECTS WITH REGARD TO INCORPORATION

A. RESERVATION OF NAME

The Companies (Incorporation) Amendment Rules, 2020, dated 18th February, 2020 (Effective from 23rd February, 2020)

Rule 9 of the Companies (Incorporation) Rules, 2014 –

RESERVATION OF NAME

An application for reservation of name shall be made through the **web service** available at www.mca.gov.in by using web service **SPICE+** (Simplified Proforma for Incorporating Company Electronically Plus: INC-32).

CHANGE OF EXISTING NAME

and for change of existing name by using web service **RUN** (Reserve Unique Name)

along with fee as provided in the Companies (Registration Offices and Fees) Rules, 2014, which may either be **approved or rejected**, as the case may be, by the Registrar, Central Registration Centre after allowing **re-submission** of such web form within fifteen days for rectification of the defects, if any, with effect from the 23rd February, 2020.

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B. INCORPORATION PROCESS

SIMPLIFIED PROFORMA FOR INCORPORATION FOR INCORPORATING COMPANY ELECTRONICALLY PLUS (SPICE+) - MEANING

Rule 38 of Companies (Incorporation) Rules, 2014

SPICE+ means **Simplified Proforma for Incorporating Company Electronically Plus**. MCA has notified simplified integrated process for incorporating a company in E-form INC-32 along with Memorandum Association in E-form INC-33 and Article of Association in E-form INC-34. So by this process MCA has simplified the procedure for incorporation of Company by introducing filing of pre-drafted Memorandum and Article of Association electronically, which will make work easier and also prove to **Ease of Doing Business**.

WHAT IS THE PURPOSE OF SPICE+

To Provide better Platform to the Professionals and remove difficulties in day to day business and make sure that the professionals will carry their business in smooth and efficient manner.

WHICH COMPANY WILL BE APPLY UNDER SPICE+

1. One Person Company.
2. Private Company.
3. Public Company
4. Incorporation of Seciton-8 Company.
5. Incorporation of Producer Company.

SIMPLIFIED PROFORMA FOR INCORPORATION FOR INCORPORATING COMPANY ELECTRONICALLY (SPICE+) - FEATURES

1. SPICE+ is an integrated web form.
2. SPICE+ process is divided into 2 part viz. Part A & Part B.
3. SPICE+ an integrated web form offers the following services:

Part A --: Name Reservation (New Companies only)

Part B:

- Company Incorporation
- Application for DIN
- PAN Application
- TAN Application
- GSTIN Application
- EPFO Registration
- ESIC Registration
- Opening of Bank Account for the Company
- Profession Tax Registration (only for Maharashtra)

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4. The SPICe+ application form can be applied in two ways:

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|--|
| 1. Part A (Name Reservation) and Part B (All Other Services) can be applied for on a simultaneous basis. |
| 2. Part A can be applied for initially, and upon reservation of the name, Part B can be applied for. |

SPICE+, A SINGLE WINDOW FORM

SPICE++ is an integrated Web form offering multiple services viz.

1. name reservation,
2. incorporation,
3. DIN allotment (Maximum 3 DIN),
4. mandatory issue of PAN, TAN, EPFO registration, ESIC registration, Profession Tax registration (Maharashtra) and
5. Mandatory opening of Bank Account for the Company.
6. It also facilitates allotment of GSTIN wherever so applied for by the Stakeholders

AGILE-PRO

(APPLICATION FOR GOODS AND SERVICES TAX IDENTIFICATION NUMBER, EMPLOYEES STATE INSURANCE CORPORATION REGISTRATION PLUS EMPLOYEES PROVIDENT FUND ORGANISATION REGISTRATION AND PROFESSION TAX REGISTRATION AND OPENING OF BANK ACCOUNT)

Rule 38A of the Companies (Incorporation) Rules, 2014

The application for incorporation of a company shall be accompanied by **AGILE (INC-35)** containing an application for registration of the following numbers, namely:-

(a) GSTIN
(b) EPFO
(c) ESIC
(d) Profession Tax Registration
(e) Opening of Bank Account

AGILE – PRO is also a web form.

DOCUMENTS REQUIRED

1. For SPICe+:

• Memorandum of Association
• Articles of Association
• Declaration by the first director(s) and subscriber(s) (Affidavit not required)
• Proof of office address
• Copy of utility bills
• Copy of certificate of incorporation of foreign body corporate (if any)
• A resolution passed by promoter company
• The interest of first director(s) in other entities

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• Consent of Nominee (INC-3)
• Proof of identity as well as the residential address of subscribers
• Proof of identity as well as residential address of the nominee
• Proof of identity and address of Applicant I, II, III
• Resolution of unregistered companies in case of Chapter XXI (Part 1) Companies
• Declaration in Form No. INC – 14
• Declaration in Form No. INC – 15
• Optional attachments (if any)

2. For AGILE-PRO:

• Proof of principal place of business
• Proof of appointment of Authorised Signatory for GSTIN (Either of the documents– Letter of Authorisation/Copy of Resolution passed by BOD/ Managing Committee and Acceptance Letter)
• Proof of identity of Authorised Signatory for the opening of a bank account
• Proof of address of Authorised Signatory for the opening of a bank account
• Specimen Signature of Authorised Signatory for EPFO

STEP WISE INCORPORATION PROCESS

1. With the introduction of a new dashboard for the SPICe+ and linked forms, the approved name will be displayed on it.
2. submit the 'Part A' for reservation of name
3. Upon choosing to proceed with incorporation, 'Part B' is enabled.
4. The details required for registration have to be entered. The details also include: – Address of the registered office of the company – Proposed directors and subscribers – Capital of the company – Other information to apply for tax registrations such as PAN and TAN
5. You have to upload the documents required for registration
6. After filling up Part B, you have to carry out a 'pre-scrutiny' check. Once the 'pre-scrutiny' is successful, click on 'submit'
7. Once the application is completed in all respects, the next step would be the conversion into PDF format. Next, you should download the PDF of Part B submitted for affixing the DSC and for filling up any linked forms along with Part B.
8. Part B of SPICe+ and linked forms can then be uploaded on the MCA portal.
9. A Service Request Number is generated for making a payment towards company incorporation.
10. Once the payment is made successfully, the forms would be processed.

ISSUE OF CERTIFICATE OF INCORPORATION BY REGISTRAR

Section 7(2) states that the Registrar on the basis of documents and information filed shall register all the documents and information and issue a certificate of incorporation in the prescribed form (**form INC.11**) to the effect that the proposed company is incorporated under this Act.

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From the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name. The subscribers would become the members of the company.

CASE LAW



COI TO BE CONCLUSIVE EVIDENCE

<p><i>Moosa</i> v. <i>Ebrahim</i></p>	<p>A Certificate of Incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of the Act have been complied with in respect of registration and matters precedent and incidental thereto, and that the association is a company authorised to be registered and duly registered under the Act.</p>
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ALLOTMENT OF CORPORATE IDENTITY NUMBER

Section 7(3) states that on and from the date mentioned in the certificate of incorporation issued the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.

PRESERVATION OF DOCUMENTS OF INCORPORATION

Section 7(4) states that the company shall maintain and preserve at its registered office copies of all documents and information as originally filed under sub-section (1) till its dissolution under this Act.

PUNISHMENT FOR FURNISHING FALSE OR INCORRECT INFORMATION AT THE TIME OF INCORPORATION

The Companies Act, 2013 imposes severe punishment for incorporation of a company by furnishing false or incorrect information.

The persons furnishing false or incorrect information shall be liable for following punishment:-

- (i) **If any person** furnishes any false or incorrect particulars of any information or suppresses any material information, of **which he is aware** in any of the documents filed with the Registrar in relation to the registration of a company, he shall be punishable **for fraud under section 447**.
- (ii) Without prejudice to the above liability, where, **at any time after the incorporation** of a company, it is proved that the company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration shall each be punishable for fraud under **section 447**.

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*Section 447 provides that any person who is found to be guilty of fraud "involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower", shall be punishable with imprisonment for a term which shall not be less than **six months** but which may extend to **ten years** and shall also be liable to fine which shall not be less than the **amount involved** in the fraud, but which may extend to **three times** the amount involved in the fraud.*

Provided that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to twenty lakh rupees or with both.

*However, where the fraud in question involves **public interest**, the term of imprisonment shall not be less than **three years**.*

COMMENCEMENT OF BUSINESS

SECTION 10A

- (1) A company incorporated after the commencement of the Companies (Amendment) Ordinance, 2018 and having a share capital shall not commence any business or exercise any borrowing powers unless—
 - (a) a declaration is filed by a director within a period of one hundred and eighty days of the date of incorporation of the company in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration; and
 - (b) the company has filed with the Registrar a verification of its registered office as provided in sub section (2) of section 12.
- (2) If any default is made in complying with the requirements of this section, the company shall be liable to a penalty of fifty thousand rupees and every officer who is in default shall be liable to a penalty of one thousand rupees for each day during which such default continues but not exceeding an amount of one lakh rupees.
- (3) Where no declaration has been filed with the Registrar under clause (a) of sub-section (1) within a period of one hundred and eighty days of the date of incorporation of the company and the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may, without prejudice to the provisions of sub-section (2), initiate action for the removal of the name of the company from the register of companies under Chapter XVIII.

PROVISIONS SPECIFICALLY RELATING TO INCORPORATION OF COMPANIES WITH CHARITABLE OBJECTS UNDER SECTION 8

1. Rule 19 of Companies (Incorporation) Rules, 2014

A person or an association of persons desirous of incorporating a company with **limited liability** under section 8 without the addition to its name of the word "Limited", or as the case may be, the words "Private Limited", shall make an application in **Form No.INC.12** along with the prescribed fee to the **Registrar for a license** under section 8.

The **memorandum of association** of the proposed company shall be in **Form No.INC.13**.

Attachment with application:-