

PROCEDURE FOR CREATION/ MODIFICATION OF CHARGES

85

{Sections 77(1) of the Act read with Rules 3(1) of the Companies
(Registration of Charges) Rules, 2014}

Synopsis

85.1	Procedure with check points	1567
85.2	Forms to be filed	1571
85.3	List of documents required	1572
85.4	List of information required	1572
Appendix 85.1	Table of Fees for Filing Charge Documents	1572
Appendix 85.2	Sample board resolution	1573

Relevant Sections, Rules and Forms at a Glance

Particulars	Section(s), Rule(s) and Name of e-Form(s)
The Companies Act, 2013	Sections 77, 78, 79, 81, 85, 87, 173 and 403
The Companies (Registration of Charges) Rules, 2014	Rules 3, 5, 6, 7 and 10
The Companies (Management and Administration) Rules, 2014	Rule 24
The Companies (Registration of offices and Fees) Rules, 2014	Rules 7, 8 and 12
Secretarial Standard-1 of ICSI	Clauses 3, 4, 5, 6, 7 and 8
e-Forms to be filed	MGT-14 (board resolution) CHG-1 (other than debentures) CHG-9 (for debentures)

Significant Relevant Approvals and Requirements

- ❖ Board resolution
- ❖ Instruments creation/modification of charges
- ❖ Sanction letter from the lender
- ❖ Tripartite agreement, wherever applicable

85.1 PROCEDURE WITH CHECK POINTS

S. No.	Particulars
1.	Ensure that— <ul style="list-style-type: none"> • if an interest or lien is created on the property or assets of a company or any of its undertakings or both as security, the company shall create a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India {Section 77(1) read with section 2(16) of the Act}.

S. No.	Particulars
	<ul style="list-style-type: none"> • a copy of every instrument evidencing any creation or modification of charge and required to be filed with the Registrar pursuant to section 77, 78 or 79 of the Act shall be verified in the following manner- <ul style="list-style-type: none"> (a) where the instrument or deed relates solely to the property situated outside India, the copy shall be verified by a certificate issued either under the seal, if any, of the company, or under the hand of any director or company secretary of the company or an authorised officer of the charge holder or under the hand of some person other than the company who is interested in the mortgage or charge; (b) where the instrument or deed relates, whether wholly or partly, to the property situated in India, the copy shall be verified by a certificate issued under the hand of any director or company secretary of the company or an authorised officer of the charge holder <i>{Rule 3(4) of the Companies (Registration of Charges) Rules, 2014}</i>.
2.	<p>Note that—</p> <ul style="list-style-type: none"> • any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered <i>{Third proviso to section 77(1) of the Act}</i>. • no charge created by a company shall be taken into account by the liquidator appointed under this Act or the Insolvency and Bankruptcy Code, 2016, or any other creditor unless it is duly registered under section 77(1) of the Act and a certificate of registration of such charge is given by the Registrar under section 77 (2) of the Act <i>{Section 77(3) of the Act}</i>. • the provisions of section 77 relating to registration of charges shall also apply to— <ul style="list-style-type: none"> (a) a company acquiring any property subject to a charge within the meaning of that section; or (b) any modification in the terms or conditions or the extent or operation of any charge registered under section 77 of the Act <i>{Section 79 of the Act}</i>. • if any person acquires any property or assets of a company or any of its undertakings on which a charge is already registered according to section 77, it would be deemed that he has complete knowledge of such charge on the said property from the date the charge is registered <i>{Section 80 of the Act}</i>.
3.	<p>Ensure that—</p> <ul style="list-style-type: none"> • public limited company and private limited company where the borrowing amount together with the amount already borrowed is not exceeding the aggregate of paid-up share capital, free reserves and securities premium of the company, has duly passed a board resolution for secured borrowings <i>{Section 179(3)(d) of the Act}</i> and creation of charge on the assets and properties of the company. • public limited company and those private limited company which has committed a default in filing of its financial statements and annual return with the Registrar of Companies where the borrowing amount together with the amount already borrowed is exceeding the aggregate of paid-up

S. No.	Particulars
	<p>The subscribers, who are individuals in the Memorandum of Association (MOA) shall be deemed as first directors until the directors are duly appointed by the members in accordance with Section 152 of the Companies Act, 2013 and rules made thereunder (Section 152 of the Act).</p> <ul style="list-style-type: none"> • Not the person intended/proposed to be appointed a director of a company has a valid Director Identification Number (DIN) under section 174 or any other number as may be prescribed under section 174 of the Companies Act, 2013, however, in case of first directors of a new company, the DIN up to 3 (three) persons can be obtained through incorporation with integrated form SPICe-1 (INC-32) (Section 152 of the Act read with rule 152 of the Companies Incorporation Rules, 2014). • Not a total number of directors, at least one director has stayed in India for a total period of not less than 182 days during the financial year. Provided that in case of newly incorporated company, residential status shall be determined proportionately. However, it is not required in case the director is appointed by the Central Government or State Government (Section 152 of the Act). • A person, who is intended to be appointed, shall not be eligible for appointment, if he/she has any disqualification for appointment under section 164 of the Act (Section 164 of the Act read with companies prescribed a government company and regulations in COA 2012 about COA 2012). • A person proposed to be appointed as a director in a company other than a company registered under Section 8 (non-profit company) of the Companies Act, 2013 (Section 152 of the Act) <ul style="list-style-type: none"> - shall not hold office as a director including any alternate directorship in more than 20 companies including directorship in dormant companies. - shall not hold office in more than 10 public companies including the private companies which are holding or subsidiary of public company.
1.	In case of one person company, an individual being sole member is deemed to be the first director of the company, if the articles of association has not mentioned the names of first directors (Section 152 of the Act).
2.	Forms created in writing, on or before appointment, from the appointed director to act as director in the company as Form 208-2 (Part 2 of the Companies Appointment and Qualification of Directors) Rule, 2014.
3.	Form created in writing, on or before appointment, from the appointed director as Form 208-3 regarding that he/she is not disqualified under Section 164 of Companies Act, 2013, to act as a Director (Section 164 of the Act read with rule 164 of the Companies Appointment and Qualification of <u>Directors</u>) Rule, 2014.
4.	The particulars of first directors to be integrated with Form SPICe-1 (INC-32) at the time of incorporation of company.

For the detailed procedure, please refer Company Law Procedures & Compliances by Dr. Sanjeev Gupta, 2nd edn, 2021. You can buy from your bookseller or online at www.bharatlaws.com

[COMPANY LAW Procedures & Compliances \(in 2 vols.\)](#)