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The **SAICA** Guide to the Companies Act 71 of 2008

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Unpacking the key provisions and areas of consideration impacting those engaging with company law regulation, enforcement, governance and compliance.

Unpack the key points.

4.3 Filing of the MOI

4.3.1 New companies must submit a registration form and file the MOI by virtue of registration.

4.3.2 For pre-existing companies the current Memorandum and Articles of Association become the new MOI by stipulation in terms of Section 4(3).

4.3.3 The provisions of the MOI must be consistent with the Act, unless the Act permits otherwise. Companies cannot “opt out” of the Act.

4.3.4 However, during a period of two years immediately following the Effective Date, if there is a conflict between the Act and provisions of the MOI, the Act will prevail, while certain exceptions are referred to below.

Issue for consideration

The Act clearly intends that companies will use the two-year interim period to familiarise themselves with the Act and to align their MOI with the Act. Despite the two-year interim period referred to above, the following provisions of the Act apply from the Effective Date:

- The provisions of the MOI at the time of registration will prevail despite the continuance of the existing Articles and the MOI, which are not altered or arranged differently in the existing Articles, as from the Effective Date, therefore, where the Act contains alterable provisions and the MOI contains provisos, the provisions of the Act will prevail despite the continuance of the existing Articles.

- The significance of the transitional arrangements is that they may create a false sense of security that a particular position under the previous Act continues to apply. The Act will apply as from the Effective Date (with certain exceptions referred to below).

- The right of any person to apply a remedy in terms of the Act applies with respect to conduct pertaining to a pre-existing company and occurring before the Effective Date, unless the person had commenced proceedings in a court in respect of the relevant section in the new Act before the Effective Date.

- The Act permits special conditions. Section 13(3) requires the inclusion of provisions regarding meetings of shareholders or directors, and financial restrictions regarding a company from the list of alterable provisions.

S4.3.5 The Act clearly intends that companies will use the two-year interim period to familiarise themselves with the Act and to align their MOI with the Act. Despite the two-year interim period referred to above, the following provisions of the Act apply from the Effective Date:

- The cover-up of the MOI at the time of registration will prevail despite the continuance of the existing Articles and the MOI, which are not altered or arranged differently in the existing Articles, as from the Effective Date, therefore, where the Act contains alterable provisions and the MOI contains provisos, the provisions of the Act will prevail despite the continuance of the existing Articles.

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- Glossary
- Important information
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- External companies
- Accounting, company records, financial statements and auditing
- Capitalisation of companies
- Governance of companies
- Chapter 3 (important information) application
- Existing share incentive scheme
- Appointment of a compliance officer for an employee share scheme
- Business rescue
- Whistle Blowers
- Annexures:
  - Alterable provisions
  - Considerations relating to MOI
  - Decision tree on audit or review
  - Audit, review and reporting standards
  - JSE Listings Requirements
  - UN Global Compact
  - Comparison of forms (old and new Acts)
  - List of new prescribed forms not replacing other forms
  - List of special resolutions required
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