

I. CHANGES RELATED TO INCORPORATION :

The Companies Act, 2013 is a vibrant step, which will play a major role in attaining the ultimate ends of social and economic policy of the government and in the development of companies in India on healthy lines.¹

One Person Company

The 2013 Act introduces a new type of entity to the existing list apart from forming a public or a private limited company, the 2013 Act enables the formation of a new entity 'one-person company' (hereinafter "OPC"). An OPC means a company with only one person as its member [Section 3(1) of the 2013 Act]. The draft rules state that only a natural person who is an Indian citizen and resident in India can incorporate an OPC or be a nominee for the sole member of an OPC.

Formation of a Company

In addition to the 10 types of companies that could be formed under the 1956 Act, following 5 new types of companies can be formed under the 2013 Act:

- One person company (OPC) limited by shares
- OPC limited by guarantee & having share capital
- OPC limited by guarantee having no share capital
- OPC unlimited company having share capital
- OPC unlimited company having no share capital

Also, the maximum number of members allowed in a private company has been increased from 50 to 200 (other than OPC) in the 2013 Act.

Memorandum of AssociationObject Clause

The 2013 Act specifies the mandatory content for the memorandum of association which is similar to the existing provisions of the 1956 Act and refers inter-alia to the following:

- Name of the company with last word as limited or private limited as the case may be
- State in which registered office of the company will be situated
- Liability of the members of the company

However, as against the existing requirement of the 1956 Act, the 2013 Act does not require the objects clause in the memorandum to be classified as the following:

1. The main object of the company

¹"Presentation on New Companies Bill, 2013", obtained from: <http://www.slideshare.net/ANANDGAWADE1/new-company-act-highlights> on 12 November, 2014 at 17:17

2. Objects incidental or ancillary to the attainment of the main object
3. Other objects of the company [section 4(1) of 2013 Act]

The basic purpose in the 1956 Act for such a classification as set out in Section 149 of the 1956 Act, is to restrict a company from commencing any business to pursue 'other objects of the company' not incidental or ancillary to the main objects except on satisfaction of certain requirements as prescribed in the 1956 Act like passing a special resolution, filing of declaration with the ROC to the effect of resolution.

Succession Clause

The 2013 Act introduces a 'Succession Clause' making it compulsory for OPC to state in the Memorandum of Association the name of the person (nominee) who shall become member in the event of the subscriber's death or his incapacity to contract. A prior written consent of nominee to be obtained in *Form No. INC 3*. Nomination in *Form No. INC 2* along with written consent in *Form No. INC 3* shall be filed with ROC at the time of incorporation of the OPC along with its memorandum and articles.

There was no requirement of such clause under the 1956 Act as the 1956 Act did not allow formation of OPCs.

Name Clause

Section 20(3) of the 1956 Act provided that the Central Government shall consult the Registrar of Trade Marks before deeming a name as desirable on account of resemblance with registered trademarks of any other person.

This consultation provision has been omitted by the 2013 Act.

Company's name to contain/not to contain certain words

Section 4(3) of 2013 Act states that Company's name shall not contain such word or expression likely to give an impression of connection with or patronage of Central Government/State Government/ local authority/ statutory corporation or as may be prescribed in Rule 8 of the Companies (Incorporation) Rules, 2014.

There was no such provision in the 1956 Act.

Actions which ROC may take in case of furnishing any wrong/incorrect information

If the company has not been incorporated, the reserved name shall be cancelled and the person making the application for reservation of name shall be liable to penalty not exceeding Rs. 1,00,000; and

If the company has been incorporated, the ROC may, after giving the company an opportunity of being heard-

- Direct the company to change its name within 3 months by passing an ordinary resolution, or
- Take action for striking off the name of the company from the register of companies, or
- Make a petition for winding up of the company.

The 1956 Act contained no such provision in this regard.

Articles of Association

The 2013 Act introduces the entrenchment provisions in respect of the Articles of Association of a company. An entrenchment provision enables a company to follow a more restrictive procedure than passing a special resolution for altering a specific clause of Articles of Association. A private company can include entrenchment provisions only if agreed by all its members or, in case of a public company, if a special resolution is passed [Section 5 of the 2013 Act].

Incorporation of company

The 2013 Act mandates inclusion of declaration to the effect that all provisions of the 1956 Act have been complied with, which is in line with the existing requirement of the 1956 Act.

Additionally, an affidavit from the subscribers to the memorandum and from the first directors has to be filed with the ROC, to the effect that they are not convicted of any offence in connection with promoting, forming or managing a company or have not been found guilty of any fraud or misfeasance, etc., under the 2013 Act during the last five years along with the complete details of name, address of the company, particulars of every subscriber and the persons named as first directors.

The 2013 Act further prescribes that if a person furnishes false information, he or she, along with the company will be subject to penal provisions as applicable in respect of fraud i.e. Section 447 of the 2013 Act [section 7(4) of the 2013 Act]

Formation of a company with charitable objects

An OPC with charitable objects may be incorporated in accordance with the provisions of the 2013 Act. New objects like environment protection, education, research, social welfare etc., have been added to the existing object for which a charitable company could be incorporated.

As against the existing provisions under which a company's licence could be revoked, the 2013 Act provides that the licence can be revoked not only where the company contravenes any of the requirements of the section but also where the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest. The 2013 Act thus provides for more stringent provisions for companies incorporated with charitable objects [section 8 of the 2013 Act].

Commencement of business, etc.

The existing provisions of the 1956 Act as set out in section 149 which provide for requirement with respect to the commencement of business for public companies that have a share capital would now be applicable to all companies.

The 2013 Act empowers the ROC to initiate action for removal of the name of a company in case the company's directors have not filed the declaration related to the payment of the value of shares agreed to be taken by the subscribers to the memorandum and that the paid-up share capital of the company is not less than the prescribed limits as per the 2013 Act, within 180 days of its incorporation and if the ROC has reasonable cause to believe that the company is not carrying on business or operations [section 11 of the 2013 Act].

Registered office of company

Where a company has changed its name in the last two years, the company is required to paint, affix or print its former names along with the new name of the company on business letters, bill heads, etc. However, the 2013 Act is silent on the time limit for which the former name needs to be kept [section 12 of the 2013 Act].

Alteration of memorandum

The 2013 Act imposes additional restriction on the alteration of the object clause of the memorandum for a company which had raised money from the public for one or more objects mentioned in the prospectus and has any unutilized money. The 2013 Act specifies that along with obtaining an approval by way of a special resolution, a company would be required to ensure following if it intends to alter its object clause:

- Publishing the notice of the aforesaid resolution stating the justification of variation in two newspapers
- Exit option can be given to dissenting shareholders by the promoters and shareholders having control in accordance with the regulations to be specified by the Securities and Exchange Board of India (SEBI) [section 13 of the 2013 Act].

Subsidiary company not to hold shares in its holding company

The existing provision of section 42 of the 1956 Act which prohibits a subsidiary company to hold shares in its holding company continues to get acknowledged in the 2013 Act. Thus, the earlier concern that if a subsidiary is a body corporate, it may hold shares in another body corporate which is the subsidiary's holding company continues to apply [section 19 of the 2013 Act].