

CERTIFIED SECRETARIES (CS)

PART II

SECTION 4

CORPORATE SECRETARIAL PRACTICE

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TOPIC 1

COMPANY FORMATION AND CONVERSION

INCORPORATION OF COMPANIES LIMITED BY GUARANTEE AND UNLIMITED COMPANIES

COMPANIES LIMITED BY GUARANTEE

1. Section 7 of the Companies Act 2015 states that a company is a company limited by guarantee if:
 - it does not have a share capital;
 - the liability of its members is limited by the company's articles to the amount that the members undertake, by those articles, to contribute to the assets of the company in the event of its liquidation; and
 - Its certificate of incorporation states that it is a company limited by guarantee.
2. Subsection (1) does not prohibit a company limited by guarantee from having a share capital if it was formed and registered before the commencement of this section.

UNLIMITED COMPANIES

Section 8 of the Companies Act 2015 states that a company is an unlimited company if:

- there is no limit on the liability of its members and
- Its certificate of incorporation states that the liability of its members is unlimited.

PROCEDURE OF FORMATION AND REGISTRATION

Method of Forming Company

Section 11 of the Companies Act states that one or more persons who wish to form a company may subscribe their names to a memorandum of association and comply with the requirements of sections 13 to 16 with respect to registration. A company formed for an unlawful purpose may not be registered.

Persons wishing to form a company should prepare a memorandum of association under Section 12. It is a document stating that the subscribers wish to form a company under the Companies Act and they agree to become members of the company and, in the case of a company that is to have a share capital they should take at least one share each.

A company may not be registered unless its memorandum of association is in the form prescribed by the regulations and authenticated by each subscriber.

Registration documents required in incorporation

Section 13 states that a person who wishes to register a company shall lodge with the Registrar:

- a) An application for registration of the company that states the proposed name of the company, the proposed location of the registered office of the company, whether the liability of the members of the company is to be limited, and if so whether it is to be limited by shares or by guarantee and whether the company is to be a private or a public company. If the application for registration of a company is submitted by an agent for the subscribers to the memorandum of association, the agent shall include in the application the name and address of the agent. An application for registration should be accompanied by:
 - in the case of a company that is to have a share capital, a statement of capital and initial shareholding in accordance with section 14
 - in the case of a company that is to be limited by guarantee, a statement of guarantee in accordance with section 15 and
 - a statement of the company's proposed officers in accordance with section 16.
- b) a memorandum of association of the company; and
- c) Except as provided by section 21, a copy of the proposed articles of association.

In order to be registered, the articles of association of a company are required to:

- be contained in a single document;
- be printed
- be divided into paragraphs numbered consecutively;
- be dated; and
- be signed by each subscriber to the articles.

A subscriber's signature is required to be attested by a witness, whose name, occupation and postal address are required to be written or printed below the subscriber's signature.

Statement of capital and Initial shareholding (Section 14)

1. If the company is to have a share capital, the applicants for registration shall ensure that the requisite statement of capital and initial shareholding comply with subsections (2) and (3).
2. The statement of capital and initial shareholding complies with this subsection if it states-
 - the total number of shares of the company to be taken on formation by the subscribers to the memorandum of association ;
 - the aggregate nominal value of those shares;
 - for each class of shares:
 - i. the particulars of the rights attached to shares prescribed by the regulations for purposes of this subsection;
 - ii. the total number of shares of that class; and
 - iii. the aggregate nominal value of shares of that class; and

- iv. The amount to be paid up and the amount (if any) to be unpaid on each share, whether on account of the nominal value of the share or in the form of a premium.
3. The statement of capital and initial shareholding complies with this subsection if it
 - contains such information as may be prescribed for the purpose of identifying the subscribers to the memorandum of association; and
 - states, with respect to each subscriber to the memorandum-
 - i. the number, nominal value of each share and class of shares to be taken by the subscriber on formation; and
 - ii. the amount to be paid up and the amount, if any to be unpaid on each share, whether on account of the nominal value of the share or in the form of a premium.
 4. If a subscriber to the memorandum of association is to take shares of more than one class, the information required for each class.

Statement of guarantee for companies limited by guarantee (Section 15)

1. The applicant for registration of a company to be limited by guarantee shall ensure that the requisite statement of guarantee contains the prescribed information to enable the subscribers to the memorandum of association to be identified.
2. The applicant shall also ensure that the statement of guarantee states that each person who is a member undertakes, if the company is liquidated while the person is a member or within twelve months after the person ceases to be a member, to contribute to the assets of the company such amount as may be required for
 - paying the debts and liabilities of the company contracted before the person ceases to be a member
 - paying the costs, charges and expenses of liquidation and
 - adjusting the rights of the contributories among themselves.

Statement of proposed officers (Section 16)

1. The applicant for registration shall ensure that the requisite statement of the company's proposed officers complies with subsections (2) and (4).
2. The statement complies with this subsection if it contains the required particulars of-
 - the person who is, or persons who are, to be the first director or directors of the company;
 - in the case of a company that is to be a public company, the person who is or the persons who are to be the first secretary or joint secretaries of the company; and
 - any person who is to be appointed as an authorized signatory of the company.
3. The required particulars are the particulars that will be required to be stated-
 - in the case of a director, in the company's register of directors and register of directors' residential addresses;
 - in the case of a secretary of a public company, in the company's register of secretaries; and
 - in the case of a person appointed as an authorized signatory, in the company's register of authorized signatories.

4. The statement of the company's proposed officers complies with this subsection if it contains a consent by each of the persons named as a director, as secretary or as one of joint secretaries or as an authorized signatory, to act in the relevant capacity.
5. If all the partners in a firm are to be joint secretaries, consent can be given by one partner on behalf of all the partners.

Section 17 states that the Registrar, if satisfied that an application for registration complies with the requirements of the Companies Act relating to registration, the Registrar shall register the company and allocate to it a unique identifying number.

Registrar to issue company with certificate of incorporation (Section 18)

1. On the registration of a company in accordance with section 17, the Registrar shall issue to the company a certificate of incorporation that complies with this section.
2. A certificate of incorporation complies with this section if it states-
 - the name of the company and its unique identifying number;
 - the date of the company's incorporation;
 - whether the company's liability is limited or unlimited and if it is limited, whether it is limited by shares or by guarantee; and
 - whether the company a private or a public one.
3. The Registrar shall sign the certificate of incorporation and authenticate it with the Registrar's official seal.
4. The certificate is conclusive evidence that the requirements of this Act relating to registration have been complied with and that the company is duly registered under this Act.

Effect of registration

From the date of incorporation of a company:

- the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, become a body corporate by the name stated in the certificate of incorporation
- the company can do all of the things that an incorporated company can do
- the registered office of the company is as stated in the application for registration
- the status of the company is as stated in its certificate of incorporation
- in the case of a company having a share capital, the subscribers to the memorandum of association become holders of the shares specified in the statement of capital and initial shareholdings and
- the persons" named in the statement of proposed officers -
 - i. as directors of the company:
 - ii. in the case of a public company, as secretary or as a joint secretary of company: or
 - iii. as an authorized signatory of the company, become holders of those offices.