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Amendments to the Memorandum of Incorporation

The Companies Act, No 71 of 2008, became effective on 1 May 2011. Companies are required to amend their Memorandum of Incorporation (MOI) to ensure that the MOI meets the requirements of the new Act. During the two (2) years from 1 May 2011 to 30 April 2013, the current MOI takes precedence except where specifically stated otherwise. After the two year period the new Act's requirements will override any requirements in the MOI.

Companies Act, 2008

Schedule 5, section 4(4)

"During the period of two years immediately following the general effective date—

(a) if there is a conflict between—

(i) a provision of this Act, and a provision of a pre-existing company's Memorandum of Incorporation, the latter provision prevails, except to the extent that this Schedule provides otherwise;

(ii) a binding provision contemplated in sub-item (3), and this Act, the binding provision prevails; or

(iii) a provision of an agreement contemplated in sub-item (3A), and this Act or the company's Memorandum of Incorporation, the provision of the agreement prevails, except to the extent that the agreement, or the Memorandum of Incorporation, provides otherwise;"

It is important to note that the MOI can impose stricter or additional requirements to the Act, and that such requirements would prevail before and after the transitional period.

Companies that have not yet amended their existing articles (deemed MOI) can find themselves bound to certain requirements in Table B of Schedule 1 of the Companies Act, 1973 – *Articles for a private company having a share capital*, if they adopted those articles, which would lead to additional requirements having to be met that are no longer required in terms of the Companies Act, 2008.

Three such items, *inter alia*, have been identified that we advise companies to consider amending if they do not wish to meet these stricter requirements.

Table B of the Articles state the following:

- right to transfer shares are restricted
- all companies to hold an Annual General Meeting
- all companies must appoint an auditor

All three of these requirements have been significantly changed in the Companies Act, 2008.

1. **Private company restricts the right to transfer shares.**

> ***Companies Act, 1973, Schedule 1, Table B***
>
> *"3. The company is a private company and accordingly--*
>
> *a) the right to transfer its shares is restricted;*
>
> *b) the number of members of the company (exclusive of persons who are in the employment of the company and of persons who having been formerly in the employment of the company were, while in such employment, and have continued since the determination of such employment, to be members of the company) is limited to fifty;*
>
> *c) any invitation to the public to subscribe for any shares or debentures of the company is prohibited; and*
>
> *d) the company shall not have power to issue share warrants to bearer."*

The Companies Act, 2008, refers to the fact that a company is a private company if it is not a state-owned company and its Memorandum of Incorporation prohibits the **offering of any of its securities** to the public and **restricts the transferability of its securities.**

Companies should ensure that their MOIs are amended to refer to "securities" and not only "shares" as this might inadvertently lead to them being classified as public companies and no longer private companies. Furthermore, companies should incorporate a pre-emptive right in favour of existing security holders upon the sale of such securities by an existing holder.

2. **Annual general meeting**

> ***Companies Act, 1973, Schedule 1, Table B***
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> *"31. The company shall hold its first annual general meeting within eighteen months after the date of its incorporation and shall thereafter in each year hold an annual general meeting: Provided that not more than fifteen months shall elapse between the date of one annual general meeting and that of the next and that an annual general meeting shall be held within six months after the expiration of the financial year of the company."*

The Companies Act, 2008 only mandates that public and state-owned companies must convene an annual general meeting, initially not longer than 18 months after the incorporation and thereafter once in every calendar year. Companies that need to appoint an auditor should also perform this appointment at the AGM.

Companies need to amend their MOIs to delete this requirement if they meet the Companies Act, 2008, requirements of not requiring an audit in terms of the Companies Act, 2008.

3. Auditor appointment and duties

Companies Act, 1973, Schedule 1, Table B

95. An auditor shall be appointed in accordance with Chapter X of the Act.

Chapter X in the Companies Act, 1973, deals with the appointment, rotation, duties and other requirements relating to the auditor. In terms of the Companies Act, 2008, certain companies no longer require the appointment of the auditor nor the duty to have an audit.

There is no statutory obligation to amend the existing articles, but it is highly recommended to amend the 3 requirements should you wish to take advantage of the additional flexibility allowed by the Companies Act, 2008. Amendment within the 2-year period is also free (from a CIPC perspective, although not from a service provider perspective).

SAICA recommends that companies draw up an entirely new MOI rather than simply amending the existing articles; but, as this can be a lengthy process, due consideration should be given to the items mentioned above as a matter of urgency.

The provisions relating to changes to the MOI in the Companies Act, 2008, are as follows:

Companies Act, 2008

Section 16 (9)

"An amendment to a company's Memorandum of Incorporation takes effect—

(a) in the case of an amendment that changes the name of the company, on the date set out in the amended registration certificate issued by the Commission in terms of subsection (8), read with section 14 (1) (b) (iii); or

(b) in any other case, on the later of—

(i) the date on, and time at, which the Notice of Amendment is filed; or

(ii) the date, if any, set out in the Notice of Amendment."