Draft

SAICA Companies Act Guide

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(Comments to be received by 23 September 2011)

Important notice

This guide is based on the Companies Act No. 71 of 2008 (as amended by the Companies Amendment Act No. 3 of 2011) and the Companies Regulations, 2011, as published under GNR.351 in GG34239 dated 26 April 2011.

Please note that this guide is not a full summary of all relevant provisions of the new Act or its regulations. We have, however, tried to include information on matters which are relevant to our members and practical. In the interest of brevity we often paraphrase the provisions of the new Act and the Regulations or refer to extracts only. This guide is not intended to be exhaustive and should not be viewed as a substitute for reading the Act and the Regulations. The guidance given in this document is general in nature and does not constitute legal advice.

There is currently no authoritative case law and little reference material that can be used to substantiate interpretation of the Act or the Regulations. Therefore, where we propose a particular interpretation or approach to any matter, this is based only on our current view of the interpretation of the Act. Although we have consulted widely on contentious issues, it is possible that a different view may ultimately be followed in practice, for example in instances where the Companies and Intellectual Property Commission provides specific guidance.

We recommend that any decision or actions being considered by a business in terms of the new Companies Act and its Regulations be checked with appropriately qualified legal advisors, the Companies and Intellectual Property Commission or another appropriate expert.

Please also note that this document does not consider the requirements of the JSE, King III or any other legislation or regulation which could potentially impact on the compliance requirements of businesses.

Contents

1 Introduction

The new Companies Act No. 71 of 2008 (the "Act") replaced the Companies Act No. 61 of 1973 (the "previous Act") in its entirety on 1 May 2011, except for the provisions relating to winding-up and liquidation. As such, it will have a significant impact on all aspects of conducting business in South Africa. The implementation of this Act presents both challenges for and opportunities to companies. The purpose of this guide is to provide companies with an indication of some of the important issues that arise for their business as a result of the anticipated changes to the corporate landscape.

2 Glossary

AFS	Annual Financial Statements;
AGM	Annual general meeting;
Alterable provision	a provision of the new Act in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company's Memorandum of Incorporation (MOI). Annexure "A" contains a list of Alterable provisions;
CIPC/Commission	the Companies and Intellectual Property Commission, which replaced the Companies and Intellectual Property Registration Office (CIPRO). In terms of Schedule 5 par 12 of the new Act, the CIPC took over all the assets, liabilities and contractual arrangements of CIPRO. The Act refers to the CIPC as "the Commission";
Effective Date	the Act uses the expression "general effective date" to refer to the date on which section 1 of the Act comes into operation. For purposes of brevity we use the term "Effective Date", which is 1 May 2011;
IFAC	International Federation of Accountants;
IFRS	"IFRS" means the International Financial Reporting Standards as issued from time to time by the International Accounting Standards Board or its successor body;
IFRS for SMEs	"IFRS for SMEs" means the International Financial Reporting Standards for Small and Medium Enterprises, as issued from time to time by the International Accounting Standards Board or its successor body;
Issue	description or discussion of potential issues to be considered and which arises as a result of the provisions of the Act and its

application;

Independently compiled and reported	the annual financial statements are prepared – ***(i)*** by an independent accounting professional; ***(ii)*** on the basis of financial records provided by the company; and ***(iii)*** in accordance with any relevant financial reporting standards;
Independent accounting professional	a person who – ***"(i) is –*** ***(aa) a registered auditor in terms of the Auditing Profession Act; or*** ***(bb) a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Professions Act; or*** ***(cc) qualified to be appointed as an accounting officer of a close corporation in terms of section 60(1), (2) and (4) of the Close Corporations Act, 1984 (Act No. 69 of 1984); and*** ***(ii)does not have a personal financial interest in the company or a related or inter-related company; and*** ***(iii)is not –*** ***(aa) involved in the day to day management of the company's business, nor has been so involved at any time during the previous three financial years; or*** ***(bb) a prescribed officer, or full-time executive employee, of the company or another related or inter-related company, or have been such an officer or employee at any time during the previous three financial years; and(iv) is not related to any person who falls within any of the criteria set out in clause (ii) and (iii)."***
ISRE 2400	International Standard for Review Engagements, as issued from time to time, by the International Auditing and Assurance Standards Board, or its successor body;
Independent reviewer	Person appointed to perform an independent review under Regulation 29 and who meets the criteria for an independent accounting professional;

MOI — the Memorandum of Incorporation and which is defined in the Act as:

"***the document, as amended from time to time that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and others as contemplated in section 15 and by which***

a) the company was incorporated in terms of this Act, as contemplated in section 13; or

b) a pre-existing company was structured and governed before the later of the-

i. effective date; or

ii. …"

In terms of section 15(6), a company's MOI is ***"…binding-***

(a) ***between the company and each shareholder;***

(b) ***between or among the shareholders of the company; and***

(c) ***between the company and-***

i. ***each director or prescribed officer of the company; or***

ii. ***any other person serving the company as a member of a committee of the board,***

in the exercise of their respective functions within the company.";

NPC — Non-profit company

Pre-existing company — A pre-existing company that

(i) was registered in terms of the-

a. Companies Act, 1973, other than an external company as defined in that Act; or

b. Close Corporations Act, 1984, if it has subsequently been converted in terms of Schedule 2;

(ii) was in existence and recognised as an "existing company" in terms of the Companies Act, 1973; or

(iii) was deregistered in terms of the Companies Act, 1973 and has subsequently been reregistered in terms of the Act.

Prescribed officer — in terms of the Regulation 38 a person is a prescribed officer of a company if ***"despite not being a director of the company" that "person –***

(a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or

(b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company;

The regulation applies to a person contemplated in sub-regulation (1) irrespective of any particular title given by the company to-

(a) an office held by the person in the company

(b) a function performed by the person for the company";

“previous Act”	the Companies Act No. 61 of 1973, repealed by section 224 of the Act;
R	Abbreviation for “regulation” and all references to regulations are to the Companies Regulations, 2011, unless indicated otherwise.
Regulations	The Companies Regulations, 2011, published in the Government Gazette of 26 April 2011.
RF	Ringfenced
S	abbreviation for “section” and all reference to sections are to the Act, unless indicated otherwise;
SA GAAP	“SA GAAP” means the South African Statements of Generally Accepted Accounting Practice, as adopted from time to time by the Accounting Practices Board or its successor body;
SOC	State-owned company
“the Act”	the Companies Act No. 71 of 2008, read with the Companies Amendment Act No. 3 of 2011;
Transitional provisions	the provisions contained in Schedule 5 of the Act;

3 Important information

3.1 Continuation of existing companies, rights and obligations

Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act that had not been spent or fulfilled immediately before the Effective Date is a valid right or entitlement of, or obligation imposed on, that person in terms of any “comparable” section of the Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of the new Act. (Schedule 5, Item 11 of the Act)

Every company which existed immediately before the Effective Date continues to exist as a company, as if it had been incorporated and registered in terms of the Act, with the same name and registration number previously assigned (Schedule 5, Item 2 of the Act). Certain companies, affected by the change in classification, will be “deemed” to have changed their names as required, as from the “general effective date”. These will include:

- section 21 companies (for this type of company instead of the suffix “Association incorporated under section 21” it will attach the suffix “NPC” to its name); and
- state-owned companies (this type of company will change its name to include the suffix “SOC Ltd”).

3.2 Interpretation of the Act

Section 5 of the Act prescribes the interpretation and application of the Act. It provides that the Act must be applied in accordance with the "purposes" of the Act as contained in S7. These purposes are diverse and include matters such as promotion of compliance with the Bill of Rights and encouragement of the efficient and responsible management of companies.

If there is an inconsistency between the Act and the provisions of other national legislation, both Acts shall apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second. To the extent that it is impossible to apply or comply with one inconsistent provision without contravening the second, the Act shall prevail, with certain exceptions. These exceptions are:

- Auditing Professions Act, No. 26 of 2005;
- Labour Relations Act, No. 66 of 1995;
- Promotion of Access to Information Act, No. 2 of 2000;
- Promotion of Administrative Justice Act, No. 3 of 2000;
- Public Finance Management Act, No. 1 of 1999;
- Securities Services Act, No. 36 of 2004;
- Banks Act, No. 94 of 1990;
- Local Government: Municipal Finance Management Act, No. 56 of 2003;
- Section 8 of the National Payment System Act, No. 78 of 1998.

If there is a conflict between a provision of Chapter 8 of the Act and a provision of the Public Service Act, No. 103 of 1994, the provisions of that Public Service Act shall prevail.

If there is a conflict between the Act and the provisions of the listings requirements of an exchange (i.e. including the JSE Rules):

- the provisions of both the Act and the listings requirements shall apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and
- to the extent that it is impossible to apply and comply with one of the inconsistent provisions without contravening the second, the provisions of the Act shall prevail, except to the extent that the Act expressly provides otherwise.

In terms of S6 of the Act, a court may declare an agreement, transaction, resolution or a provision of a company's MOI void, to the extent that it is primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement of the Act and defeats or reduces the effect of a prohibition or requirement.

Application may be made to the Companies Tribunal for an administrative order **exempting** an agreement, transaction, resolution or a provision of a company's MOI, from the Act.

Section 158 provides that any of the CIPC, the Takeover Regulation Panel, the Companies Tribunal or a court, when determining a matter brought before it, must promote the spirit, purpose and object of the Act and, if any provision of the Act, or any other document in terms of the Act, read in its context, can reasonably be construed to have more than one meaning, the relevant forum must prefer the meaning that best promotes the spirit and purpose of the Act and best improves the realisation and enjoyment of rights.

It is proposed that, in practice, the following approach should be followed when any difficulties arise in understanding the provisions of the Act:

> ***"The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).***
>
> ***The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament, embodied in the Act, and if they are clear and unambiguous and in harmony with the intention, object and scheme and with the general body of the law, that is the end.***
>
> ***If the words are apparently obscure or ambiguous, then the meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one which the words are reasonably capable of bearing, is to be given them."[1]***

3.3 Company records in electronic form

Section 6(11) provides that any document that a company is obliged to retain may be retained in electronic form. In terms of S6(7), an unaltered electronically or mechanically generated reproduction of any document (other than a share certificate) may be substituted for the original. Further, if "notice" is required, it is sufficient that the notice is transmitted electronically directly to the relevant person in a form that allows the notice to be printed by the recipient conveniently (see S6(10)). It would therefore seem to be acceptable for e-mails to be sent. In terms of S24, any information required to be kept by the company must be retained for at least seven years.

3.4 Substantial compliance

Section 6 of the Act provides that a defect on or a deviation from a form of document, record, statement or notice does not necessarily invalidate such document, record, statement or notice, provided that the defect or deviation does not negatively and materially affect the substance of the document, record, statement or notice and will not reasonably mislead the addressee (see S6(8) and (9)).

[1]Quoted from Miers, D.R. & Page, A.C. 1990. ***Legislation***. 2nd edition. London: Sweet & Maxwell (Miers & Page 1990:177) as quoted by Goldswain, G.K. in "***The purposive approach to the interpretation of fiscal legislation – the winds of change"*** published in ***Meditari Accountancy Research Vol. 16 No. 2 2008: 107-121*** on page 117.)

3.5 Plain language

Section 6(4) and (5) contain various provisions which are aimed at ensuring that all documentation and disclosures required in terms of the Act are compiled in such a manner that the addressee will reasonably be able to understand the content and significance of the documentation and disclosures, in other words "***plain language***".

3.6 Actions in contravention of the Act

Note that no agreement, MOI or rules of a company that are prohibited, voidable or may be declared unlawful in terms of the Act are void unless a court declares them void (S218(1)) or unless the Act specifically states that they are void.

3.7 The doctrine of constructive notice

In terms of the previous Act, third parties were deemed to have knowledge of the information contained in a company's Memorandum and Articles of Association, whether they had actual knowledge or not. In terms of the Act, this is no longer the case. S19(4) provides that:

> "***a person must not be regarded as having received notice or knowledge of the contents of any document relating to a company merely because the document-***
>
> a) ***has been filed; or***
>
> b) ***is accessible for inspection at an office of the company.***"

Therefore, although a company is required to "file" its MOI and any amendments thereto with the CIPC and the CIPC is obliged to provide the public with access to documents filed with it, third parties are no longer "deemed" to have knowledge of the contents of the MOI.

The MOI of a company with the expression "(RF)" after its name is the exception to this rule (see S19(5)).

3.8 Application of the Act

The Act only applies to companies and not other juristic forms in South Africa.

The definition of a company in the Act states the following:

"'company' means a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that immediately before the effective date-

(i) was registered in terms of the-

a. Companies Act, 1973, other than an external company as defined in that Act; or

b. Close Corporations Act, 1984, if it has subsequently been converted in terms of Schedule 2;

(ii) was in existence and recognised as an 'existing company' in terms of the Companies Act, 1973; or

(iii) was deregistered in terms of the Companies Act, 1973 and has subsequently been reregistered in terms of the Act."

Therefore this Act applies to companies registered in South Africa. Where the Act refers to a company it is also referring to a South African company; a company registered in another jurisdiction would not have to apply the Act.

3.9 Categories of companies

Reference: Section 8 and Section 11

The following categories of companies exist:

i. Non-profit Companies (to be reflected as “NPC”); and

ii. Profit Companies.

Profit companies are divided into the following sub-categories:

- Private Companies: to be reflected as “Proprietary Limited” or “(Pty) Ltd” (Note that the Act requires no brackets where the long form of the name is used.);
- Personal Liability Companies: to be reflected as “Incorporated” or “Inc”;
- Public Companies: to be reflected as “Limited” or “Ltd”; and
- State-owned Companies: to be reflected as “SOC Ltd”.

If a company’s MOI includes “special conditions”, the name of the company must include the expression “RF”. A special condition is any restrictive condition applicable to the company (e.g. limiting the company’s capacity to trade or contract) or any special provision relating to the amendment of such a restrictive condition. This would typically apply to a special purpose company where the capacity of the company to carry out certain activities has been limited in its MOI and where such provisions in the MOI may not be amended or may only be amended under particular circumstances.

The Act does away with the concepts of “widely-held” and “limited interest” companies that were previously provided for in the 1973 Companies Act.

Non-profit companies

These “replace” the so-called section 21 companies under the previous Act, but the provisions and requirements are more flexible in many respects. Non-profit companies must have a “public benefit” object or an object relating to cultural or social activities or communal or group interests. Not all the provisions of the Act apply to non-profit companies and there are specific provisions contained in Schedule 1 to the Act that govern these companies.

Overall the provisions applicable to non-profit companies are less formalistic and restrictive than used to be the case under the previous Act. For example, non-profit companies are no longer required to have seven members. In terms of Schedule 1, a non-profit company may in its constitution set out whether it will have any members and, if it has members, whether the members will be entitled to vote.

Profit companies

Private companies

The provisions and requirements applicable to private companies are similar to those relating to private companies under the previous Act in that they prohibit an offer of securities to the public and restrict the transferability of their securities. However, private companies are no longer limited to 50 members as was previously the case.

Personal liability companies

The directors and past directors of such companies are jointly and severally liable, together with the company, for any debts and liabilities that were contracted during their periods of office. These provisions are similar to the incorporated professional practices which used the abbreviation "Inc" under the previous Companies Act.

Public companies

These are similar to public companies under the previous Companies Act, although only one member is required (compared to the seven members' requirement previously).

State-owned companies

A state-owned company is a company which is listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act, 1999 (PFMA), or is owned by a municipality and is similar to a public entity as listed in Schedule 2 or 3 of the PFMA.

The majority of the provisions of the Act which apply to a public company will apply to a state-owned company, unless such a provision is specifically exempted by the Minister.

Analysis

4 Memorandum of Incorporation (MOI)

4.1 Scope of MOI

Reference: Section 15(6)

Issue: Scope of the MOI

Issues for consideration

Under the previous Act the memorandum and articles were binding between the company and its members and also among the members ***inter se***.

The MOI under the Act is binding also on directors, prescribed officers and board committee members.

In terms of S15(6), a company's MOI is ***"…binding-***

(a) between the company and each shareholder;
(b) between or among the shareholders of the company; and
(c) between the company and-
- ***i. each director or prescribed officer of the company; or***
- ***ii. any other person serving the company as a member of a committee of the board,***

in the exercise of their respective functions within the company."

4.2 Amended formalities in respect of the MOI

Reference: Forms CoR 15.1A – E

Issue: Amended formalities in respect of the MOI

Issues for consideration

Under the previous Act companies had to register "Memorandums of Association" and "Articles of Association". The content of the articles was not prescribed, but Table A or Table B of the previous Act could be used and applied unless excluded or modified by the company.

The Act replaces the memorandum and articles with a single memorandum of incorporation (MOI). On the incorporation of a new company, the MOI must be completed and filed by way of a notice of incorporation. Forms CoR 15.1 A to CoR 15.1 E provide the format of the MOI for the different categories of companies.

4.3 Filing of the MOI

Reference: Section 1; Schedule 5, Transitional arrangements, paragraph 4

Issue: When must the MOI be filed?

Discussion

New companies must on incorporation complete and file the MOI by way of a notice of incorporation.

For pre-existing companies the current Memorandum and Articles of Association become the new MOI by operation of law (see definition of MOI in S1).

In terms of the transitional provisions, a company may within two years of the Effective Date, without charge, amend its MOI to harmonise it with the Act and alter its name. As mentioned below, it is submitted that companies may not within the two-year transitional period amend the MOI to introduce matters which are non-compliant with the requirements of the Act, such as that a special resolution is not required to authorise directors' remuneration. This is against the intention of the transitional provisions and S15 of the Act.

During a period of two years immediately following the Effective Date, if there is a conflict between the Act and a provision of the MOI, the MOI will prevail (with certain exceptions referred to below).

Issues 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 as from the Effective Date (in other words regardless of the content of the MOI):

- a person who is ineligible or disqualified from being a director, alternate director, prescribed officer, company secretary or auditor is deemed to have resigned from any office held in that company;
- a company is deemed to have a number of vacancies on the board equal to the difference between the minimum number of directors required in terms of the Act and the actual number of directors of the company;
- a vacancy in the office of director, company secretary or auditor must be filled in accordance with the Act;
- the duties, conduct and liability of directors apply to every director of a pre-existing company;
- rights of shareholders in terms of the Act to receive any notice or have access to any information;
- provisions regarding meetings of shareholders or directors, and adoption of resolutions must be carried out in accordance with the Act;
- the provisions relating to fundamental transactions apply;
- any distribution, financial assistance, and insider share issue or options (even if such action had been approved by the company's shareholders before the Effective Date) must be approved in terms of the provisions of the Act;
- the right of any person to seek 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 same conduct before the Effective Date.

Note: The significance of the transitional provisions is that they may create a false sense of security that a particular current position (previous Act) continues to apply. The Act will apply as from the Effective Date, unless specifically excluded in the MOI and, therefore, where the Act contains Alterable provisions which are not altered in the existing Articles, the Act will prevail despite the continuance of the existing Articles and Memorandum of Association as the MOI.

4.4 Special conditions in the MOI

Reference: Section 11(3), Section 13(3) and Section 15(2)

Issue: Inclusion of special conditions in the MOI

Issues for consideration

Section 53 of the previous Act entitled a company to include special conditions in the Memorandum of Association. Similarly S15(2) of the Act permits special conditions. Section 13(3) requires the inclusion of a prominent statement in the notice of incorporation which indicates the existence of each special condition and its location in the MOI. Section 11(3) determines that if a company's MOI includes any special condition, its name must also be immediately followed by the expression "RF" to alert third parties dealing with the company that such special conditions exist.

4.5 Third-party knowledge of special conditions in the MOI and the doctrine of constructive notice

Reference: Section 19(4), Section 19(5), Section 20(1) and Section 20(7)

Issue: Third-party knowledge of special conditions in the MOI and the doctrine of constructive notice

Discussion

In terms of the previous Act, third parties were deemed to have knowledge of the information contained in a company's Memorandum and Articles of Association, whether they had actual knowledge or not. In terms of the Act, this is no longer the case. Section 19(4) provides that:

> ***"a person must not be regarded as having received notice or knowledge of the contents of any document relating to a company merely because the document-***
>
> ***a) has been filed; or***
>
> ***b) is accessible for inspection at an office of the company."***

The MOI of a company with the expression "(RF)" after its name is the exception to this rule (see S19(5)). Section 19(5) of the Act provides that if a third party's attention is drawn to the inclusion of special conditions in the MOI, such third party must be regarded as having received notice and of having knowledge thereof.

Therefore, although a company is required to "file" its MOI and any amendments thereto with the CIPC and the CIPC is obliged to provide the public with access to documents filed with it, third parties are no longer "deemed" to have knowledge of the contents of the MOI.

Issues for consideration

Owing to the impact of S20(1), special conditions in the MOI should be effected in such a manner that they satisfy the prescribed procedural requirements, as opposed to being limitations on the capacity of the company to enter into transactions. Actions in contravention of a limitation on capacity will not be void, in terms of S20(1) of the Act. Section 20 can be compared to S36 of the previous Act.

Furthermore, S20(7) of the Act codifies the existing “Turquand Rule” and provides that a third party dealing with the company in good faith is entitled to assume that the company, in exercising its powers, has complied with all the formal and procedural requirements in terms of the Act, the MOI and any other rules of the company unless in the circumstances the person knew or reasonably ought to have known of any failure by the company to comply with a requirement.

4.6 Alterable and unalterable provisions

Reference: Section 1 and Annexure A

Issue: The Act states that certain provisions of the Act can be altered.

Discussion

Unlike the previous Act, the Act offers flexibility to companies by entitling them to alter certain alterable provisions of the Act.

Alterable provisions are defined in S1 as provisions which expressly contemplate that their effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company’s MOI.

These alterable provisions merit careful consideration for, if an alterable provision is not altered in the company’s MOI as permitted by the Act, then the Act in that regard will apply to such company.

By the same token and by definition an unalterable provision means a provision of the Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company’s MOI or rules.

Section 15(2)(a)(iii) does, however, specifically allow a company to impose on the company “a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision” of the 2008 Act. A company cannot therefore remove or diminish an unalterable provision by way of a different requirement in the MOI, but a company may impose on the company a more onerous requirement pertaining to that unalterable provision by way of additional requirements stipulated in the MOI.

Alterable provisions mainly relate to the allocation of power between shareholders and directors, the procedure dealing with convening of shareholder and directors’ meetings, quorums required at meetings and the majority vote requirements for passing ordinary and special resolutions. Some examples of alterable provisions are:

- quorums at meetings where the company may specify a lower or higher percentage in place of the 25% required;
- the higher percentage that a company may require for ordinary resolutions, or permitting a different percentage of voting rights than 75% to approve a special resolution.

Issues for consideration

There is a need for the immediate assessment of provisions to be inserted in the MOI to ensure:

- no unintended consequences arise as a result of the operation of the alterable provisions (see Annexure A); in other words, the assessment should establish which alterable provisions should immediately be excluded or amended. An example of a provision that may be excluded is the powers of the directors in terms of S36(2)(b) to authorise or issue shares and the rights, limitations or preferences of any shares;

- alignment and compliance with provisions that are immediately effective, for example notices of shareholders' meetings, and dissenting shareholders' appraisal rights (see S164 read with Schedule 5 par 7(5)(b));

- the mitigation of the immediate impact of the Act on the company.

Additional considerations

An immediate review of the provisions of the Act should take place to establish which provisions may be convenient for companies to apply immediately, for example allowing for shareholder and director "round robin" resolutions which may be passed by a simple majority instead of the restrictive 100% majority that is currently the norm (see S60 and S74 respectively) and ensuring that there is nothing in the current MOI that will prevent its immediate application.

During the two years immediately after the Effective Date, a full and detailed analysis of the provisions of the Act and the drafting of a new MOI that aligns with the requirements of the company as well as its business partners (for example existing joint venture partners) should take place.

Examples of matters that can be considered during the two years immediately after the Effective Date are:

- whether to provide for different percentages for the passing of ordinary or special resolutions (see S65(8) and (10)); and

- the extent to which directors and prescribed officers will be indemnified by the relevant company (S78).

4.7 Shareholders' agreements

Reference: Section 15(7), Wording of Alterable Provisions in Annexure A; Annexure B, Section 1 definition of MOI (b)(ii) and Schedule 5, Item 4(3A).

Issue: Shareholders agreements

Discussion

Shareholders' agreements and joint venture agreements:

1.1 must be consistent with the Act and the MOI (but see the transitional provisions (Schedule 5, Item 4(3A)) that provide that shareholders' agreements in place on 1 May 2011 will continue to have the same force and effect that they had prior to 1 May 011, until amended or the expiry of two years, whichever is the earlier);

1.2 will only be effective to exclude or amend alterable provisions during the "grace period"; and

1.3 may become (part of) the MOI and therefore be a public document.

In terms of S15(7) the shareholders of a company may enter into any agreement with one another regarding any matter relating to the company, but the agreement must be consistent with the Act and the MOI (it will be void to the extent of any inconsistency). However, in terms of the transitional provisions in Schedule 5, Item 4(3A), the agreement will, despite S15(7), be valid for a period of two years from the Effective Date, after which period it will be valid only to the extent that it is consistent with the Act and the MOI.

Note: Any amendment made to the shareholders' agreement during the two-year "grace period" will have the result that the "grace period" expires immediately.

The consequence is that a shareholders' agreement can effectively amend the alterable provisions of the Act for a period of two years.

Issues for consideration

During the two years after the Effective Date, companies should perform a full, detailed analysis of the provisions of existing shareholders' agreements relating to the company to understand:

- whether the shareholders' agreement will contradict either the Act or the MOI;
- whether the shareholders' agreement affects any alterable provisions;
- whether the shareholders' agreement could become part of the MOI by operation of law;
- whether the matters discussed in Annexure B or other matters of convenience, for example the new voting thresholds required for fundamental transactions contemplated in S115(3), are or should be addressed in the shareholders' agreement.

Within the two-year period immediately after the Effective Date, an assessment of the shareholders' agreement must be carried out to determine whether to insert new provisions into or delete existing provisions from the agreement, and an analysis of its interaction with the Act and relevant MOI of the company must be undertaken, considering, for example:

- where the shareholders' agreement is inconsistent with the Act or MOI, amendments to the relevant provisions;
- confidential arrangements which would preferably be included in a shareholders' agreement rather than an MOI.

5 Interpretation of certain issues

5.1 Subsidiary relationships

Reference: Section 3

Issue: Definition of subsidiary relationships

Discussion

A company is a subsidiary of another juristic person if that juristic person or one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person or any of its subsidiaries, alone or in any combination:

1. is directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or
2. has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board.

Issues for consideration

For the purposes of determining whether a person controls all or a majority of the general voting rights:

1. voting rights attached to securities that will only be issued in certain circumstances will be included if the circumstances have been met and for as long as they continue to be met or the circumstances are under the control of the person holding the voting right;
2. voting rights that are exercisable only on the instruction or with the consent or concurrence of another person are to be treated as being held by that other person;
3. voting rights held by a person in a fiduciary capacity are to be treated as held by the beneficiary of those voting rights.

A subsidiary would be classified as a wholly owned subsidiary of another juristic person if **all** of the general voting rights associated with issued securities of the company are held or controlled (directly or indirectly) by that juristic person.

The definitions provided in S3 of a “subsidiary” and a “wholly-owned subsidiary” are for the purposes of the Act and may be different from the definitions provided in the financial reporting standards as identified in Regulation 27. For example, in accordance with S3 of the Act, a subsidiary can only be a company as defined in S1 of the Act. In accordance with IFRS, IFRS for SMEs and SA GAAP (refer to Appendix C of the guide), any entity can be a subsidiary regardless of legal form as long as it is controlled by the holding company. For the purposes of the preparation of the financial statements as required by S29 of the Act, the requirements of the financial reporting standards as prescribed by Regulation 27 should be applied.

In accordance with the Companies Act, any **juristic person** (as defined in S1 of the Act) can be a holding company, which includes trusts. This application is significantly different from the previous Act, which indicated that only a company as defined by that Act could be classified as a holding company.

5.2 Performing the solvency and liquidity test

Reference: Section 4

Issue: Performing the solvency and liquidity test

Discussion

The manner in which and when the solvency and liquidity test should be performed are not clear.

Issues for consideration

A company is required to perform a solvency and liquidity test for the following actions:

- providing financial assistance for the subscription of its own securities (S44);
- providing loans or other financial assistance to directors and to a related or inter-related company (S45);
- making distributions (S46);
- issuing capitalisation shares (S47);
- acquiring own securities (S48); and
- amalgamating or merging (S113).

Solvency test

- The solvency test is designed to determine whether the assets fairly valued exceed the liabilities fairly valued on the date that the test is performed.

Liquidity test

- The liquidity test is designed to indicate whether the company will be able to settle its debts when they become due in the ordinary course of business within at least 12 months after the test is performed or, in the case of distributions, 12 months after the distribution is made.
- It is recommended that the liquidity test is performed by carrying out a detailed cash flow analysis that clearly indicates the expected cash inflows and outflows of the company for at least the following 12 months. This will clearly indicate the ability of the company to pay its debts when they become due and its ability to generate cash in its ordinary course of business. The budget of the company as well as its cash conversion ability (ability to generate cash profits based on experience) should be applied as the basis for this test.

Information to be used for the liquidity and solvency test

Step 1: The tests should be performed by obtaining the information as provided in the:

- accounting records prepared in accordance with S28 and Regulation 25; and
- financial statements prepared in accordance with S29 and Regulation 27.

Step 2: When evaluating the financial information obtained in Step 1, a company should remember that not all components presented were measured at their fair value or that all items required to be considered by S4 of the Act were included in the accounting records and the financial statements. A company would therefore be required to:

- obtain a fair value for all assets and liabilities not measured at their fair value in the accounting records and financial statements; and
- obtain the fair values of contingent assets (for example client lists, trade names) and contingent liabilities (for example legal claims against the company that did not meet the recognition criteria of the applicable financial reporting framework) that were not recognised in the accounting records or financial statements of the company.

Step 3: Lastly a company should evaluate the reasonableness of the fair values already obtained. At this stage any other valuation of the assets and liabilities should be considered as identified in Step 1 and Step 2 that appears to be reasonable in these circumstances.

Practical issues to consider are the following:

- Determination of the fair value of a liability subject to a subordination agreement:

  A subordination agreement attached to a liability can affect the fair value of that liability. The company should substantiate and apply the likely repayment term when calculating the fair value of the loan, even though this might not have applied in terms of the applicable FRSs.

  For more guidance on the treatment of subordination agreements and the implications of a company that trades under circumstances where the company is not liquid and solvent, refer to the ***"SAICA Guide on Trading Whilst Factually Insolvent".***

- The classification of equity and liabilities should not be changed for the purposes of the liquidity and solvency test:

  The applicable financial reporting standards prescribe the manner in which the components of the financial statements should be classified. With the calculation of liquidity and solvency, a company should not change this classification. For example, certain intercompany loans with no repayment terms are seen by some as an extension of equity and should be classified as equity. However, when IFRS or IFRS for SMEs are applied, these loans should be classified as a liability as the company has an obligation to deliver cash in future. A company would not be allowed to transfer the liability to equity and in this way instantly improve its liquidity and solvency position. A company would, however, be permitted to apply the deemed repayment terms in establishing the fair value of the loans, as long as these can be reasonably substantiated.

- The Act requires the independent reviewer to report to the Commission where any person responsible for management of the company is causing the company to trade under insolvent circumstances.

6 External companies

Reference: Section 13, Section 23, Section 32, Section 33, Section 115 and Section 159

Issue: How does the Act impact on external companies?

Discussion

The previous Act applied to external companies in its entirety unless otherwise stated. The Companies Act does not include an external company in the definition of a company and therefore the complete Act does not apply to external companies.

An external company will be recognised as doing business in South Africa if it has any employees in the Republic or if it is engaging in a course of conduct or has engaged in a course or pattern of activities over a period of at least six months that would lead a reasonable person to conclude that the company continues to engage in business in the Republic.

When applying the test, the items noted below may be indicators of a foreign company conducting business in the Republic, but a foreign company must not by default be regarded as conducting business activities if it engages in one or more of the following requirements as stated in S23(2A):

- holding a meeting or meetings within the Republic of the shareholders or board of the foreign company, or otherwise conducting any of the company's internal affairs within the Republic;
- establishing or maintaining any bank or other financial accounts within the Republic;
- establishing or maintaining offices or agencies within the Republic for the transfer, exchange or registration of the foreign company's own securities;
- creating or acquiring any debts within the Republic, or mortgages or security interests in any property within the Republic;
- securing or collecting any debt, or enforcing any mortgage or security interest within the Republic; or
- acquiring any interest in any property within the Republic.

External companies are required to maintain at least one office in the Republic and register the address of this office or of its principal office when filling in its registration forms. External companies remain liable to file annual returns.

The Act does not contain the onerous provisions that apply to external companies in terms of the previous Act. External companies will not be required to be audited or independently reviewed and do not face requirements in terms of the enhanced accountability requirements set out in Chapter 3 of the Act.

Table 1 below highlights some of the salient differences between the requirements of the previous Act and the 2008 Act.

Table 1: Companies Act requirements for external companies

Previous Act	**New Act**
Register within 21 days	Register within 21 business days
Companies Act applicable unless otherwise stated	Companies Act only applicable where stated
Required to appoint auditor	No requirement
Appoint and have at least one resident person to accept services in the Republic	Appoint and have at least one person located in South Africa to accept services in the Republic
Keep accounting records and lodge annual financial statements (AFS)	No requirement
The process to deregister an external company is set out	No deregistration, dissolution or winding-up procedures
Failure to meet Companies Act requirements is classified as an offence	No offence
External company cannot be voluntarily wound up, but can be placed under liquidation by Court	No requirement
External company can transfer its registration to South Africa	External company can transfer its registration to South Africa, referred to as a "domesticated company" in the Act

Issues for consideration

If an external company does not register within three months after commencing activities in the Republic, the Commission may issue a compliance notice requiring it to register within 20 business days after receiving the notice. If the external company fails to register, the Commission may request the external company to cease doing business in the Republic.

The Act also provides for a mechanism by which foreign companies can be "domesticated". This means that a foreign company can transfer its registration to South Africa. In order to transfer its registration the foreign company must comply with the specific provisions of the Act. These include establishing that the law of the jurisdiction in which the company is registered permits such a transfer; obtaining the approval of its shareholders; ensuring that the whole or greater part of its assets and undertaking are within South Africa, other than the assets and undertaking of any subsidiary that is incorporated outside South Africa; and ensuring that the majority of its shareholders are resident in South Africa and that the majority of its directors are or will be South African citizens. The company must, after registration, satisfy the solvency and liquidity test and no longer be registered in another jurisdiction.

The obligations of external companies are set out in S23 of the Act and appear much less onerous than the obligations which apply in terms of the previous Act.

7 Accounting, company records, financial statements and auditing

7.1 Company records

Reference: Section 24, Section 25 and Section 26

Issue: Security holders have enhanced rights to access information.

Discussion

Certain important compliance-related provisions are made in the Act, including that:

- records of the company referred to in S24 must be kept at, or made accessible from, the company's registered office or another location within the Republic. In respect of each of the records contemplated in S24 which are not kept at or made accessible (presumably in the case of electronic documentation) from the company's registered address a notice must be filed with the Commissioner;
- accurate and complete accounting records of the company must be kept at or made accessible from the company's registered office. Refer to section 7.5 for the requirements relating to the form and content of accounting records.

Issues for consideration

The company will generally be obliged to comply with the administration and recordkeeping provisions of the Act from the Effective Date. In this regard we suggest that the current systems and practices be evaluated for compliance and for considering possible changes required to the current systems and practices.

Table 2: Retention of documents

	Document	**Retention period**
1.	Any documents, accounts, books, writing, records or other information required to be kept in terms of the Act and other public regulations	7 years or longer as stated in public regulations
2.	Registration certificate	Indefinite
3.	Memorandum of Incorporation and alterations or amendments	Indefinite
4.	Company rules	Indefinite
5.	Securities register and uncertificated securities register	Indefinite
6.	Register of company secretary and auditors	Indefinite
7.	Regulated companies (companies to which Chapter 5, parts B, C and Takeover Regulations apply) - Register of disclosures of persons who hold beneficial interest equal to or in excess of 5%of the securities of that class issued	Indefinite
8.	Notice and minutes of all shareholder meetings, including: • Resolutions adopted • Documents made available to holders of securities	7 years
9.	Copies of reports presented at the annual general meeting (AGM) of the company	7 years
10.	Copies of annual financial statements (AFS) required by the Act	7 years
11.	Copies of accounting records as required by the Act	7 years
12.	Record of directors and past directors, after the directors have retired from the company	7 years
13.	Written communication to holders of securities	7 years
14.	Minutes and resolutions of meetings of directors', audit committee and directors' committees	7 years

7.2 Annual returns

Reference: Section 33 and Regulation 30

Issue: All companies have to complete an annual return on an annual basis.

Issues for consideration

- Every company must file an annual return within 30 business days after the anniversary of its date of incorporation, using Form CoR30.1.
- Companies that are required to be audited are obliged to submit copies of the annual financial statements (AFS) with their annual returns (S33(1)). All other companies can either submit their AFS or complete a Financial Accountability Supplement (Form CoR30.2).
- Every external company must file an annual return within 30 business days after the anniversary of its date of registration as an external company on Form CoR30.3.
- The annual return must also include the name of the person who will be designated to ensure that the company complies with the requirements of Chapter 2, Part C and Chapter 3.

7.3 Right to access information

7.3.1 Enhanced right by security holders to access information

Reference: Section 26, Section 31 and Section 187(5)

Issue: Security holders have additional rights to access information.

Discussion

- Section 26 deals comprehensively with access to information by "***a person who holds or has a beneficial interest in any securities issued by the company***", and contemplates a process in terms of which the relevant person can "demand" access (i.e. access is not automatic).
- Note that this section refers to the holder of any security as defined or a person with a beneficial interest in a security, not only shareholders.
- Security holders have a right to access ***inter alia*** the following:
    - the MOI and any amendments to it;
    - any rules of the company;
    - records of the company's directors;
    - reports to annual meetings;
    - AFS;
    - notices and minutes of shareholders' meetings (including resolutions and documents presented in relation to those resolutions);

   - written communications sent generally by the company to all holders of any class of the company's securities;
   - securities register.
- Security holders do not, in terms of S26, have an automatic right to access the company's accounting records or minutes of directors' meetings.
- The MOI may provide for the accessing of further information by security holders.

In terms of S31, any person who holds or has a beneficial interest in any security issued by a company is entitled, without demand, to notice of publication of AFS and the steps to be followed to obtain copies.

Issue for consideration

- Consider whether the MOI should grant the additional right to access information:

Depending on the number of shareholders and the existence of other "securities" in respect of a particular company, the company should assess whether its present records and registers contain sufficient and updated information on all holders of securities as well as those who are not the registered holders but who hold a beneficial interest in securities. This assessment should be undertaken as soon as possible. Where access to records is requested, information or access to the information must be provided within 14 business days.

The register of members and directors must be available for inspection during normal business hours at no cost to any member, and any other person should not pay more than R100.00 to inspect the registers.

Companies should take note that it is an offence not to provide the information on the basis of a reasonable request or to refuse access to the information unreasonably.

7.3.2 Right of creditors

Reference: Section 31(2)

Issue: Right of judgement creditor to access AFS

Discussion

If a judgement creditor of a company has been informed, by a person whose duty it is to execute the judgement, that there appears to be insufficient disposable property to satisfy that judgement, the judgement creditor is entitled, within five business days after making a demand, to receive without charge one copy of the most recent AFS of the company.

Issue for consideration

It is an offence not to comply with the request within five business days. Companies should therefore ensure that they either comply with the request or obtain specific legal advice regarding any other actions to be taken.

7.3.3 Rights of unions

Reference: Section 31(3)

Issue: Rights of trade unions to access information

Discussion

- Section 31(3) provides that trade unions must, through the CIPC and under conditions as determined by the CIPC, be given access to company financial statements for purposes of initiating business rescue proceedings.
- Note that the term "trade union" in this section is not defined. It probably refers to any trade union registered in terms of S96 of the Labour Relations Act No. 66 of 1995, regardless of the level of representation of union members in a particular company.

Issue for consideration

We propose that the boards of companies consider whether S31(3) constitutes a risk to the companies and whether mitigating steps, if any, should be put in place in anticipation of a request by any trade union for access to financial statements.

It is an offence not to comply with the request within five business days. Companies should therefore ensure that they either comply with the request or obtain specific legal advice regarding any other actions to be taken.

7.3.4 Rights of access to documents filed with the Commission

Reference: Section 33(1) read with Regulation 30(2), Section 187(5) – (7) and Section 212

Issue: Right of persons to access documents filed with the Commission

Discussion

- Section 187(5) allows any "person" to, on payment of the prescribed fee:
  - inspect any document filed in terms of the Act;
  - obtain a certificate from the Commission regarding the contents of any document that has been filed by a company in terms of the Act and which is open to inspection;
  - obtain a copy of any such document.

The above will not apply if the information has been determined to be confidential in terms of S212 of the Act. To claim confidentiality, the claim must be supported by a written statement explaining why the information is confidential. The Commission must then consider the claim of confidentiality and make a decision on the confidentiality of the information. If the Commission concludes that the information is not to be considered confidential, a party may apply to a court for an appropriate order.

Issue for consideration

Read with Regulation 30, S33 of the Act requires a company that is required to be audited by the Act or the Regulations also to attach a copy of the latest approved audited financial statements to the annual return; there is thus a risk that S187 may allow any person (i.e.

including a person not related to the company) to request and receive a copy of those financial statements or a certificate outlining the contents of these statements.

7.4 Financial year of a company

Reference: Section 27

Issue: Requirements for the year end of a company

Discussion

The first financial year of a company may not end more than 15 months after the date of registration of the company.

A company is allowed to change its financial year end only once during a financial year by filing Form CoR25. After the change the following financial year end should not be more than 15 months after the end of the preceding financial year.

7.5 Accounting records

Reference: Section 28 and Regulation 25

Issue: Accounting records required

Discussion

A company must keep accounting records in an official language of the Republic, as necessary to provide an adequate information base sufficient to support the preparation of the financial statements as required by Regulation 27 and the audit or review requirements of Regulations 28 and 29.

Regulation 25 provides guidance regarding the types and the content of accounting records that should normally be kept by a company to meet the requirements of Regulations 27, 28 and 29. This is, however, guidance and management of the company should use its judgement in deciding what information is required to meet the requirements of Regulations 27, 28 and 29.

7.6 Financial statements

7.6.1 Summarised financial statements

Reference: Sections 1 and 29 and Regulation 27

Issue: What does the Act require when a company elects to provide a summary of its financial statements?

Discussion

While S1 of the Act does not include summarised financial statements in its definition of financial statements, S29 makes provision for companies to provide a summary of any particular financial statement to any person.

Specifically, in providing the notice of the annual general meeting (AGM) to shareholders, the Act requires the notice to include either the financial statements to be presented or a summarised form of these statements.

The Act does not mandate the preparation of summarised financial statements, but if a summary of any particular financial statement is provided to any person section 29(3) states-

"(a) any such summary must comply with any prescribed requirements; and

(b)the first page of the summary must bear a clear prominent notice–

i. ***stating that it is a summary of particular financial statements prepared by the company, and setting out the date of those statements;***

ii. ***stating whether the financial statements that it summarises have been audited, independently reviewed, or are unaudited;***

iii. ***stating the name, and professional designation, if any, of the individual who prepared, or supervised the preparation of, the financial statements that it summarises; and***

iv. ***setting out the steps required to obtai***n a copy of the financial statements that it summarises."

To the extent that the prescribed financial reporting standards contained in Regulation 27 to the Act provide guidance for summarised financial information, companies should apply this guidance in the preparation of their summarised financial statements.

Currently none of the IFRS, SA GAAP or IFRS for SMEs contains guidance for the preparation of summarised financial statements.

It is our view that the requirements of S29(3) do not extend to newspaper advertisements or SENS notices of company results. These are advertisements and compliance notices respectively and do not fall within the ambit of "summaries", which are envisaged to be official company documents in book/let form.

Similarly presentations and result booklets do not need to meet the requirements of S29(3).

Issue for consideration

Where a company elects to prepare summarised financial statements, the company must ensure that, at a minimum, such statements satisfy the requirements of the Act.

7.6.2 Independent accounting professional

Reference: Regulation 26

Issue: The Regulations state that the independent accounting professional responsible for the independent review of financial statements may not be responsible for the compilation and preparation of those financial statements.

Discussion

The Regulations define an independent accounting professional as a person who is:

- a registered auditor in terms of the Auditing Profession Act, No 26 of 2005;
- a member in good standing of a professional body that has been accredited in terms of S33 of the Auditing Profession Act; or

- qualified to be appointed as an accounting officer of a close corporation in terms of S60(1), (2) and (4) of the Close Corporations Act, 1984.

Such person must meet the independence criteria described below:

> ***Regulation 26(1)(d)***
> ***"(ii)does not have a personal financial interest in the company or a related or inter-related company; and***
> ***(iii)is not***
> > ***(aa)involved in the day-to-day management of the company's business, nor has been so involved at any time during the previous three financial years; or***
> > ***(bb)a prescribed officer, or full-time executive employee of the company or another related or inter-related company, nor has been such an officer or employee at any time during the previous three financial years; and***
>
> ***(iv)is not related to any person who falls within any of the criteria set out in clause (ii) and (iii)"*** (the term "related" is defined in S2 of the Act).

Employee compiling AFS

The question arises as to whether an employee of a company who meets the qualifications of an independent accounting professional may compile the AFS of the company, and whether such AFS can be considered to be independently compiled?

Assume that the employee is not involved in the day-to-day management of the company's business and is not a prescribed officer or full-time executive employee of the company; nor is he related to anyone performing such functions.

The matter to be considered is whether the employee can be said to have a personal financial interest in the company. Section 1 states that a ***"'personal financial interest', when used with respect to any person-***

- ***(a) means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed; but***
- (b) ***does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act No. 45 of 2002, unless that person has direct control over the investment decisions of that fund or investment***."

There are differing views on these issues.

Recommended view

The salary which the employee earns from the company represents a direct material interest of that employee in the Company A, as his salary represents a material source of his personal income. As such if the employee were to compile the AFS, such statements would not be regarded as being independently compiled.

One could argue that as a result of his membership of a professional body, such as the South African Institute of Chartered Accountants (SAICA), the employee would be required to satisfy any independence requirements as contained in the applicable professional code, such as the Code of Professional Conduct. Despite the fact that some comfort may be obtained from the fact that the employee will not conduct himself in a manner contrary to this code, his position as employee means that he is subject to an employment contract and in order to fulfil this role he is likely to be influenced by instruction from his superiors. This means that he cannot be considered to be independent of the company or fellow group companies.

It is thus our view that employees of companies will not meet the independence criteria for independent accounting professionals and thus cannot be appointed as independent accounting professionals for the company which employs them.

Alternative view

There is similarly a belief that the receiving of a salary does not constitute a personal financial benefit. Where a company holds this view then where an employee is not involved in the day-to-day management or employed in an executive capacity, he may be regarded as an independent accounting professional.

Employee compiling related company's AFS

Similarly the question arises as to whether an employee of group Company A who meets the qualifications of an independent accounting professional may compile the AFS of fellow group Company B, and whether such AFS may be considered to be independently compiled?

Assume that the employee is not involved in the day-to-day management of Company B's business and is not a prescribed officer or full-time executive employee of either Company A or Company B; nor is he related to anyone performing such functions.

The matter to be considered is whether the employee can be said to have a personal financial interest in either Company A or Company B.

There are differing views on these issues.

Recommended view

The salary which the employee earns from Company A represents a direct material interest of that employee in Company B (a related company), as his salary represents a material source of his personal income. As such if the employee were to compile the AFS of Company B, such statements would not be regarded as being independently compiled.

One could argue that as a result of his membership of a professional body, such as the South African Institute of Chartered Accountants (SAICA), the employee would be required to satisfy any independence requirements as contained in the applicable professional code, such as the Code of Professional Conduct. Despite the fact that some comfort may be obtained from the fact that the employee will not conduct himself in a manner contrary to this code, his position as employee will mean that he is subject to an employment contract and in order to fulfil this role he is likely to be influenced by instruction from his superiors. This means that he cannot be considered to be independent of the company or fellow group companies.

It is thus our view that employees of group companies will not meet the independence criteria for independent accounting professionals and thus cannot be appointed as independent accounting professionals for fellow group companies.

Alternative view

There is a belief that the receiving of a salary does not constitute a personal financial benefit. Where a company holds this view then where an employee is not involved in the day-to-day management or employed in an executive capacity, he may be regarded as an independent accounting professional.

Table 3: Persons qualified to be appointed as accounting officers

	Professional bodies whose members qualify to act as accounting officers
1.	The South African Institute of Chartered Accountants • A Chartered Accountant (SA) – CA(SA) – or • An Associate General Accountant (SA) – AGA(SA)
2.	Auditors registered in accordance with the provisions of the Auditing Profession Act No. 26 of 2005 • A Registered Auditor – RA
3.	The Southern African Institute of Chartered Secretaries and Administrators – ACIS/FCIS
4.	The Chartered Institute of Management Accountants – CIMA
5.	The South African Institute of Professional Accountants – Professional Accountant (SA)
6.	The Chartered Association of Certified Accountants – ACCA
7.	The Institute of Administration and Commerce of Southern Africa – IAC
8.	The South African Institute of Business Accountants – SAIBA
9.	The Members of the Chartered Institute for Business Management

7.6.3 Internal versus independent compilation of financial statements

Reference: Section 30 and Regulation 26

Issue: Internal versus independent compilation of financial statements.

Discussion

A company's financial statements may be compiled internally or independently. AFS will be considered to be compiled internally unless they have been **independently compiled and reported**. AFS are defined as being independently compiled and reported when–

- they are prepared by an independent accounting professional;
- on the basis of financial records provided by the company; and

- they are compiled in accordance with any relevant financial reporting standards.

The default position is that AFS are internally compiled unless it is asserted that they are independently compiled and reported subject to the above criteria being met.

The question arises as to the difference in meaning of the terms “prepared” and “compiled”. It would seem as if prepare and compile in the ordinary sense have the same meaning as defined in Dictionary.com:

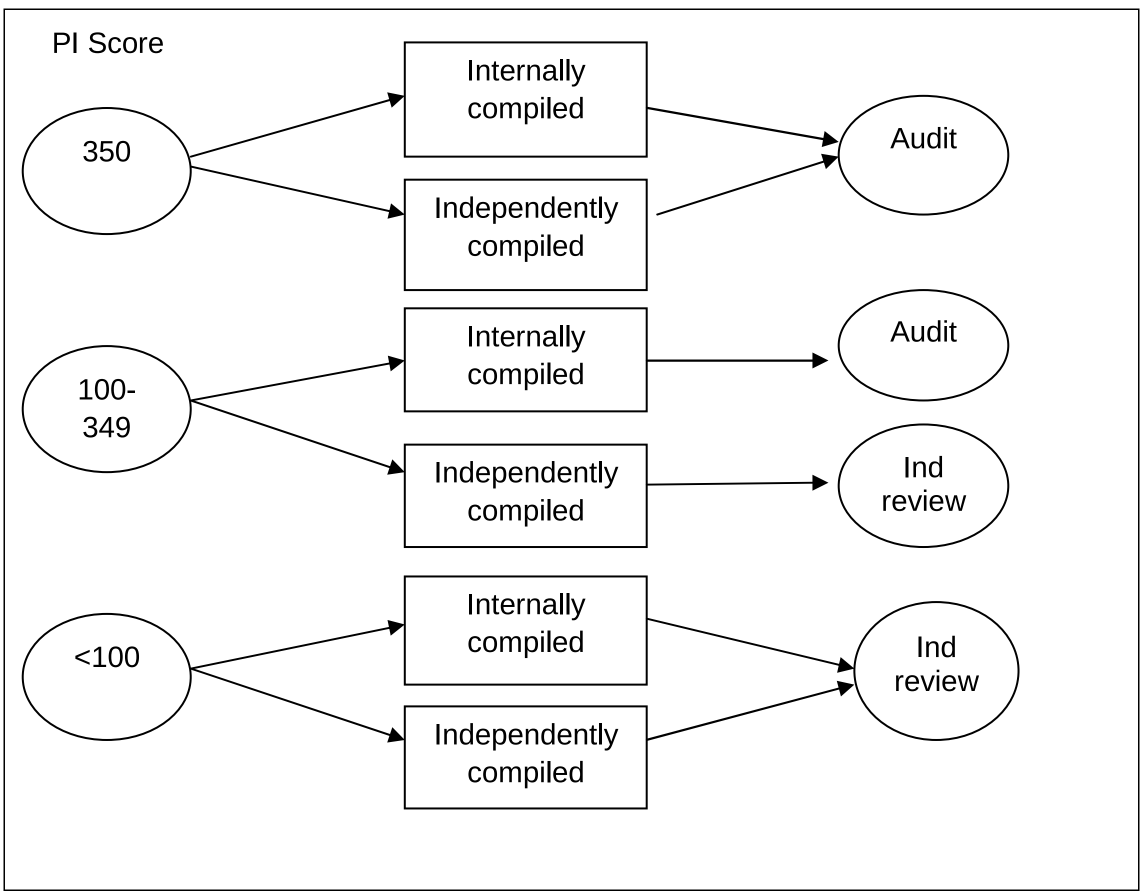
“***’Compile’ means to put together (documents, selections, or other materials) in one book or work.***

‘Prepare’ means to put in proper condition or readiness.”

The preparation and compilation of financial statements include the compilation of the income statements, balance sheet, cash flow statement and notes. The financial records used for this process include the ledgers, journals, documents AND trial balance.

The distinction between internal or independent compilation is important when clarifying whether a company should be audited or reviewed in certain circumstances.

Table 4: Requirements for independent or internally compiled financial statements



We believe that companies should decide whether they want their financial statements to be independently compiled. Should that be the case, then they should ensure that they meet the requirements for financial statements to be “independently compiled and reported”. If a company does not meet the requirements, its statements will be considered to be internally compiled, as the Regulations specifically state that all financial statements are deemed to have been prepared internally unless they specifically meet the requirements for being considered independently compiled and reported.

The requirements for financial statements to be considered independently compiled include that they are:

- compiled by an independent accounting professional (as discussed in section 7.6.2);
- on the basis of financial records provided by the company. Financial records could include the trial balance, journals and other ledgers;
- in line with the relevant financial reporting standards – the financial reporting standards are the standards prescribed in the Regulations.

All three requirements must be met for the financial statements to be considered independently compiled and reported. If one of the requirements is not met, then the financial statements would be considered internally compiled.

The issue arises regarding where a line can be drawn between independent and internal compilation. What would be the case, for example, where a person or company was employed to prepare the financial/accounting records and then prepare the financial statements? Companies would have to evaluate whether the three requirements were met, and, if not, then the statements could not be considered to be independently compiled.

Issue for consideration

The company must ensure that an appropriately qualified person is appointed to act as the independent accounting professional.

7.6.4 Requirements for annual financial statements

Reference: Section 1 and Section 30

Issues

- Are company-specific financial statements still required to be prepared for a company that prepares consolidated financial statements?
- When should AFS be prepared?
- When should financial statements be approved and who should approve them?
- What are additional disclosure requirements for the preparer or the supervisor of the preparation of the AFS?

Discussion

Section 30 requires that every company prepare AFS each year within six months after the end of its financial year.

Additionally S30 requires that the AFS of a company must—

a) “Include an auditor’s report, if the statements were audited;

b) ***include a report by the directors with respect to the state of affairs, the business and profit or loss of the company, or of the group of companies, if the company is part of a group, including—***
   1) ***any matter material for the shareholders to appreciate the company's state of affairs; and***
   2) ***any prescribed information;***

c) ***Be approved by the board and signed by an authorised director; and***

d) ***Be presented to the first shareholders meeting after the statements have been approved by the board."***

It is, however, important to note that:

- there is no specific timing requirement for the first shareholders' meeting where the AFS will be presented to the shareholders; and
- the AFS can be signed by only one director where the previous Act required at least two directors;
- S29 requires that all sets of financial statements prepared by a company, including AFS, set out on the first page:
  - o the name and professional designation, if applicable, of the person who prepared or assisted with the preparation of the financial statements;
  - o the fact that the financial statements were subjected to an audit, or a review or neither.

Section 30 requires each **company** to prepare AFS. If a group scenario exists, consolidated financial statements may be required to be prepared in accordance with the prescribed financial reporting standard applicable to the company. In this case a company would still be required to prepare company AFS to comply with the requirements of S30 and consolidated AFS to comply with the prescribed financial reporting standard and therefore the Act. The Act does not provide any company with any exemption from preparing consolidated financial statements if so required by the prescribed financial reporting framework applicable to the company.

Regulation 27 additionally provides guidance on what financial reporting framework should be applied when these AFS are prepared (refer to Annexure D of the guide for detailed guidance on the application of Regulation 27).

Issues for consideration

The requirement to include the name and professional designation of the person who prepared or assisted with the preparation of the financial statements has raised a question regarding whose name should be included where financial statements are internally or independently compiled. Determining who the preparer is should be based on who is ultimately responsible for the decision to prepare the financial statements. If management was responsible for preparing and compiling the AFS the finance director or manager assigned to complete the financial statements should be identified.

The independent accounting professional's details can be included as the preparer and compiler.

Companies should ensure that they meet the six-month deadline for completing the financial statements as there is currently no extension of the six months allowed and companies would be in breach of the Act should they not complete their financial statements within the six months.

7.7 Auditing and review requirements

7.7.1 Requirements for audit and review

Reference: Section 30, and Regulations 26 and 28

Issue: Which companies should be audited or reviewed?

Discussion

The Act requires all public and state-owned companies to be audited. Companies that fall into other categories will have to refer to the Regulations where additional categories of companies to be audited are set out (refer to section 7.7.2). The provisions of the Act relating to mandatory audits will also apply to any company that voluntarily chooses to have audited financial statements and includes this requirement in its MOI.

Issue for consideration

Companies need to consider the requirements for audit or independent review as discussed in the following section.

7.7.2 Requirements for a private, personal liability or non-profit company to be audited or independently reviewed

Reference: Section 30, Regulations 26 and 28 and Annexure C, Annexure D and Annexure E

Issue: Which private, personal liability or non-profit companies are required to be audited?

Discussion

The Regulations provide that, in addition to public and state-owned companies, where the audit of any other company is desirable in the public interest, as indicated by prescribed criteria in any particular financial year, the AFS of that company must be audited. The prescribed criteria which indicate that an audit is required are as follows:

- if in the ordinary course of its primary activities, a profit or non-profit company holds assets in a fiduciary capacity for persons who are not related to the company, and the aggregate value of such assets held at any time during the financial year exceeds R5 million;
- a non-profit company which was incorporated
    - directly or indirectly by the state, an organ of state, a state-owned company, an international entity, a foreign state entity or a foreign company; or
    - primarily to perform a statutory or regulatory function in terms of any legislation, or to carry out a public function at the direct or indirect initiation or direction of an organ of the state, a state-owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function;
- any other company whose public interest score in that financial year is 350 or more; or
- any other company whose public interest score in that financial year is at least 100 (but less than 350) and its AFS for that year were internally compiled.

The terms “ordinary course of its primary activities” and “fiduciary capacity” are not defined.

Assets held in a fiduciary capacity must be held in the ordinary course of the company’s **primary** business, not incidental thereto, on behalf of third parties not related to the company. Fiduciary capacity implies decision-making capability over the application of the assets and that the third parties have the right to reclaim the assets.

Whether a company holds assets in the ordinary course of its primary activities depends on the nature of the company, viz. whether the activity is part of the core business or is incidental thereto. Incidental activities will not be included in a company’s primary activities.

There is an alternative view that fiduciary capacity can encompass VAT held on behalf of SARS and the taking of deposits.

A private, personal liability or non-profit company may voluntarily elect an audit–

- by including an audit requirement in the company’s MOI;
- by a shareholder’s resolution; or
- in terms of a board decision.

In the event that a company voluntarily elects by shareholder’s resolution or in terms of a board decision to have its AFS for any particular year audited , such a company will not be required to comply with the enhanced accountability requirements in Chapter 3 of the Act which relate to auditors, audit committees or company secretaries.

A company which voluntarily elects to be audited by including an audit requirement in its MOI will be required to comply with S90 to S93 of the Act, which deals with the appointment, resignation , rotation and rights of an auditor. All other sections in Chapter 3 relating to audit committees and company secretary will not apply.

Any company whose MOI requires compliance with certain or all of the provisions in Chapter 3 will be required to comply with the enhanced accountability requirements in this Chapter to the extent that the company’s MOI so requires.

In the case of listed companies, the JSE Listings Requirements clarify that all South African subsidiaries of listed companies (including applicants) must continue to be audited regardless of their classification within the Act. The MOI of such subsidiaries must be amended to make provision for the audit. In applying this requirement companies should have regard to the definition of subsidiary per the Listings Requirements.

Owing to conforming amendments made to the Close Corporations Act, Close Corporations will be required to be audited if they meet any of the criteria outlined in the Regulations as discussed above.

Issue for consideration

Each company must evaluate whether it is required to be audited, for statutory purposes, in terms of the requirements of the Act. Companies should bear in mind that in a group situation an audit of certain group companies, such as significant subsidiaries, may be required in order for the auditor to be able to express an opinion on the consolidated financial statements, regardless of whether such an audit is also a statutory requirement in terms of the Act. The auditor must satisfy this requirement to comply with the International Standards on Auditing (ISA

600 – Special considerations – **Audits of group financial statements (including the work of component auditors)**).

Companies should also evaluate whether they will be in the category where the public interest score will fluctuate below and above 350. In this case companies are advised to adopt a conservative approach and carry out an audit. The requirements when companies drift in and out of audit will impact the audit of opening balances and possibly require more audit work when this occurs.

The public interest score should also be calculated at the end of the financial year for the year that has passed. Companies should ensure that where they foresee that the public interest score for the following year will exceed audit requirements they should prepare for an audit for the following year.

7.7.3 Independent review of the annual financial statements

Reference: Sections 1 and 30, and Regulations 26 and 29

Issue: Which private, personal liability or non-profit companies must be independently reviewed?

Discussion

Certain categories of private, personal liability and non-profit companies that are not subject to audit will be required to have their AFS independently reviewed.

This independent review must be performed in accordance with ISRE 2400, the International Standard for Review Engagements, as issued from time to time by the International Auditing and Assurance Standards Board or its successor body.

The Regulations prescribe the categories of companies to which the independent review requirement will apply, as follows:

- private, personal liability and non-profit companies whose public interest score in that financial year is at least 100 (but less than 350) and its AFS for that year were independently compiled; and
- private, personal liability and non-profit companies whose public interest score in that financial year is less than 100 and that company does not satisfy the criteria for exemption from audit and review.

7.7.4 Exemptions to audit and independent review

Reference: Section 30(2A)

Issue: Certain companies do not require to be audited or independently reviewed.

Discussion

The Regulations clarify that the following categories of companies will not be required to perform an independent review:

- a company which is exempt, in terms of S30(2A) of the Act (discussed further in this document);

- a company which is required by its own MOI, or required in terms of the Act or by Regulation, to have its AFS for that financial year audited; or
- a company which has voluntarily had its AFS for that year audited.

In addition, owing to conforming amendments made to the Close Corporations Act, Close Corporations will be required to be audited if they meet any of the criteria outlined in the Regulations as discussed above.

A company may qualify for an exemption from having its AFS audited and independently reviewed as allowed in S30(2A) of the Act. The Act provides that if, with respect to a particular company, every person who is a holder of, or has a beneficial interest in, any securities issued by that company is also a director of the company, then that company is exempt from the requirements in S30 of the Act to have its AFS audited or independently reviewed. It is important to note that this exemption—

a) does not apply to the company if it falls into a class of company that is required to have its annual financial statement audited in terms of the regulations***;*** and
b) does not relieve the company of any requirement to have its financial statements audited or reviewed in terms of another law, or in terms of any agreement to which the company is a party.

Issue for consideration

While the definition of person in S1 includes a juristic person, S69 clarifies that juristic persons are ineligible to be appointed as directors. Companies in which beneficial interest holders are juristic persons, for example in a group situation where the shares in a subsidiary company are held by its holding company, the holding company will be disqualified from being appointed as a director and as a result the subsidiary company will not qualify for the exemption from independent review.

The CIPC holds the view that if a company/CC is held by another company or a trust, then the exemption stated in S30(2A) would not apply, as the company or trust cannot be a director of the company as it is not a natural person. A trust is specifically included in the definition of "juristic person".

Each company must evaluate whether it is required to be audited or independently reviewed, for statutory purposes, in terms of the requirements of the Act. Companies must also consider whether they qualify for an exemption from the audit and independent review.

7.7.5 Persons who meet the requirements to perform an independent review

Reference: Regulation 29

Issue: Which persons are qualified to perform an independent review of the AFS?

Discussion

An independent review must be performed in accordance with ISRE 2400, the International Standard for Review Engagements. The Regulations provide for the qualification of the independent reviewer permitted to perform such independent reviews.

“***An independent review of a company’s annual financial statements must be carried out–***

(a) in the case of a company whose public interest score for the particular financial year was at least 100 by–

(i) a registered auditor; or

(ii) a member in good standing of a professional body that has been accredited in terms of S33 of the Auditing Professions Act; or

(b) in the case of a company whose public interest score for the particular financial year was less than 100 by–

(i) a person contemplated in (a) above; or

(ii) a person who is qualified to be appointed as an accounting officer of a close corporation in terms of S60(1), (2) and (4) of the Close Corporations Act, 1984 (Act No. 69 of 1984).”

Additionally such a person must meet the independence criteria prescribed for an independent accounting professional, viz. that such as person:

- does not have a personal financial interest in the company or a related or inter-related company; and
  - is not involved in the day-to-day management of the company’s business, nor has been so involved at any time during the previous three financial years; or
  - is not a prescribed officer, or full-time executive employee of the company or another related or inter-related company, or has been such an officer or employee at any time during the previous three financial years; and
- is not related to any person who falls within the independence criteria described above (the term “related” is defined in S2 of the Act).

The independent reviewer may not be the same individual who was involved in the preparation of the said AFS and who acted as the independent accounting professional with respect to those AFS.

Issue for consideration

Each company which is subject to an independent review must appoint an appropriate independent reviewer who meets the prescribed criteria and qualifications.

7.7.6 Reportable irregularities for independent reviewers

Reference: Regulation 29

Issue

The Regulations introduce reporting requirements for independent reviewers with regard to any reportable irregularities.

Discussion

The Act provides that an independent reviewer of a company that is satisfied or has reason to believe that a reportable irregularity, as defined in the Act, has taken place or is taking place must, without delay, send a written report to the Companies and Intellectual Property Commission. The Commission is empowered to investigate any alleged contravention of the Act.

The Act defines a reportable irregularity as any act or omission committed by any person responsible for the management of a company which:

- unlawfully has caused or is likely to cause material financial loss to the company or to any member, shareholder, creditor or investor of the company in respect of his, her or its dealings with that entity; or
- is fraudulent or amounts to theft; or
- causes or has caused the company to trade under insolvent circumstances.

The requirement to report instances where a company is trading under insolvent circumstances is new. It is peculiar that this Regulation requires the reporting of instances in which a company trades under insolvent circumstances, i.e. technical insolvency (liabilities exceed assets). While S22, which deals with the prohibition on reckless trading, provides that the Commission may issue a compliance notice to a company which is unable to pay its debts as they become due and payable in the normal course of business, i.e. commercial insolvency, it was expected that the Commission would utilise the reportable irregularity reporting process to identify any company which was commercially insolvent. This would enable the Commission to issue compliance notices. The wording of Regulation 29 does not achieve this aim. It is likely, however, that the Commission will still use the reports of reportable irregularities as contributing information when making its decision as to whether to issue a compliance notice.

These requirements contrast with the provisions of the Auditing Professions Act, which provides that a registered auditor of a company that is satisfied or has reason to believe that a reportable irregularity, as defined in the Auditing Professions Act, has taken place or is taking place must, without delay, send a written report to the Independent Regulatory Board for Auditors.

The Auditing Professions Act defines a reportable irregularity as any unlawful act or omission by any person responsible for the management of an entity which:

- has caused or is likely to cause material financial loss to the entity or to any partner, member, shareholder, creditor or investor of the entity in respect of his, her or its dealings with that entity; or
- is fraudulent or amounts to theft; or
- represents a material breach of any fiduciary duty owed by such a person to the entity or any partner, member, shareholder, creditor or investor of the entity under any law applying to the entity or the conduct or management thereof.

Issue for consideration

The definition of and reporting requirements in respect of reportable irregularities in terms of the Act differ from the requirements provided for in the Auditing Professions Act. The “Reportable Irregularity” under this section does not refer to the “Reportable Irregularity” as defined and reported under the Auditing Professions Act.

7.8 Use of the company name and registration number

Reference: Section 32(4)

Issue: Use of the company's name and registration number

Discussion

A company is required to have its name and registration number provided in legible characters in all notices and official publications of the company, including publications in electronic format, as well as other documents such as letters, invoices and receipts (for a full list see S32(4)). This is different from the previous Companies Act, where the names of directors and the company secretary were also required on correspondence. The requirement for a company to display its name on the outside of its registered office and every office or place in which business is carried on, as required in S50 of the previous Act, has also not been included in the Act.

Issue for consideration

Companies should ensure that they meet the requirements of having their name and registration number mentioned in all the applicable documentation.

8 Capitalisation of companies

8.1 Authorisation for shares

Reference: Section 36, Section 37(8), Section 41 and Section 164

Issue: How should shares in future be authorised?

Discussion

The authorisation for and classification of shares, the numbers of authorised shares of each class, and the preferences, rights, limitations and other terms associated with each class of shares, as set out in a company's MOI, may be changed only by an amendment of the MOI by special resolution of the shareholders, or by the board of the company, in the manner prescribed by the Act, except to the extent that the MOI provides otherwise. If the board acts pursuant to its authority as prescribed, the company must file a Notice of Amendment of its MOI, setting out the changes effected by the board.

Shareholder approval is also required for the issue of shares in certain circumstances. An issue of shares, securities convertible into shares, or rights exercisable for shares in a transaction, or a series of integrated transactions, inter alia requires approval of the shareholders by special resolution if the voting power of the class of shares that is issued or issuable as a result of the transaction or series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions.

If a company has given notice to shareholders of a meeting to consider adopting a resolution to amend its MOI by altering the preferences, rights, limitations or other terms of any class of its shares in any manner materially adverse to the rights or interests of holders of that class of shares, the notice must include a statement informing shareholders of their rights. At any time before a resolution is to be voted on, a dissenting shareholder may give the company a written notice objecting to the resolution. If the MOI of a company has been amended to alter the preferences, rights, limitations or other terms of a class of shares materially and adversely, any holder of those shares is entitled to seek relief in terms of ***S64*** if that shareholder had notified the company in advance of the intention to oppose the resolution to amend the MOI, and was present at the meeting, and voted against that resolution. This is referred to as the "appraisal rights" of shareholders.

Shareholders who unsuccessfully oppose any fundamental transaction will thereafter be able to compel the company to repurchase all of their shares at a fair value, unless a court orders otherwise.

8.2 Issue price for shares

Reference: Section 40

Issue: Issue price for shares

Discussion

In terms of S40(1), the board may issue shares only for "***adequate consideration***". This term is not defined in the Act. Subsection (2) provides that before a company issues any particular shares, the board must determine the consideration for which the shares will be issued.

In terms of S40(3) the determination by the board as to the adequacy of the consideration may only be challenged on the basis that the directors did not conduct themselves in accordance with the standards of directors' conduct contemplated in S76.

In our view the above gives the directors substantial discretion to determine the appropriate share price for any issue of shares and the ability to take account of all relevant factors, including but not limited to the valuation of the company.

Issue for consideration

It is proposed that a valuation of the company may be one of the mechanisms utilised by the directors when deciding on "***adequate consideration"*** for any issue of shares. However, the directors will also be entitled to take account of any other relevant information, provided the ultimate decision by the directors is arrived at in accordance with the appropriate standard of conduct.

We note, once again, that a full record by the directors of the process and information that ultimately determined the issue price for any shares should be a good safeguard in the event that the directors' determination of the "adequate consideration" is challenged.

8.3 Share premium

Reference: Section 35, Regulation 31 and Schedule 5 Item 6

Issue: Shares no longer have a nominal or par value (S35(2))

Discussion

It will not be possible to create new classes of shares with a par value. For new classes of shares there will therefore no longer be a separation between the share capital and share premium accounts.

If a company has existing issued shares with a par value, these shares will continue to have this par value, unless the entire class of shares is converted in terms of Regulation 31. Regulation 31 contains an extensive process for the conversion of par value shares into no par value shares. The conversion of existing shares to no par value shares is a **voluntary** process.

Regulation 31 provides further clarification on the position regarding existing classes of par value shares. In summary:

- no new classes of par value shares may be authorised;
- if there is an existing class of par value shares of which no shares are in issue (i.e. only authorised shares), no shares may be issued from that class until the shares have been converted to no par value shares (only a board resolution is required for the conversion in this case);
- if there is an existing class of par value shares of which some shares have been issued:
  - the number of shares may not be increased; but
  - existing authorised par value shares may be issued.

Issue for consideration

Existing par value and share premium accounts will remain on the financial statements of the company for as long as the company has par value shares in issue. A conversion of existing issued authorised shares is voluntary.

To the extent that new no par value shares are issued, amounts received can all be reflected in a share capital account. The Act is not prescriptive in respect of the name of this account (as opposed to the previous Act, which required the use of names such as “stated capital”, “share premium”, etc.).

8.4 The concept of capital maintenance

Issue: Rules governing distributions from capital.

Discussion

Unlike the previous Act, the new Act contains less rules relating to the concept of capital maintenance, but rather relies on the solvency and liquidity test principle (section 4 of the Act).

Specifically, due to the removal of the par value shares, no requirements are in place for Share Premium.

Issues for consideration:

The reduction of capital, unless it takes the form of a share buyback that is governed by section 48, meets the definition of "distribution" and simply needs to satisfy the requirements of section 4 (***Solvency and liquidity test***) and section 46 (***Distributions must be authorised by board***).

8.5 Financial assistance to directors and related parties

Reference: Section 45

Issue: The Act refers to the fact that financial assistance cannot be made without certain requirements being adhered to.

Discussion

The heading of S45 is somewhat misleading, as this section regulates financial assistance to persons other ***than only directors***.

In terms of this section, unless the company's MOI provides otherwise, the board may authorise direct or indirect financial assistance to the following parties:

- a director and prescribed officer of the company or of a related or inter-related company;
- a related or inter-related company or corporation;
- a member of a related or inter-related corporation; or
- a person related to any of the above parties.

The Act provides a wide definition of financial assistance, which includes the lending of money, guaranteeing of a loan and securing of any debt or obligation. However, it should be noted that this section of the Act does apply to the lending of money where the primary business of the company is to lend money.

By extending the provision of financial assistance to related and inter-related companies, the Act effectively requires companies to comply with the provisions of this section in the case of intercompany loans, or any type of financial assistance from one company to another within the same group.

Section 45 seems to be based on a policy decision taken during 2007, by the then Minister of Finance, Mr Trevor Manual, where he specifically mentioned intra-group company loans without shareholder knowledge or approval as a matter of concern. This led to a shift in the drafting policy as reflected in the difference between S226 of the previous Act and S45 of the Act.

Issues for consideration

Before the board may authorise any financial assistance, it has to ensure that all statutory requirements are met. Despite any provision of a company's MOI to the contrary, the board may not authorise any financial assistance contemplated in S45, unless:

- the financial assistance is:
  - provided pursuant to an employee share; **or**

    - provided in line with a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient or generally for a category of potential recipients; **and**
- the board has ensured that:
    - the company will satisfy the solvency and liquidity test immediately after providing the financial assistance; and
    - the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

Note: This means that the requirements of this section must be complied with where a holding company provides financial assistance to subsidiaries.

With respect to the special resolution required, it should be noted that the resolution must be passed before the provision of financial assistance. Ratification after the fact is not possible. It is possible for the company to phrase the special resolution generally to ensure that it covers all types of financial assistance. However, it is advisable to include at least maximum limits of financial assistance that may be given pursuant to that particular special resolution. It is not necessary to wait for an AGM to pass the required special resolution. The Act allows for resolutions to be circulated to all shareholders as a round robin, and it is no longer required for special resolutions to be registered with the Companies Commission.

Of course, in addition to the requirements set out above the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's MOI have been satisfied.

An important development is the fact that the Act requires the board to provide written notice to all shareholders (unless every shareholder is also a director of the company) and trade unions representing employees whenever it resolves to provide financial assistance in terms of this section. The required written notice must be provided:

- within 10 business days ***after the board adopts the resolution***, if the total value of all loans, debts, obligations or assistance contemplated in that resolution, together with any previous such resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution; or
- within 30 business days ***after the end of the financial year***, in any other case.

Any board resolution approving the provision of financial assistance that is inconsistent with the requirements of this section is void, and directors may incur personal liability for the damage, cost or loss suffered by the company as a result.

8.6 Financial assistance for subscription of securities

Reference: Section 44 and Section 77(3)(e)(iv)

Issue: Section 44 of the Act allows that companies may provide financial assistance for the subscription of securities, but contains very onerous requirements. (Section 44 is, in fact, even more restrictive than S38 of the previous Act.)

Discussion

Despite any provisions in the MOI or the rules of the company, a board of directors of a company may not authorise any form of financial assistance to another party to purchase the shares of the company unless the following requirements are met:

- the financial assistance must be pursuant to an employee share scheme or a special resolution (either specifically for the recipient or generally for a category of recipients) adopted within the previous two years; and
- the board must have decided that:
  - o the company will meet the liquidity and solvency test (as discussed in Section 5.2 of this guide) immediately after the financial assistance has been provided; and
  - o the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

Additionally the board of directors should ensure that all additional requirements as stipulated in the MOI of the company were adhered to with providing the financial assistance.

Provision of financial assistance in contravention of these requirements is ***void***. The directors face potential personal liability in the event of a contravention (S77(3)(e)(iv)).

Section 44 is wider than the previous S38 in that:

a) it regulates financial assistance of "securities" not only shares;

b) it regulates financial assistance in respect of an entire group, that is financial assistance by any company that is "related orinter-related" to any other company. (Section 38 of the previous Act only applied to a company or its holding company.);

c) the employee share scheme exemption no longer requires a trust in certain instances, but the definition of "employee share scheme" is narrower than the understanding of this term in terms of the previous Act; and

d) the board must be satisfied that the terms of the financial assistance are fair and reasonable to the company.

8.7 Distributions to be authorised by the board

Reference: Section 46

Issue: Section 1 provides specific guidance on what a distribution is and S45 provides the requirements for a company to make such a distribution.

Discussion

S1 of the Act defines a distribution as:

> ***"A direct or indirect***
>
> ***(a) transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one more holders of any of the shares, or to the holder of a beneficial interest in any such shares, of that company or of another company within the same group of companies, whether—***

(i) in the form of a dividend;
(ii) as a payment in lieu of a capitalisation share, as contemplated in section 47;
(iii) as consideration for the acquisition—

(aa) by the company of any of its shares, as contemplated in section 48; or

(bb) by any company within the same group of companies, of any shares of a company within that group of companies; or

(iv) otherwise in respect of any of the shares of that company or of another company within the same group of companies, subject to section 164 (19);

(b) incurrence of a debt or other obligation by a company for the benefit of one or more holders of any of the shares of that company or of another company within the same group of companies; or

(c) forgiveness or waiver by a company of a debt or other obligation owed to the company by one or more holders of any of the shares of that company or of another company within the same group of companies;

but does not include any such action taken upon the final liquidation of the company."

A company should not make a distribution unless:

- the distribution:
  - o is pursuant to an existing legal obligation of the company, or a court order; or
  - o the board of directors has approved the distribution;
- the board of directors has applied the liquidity and solvency test (as discussed in Section 5.2 of this guide) and by resolution has indicated that the board is satisfied that the company will be liquid and solvent immediately after the distribution is made.

The directors that were present at a meeting where a decision was made to make a distribution not in compliance with the requirements of S45 and failed to vote against this decision could be held personally liable in terms of S77 of the Act.

If a distribution has not been concluded within 120 business days after the board resolution was taken that the company is liquid and solvent, the board would be required to reassess liquidity and solvency and pass another resolution that the company will be liquid and solvent immediately after the distribution is completed.

8.8 Capitalisation shares

Reference: Section 47

Issue: Unless the MOI permits otherwise, S47 allows a company to issue capitalisation shares in certain circumstances.

Discussion

The board of that company, by resolution, may approve the issuing of any authorised shares of the company, as capitalisation shares, on a pro rata basis to the shareholders of one or more classes of shares.

Shares of one class may be issued as a capitalisation share in respect of shares of another class.

The board may also resolve that the shareholder may receive a cash consideration rather than the actual capitalisation shares issued at a consideration determined by the board. The cash consideration may not be made unless the board:

- has considered the solvency and liquidity test, as required by S46, on the assumption that every such shareholder would elect to receive cash; and
- is satisfied that the company would satisfy the solvency and liquidity test immediately upon the completion of the distribution.

8.9 Company or subsidiary acquiring company's shares

Reference: Section 48

Issue: Unless the MOI permits otherwise, S48 allows a company or its subsidiaries to purchase the shares of the company in certain circumstances.

Discussion

Section 48 indicates that the board of directors of a company may determine that the company will acquire a number of its own shares, or that the board of a subsidiary company may determine that it will acquire shares of its holding company, but:

- not more than 10%, in aggregate, of the number of issued shares of any class of shares of a company may be held by, or for the benefit of, all of the subsidiaries of that company, taken together; and
- no voting rights attached to those shares may be exercised while the shares are held by the subsidiary and it remains a subsidiary of the company whose shares it holds.

A repurchase of shares will not be allowed regardless of the provisions in any other Act, agreement or MOI if the company will have no issued share capital after the repurchase of the shares.

A decision of a company to repurchase its own shares must meet the following requirements (if applicable):

- a special resolution of the shareholders of the company is required if any share is to be purchased from a director or prescribed officer or a person related to a director or prescribed officer of the company; and
- the repurchase decision is subject to the requirements of S114 and S115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares.

If a company acquires any shares contrary to the specifications of S46, the company should apply to a court within 24 months after the acquisition for an order to reverse the acquisition, and the court may order:

- the person from whom the shares were acquired to return the amount paid by the company; and
- the company to issue to that person an equivalent number of shares of the same class as those acquired.

The directors that were present at a meeting where a decision was made to acquire the shares of the company not in compliance with the requirements of S48 and failed to vote against this decision could be held personally liable in terms of S77 of the Act.

9 Governance of companies

9.1 Exemption from governance requirements for certain companies

Reference: Section 57

Issue: Any profit company (including public companies but excluding state-owned companies) which has only one shareholder is not subject to S59 to S65 of the Act.

A profit company (including a public company but excluding a state-owned company) which has only one director is not subject to S71(3) to (7), S74 and S75 of the Act.

Special exemptions also apply if every shareholder of the company (other than a state-owned company) is also a director.

Discussion

Company with only one shareholder

The provisions relating to record dates, round robin resolutions, shareholders' meetings, notices of meetings, conduct of meetings, quorums and adjournments as well as shareholders' resolutions generally do not apply to companies with only one shareholder. Effectively these companies are therefore not subject to any of the formalities related to shareholders' meetings, AGMs, etc.

Company with only one director

A single director may exercise his or her duties and powers at any time without compliance with any formalities.

Company where every shareholder is also a director

If a matter is referred to the shareholders by the board, such a matter may be decided on at any time after it has been referred and without complying with any further formalities, provided that sufficient shareholders are present to form a quorum and all shareholders were present when the board referred the matter.

The duties, obligations, liabilities and indemnification of directors do not apply to the individual persons when they are acting in their capacities as shareholders.

9.2 Amendment of shareholders' voting threshold

Reference: Section 65 (7) and 8, and Section 65 (9) and 10

Issue: The MOI may provide that for an ordinary resolution to be passed a higher than 50% support is required and for a special resolution to be passed a lower or higher than 75% support.

Discussion

S65 provides an opportunity for companies to apply different voting thresholds to different decisions.

In addition to the distinction between ordinary and special resolutions, a company may provide that different matters will require different levels of support for them to be passed.

The Act determines that an ordinary resolution will require the support of more than 50% of the voting rights exercised on the resolution, and a special resolution will require at least 75% of the voting rights exercised on the resolution. However, the Act allows for companies to provide for different voting thresholds in their MOIs. An MOI may provide for an ordinary resolution to require a higher than 50% support to be passed and for a special resolution a lower or higher than 75% support, as long as there is a margin of at least 10% between the highest established requirement for approval of an ordinary resolution on any matter and the lowest established requirement for approval of a special resolution on any matter.

It is not entirely clear whether an adjustment of voting thresholds in a shareholders' agreement and not in the MOI will be effective between parties if it does not contradict an express provision of the MOI.

Issues for consideration

We propose that the assessment to adjust the approval thresholds for resolutions is ultimately a business decision which depends on the current shareholding and the arrangements with business associates.

We propose the adjustment of approval thresholds be considered as part of the process to evaluate the current provisions of the MOI of the company, together with the review of existing shareholders' agreements.

9.3 Shareholders' resolutions adopted via round robin

Reference: Section 60

Issue: The Act provides that some shareholder resolutions may be adopted via round robin.

Discussion

The Act allows for shareholders' resolutions to be passed by distributing the resolution to all shareholders, and allowing them to respond in writing. This procedure applies to all resolutions that could be voted on at a shareholders' meeting, but excludes resolutions pertaining to any business of the company that is required by the Act or the MOI to be conducted at an AGM of the company.

In terms of this alternative procedure, a resolution may be submitted for consideration to the shareholders entitled to exercise voting rights in relation to the resolution. Shareholders may then exercise their votes in writing within 20 business days after the resolution was submitted to them. The resolution will have been adopted if it is supported by persons entitled to exercise sufficient voting rights for it to have been adopted as an ordinary or special resolution, as the case may be, at a properly constituted shareholders' meeting.

Issue for consideration

We propose the viability of this alternative procedure be considered by the company.

Note the requirements pertaining to the delivery of notices/resolutions to shareholders, and the concomitant notice periods.

9.4 Electronic participation for shareholder meetings

Reference: Section 61(10) and Section 63(2)

Issue: The Act allows companies to make shareholder meetings available for electronic participation.

Discussion

The Act determines that, unless prohibited by its MOI, a company may conduct any shareholder meeting entirely by electronic communication. In addition, the company may allow any shareholder, or the proxy for any shareholder, to participate by electronic communication in all or part of a shareholders' meeting that is being held in person. These provisions will apply as long as the electronic communication employed enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting.

The Act does not define electronic means; thus, any means that meet the requirements set out above will suffice. This may generally include teleconferencing and video conferencing.

The allowance for meetings to be conducted by electronic means enables companies to conduct business differently. These provisions eliminate the need for shareholders to travel physically to a particular venue to attend a meeting.

Issue for consideration

We recommend that companies investigate the viability of electronic participation as an alternative means to conduct or participate in shareholder meetings. Public companies and state-owned companies are obliged to comply with these provisions, as S61(10) states that public and state-owned companies must be reasonably accessible for electronic participation by shareholders.

9.5 Quorum requirements

Reference: Section 64

Issue: There is no longer a distinction between the quorum requirements for ordinary and special resolutions.

Discussion

Two different quorum requirements must be met:

- a minimum of 25% of the voting rights entitled to be exercised on a matter must be present (regardless of the number of shareholders); and
- if a company has more than two shareholders (regardless of the number of shares held by each shareholder), at least three shareholders must be present.

A company's MOI may adjust the "25% of voting rights" requirement either up or down. However, the second requirement regarding the minimum number of shareholders cannot be reduced (it may be increased) in the MOI.

9.6 Mandatory annual general meeting

Reference: Section 60, Section 61 and Section 90

Issue: The Act requires only public companies to have AGMs, but some other categories of companies may be required to have an AGM.

Discussion

Section 61 of the Act requires public companies to convene an AGM at least once in every calendar year, but no more than 15 months after the date of the previous AGM. The Tribunal may extend this period upon application.

An AGM convened by a public company in terms of S61 must, at a minimum, provide for the following business to be transacted:

- presentation of the directors' report, audited financial statements for the immediately preceding financial year, and an audit committee report;
- election of directors;
- appointment of an auditor for the ensuing financial year and an audit committee; and
- any matters raised by shareholders, with or without advance notice to the company.

(Note that the round robin procedure for shareholder resolutions provided for in S60 may not be used for any of the matters that must be concluded at an AGM.)

However, where the Act requires a private company, personal liability company or a non-profit company to have their AFS audited, S90 requires the appointment of an auditor ***at the AGM***. This would mean that even though the Act does not specifically require private companies to convene an AGM, such a company would nonetheless be required to have an AGM in order to appoint an auditor.

Issue for consideration

We recommend that all companies that are required by the Act to have audited financial statements convene an AGM in order to appoint an auditor, and to conduct such other business as required by the Act.

9.7 Board composition

Reference: Section 66(2), Section 72(4) read with Regulation 43, and Section 94(2) and (3)

Issue: Balance of executives versus non-executives

Discussion

We note that neither the previous Act nor this Act refers to the concepts of executive or non-executive directors, but these terms (derived from the King Report on Corporate Governance) are generally used for convenience purposes to distinguish between directors employed by the company and those that are not.

The Act does not specifically refer to the balance on the board between executive and non-executive directors. See, however, the requirements regarding minimum number of directors and the qualifications of directors for the audit committee and social and ethics committee.

The Act requires private companies and personal liability companies to appoint at least one director, whereas public companies and non-profit companies are required to appoint at least three directors. This prescribed number of directors is in addition to the number of directors appointed to the audit committee and/or the social and ethics committee.

As pointed out above, all public companies and state-owned companies need to appoint an audit committee comprising at least three directors that meet the prescribed criteria.

All listed public companies and state-owned companies (as well as those other companies that would have scored at least 500 public interest points in any two of the last five financial years) must appoint a social and ethics committee comprising at least three directors or prescribed officers. It is, however, permitted for committee members to serve on more than one committee. Thus, the members of the audit committee may also serve on the social and ethics committee. As such, the minimum prescribed number of directors for a public company is six (i.e. three directors as required by the Act, plus three committee members).

Unless the company's MOI determines otherwise, a person holding office as a director, prescribed officer, company secretary or auditor immediately before the Effective Date continues to hold that office. If any of these persons are ineligible for appointment or disqualified in terms of the Act from being a director, company secretary or auditor, those persons are regarded to have resigned from office as from the Effective Date.

Issues for consideration

When considering the constitution of the board, we propose that both the provisions of the Act and the requirements of the King III Report on Corporate Governance be considered.

In terms of Regulation 43, every private company with a public interest score exceeding 500 in any two of the previous five years will be required to have a social and ethics committee. The board should consider this threshold from time to time and re-evaluate its obligations in this regard.

9.8 Remuneration of directors to be approved by special resolution

9.8.1 Approval of directors' remuneration

Reference: Section 66(8) and (9)

Issue: Approval by shareholders, every two years, of directors' remuneration for their "***service as directors***"

Discussion

Section 66(8) provides that "***Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the company may pay remuneration to its directors for their services as directors, subject to subsection (9).***"

Section 66(9) provides that ***"Remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the shareholders within the previous two years.***"

These sections refer to "remuneration" and "services as directors".

Directors' remuneration is not defined in this section, but in S30(6) (which deals with disclosure of remuneration) "remuneration" is defined as including fees paid to directors for services rendered, salaries, bonuses and performance-related payments, pension contributions, options and financial assistance.

The Act does not differentiate between remuneration for executive and non-executive directors. Non-executive directors normally receive directors' fees for their attendance at board meetings and other meetings and for the provision of services as directors.

Executive directors receive an annual remuneration package, including a cash component, pension fund contributions, medical aid and performance bonus.

Our interpretation of the above is that a special resolution is required for the payment of directors' fees (those fees paid to directors for their attendance at board and other meetings and for providing services as directors). We are also of the view that the company's MOI may limit or negate the ability of a company to pay directors' fees but will not be able to provide that a special resolution is not required.

We believe that this section does not limit the ability to pay the salaries of executive directors in their capacity as employees.

Issue for consideration

For executive directors it will be useful to separate their remuneration into the categories of "salary" and "directors' fees", if any, in order to understand the extent to which shareholders' approval is required.

As far as non-executive directors are concerned, we propose that the contract of appointment of such directors should provide for the eventuality that the anticipated remuneration of such directors may not be sanctioned by the shareholders.

However, the Act requires full disclosure of director and prescribed officer remuneration in the AFS. In addition, King III proposes that shareholders approve the company's remuneration policy (the policy and parameters for determining and calculating executive and director remuneration). As such, it is recommended that shareholders approve the company's remuneration policy (which will inevitably include the remuneration for "services as directors") in addition to the special resolution required in respect of directors' fees.

9.8.2 Disclosure of remuneration

Reference: Section 30(2) – 30(6)

Issue: Disclosure of directors' and prescribed officers' remuneration required

Discussion

The Act requires full disclosure of the remuneration of directors AND prescribed officers (whether executive, non-executive or alternate directors) in the AFS **of companies that require**

an audit in terms of the Act (see S30(3) to (6)). The Act specifies which companies need to be audited, the Regulations merely provide the criteria for determining "public interest".

See Annexure D of the guide for the requirements to audit private companies.

Section 30(6) contains a lengthy list of potential remuneration of directors. We are of the view that it is the intention of this section that payments and forms of reward to directors (and the other relevant officers) be disclosed on an individual basis (not in aggregate as per the previous Act). Furthermore, S5 requires that any interpretation and any section of the Act must be applied in a manner that gives effect to the purpose referred to in S7. Section 7 sets out the purpose of the Act as the promotion of the South African economy by "encouraging transparency and high standards of corporate governance". The meaning of S30(5) and the reference to "person" requires disclosure of the identity of the director.

Issue for consideration

We propose that the company determines whether it is likely that it will be subject to the disclosure of the remuneration of directors and prescribed officers. This requirement will take effect for any financial year ending after the Effective Date.

9.9 Appointment of at least 50% of directors by shareholders

Reference: Section 66(4)

Issue: Section 66 regarding the appointment of directors:

- requires the appointment of at least 50% of directors by the shareholders; and
- creates the opportunity to utilise other appropriate mechanisms for the appointment of the balance of the directors.

Discussion

In terms of S66(4)(b) the MOI of a profit company must provide for the election by shareholders of at least 50% of directors and 50% of any alternate directors.

Section 66(4) stipulates that the MOI may also provide for:

- the direct appointment or removal of one or more directors by any person who is named in or determined in terms of the MOI; and
- a person to be an ex officio director as a consequence of that person holding some other office, title, etc.

Issue for consideration

We propose that the "Alterable Provisions" of S66(4) be specifically considered during the review of the MOI and shareholders' agreements after the Effective Date to determine the appropriate requirements for the company and its business associates.

9.10 Members of board committees

Reference: Section 72(2)(a)(i) and (ii), Section 72(2)(b) and Section 75 to Section 78

Issue: Non-director members of board committees attract the liability of directors.

Discussion

Board committees may include persons who are not directors, provided such persons are not ineligible to become directors and that such persons have no vote.

All the duties and liabilities of directors attach to non-director members of board committees, regardless of the fact that such persons may not be allowed to vote. In our view this is a particularly onerous stipulation in respect of non-director members of board committees.

In terms of S72(2)(b), a board committee may "***consult with or receive advice from any person***".

Issue for consideration

It appears that the less risky approach regarding the involvement of non-director members on board committees would be, as a matter of policy, to invite such persons to provide relevant input, but not to appoint them formally as board committee members. We see little advantage to either the company or the non-director member in a formal appointment as a board committee member, but substantial risk.

An audit committee is not a board committee and may not appoint non-directors as members but may have consultants.

9.11 Prescribed officers

Reference: Section 66(10) and Regulation 38

Issue: In certain sections of the Act a "prescribed officer" is given the same duties and responsibilities as directors. Companies should take notice of these requirements.

Discussion

The Regulations define a "prescribed officer" as a person, despite not being a director, that:

- exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or
- regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.

A person will be a prescribed officer regardless of any title or office they are designated.

Issues for consideration

Most of the provisions in the Act pertaining to directors also apply to prescribed officers. The Act states that prescribed officers are required to perform their functions and exercise their duties to the standards of conduct as they apply to directors. Prescribed officers will be subject to the same liability provisions as directors.

The following provisions, ***inter alia*** applicable to directors, will also apply to prescribed officers:

- Section 69 – Ineligibility and disqualification of persons to be directors or prescribed officers;
- Section 75 – Directors' personal financial interest;
- Section 76 – Standards of directors' conduct;
- Section 77 – Liability of directors and prescribed officers;

- Section 78 – Indemnification and directors' insurance; and
- Section 30(4) and 30(5) – Disclosure of remuneration.

Please refer to the discussions regarding these sections for more information.

As "prescribed officers" is not clearly defined, judgement will have to be applied to determine who will be classified as prescribed officers. Management will have to define "general executive management" and "control" on the basis of their specific company.

We recommend that the board records the names of all those individuals that are regarded as prescribed officers. This will be necessary and helpful where the requirements of the Act are complied with, especially when remuneration of the individuals is disclosed in the annual financial statements.

9.12 Social and ethics committee

Reference: Section 72(5) – 72(10), and Annexure F

Issue: Certain companies require a social and ethics committee.

Discussion

The Companies Act provides the Minister with the authority to require certain companies to appoint a social and ethics committee.

In terms of the Regulations, the following companies must appoint a social and ethics committee within one year after the Act becomes effective:

- every state-owned company;
- every listed public company; and
- any other company that has, in any two of the previous five years, had a public interest score of at least 500 points, or would have had such a score if the Act had been in effect at that time.

In certain instances, the companies listed above are exempt from the requirement to appoint a social and ethics committee. Where the holding company has a social and ethics committee, a subsidiary that is required to appoint such a committee may use the holding company's social and ethics committee to fulfil the function for the subsidiary.

The Act and the Regulations prescribe a process in terms of which a company may apply to the Companies Tribunal for an exemption from the requirement to appoint such a committee. The exemption can be shorter, but will be a maximum of five years before the company must re-apply.

The social and ethics committee must be appointed within 12 months from the Effective Date of the Act (i.e. by 30 April 2012).

The social and ethics committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business, and must not have been so involved within the previous three financial years.

The social and ethics committee does not have any exclusive responsibility or accountability (as is the case with the audit committee). The committee is merely required to bring matters within its mandate to the attention of the board and to report annually to the shareholders at the AGM. The board is required to act on any matters reported to it.

The social and ethics committee must report to shareholders at the AGM. At least one member of the committee must attend the AGM to report to shareholders on the performance of its functions.

A social and ethics committee has the function of monitoring the company's activities with regard to matters relating to:

- social and economic development, including the company's standing in terms of the goals and purposes of:
  - the 10 principles set out in the United Nations Global Company Principles (see Annexure F of this guide);
  - the OECD recommendations regarding corruption (refer to the Organisation for Economic Co-operation and Development (OECD) website for further details (www.oecd.org));
  - the Employment Equity Act;
  - the Broad-Based Black Economic Empowerment Act;
- good corporate citizenship, including the company's:
  - promotion of equality, prevention of unfair discrimination, and reduction of corruption;
  - contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and
  - record of sponsorship, donations and charitable giving;
- the environment, health and public safety, including the impact of the company's activities and of its products or services;
- consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws; and
- labour and employment.

Neither the Act nor the Regulations provide any requirement in respect of the number of meetings required per annum, the chairperson's appointment or role, meeting proceedings etc. All of these issues can be dealt with as the company sees fit.

9.13 Directors

9.13.1 Directors' meeting: minute keeping

Reference: Section 24(3)(f), Section 73(7), Section 73(8), Section 76(2)(b), Section 76(4), Section 76(5) and Section 77(3)(e)

Issue: Extension of the nature and extent of information recorded at directors' meetings

Discussion

- The Act provides that minutes of all meetings and resolutions of directors, directors' committees or the audit committee must be kept for seven years.

- In terms of S73(7), resolutions adopted by the board must be dated and sequentially numbered.
- Section 73(8) provides that any minutes of a board meeting or resolution signed by the "***chair of the meeting***" or the "***chair of the next meeting…is evidence of the proceedings of that meeting, or adoption of that resolution***".
- Section 73(8) clearly increases the obligation to ensure accurate minute keeping.
- Sections 75(4) and (5) require directors (including all alternate directors, prescribed officers and members of board committees and the audit committee) to disclose in writing to the board any personal financial interest. The disclosure should set out the nature and extent of that interest. Where no general disclosure was made, and a director has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director (***a***) must disclose the interest and its general nature before the matter is considered at the meeting, (***b***) must disclose to the meeting any material information relating to the matter, and known to the director, and (c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors.
- Directors (including all alternate directors, prescribed officers and members of board committees and the audit committee) have an obligation to "***communicate to the board at the earliest practical opportunity any information that comes to that director's attention…***" (S76(2)(b))
- It will be in the interest of directors to ensure that any information communicated to the board is recorded in the minutes to demonstrate compliance with this duty.
- It may be necessary to establish a mechanism/procedure for persons who may not necessarily be attending the board meetings (e.g. alternates or prescribed officers) to communicate relevant information to the board formally in compliance with their duty in terms of S76.
- In terms of the "business judgment test" set out in S76(4), a director can prove that he acted in the best interest of the company and with the requisite degree of care, skill and diligence (see S76(3)(b) and (c)). One of the aspects that the director will be obliged to prove is that he "***has taken reasonably diligent steps to become informed about the matter…***". In this regard a director is entitled to rely on information provided by certain classes of people listed in S76(5), for example "***legal counsel***" and "***accountants***".
- In addition to any director's personal recordkeeping of information obtained, full detail of any information presented to the board by, for example, advisors or board committees will be an important safeguard in the event that a director is required to prove "***reasonably diligent steps to become informed***".
- In a number of situations, mostly where transactions are entered into in contravention of the solvency and liquidity test (see S77(3)(e) for a full list), a directr who participated in the making of a decision in terms of S74, and "***failed to vote against…***" will attract liability. It will therefore be important to minute (i) the persons attending any board meeting, (ii) the identity of the directors who voted for or against any resolution and (iii) any abstentions.

Issues for consideration

Enhanced directors' duties, and certain other requirements will apply immediately as from the Effective Date (see Schedule 5 par 7(5)). Therefore, enhanced minute keeping in respect of directors should be implemented no later than the Effective Date. If not already the norm, consider minuting:

- full details of any disclosure of a personal financial interest in any matter considered at a board meeting;
- full details of information provided to the board, as well as the identity and credentials of the person providing such information (i.e. document the reasons why the board was of the opinion that it could rely/not rely on the information);
- full details of reasons for decisions made;
- full information on the identity of directors attending the meeting; and
- an individual record of how each director voted.

Note that third parties will not, as a matter of course, have access to board minutes, although they may be able to obtain copies if allowed by the MOI or in terms of the process prescribed by the Promotion of Access to Information Act No. 2 of 2000 (S26).

Enhanced duties will also apply to prescribed officers. We propose that the company:

- determines as soon as possible which of its employees may potentially be classified as prescribed officers; and
- implements formal processes to record the communication of prescribed officers with the board.

9.13.2 Resignation of directors

Reference: Section 70(6)

Issue: Resignation of directors

Discussion

The Act states that, where a person resigns as director, the company must file a notice within 10 days with the Commission. There seems to be no option for a director to resign when the remaining directors refuse to sign the applicable CoR39 and lodge the resolution with the CIPC.

Issue for consideration

We would advise any director intending to resign to notify both the company and the CIPC by means of a resignation letter and to obtain proof of receipt for both notifications. The director should draw the CIPC's attention to the failure of the company to lodge the CoR39.

9.13.3 Removal of directors

Reference: Section 71

Issue: Either shareholders or other directors may remove a director.

Discussion

Shareholders may remove a director by way of an ordinary resolution, despite any agreement or provision in the MOI to the contrary, subject to the director's right to make representations to the meeting (S71(1) and (2)). Also a company may not require this ordinary resolution to be approved by a percentage of voting rights in excess of "more than 50%"; i.e., 50% plus one vote is all that is required for the shareholders to remove a director.

If a company has more than two directors, the directors may remove a fellow director, subject to certain rights, for example the right to make representations (S71(3) to (10)).

Issue for consideration

Companies should consider providing training to directors of their rights, duties and the new process contemplated in S71 to ensure that decisions in terms of S71 are not likely to be overturned on review by a court.

9.13.4 Delinquency and probation of directors

Reference: Section 162

Issue: The Act determines that directors may be declared delinquent or placed on probation as a result of certain conduct.

Discussion

This can be achieved by an application to a court by the company, a director, a shareholder, the company secretary, a registered trade union or representatives of employees of the company. The grounds for the application for delinquency and probation are set out in the Act, but in general terms directors could be:

- **declared delinquent if the person:**
  - consented to serve as director, or acted as director or prescribed officer while ineligible or disqualified;
  - was under order of probation in terms of this section or S47 of the Close Corporations Act, 1984, and acted as a director in a manner that contravened the order;
  - whilst holding the position of director-
    - grossly abused the position of director;
    - took personal advantage of information;
    - intentionally or by gross negligence inflicted harm on the company or subsidiary of the company;
    - acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performing of duties;
    - had repeatedly been personally subject to a compliance notice in terms of any legislation;

        - had at least twice been personally convicted of an offence or required to pay an administrative fine;
        - within a period of five years was a director or a managing member of a company or close corporation that was convicted of an offence or subject to an administrative fine in terms of any legislation and the person was a director or managing member and the court was satisfied that the declaration of delinquency was justified;
- **placed on probation if the person:**
    - improperly supported a resolution in contravention of the solvency and liquidity test;
    - acted in a manner which was inconsistent with the duties of directors;
    - acted in a manner that was oppressive or unfairly prejudicial to a shareholder or director;
    - within 10 years after the Effective Date was a director or managing member of a close corporation and during that time two or more of the companies or close corporations failed to pay all of their creditors fully or meet their obligations, except if this was in terms of a business rescue plan or a compromise with creditors.

Delinquency usually lasts for seven years from the date of the order or a longer period as determined by the court order. A person who has been declared delinquent may apply to court after three years, for suspension of the delinquency order and substitution thereof with a probation order. A probation order will lapse automatically after five years.

Issue for consideration

Companies should ensure that directors meet the prescribed requirements and have not been declared delinquent or under probation when appointed.

9.13.5 Conflict of interest

Reference: Section 75

Issue: Conflict of interest should be declared.

Discussion

One of the fundamental duties of a director is to avoid any possible conflict of interests with the company. It is an accepted principle in South African law that, as a result of the trust placed in the director, he or she is bound to put the interests of the company before their own personal interests.

Section 75 of the Companies Act makes clear provision for dealing with a director's use of company information and conflict of interest. It extends the application of the conflict of interest provisions to prescribed officers and members of board committees (even if those persons are not directors).

Where a director, prescribed officer or member of board committees has a conflicting personal financial interest (where his or her own interests are at odds with the interests of the company), he or she is prohibited from making, participating in the making of, influencing, or attempting to influence any decision in relation to that particular matter. This provision seems to impose a strict duty not to allow personal financial interest to impact, in any way, on the dealings with the company. In addition, where a director, prescribed officer or member of board committees has a conflicting personal interest in respect of a matter on the board agenda, he or she has to declare that personal interest and immediately leave the meeting. Such a person is also prohibited from any action that may influence or attempt to influence the discussion or vote by the board, and is prohibited from executing any document on behalf of the company in relation to the matter, unless specifically requested to do so by the board.

It is important that all directors and prescribed officers comply with the conflict of interest declaration provisions, as non-compliance may render certain transactions and agreements void.

Issue for consideration

The conflict of interest provisions apply equally to persons related to the director, prescribed officer or member of a board committee. Thus, where a director, prescribed officer or member of board committees knows that a related person has a personal financial interest in a matter to be considered at a meeting of the board, or knows that a related person has acquired a personal financial interest in a matter, after the board has approved that agreement or matter, he or she should disclose that fact to the board.

9.13.6 Standard of directors' conduct

Reference: Section 76

Issue: The standard of directors' conduct was part of common law, but in the Act it has been codified, and directors and prescribed officers need to take cognisance of this fact.

Discussion

By accepting their appointment to the position, directors and prescribed officers agree that they will perform their duties to a certain standard, and it is a reasonable assumption of the shareholders that every individual director and prescribed officer will apply their particular skills, experience and intelligence to the advantage of the company.

The Companies Act codifies the standard of directors' conduct in S76. The standard sets the bar for directors very high. The intention of the legislature seems to be to encourage directors to act honestly and to bear responsibility for their actions – directors should be accountable to shareholders and other stakeholders for their decisions and their actions. However, with the standard set so high, the unintended consequence may be that directors will not be prepared to take difficult decisions or expose the company to risk. Since calculated risk taking and risk exposure form an integral part of any business, the Companies Act includes a number of provisions to ensure that directors are allowed to act without constant fear of personal exposure to liability claims. In this regard, the Companies Act has codified the business judgement rule, and provides for the indemnification of directors under certain circumstances, as well as the possibility of insuring the company and its directors against liability claims in certain circumstances.

The codified standard applies to all directors, prescribed officers or any other person who is a member of a board committee irrespective of whether or not that person is also a member of the company's board. The Act makes no distinction between executive, non-executive and independent non-executive directors. The standard, and consequent liability where the standard is not met, applies equally to all directors.

In terms of this standard, a director (or other person to whom S76 applies) must exercise his or her powers and perform his or her functions:

- in good faith and for a proper purpose;
- in the best interest of the company; and
- with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions and having the general knowledge, skill and experience of that director.

The Companies Act prohibits a director from using the position of director, or any information obtained while acting in the capacity of a director, to gain an advantage for himself or herself, or for any other person (other than the company or a wholly-owned subsidiary of the company), or to knowingly cause harm to the company or a subsidiary of the company.

Directors have a fiduciary duty to act in the best interest of the company as a whole. Directors owe this duty to the company as a legal entity, and not to any individual or group of shareholders – not even if the majority shareholder appointed the director. Directors are obliged to act in good faith in the best interest of the company. They should act within the bounds of their powers, and always use these powers for the benefit of the company. Where a director transgresses his or her powers, the company might be bound by his or her action, but he or she can be held personally liable for any loss suffered as a result of the transgression.

The duties imposed under S76 are in addition to, and not a substitution for, any duties of the director of a company under the common law. The traditional concept of fiduciary duties is not replaced by the codified standard of conduct.

As mentioned above, the Companies Act also codifies the business judgement rule. In terms of this rule, a director will have met the required standard if he or she has taken reasonably diligent steps to become informed about the subject matter, does not have a personal financial interest (or has declared such a conflicting interest), and has a ***rational basis*** for believing that the decision is in the best interest of the company.

In discharging any board or committee duty, a director is entitled to rely on one or more employees of the company, legal counsel, accountants or other professional persons, or a committee of the board of which the director is not a member. However, the director does not transfer the liability of the director imposed by this Act onto such an employee.

Directors of a company may be held jointly and severally liable for any loss, damage or costs sustained by the company as a result of a breach of the directors' fiduciary duty or the duty to act with care, skill and diligence. The Companies Act sets out a range of actions for which directors may be held liable for any loss, damage or costs sustained by the company. These actions are discussed in Section 9.13.7 of this guide.

In certain instances, except if a company's MOI provides otherwise, a company is allowed to indemnify a director in respect of any liability, or a company may purchase insurance to protect a director against liability (but only for those instances in which a company may indemnify the director), or to protect a company against expenses or liabilities for which the company may indemnify a director. A company may indemnify a director in respect of any liability, except for:

- any liability arising from situations where the director:
    - acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;
    - acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a reckless manner;
    - was a party to an act or omission by the company despite knowing that the intention was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;
- any liability arising from wilful misconduct or wilful breach of trust; or
- where the director incurred a fine as a result of a conviction for an offence in terms of national legislation.

This last point does not apply to a private or personal liability company if there is only one shareholder who is also the only director or the company or if two or more related individuals are the only shareholders and one or more of them are directors of the company.

Issue for consideration

Companies should ensure through training and information that directors are aware of their duties.

9.13.7 Liability of directors

Reference: Section 77

Issue: The Act identifies certain instances where a director will incur liability due to certain actions taken by the director.

Discussion

The Companies Act makes it clear that a person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except where the Companies Act or the company's MOI provides otherwise. The directors AND prescribed officers of a company may only incur liability in specific instances.

In terms of the Companies Act, a director or prescribed officer of a company may be held liable for any loss, damages or costs sustained by the company as a consequence of any breach by him or her of a duty contemplated in the standard of directors' conduct, failure to disclose a personal financial interest in a particular matter, or any breach by the director or prescribed officer of a provision of the Companies Act or the company's MOI.

In addition, the Companies Act determines that a director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having—

- acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that he or she had no authority to do so;

- persisted in and went along with any action or decision, despite knowing that it amounted to reckless trading;
- been a party to any action or failure to act, despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company;
- signed, consented to, or authorised the publication of any financial statements that were false or misleading, or a prospectus that contained false or misleading information; or
- been present at a meeting, or participated in the making of a decision, and failed to vote against a decision
  - to issue any unauthorised shares or securities;
  - a decision to issue any authorised securities;
  - to issue options for unauthorised shares or securities;
  - to provide financial assistance to a director or any person without complying with the requirements of the Companies Act and the MOI;
  - to approve a distribution that was contrary to the requirements of the Companies Act;
  - to allow the company to acquire any of its own shares, or the shares of its holding company, or make an allotment, despite knowing that the acquisition or allotment was contrary to the requirements of the Companies Act.

The Companies Act makes it clear that a director or prescribed officer is jointly and severally liable with any other person who is or may be held liable for the same act. Also, any claim for loss, damages or costs for which a person is or may be held liable in terms of the Companies Act prescribes after three years after the act or omission that gave rise to that liability.

9.13.8 Insurance for directors and prescribed officers

Reference: Sections 78 and 218(2)

Issue: Additional insurance in terms of the Act

Discussion

The potential indemnification by a company of its directors is a little wider than in the 1973 Act, as it will be possible to indemnify directors against their negligent acts.

Note the inclusion of prescribed officers in S75 to S78, their potential exposure as a result of their inclusion and the ability of the company to indemnify and insure prescribed officers.

We are of the view that the potential exposure of directors and prescribed officers is particularly increased by S218(2), which provides that "***Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.***"

Note that it is not possible to indemnify or insure any director or prescribed officer for any wilful misconduct or wilful breach of trust, as well as for acting without authority or knowingly acting with a fraudulent purpose.

Issue for consideration

The company should determine the current indemnities provided for by the company. The current insurance in respect of directors and prescribed officers should be revisited.

10 Chapter 3 application

10.1 Application of Chapter 3 of the Act

Reference: Section 84, Annexure G and Annexure H

Issue: Who should apply Chapter 3, including the appointment of a company secretary, auditor and audit committee?

Discussion

Chapter 3 deals with the appointment of an auditor, company secretary and audit committee. The complete chapter is not applicable to all companies.

Issue for consideration

The following companies have to comply with all the requirements of Chapter 3, i.e. the requirements pertaining to audit, audit committees and company secretaries:

- public companies; and
- state-owned companies (unless exempted by the Minister in terms of S9 of the Act).

In addition to the above, private, personal liability and non-profit companies must comply with the sections of Chapter 3 which pertain to the appointment of the auditor (Part C of Chapter 3 of the Act), if the company is required by the Act or its MOI to be audited (see also our detailed discussion in section 7.7 of this guide).

Private, personal liability and non-profit companies have to comply with the requirements of Chapter 3 which pertain to audit committees and company secretaries to the extent required in the MOIs of these companies. These companies therefore have the option of deciding whether they intend to appoint an audit committee or company secretary and to what extent they intend to meet the Companies Act requirements.

If a company does not include these requirements in their MOI but decides to appoint an auditor, audit committee or company secretary, it only needs to meet the requirements of other relevant legislation and not the Companies Act.

10.2 Company secretary

Reference: Section 86 to Section 89

Issue: Appointment of company secretary

Discussion

The provisions relating to the company secretary are similar to the provisions of the previous Act. In our view it will remain possible for one person to be the company secretary for more than one company, provided of course that the person has the necessary knowledge and capacity. The Act requires that the company secretary must have the requisite knowledge of or experience in relevant laws and the person must be a permanent resident of the Republic while serving as secretary.

All public or state-owned companies must appoint a company secretary. A private company is not obliged to appoint a company secretary, but may do so voluntarily by including this requirement in its MOI.

A company secretary's duties include, but are not restricted to-

- providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers;
- making the directors aware of any law relevant to or affecting the company;
- ensuring that minutes of all shareholders' meetings, board meetings and the meetings of any committees of the directors, or of the company's audit committee, are properly recorded in accordance with this Act;
- certifying in the company's AFS whether the company has filed required returns and notices in terms of this Act, and whether all such returns and notices appear to be true, correct and up to date; and
- ensuring that a copy of the company's AFS is sent, in accordance with this Act, to every person who is entitled to it.

The following two duties have been added:

- reporting to the company's board any failure on the part of the company or a director to comply with the MOI or rules of the company or this Act; and
- carrying out the functions of a person designated in terms of ***S33(3).***

The duties referred to in S33(3) require the company in its annual return to designate the company secretary to ensure compliance with Chapter 2 Part C and Chapter 3 if they applies to the company.

Issue for consideration

The duties of the company secretary remain extensive and will be of particular importance where the company secretary advises the board on the Act (S88(1)(a) to (d)).

10.3 Auditor

10.3.1 Appointment of the auditor

Reference: Sections 90, 60 and 61

Issue: Appointment of the auditor

Discussion

A private, personal liability or non-profit company that is:

- required by the Act or the Regulations to have its AFS audited every year; or
- a company that is required by its MOI to have its AFS audited

must comply with the requirements of S90 relating to the appointment of the auditor.

Additionally, any company whose MOI requires the company to comply with the extended accountability requirements in Chapter 3 would be required to do so.

Section 90 requires these companies to appoint their auditor at the AGM at which the requirement first applies to the company, and each AGM thereafter.

However, S61 only provides for an AGM to be held by a public company. Thus, there appears to be no requirement for a private, personal liability or non-profit company to hold an AGM.

Section 60 further clarifies that any business of a company that is required by the Act or the company's MOI to be conducted at an AGM of the company (such as the appointment of the auditor) may not be conducted by shareholders acting other than at a meeting, for example by written poll.

Even though private, personal liability and non-profit companies are not required to hold an AGM it is suggested that such companies hold an annual general shareholders' meeting and dispense with the requirement to appoint the auditor at such a meeting.

Unless the MOI provides otherwise, a company's shareholders' meeting may be conducted partially or entirely by electronic communication.

Issue for consideration

Private, personal liability or non-profit companies should follow this process in the appointment of their auditor. We would advise private, personal liability and non-profit companies to include this process in their MOI.

10.3.2 Independence of auditor

Reference: Section 90(2)

Issue: Auditor independence required

Discussion

The Act expressly disqualifies an auditor from being appointed to perform a ***statutory*** audit if that person provides accounting or secretarial services to the company requiring the audit.

The Act states that a person cannot be appointed as an auditor if that person has performed any of the functions listed in S90(2)(b). This includes the following:

- an employee or consultant involved in the maintenance of financial records or preparation of financial statements;
- director, officer or employee of company secretary;
- a person who alone or with a partner or employee performs the duties as accountant or bookkeeper, or performs related secretarial duties;
- a person who during the past five years has been one of the above; or
- a person related to any of the above.

It is our view that this prohibition ***expressly*** extends only to the appointment of an auditor by a public company or company required to be audited in terms of its own MOI or Regulation 28 (public interest score or activity test), and not to voluntary audits.

Furthermore, SAICA is of the opinion that the prohibition extends only to the individual partner, not the firm. Auditors must, however, carefully consider their independence with reference to the SAICA and IRBA Codes of Professional Conduct, specifically S291.

From a contextual interpretation it is evident that although S90(2) refers to both "a person or firm", this reference is qualified by subsection 3. Subsection 3 determines that where a firm is appointed as an auditor, it is **the individual auditor** that must satisfy the requirements of subsection 2. The reference to "firm" in subsection 2 only has bearing on subsection 2(a). A firm cannot be a prescribed officer, employee, director and the requirements in (b) relate to individuals or natural persons. This is confirmed by subsection 3 and context.

An alternative view that has been espoused is that the prohibition applies to the firm.

Issues for consideration

Auditors must consider whether they meet the independence requirements.

Where an auditor was involved in any of the work mentioned in S90(2)(b) prior to the Effective Date they are not disqualified from being appointed as the auditor for the year following the Effective Date, assuming the prohibited functions have not been performed on or after 1 May 2011, as constitutionally legislation may not apply retrospectively.

10.3.3 Auditors performing other duties

Reference: Section 90(2**)**

Issue: What impact does the Companies Act have on auditors currently performing other duties, including secretarial or bookkeeping duties?

Discussion

The Act states that a person cannot be appointed as an auditor if that person has performed any of the functions listed in S90(2)(b) for a public company or a company required to be audited in terms of its own MOI or Regulations.

This includes the following:

- an employee or consultant involved in the maintenance of financial records or preparation of financial statements;
- director, officer or employee of company secretary;
- a person who alone or with a partner or employee performs the duties as accountant or bookkeeper, or performs related secretarial duties;
- a person who during the past five years has been one of the above; or
- a person related to any of the above.

The transitional arrangements in Schedule 5 of the Act do not deal with the five-year period referred to above.

It is submitted that a general and broad interpretation of the wording "alone or with a partner" in S90(2)(b)(ii) could result in the conclusion that the word "partner" does not specifically relate to the legal concept of a "partnership", but to a person assisting the first person referred to in the subsection.

On the basis of the requirements of the Act and the transitional arrangements, the auditor would now be disqualified from performing the audit if he or she is involved in any of the above-mentioned functions and would immediately be deemed to have resigned as auditor as a result of performing any of the above-mentioned functions in the current year.

It is our view that this prohibition ***expressly*** extends only to the appointment of an auditor by a public company or company required to be audited in terms of its own MOI or Regulation 28 (public interest score or activity test), and not to ***voluntary audits***. Where a company therefore chooses to have a voluntary audit the auditor can provide the additional services taking into consideration the SAICA and IRBA Professional Code as well as the requirements of the Auditing Professions Act.

Issue for consideration

The auditor should consider whether the company requires a ***voluntary*** or ***statutory*** audit when deciding whether to provide additional services to the company.

10.3.4 Resignation of the auditor

Reference: Section 91

Issue: What process takes place when the auditor resigns?

Discussion

Resignation is effective when the notice CoR44 – Notice of change in auditor or company secretary is filed. The auditor is required to give the company one month's written notice, unless the board approves a shorter notice period.

Before filling a vacancy, the board must propose the name of at least one registered auditor to be considered for appointment, to the company's audit committee (if the company has such an audit committee), within 15 business days of the vacancy arising.

The board may proceed with making an appointment of such a proposed person if within five business days after delivering the proposal the audit committee does not give notice in writing to the board rejecting the proposal.

A vacancy in the office of auditor must be filled by the board within 40 business days if there is only one incumbent auditor of the company. The board may appoint a new auditor at any time if there is more than one incumbent, but while such a vacancy continues the surviving or continuing auditor may act as the auditor of the company.

If a company appoints a firm as auditor, any change in the composition of the members of the firm does not by itself create a vacancy. However, if by comparison with the membership of the firm at the time of its latest appointment less than one-half of the members remain after such a change, that change constitutes the resignation of the firm as auditor of the company, giving rise to a vacancy.

The transitional arrangements provide that a person holding office as an auditor of a pre-existing company immediately before the Effective Date continues to hold that office as from the Effective Date, subject to the company's MOI and the requirements of the Act.

A person contemplated above who, in terms of the Act, is ineligible to be, or disqualified from being, the auditor is regarded as having resigned from every such office in any company as from the Effective Date.

A vacancy in the office of director, company secretary or auditor of a pre-existing company as from the Effective Date, irrespective of how such a vacancy arises, is to be filled in accordance with the requirements of the Act.

Issues for consideration

Resignations and vacancies in the office of auditor should be filled in accordance with the requirements of the Act.

The CoR44 – Notice of change of auditor or company secretary must be signed by a representative of the company. Where the company does not want to accept the resignation of the auditor and file the notice, the auditor should notify the client and the Commission of his or her resignation. According to S91, the resignation is effective when the form is filed. "Filed" is defined as "to deliver a document to the Commission in the manner and form, if any, prescribed for the document". Therefore, where the client does not want to accept the resignation the auditor has to ensure that they deliver the letter to the client and Commission as well as keeping proof of the resignation and delivery.

10.3.5 Rotation of auditors

Reference: Section 92

1. **Issue:** To which companies do the rotation requirements of the Act apply?

Discussion

The auditor rotation provisions in S92 of the Act apply to the following categories of companies:

- public companies;
- state-owned companies;
- private, personal liability and non-profit companies if the company is required by the Act or the regulations to have its AFS audited; and
- private, personal liability and non-profit companies that voluntarily elect to have their AFS audited to the extent that the company's MOI so requires.

2. **Issue:** What impact does the Act have on the rotation of auditors?

Discussion

Section 92(1) of the Act states that the same individual may not serve as the auditor or designated auditor of a company for more than five consecutive financial years.

The transitional provisions in Schedule 5 Item 7(11) of the Act determine that the five consecutive financial years contemplated in S92(1) must be calculated from 1 May 2011, the Effective Date of the Act. The effect of the transitional provision is that a designated auditor (the individual) only needs to rotate off a particular audit after auditing five consecutive financial years after 1 May 2011 (or earlier, if required in terms of the International Federation of Accountants (IFAC) rules). This applies even if the audit partner had been the designated auditor for any number of financial years prior to the commencement of the Act. In the case of a first appointment after 1 May 2011, the partner may serve a full five financial years (e.g. from June 2011 to June 2016).

Section 92(2) of the Act states that if an individual has served as the auditor or designated auditor of a company for two or more consecutive financial years and then ceases to be the auditor or designated auditor, the individual may not be appointed again as the auditor or designated auditor of that company until after the expiry of at least two further financial years.

Section 92(3) of the Act states that if a company has appointed two or more persons as joint auditors, the company must manage the rotation required by this section in such a manner that all of the joint auditors do not relinquish office in the same year.

10.4 Audit committees

10.4.1 Appointment of the audit committee

Reference: Section 94

Issue: Appointment of the audit committee by shareholders

Discussion

The audit committee must be appointed by the shareholders at every AGM.

The requirement to appoint an audit committee does not apply where the company is a subsidiary of another company which has an audit committee that will perform the function of audit committee as required by this section. This process is different from the previous Act, where audit committees were appointed by the board.

10.4.2 Audit committees – membership

Reference: Section 94

Issue: Requirements for membership of the audit committee

Discussion

Where a company is required to appoint an audit committee, the audit committee must consist of at least three members who meet the following criteria:

- every member must be a director of the company;
- a member may not be:
    - involved in the day-to-day management of the company's business or have been so involved at any time during the previous financial year;
    - a prescribed officer, or full-time employee, of the company or another related or inter-related company, or have been such an officer or employee at any time during the previous three financial years; or

- a material supplier or customer of the company, such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that director is compromised by that relationship; and
- related to any person who falls within any of the criteria set out in the previous points.

In accordance with the provisions of Regulation 42, at least one-third of the members of a company's audit committee at any particular time must have academic qualifications, or experience, in economics, law, corporate governance, finance, accounting, commerce, industry, public affairs or human resource management.

Issues for consideration

- The transitional arrangements in Schedule 5 of the Act do not specifically deal with audit committees. Any company which is required to have an audit committee will therefore need to consider the membership criteria discussed above. To the extent that a member no longer qualifies to be a member of the audit committee or where the audit committee consists of only two members, companies should regard this as constituting vacancies on the audit committee.
- In order to ensure that the audit committee remains a properly constituted audit committee in terms of the Companies Act, 2008, these vacancies should be filled in accordance with the requirements of S94(6), which requires the board to fill any vacancy within 40 business days.

10.4.3 Different legislative requirements

Reference: Section 94 and Section 5

Issue: How should the differing requirements regarding audit committees in various pieces of legislation which may apply in particular industries be dealt with?

Discussion

Section 94 of the Act applies concurrently with the requirements of S64 of the Banks Act. The provisions regarding the membership of the audit committee set out in subsections 2 to 4 of S94 of the Act do not apply to a company which is also subject to the requirements of S64 of the Banks Act.

Refer also to our discussion of S5 of the Act in Section 3.2 of the guide.

Issue for consideration

It is recommended that a company obtain legal advice regarding the actions it should take when such an inconsistency arises.

10.4.4 Shareholders as members of the audit committee

Reference: Section 94

Issue: Can a shareholder be a member of the audit committee?

Discussion

Please refer to the earlier discussion regarding the membership criteria for an audit committee. Section 94 does not specifically exclude a shareholder from being a member of the audit committee, as long as the shareholder is a director and is not specifically disqualified as discussed. Please note that companies must also take cognisance of the stipulations of other legislation applying to the company, King III or other applicable codes of good corporate governance which may stipulate further restrictions in this regard.

Issue for consideration

Consider whether the shareholder also meets any of the other criteria in S94 which may specifically disqualify them from being a member of the audit committee.

10.4.5 Audit committee not constituted

Reference: Section 94

Issue: Can an audit committee which has not been properly constituted in terms of the requirements of S94 (including the membership requirements) validly fulfil the functions prescribed in S94?

Discussion

- The requirements of S94 are prescriptive. A public company, state-owned company and any other company which is required by its MOI to have an audit committee are obliged to appoint an audit committee consisting of at least three directors of the company meeting the criteria set out in S94. It appears that if the company appoints an audit committee with persons other than those prescribed, it will not be an audit committee as required by the Companies Act. In other words, unless the shareholders appoint a body which consists only of the persons required by the Companies Act in terms of S94, any other so-called audit committee will not in effect be an "audit" committee as defined by the Companies Act.
- As a result, any functions undertaken by a non-compliant (that is an "incorrectly constituted") audit committee (with the exception of certain specific industries where a specific different composition of audit committees is prescribed AND an exemption from the provisions of the Companies Act is provided for in S5 and S94) will not have been performed by the audit committee as required by the Companies Act.
- Where a company is not required to appoint an audit committee, but voluntarily chooses to appoint such a committee, the requirements of S94 will not apply. Such an audit committee will also, however, not be considered to be an audit committee as defined by the Companies Act.

Issues for consideration

Every public company, state-owned company and any other company required by its MOI to have an audit committee must assess the composition of its current audit committee to ensure that the members of the audit committee satisfy the criteria set out in S94. Any vacancies must be filled as discussed previously.

Where an audit committee is appointed voluntarily, companies should caution against including the requirement for an audit committee in their MOIs, as this would result in the companies having to comply with the provisions of S94, including, ***inter alia***, the provisions pertaining to the membership of the audit committee.

As shareholders appoint the audit committee they should consider the risk of having an audit committee that is not properly constituted.

10.4.6 Non-audit services provided

Reference: Section 94

Issue: What is meant by the phrase "***non-audit services***"? What about services generally included in the audit which do not strictly speaking constitute audit services as understood in the context of the Companies Act?

Discussion

- The terms "***audit***" or "***audit services***" bear the same meaning as elsewhere in the Companies Act or the statute which requires the appointment of an auditor. The exact extent of "***audit services***" is not entirely clear. In the event that the auditor intends to perform services for the company whose inclusion as "***audit services***" could be contentious, the auditor should clearly set out such services in a document and obtain pre-approval from the audit committee for the performance of such services, prior to the conclusion of a formal contract with the company in this regard. This situation typically arises where a company, as a matter of policy, imposes certain procedures on itself which are not strictly speaking required as part of the audit.
- The phrase "***audit services"*** refers to those activities performed under the supervision and direction of the auditor in order to support an opinion on the AFS, a review opinion on interim financial information, and, where applicable, other matters which are consequential on the audit appointment and which arise from statute (for example, the capital adequacy (Basel II) reports issued by an auditor of a registered bank in terms of the Banks Act).

As the audit committee determines the audit fee and terms thereof; and also the nature and extent of any non-audit services; and as both are ordinarily the subject of an engagement letter, there should be little risk arising from the definition as, whether the auditor includes a service as an ***audit service*** or a ***non-audit service,*** the audit committee will have input in approving such a service.

Issues for consideration

Audit committees have a specific duty to consider the independence of the auditor with reference to, ***inter alia***, other services rendered by the auditor to the company. If an auditor renders any service without the requisite pre-approval, S94(8)(a) may render that auditor to be not independent. Care should therefore be taken to ensure that any non-audit services are pre-approved by the audit committee before those services are rendered to the company. The Code of Professional Conduct for Chartered Accountants, S290 should also be considered where auditors are providing other services, as independence and safeguards to independence are discussed.

10.4.7 Pre-approval of agreements

Reference: Section 94

Issue: What is intended by the phrase "***pre-approve any proposed agreement with the auditor for the provision of non-audit services to the company***"?

Discussion

The interpretation of the phrase "***pre-approve any proposed agreement with the auditor for the provision of non-audit services to the company***" is difficult. However, it is important to consider both the intent of the legislation and also other practice in markets which have similar provisions. On this basis it is possible for there to be a master service agreement in place governing the auditor's provision of ***non-audit services***, provided the agreement includes all material terms governing the provision of such ***non-audit services***. Where an auditor has such a pre-approval in place it would nonetheless be incumbent on the auditor to table for approval from time to time the extent of fees to be paid or paid in respect of actual ***non-audit services*** provided. Further, the master service agreement should include the terms under which the services are provided, the nature of services which can be provided, and the extent of such services, which are pre-approved by the audit committee. If services are provided under different terms from those pre-approved by the audit committee, then these different terms should be pre-approved by the audit committee.

Issues for consideration

Every company should ensure that engagement letters deal with "typical non-audit services" which the auditor normally provides to that company as part of the audit engagement letter which is considered and pre-approved by the audit committee. Where an auditor enters into any further agreements for additional, ad-hoc non-audit services, each such agreement will need to be considered by the audit committee.

10.4.8 Pre-approval policy

Reference: Section 94

Issue: Will a pre-approval policy be sufficient to discharge the obligation of the audit committee to pre-approve any agreement to provide non-audit services?

Discussion

A pre-approval policy drafted by the audit committee will not be sufficient to discharge the obligation on the audit committee to pre-approve all non-audit services. The provision of S94 that the audit committee must determine the "***nature and extent***" of any non-audit services to be provided by the auditor appears, however, to require that the audit committee formulates a policy in this regard. Amongst other things, the audit committee could consider a list of services which the auditor would not, as a matter of principle, be allowed to render or certain limitations on fees to be paid for non-audit services received from the auditor.

10.4.9 Delegation by audit committees

Reference: Section 94

Issue: Can the functions of the audit committee be delegated to one member of the audit committee? Can the functions of the audit committee be delegated to a person who is not a member of the audit committee?

Discussion

The functions of the audit committee cannot be "delegated" to either one member of the audit committee or another person in the company; for example, a member of the board.

However, the audit committee would be able to "authorise" a member of the audit committee to take certain steps in respect of a particular contract in the same manner that the board members would generally authorise a director to settle the terms of a particular agreement and sign documentation. Authorisation differs from delegation in the sense that authorisation requires the members of the audit committee to have applied their minds to a particular situation.

10.4.10 Reliance of audit committee on other processes

Reference: Section 94

Issue: Can the audit committee rely on a process in executing its functions?

Discussion

- An audit committee can establish, or require the company to establish, processes which support its activities. The audit committee should, however, be satisfied that the objectives of the Companies Act and its statutory duties are not frustrated through the process of implementation.
- For example, if the audit committee process for agreeing the audit fees removed this decision ("***the audit committee must determine***") from the audit committee in favour of management, and the audit committee role was only one of being informed of any disagreement, then the process would be inappropriate.
- However, if the audit committee process allowed for management and auditors to provide the input necessary in building the audit hours and budget in a way that meant that the audit committee still determined the audit fee, this would be acceptable.
- This acceptable process may be achieved through various processes, one of which might be:
    - the auditors and management meet to discuss business and identify risks;
    - the auditors and management meet with the audit committee and present the result of this process;
    - the auditors scope the work and present an audit fee budget for comment to management but not for material amendment (errors and omissions would be dealt with but differences of view on the fee should be tabled for the audit committee to

consider). The audit committee would consider the fee in light of supporting the appropriate scope of audit work being performed;

- o the auditors present a fee budget to the audit committee with management's comments and suggestions for change noted.

The audit committee engages the parties and reaches a determination of the audit fee.

Issue for consideration

Care should be taken in establishing any process to ensure that the process itself does not interfere, restrict or otherwise limit the duty of the audit committee.

10.4.11 Audit committee approval of contracts for another entity

Reference: Section 94

Issue: Can the audit committee for the holding company pre-approve a contract for another entity in the group? Would it make a difference if the audit committee of the holding company were also the audit committee for a subsidiary?

Discussion

Only the audit committee appointed in respect of a particular company is entitled to perform any of the prescribed functions for that company. If the audit committee of the holding company has specifically been authorised to perform the required functions for subsidiary companies, the pre-approval by that audit committee in respect of a relevant subsidiary will be effective. The audit committee of the holding company will, however, be required to apply its mind in respect of the potential impact of the non-audit services on the particular subsidiary prior to granting the required approval.

10.4.12 Approval for non-audit services after commencement of services

Reference: Section 94

Issue: What is the position if the approval of the audit committee for the non-audit services is only obtained once a contract in this regard has already been signed by a relevant officer of the company or after the non-audit services have already commenced?

Discussion

The Act makes no provision for the ratification of any contracts and the provision of any non-audit services without pre-approval should be avoided.

10.4.13 Audit committee report in annual financial statements

Reference: Section 1, Section 29, Section 30 and Section 94

Issue: Where in the annual financial statements should the audit committee report be included?

Discussion

- AFS are included in the definition of financial statements.

- Whereas the previous Act required the audit committee to include a report in the "financial statements", S94 of the Act specifically requires this report to be included in the "Annual Financial Statements".
- Where the AFS are presented with other information in, for example, an Annual Report, the placement of the audit committee report will need to be in the AFS section of such a report to give effect to the requirement of S94.
- As discussed in section 3.2 of this guide, if there is a conflict between the Auditing Profession Act and the Companies Act, 2008, the Auditing Profession Act will prevail. There is a concern that the auditor cannot audit the contents of the audit committee report, which deals with, ***inter alia***, the auditor's independence. Given the potential conflict, it is argued that the audit report should not cover the audit committee report.

Issues for consideration

To ensure compliance with S94 of the Act and to avoid any potential conflict with the Auditing Profession Act, it is recommended that the audit committee report be included in the AFS (i.e. if the company issues an Annual Report which includes the AFS, the audit committee report should be placed in the AFS section of the said report), but that the audit committee report is placed before the audit report. The audit committee report is therefore included as an integral part of the AFS, but excluded from the pages of the AFS that are audited and referred to in the first paragraph of the audit report.

11 Existing share incentive scheme

11.1 Use of trust for share scheme

Reference: Section 95(1)(c), Section 96(1)(f), Section 97, Section 41(2)(d), Section 44(3)(a)(i) and Section 45(2)(c)(i)

Issue: Existing share schemes are affected by the new definition of "employee share scheme", which appears to be limited to the issue of shares or the granting of options, but which no longer requires the use of a trust.

Discussion

An employee share scheme is defined as:

> ***"a scheme established by a company whether by means of a trust or otherwise, for the purpose of offering participation therein solely to employees, officers and other persons closely involved in the business of the company or a subsidiary of the company, either –***
>
> ***i. by means of the issue of shares in the company; or***
>
> ***ii. by the grant of options for shares in the company."***

Employee share schemes as defined above are excluded from a number of onerous requirements in terms of the Act if they comply with the exemption requirements of S97, for example the procedure to be followed when granting financial assistance (see S44).

However, the definition is problematic in that it will only apply to schemes which provide for the issuing of shares or the granting of options (in other words not for schemes involving the secondary market).

“Foreign companies” are specifically included in the definition of “company” in this section. The share scheme exemption will therefore also apply to non-South African companies.

A trust is no longer required to qualify for the share scheme exemption, but may be used.

Other requirements relating to the compliance officer and his duties (S97) appear similar to S144A of the 1973 Act.

Issues for consideration

The Act will potentially have a significant impact on existing share schemes offered by both South African and non-South African companies to South African employees.

The compliance officer of existing share incentive schemes offered in South Africa or the comparable officers of a non-South African company offering shares to South African employees should consider whether the new definition of “employee share scheme” applies to existing schemes and, if not, the appropriate course of action, which can include:

- an amendment to the existing scheme to comply with the definition; or
- complying with the necessary approvals relating to, for example, financial assistance (S44) and financial assistance to directors (S45) if the share scheme exemption no longer applies.

The company can consider whether it would like to retain existing trusts created for purposes of existing share schemes and whether it wishes to utilise trusts for new schemes. Although a trust may no longer be required for purposes of company law, it may be useful for other purposes, depending on the provisions of every share scheme.

When reviewing current share schemes it would also be useful to consider recent changes brought about by King III and the Income Tax Act No. 58 of 1962.

11.2 Effect of solvency and liquidity test

Reference: Section 4, Section 22(1)(b) and Section 46

Issue: Effects of the solvency and liquidity test on share schemes

Discussion

The Act requires that directors ensure that the company does not trade under insolvent circumstances (S22(1)(b)) and that the directors apply the solvency and liquidity test on a regular basis.

We propose that share schemes contain a catch-all provision which exempts the scheme from any obligation that it may have towards participants to the extent that the company does not meet the solvency and liquidity requirement on the date that the relevant obligation would otherwise arise.

Depending on the interpretation of the transitional provisions, it is likely that directors will immediately from the Effective Date be obliged to perform the solvency and liquidity test for the prescribed transactions.

Issues for consideration

The compliance officer of any existing share incentive schemes offered by South African companies should carefully consider whether it is necessary to include a limitation on the obligations of the scheme vis-à-vis participants in the event that the company does not meet the solvency and liquidity test when the obligation arises.

11.3 Flexibility around issue of shares

Reference: Section 36, Section 37 and Section 40

Issue: Flexibility around the issue of shares and rights attaching to shares creates new opportunities around share schemes.

Discussion

The Act provides for more flexibility around the rights attaching to shares, for example that the MOI can provide for “unclassified shares” which will be classified (i.e. rights attached by) and issued by the board at its discretion (S36(1)(c)).

The Act provides that the MOI may provide for any terms of a class of shares to vary in response to an objectively ascertainable external fact (S37(6) and (7)).

The board of the company will determine the consideration payable for shares (S40(1)(a)), but the Act further provides that shares may be issued despite the fact that they have not been fully paid (S40(5), the issue of shares in this instance will be subject to certain conditions).

Issues for consideration

The company can consider whether the flexibility around share rights and share issues allowed in the Act creates the opportunity to better align employee compensation and incentivisation with the requirements of the company.

It may be possible for the company to provide employee share incentives outside of the “traditional” share schemes.

12 Appointment of a compliance officer

Reference: Section 97(1)

Issue: The appointment of a compliance officer is not per se required by the Act. However, in instances where a company invokes the exemptions outlined below, it can only do so if it has appointed a compliance officer and complies with the requirements set out in S97.

Discussion

For an employee share scheme to qualify for the exemptions stated in S41 (2) (***d***), S44 (3) (***a***) (i) or S45 (3) (***a***) (i), the company must appoint a compliance officer for the scheme. The compliance officer is accountable to the directors of the company and is responsible for the administration of the scheme.

The compliance officer must provide a written statement to any employee who receives an offer of specified shares in terms of that employee scheme, setting out full particulars of the nature of the transaction, including the risks associated with it; information relating to the company, including its latest AFS, the general nature of its business and its profit history over the last three years; and full particulars of any material changes that occur in respect of any of the aforementioned information provided.

The compliance officer must ensure that copies of the documents containing the above information are filed with the Commission within 20 business days after the employee share scheme has been established; and must also file a certificate within 60 business days after the end of each financial year, certifying that he or she has complied with the obligations in terms of this section during the past financial year.

For the purpose of filing the required documents with the Commission, forms CoR 46.1 and CoR 46.2 must be completed and filed with the Commission.

Issues for consideration

Duties of the compliance officer

Forms CoR 46.1 and CoR 46.2 respectively deal with the notice to the Commission advising that the company has established an employee share scheme and with the annual certificate confirming the company's compliance with the Act. The forms do not make provision for the inclusion of all the information as outlined above. It is submitted that copies of the required documents should be attached to CoR 46.1 on establishment of the scheme and that reference to the attachments should be made in a covering letter to the Commission. The compliance officer should obtain and keep an acknowledgement of receipt of the documentation and appropriately keep record of the documents filed with the Commission.

It is submitted that the compliance officer should perform appropriate monitoring procedures in respect of the scheme, to ensure that the company complies with its obligations in respect of the scheme. A conflict of interest may, however, arise where the compliance officer is required to certify that he or she has complied with the obligations as outlined. An appropriate independent procedure for purposes of this certification should be considered and it is suggested that the "authorised signature" on Form CoR 46.1 should be co-signed by management in conjunction with the compliance officer.

Invoking the exemptions

Section 41(2) (d) determines that where the issue of shares, securities or rights is pursuant to an employee share scheme that satisfies the requirements of S97 (i.e. a compliance officer has been appointed to take responsibility for the above duties), approval by special resolution is not required for the issue of shares, securities or rights.

By the same token the board may rely on the exemption from adopting a special resolution when authorising financial assistance as contemplated in S44 and S45, if it complies with the compliance officer requirements of S97 in respect of employee share schemes.

It is, however, submitted that a special resolution is still required in all cases, where the MOI of a company so requires. The memorandum may, however, not waive the requirement for the appointment of a compliance officer where a company wishes to invoke the exemptions outlined in S41(2) (d), S44 (3) (***a***) (i) or S45 (3) (***a***) (i). Also in instances where the MOI still requires the adoption of a special resolution, it is submitted that compliance with the further requirements in relation to such a resolution is still required as contained in S41, S44 and S45.

13 Business rescue

13.1 Mitigation of certain provisions

Reference: Chapter 6, Section 133 and Section 136

Issue: Mitigation of certain business rescue provisions which suspend the obligations of the financially distressed company

Discussion

The provisions of S133 (suspension of legal proceedings, including the enforcement of a guarantee of surety) and S136 (the right of the business rescue practitioner to cancel or suspend any provision of an agreement) may potentially have a severe impact on the company, in particular where major suppliers or customers are placed under business rescue.

It appears difficult to mitigate the risk posed by the above sections. Any of the following can be considered:

- obtaining alternative security in respect of obligations, other than guarantees or sureties;
- not entering into very long-term agreements with any entities;
- contractually requiring the third party to advise the company as soon as it considers entering into business rescue or receives notice from affected persons of their intention to commence such proceedings. However, we point out that should the third party fail to comply with this obligation there may be little the company can do about it.

Issues for consideration

We propose that the company obtains well informed advice prior to entering into new agreements with major suppliers or customers, as the existing safeguard against insolvency will not necessarily be effective protection in the business rescue environment.

We suggest a review of all major contract and existing suretyships and guarantees.

The potential impact of the possible suspension of agreements in terms of S136 is, in our view, a substantial business risk.

13.2 Duty of board if company is financially distressed

Reference: Section 128(1)(a) and (f), and Section 129(1) and (7)

Issue: Board duties when company is financially distressed

Discussion

Section 129(7) provides that if the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution to commence business rescue proceedings, the board must deliver written notice to each affected person setting out the reasons for not initiating business rescue proceedings.

Issues for consideration

We propose that the board of the company considers implementation of mechanisms to consider whether the company is "financially distressed" as defined in S128(1)(f) and possibly consider contingency plans in the event that it concludes that the company is financially distressed.

13.3 Solvency and liquidity test

Reference: Section 128, Section 4, Section 22, Section 77, Section 128(1)(a) and (f), Section 129(1) and (7) and Regulation 29

Issue: Solvency and liquidity test

Discussion

Refer to our discussion of when a company would satisfy the solvency and liquidity test in terms of S4 of the Act in Section 5.2 of this guide.

14 Whistle blowers

Reference: Section 159

Issue: Protection of whistle blowers

Discussion

The Protected Disclosures Act, No 26 of 2000 provides protection to an employee who discloses information under that Act as prescribed. The new Companies Act now also provides protection to a shareholder, director, company secretary, prescribed officer or registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier who provides information in terms of S159. Section 159 applies to employees in addition to the Protected Disclosures Act. The application and effect of S159 may not be limited or negated by a company's MOI and any such action is void in terms of the Act.

Section 159 offers qualified privilege in respect of the disclosure and immunity from any civil, criminal or administrative liability for that disclosure.

Section 159 governs disclosures that comply with the following summarised requirements:

- the disclosure is made in good faith to the Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, a person performing the function of internal audit, the board or committee of the company concerned; and
- the whistle blower was under the reasonable belief at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company had—
  - contravened this Act, or a law mentioned in Schedule 4;
  - failed or was failing to comply with any statutory obligation to which the company was subject;
  - engaged in conduct that had endangered, or was likely to endanger, the health or safety of any individual, or had harmed or was likely to harm the environment;
  - unfairly discriminated, or condoned unfair discrimination, against any person, as contemplated in S9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, No.4 of 2000; or
  - contravened any other legislation in a manner that could expose the company to an actual or contingent risk of liability, or was inherently prejudicial to the interests of the company.

A whistle blower who discloses in compliance with S159 is entitled to compensation from the person to whom the disclosure was made, for any damages suffered as a result of threats posed in consequence of the disclosure.

A public company or a state-owned company is obligated to establish and maintain a system to receive S159 disclosures confidentially, and act on them; and routinely publicise the availability of that system to the categories of persons contemplated above.

Issues for consideration

Section 159 offers qualified privilege in respect of the disclosure. Qualified privilege offers protection against legal action instituted against the whistle blower usually for defamation, for acts committed in the performance of a legal or moral duty and rights properly exercised in good faith. It is interesting to note that S159 does not require companies other than public and state-owned companies to maintain a system to receive S159 disclosures confidentially. It is, however, submitted that in order for whistle blowers of these other companies to rely on privilege, the disclosure should clearly be marked as confidential.

The privilege is furthermore dependent on full compliance with the requirements as outlined above. Failure to comply with the onerous requirements of subsection 3 by whistle blowers may jeopardise the whistle blower's ability to invoke the provisions pertaining to qualified privilege. Whistleblowing for contravention of laws, furthermore, seems to be limited to the Companies Act and the list of legislation in Schedule 4 that, ***inter alia***, includes (but is not limited to) the Copyright Act, No. 98 of 1978, Designs Act, No. 195 of 1993 and the Merchandise Marks Act, No. 17 of 1941. If a contravention of any other law is disclosed, the whistle blower must be under the reasonable belief that the contravention could expose the company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company. Under these onerous circumstances the whistle blower should pay great caution not to fall foul of the provisions.

Annexure A – Alterable provisions

Schedule of alterable provisions and prevalent matters relating to the Memorandum of Incorporation

	Section in Act	Alterable Provision
1.	4(2)(c)	unless the MOI provides otherwise when applying the solvency and liquidity test in respect of a distribution, a person is not to regard as a liability any amount that would be required, if the company were to be liquidated at the time of the distribution, to satisfy the preferential rights upon liquidation of the shareholders whose preferential rights upon liquidation are superior to the preferential rights upon liquidation of those receiving the distribution.
2.	15(3)	unless the MOI provides otherwise the board of a company may make, amend or repeal any necessary or incidental rules relating to governance in respect of matters not addressed in the Act or the MOI.
3.	16(1) read with 16(2)	an MOI may be amended if a special resolution to amend it is proposed by the board of the company or shareholders entitled to exercise at least 10% of the voting rights that may be exercised on such a resolution. The MOI may contain different requirements than the aforementioned with respect the proposal of amendments.
4.	19(1)(b)(ii)	unless the MOI provides otherwise a company has all the powers and capacity of an individual.
5.	19(2)	unless the MOI provides otherwise a person is not, solely by reason of being an incorporator, shareholder or director, liable for any liabilities or obligations of the company.
6.	26(3)	the MOI of a company may establish additional information rights of any person with respect to any information pertaining to the company.
7.	30(2)(b)(ii)(aa)	the annual financial statements of any company other than a public company (if not required to have an audit) may be audited voluntarily if the MOI or a shareholders' resolution so requires or if the company's board has so determined.
8.	34(2)	unless the MOI provides otherwise a private, personal liability or non-profit company is not required to comply with the extended accountability requirements set out in Chapter 3.

9.	35(6)(a)	Despite the repeal of the Companies Act, 1973 (Act No. 61 of 1973), a share issued by a pre-existing company, and held by a shareholder immediately before the effective date, continues to have all of the rights associated with it immediately before the effective date, irrespective of whether those rights existed in terms of the company's Memorandum of Incorporation, or in terms of that Act, subject only to— (a) amendments to that company's Memorandum of Incorporation after the effective date
10.	36(2)(b)	unless the MOI provides otherwise the authorisation, classification, number of shares and the preferences, rights and limitations of each class of share, as set out in the MOI, may be changed by the board of a company.
11.	36(3)	unless the MOI provides otherwise the board of a company can increase or decrease the number of authorised shares of any class, reclassify classified shares that have been authorised but not issued, classify the unclassified authorised shares and determine preferences, rights, limitations or other terms pertaining to unclassified shares.
12.	37(2)	unless the MOI provides otherwise each share has "one" general voting right.
13.	39(1)(a)	unless the MOI provides otherwise the provisions of S39 do not apply to a public company or a state-owned company.
14.	39(2) read with 39(3)	unless the MOI provides otherwise if a private company proposes to issue any shares, other than as contemplated in S39(1)(b), each shareholder of a private company has a right to be offered, and within a reasonable time to subscribe for, a percentage of the shares to be issued equal to the voting power of that shareholder's general voting rights immediately before the offer was made.
15.	39(4)	unless the MOI provides otherwise a shareholder may take up fewer shares than those he would have been entitled to subscribe for and shares not subscribed for within a reasonable time may be offered to other persons.
16.	43(2)(a)	unless the MOI provides otherwise the board of a company may authorise the company to issue a secured or unsecured debt instrument at any time.
17.	43(3)	unless the MOI provides otherwise a debt instrument may grant special privileges to the holder of the instrument regarding attending, voting at general meetings, appointing of directors or allotment of securities etc.

18.	44(2)	unless the MOI provides otherwise the board may authorise the company to provide financial assistance by way of a loan, guarantee, security etc. to any person for the purposes of subscription or purchase of any securities of the company.
19.	45(2)	unless the MOI provides otherwise the board may authorise the company to provide direct or indirect loans or other financial assistance to a director, prescribed officer of the company or related or inter-related company.
20.	47(1)	unless the MOI provides otherwise the board of a company, by resolution, may approve the issuing of capitalisation shares and may permit any shareholder entitled to receive such capitalisation shares to elect instead to receive a cash payment.
21.	56(1)	unless the MOI provides otherwise the company's issued securities may be held by, and registered in the name of, one person for the beneficial interest of another person.
22.	57(3)	unless the MOI provides otherwise if a profit company, other than a state-owned company, has only one director, the director may exercise any power or perform any function of the board at any time, without notice or compliance with any other internal formalities.
23.	57(4)(a)	unless the MOI provides otherwise if every shareholder is also a director of a company any matter referred by the board to the shareholders for decision may be decided by the shareholders without notice or compliance with any other internal formalities.
24.	58(3)	unless the MOI provides otherwise a shareholder of a company may appoint two or more proxies, a proxy may delegate his authority to another person and a copy of the proxy must be delivered to the company before the proxy exercises any rights.
25.	58(7)	A proxy is entitled to exercise, or abstain from exercising, any voting right of the shareholder without direction, except to the extent that the Memorandum of Incorporation, or the instrument appointing the proxy, provides otherwise.
26.	59(3)	unless the MOI provides otherwise if the board does not determine a record date, in the case of a meeting, the record date is the latest date by which the company is required to give shareholders notice of that meeting or the date of the action or event, in any other case.
27.	61(3) read with 61(4)	unless the MOI provides otherwise the board must call a shareholders' meeting if one or more written and signed demands are delivered and in aggregate demands for the same purpose are made by holders of at least 10% of the voting rights entitled to be

		exercised in relation to the matter proposed. The MOI may specify a percentage lower than 10%.
28.	61(9)	unless the MOI provides otherwise the board of the company may determine the location for any shareholders' meeting of the company and a shareholders' meeting of the company may be held in the Republic or in any foreign country.
29.	62(1) read with 62(2)	unless the MOI provides otherwise notice of each shareholders' meeting must be delivered at least 15 business days before the meeting is to begin, in the case of a public company or non-profit organisation that has voting rights, or 10 business days in any other case.
30.	63(2)	unless the MOI provides otherwise a shareholders' meeting may be conducted entirely or partially by electronic communication.
31.	64(1) read with 64(2)	a shareholders' meeting may not begin until at least 25% of persons holding all the voting rights that are entitled to be exercised in respect of at least one matter to be decided at the meeting are present and no matter to be decided may begin to be considered unless at least 25% of all voting rights that are entitled to be exercised on that matter are present. The MOI may specify a percentage lower or higher than 25% in either or both instances.
32.	64(4) and (5) read with 64(6)	if within one hour after the appointed time for a meeting to begin a quorum is not present, the meeting is postponed for one week and the person intended to preside over the meeting may extend the one-hour limit for a reasonable period. The MOI may provide for a longer or shorter period in respect of either or both the one-hour or one-week periods.
33.	64(9)	unless the MOI provides otherwise, after a quorum has been established for a meeting, the meeting may continue or the matter may be considered, so long as at least one shareholder with voting rights entitled to be exercised at the meeting is present.
34.	64(12) read with 64(13)	a meeting may not be adjourned beyond 120 business days after the record date or 60 business days after the date on which the adjournment occurred. The MOI may provide for different maximum periods of adjournment of meeting or for unlimited adjournment of meetings.
35.	65(8)	for an ordinary resolution to be approved by shareholders, it must be supported by more than 50% of the voting rights exercised on the resolution. The MOI may specify one or more higher percentages than 50%.
36.	65(9) and (10)	for a special resolution to be approved by shareholders, it must be

		supported by at least 75% of the voting rights exercised on the resolution. The MOI may specify one or more different percentages than 75% (i.e. either higher or lower).
37.	66(1)	unless the MOI provides otherwise the business and affairs of a company must be managed by or under the direction of the board, which has the authority to exercise all of the powers and perform any of the functions of the company.
38.	66(2) and (3)	the board of a company must comprise (in the case of a private company) at least one director. (The MOI may specify a higher number than the minimum number of directors.)
39.	66(4)	a company's MOI may provide for- • the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the MOI; • a person to be an ex officio director of the company as a consequence of that person holding some other office, title, designation or similar status, subject to S66(5)(a); • the appointment or election of one or more persons as alternate directors of the company.
40.	66(4)(a)ii) read with (5)(b)(i)	unless the MOI provides otherwise a person who holds office or acts in the capacity of an ex officio director of a company has all the powers and functions of any other director.
41.	66(8)	unless the MOI provides otherwise the company may pay remuneration to its directors for their services as directors.
42.	66(12)	unless the MOI provides otherwise, any director may be appointed to more than one committee of the company and, when calculating the minimum number of directors required, any such director who has been appointed to more than one committee must be counted only once.
43.	68(1)	unless the MOI provides otherwise a director's appointment is indefinite.
44.	68(2)	unless the MOI provides otherwise, for a profit company in any election of directors the election is to be conducted as a series of votes, each of which is on the candidacy of a single individual to fill a single vacancy, with the series of votes continuing until all the vacancies on the board at that time have been filled and each vote entitled to be exercised may be exercised once and the vacancy is filled if a majority of voting rights supports the candidate.
45.	68(3)	unless the MOI provides otherwise the board may appoint a person who satisfies the requirements for election to fill any vacancy and

		serve as a director of the company on a temporary basis until the vacancy has been filled.
46.	69(6)	in addition to the provisions of S69, the MOI may impose additional grounds of ineligibility or disqualification of directors or minimum qualifications to be met by directors.
47.	72(1)	unless the MOI provides otherwise the board may appoint any number of committees of directors and delegate to any committee any of the authority of the board.
48.	72(2)	unless the MOI provides otherwise a board committee may include persons who are not directors of the company, may receive advice from any person and has full authority of the board in respect of matters referred to it.
49.	73(1) read with 73(2)	a director authorised by the board of a company must call a board meeting if required to do so by at least 25% of the directors (in the case of a board that has at least 12 members) or two directors in any other case. The MOI may specify a percentage higher or lower than 25% or two directors.
50.	73(3)	unless the MOI provides otherwise a meeting of the board may be conducted by electronic communication.
51.	73(5)	unless the MOI provides otherwise: • if all the directors of a company acknowledge actual receipt of notice of a meeting and are present at the meeting, or waive notice, the meeting of directors may proceed despite failure to give requisite notice or a defect in the notice; • a majority of directors must be present at a meeting before a vote may be called; • each director has one vote on a matter before the board; • a majority of the votes cast on a resolution is sufficient to approve that resolution; • in the case of a tied vote the chair may cast a deciding vote if the chair did not initially have or cast a vote or the matter being voted on fails in any other case.
52.	74(1)	unless the MOI provides otherwise a decision that could be voted on at a meeting of the board of a company may instead be adopted by written consent of a majority of the directors provided that each director has received notice of the matter to be decided.
53.	78(4), (5) and (7)	unless the MOI provides otherwise the company may (with certain exceptions) advance expenses to a director to defend litigation in any proceedings arising out of his services and may directly or indirectly indemnify him for these expenses and take out insurance

		to protect the director or the company.
54.	84(1)(c)	This Chapter applies to … a private company, a personal liability company or a non-profit company — (i) if the company is required by this Act or the regulations to have its annual financial statements audited every year: Provided that the provisions of Parts B and D of this Chapter will not apply to any such company; or (ii) otherwise, only to the extent that the company's Memorandum of Incorporation so requires, as contemplated in section 34(2).'
55.	115(2)(a)	A proposed transaction contemplated in subsection (1) must be approved – (a) by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter, or any higher percentage as may be required by the company's Memorandum of Incorporation, as contemplated in section 64(2)….
56.	Schedule 1,Item 1(8)	unless the MOI provides otherwise the vote of each member of a non-profit organisation is of equal value to the vote of each other voting member on any matter to be determined by vote of members.
57.	Schedule 1, Item 4(1)	A non-profit company is not required to have members, but its MOI may provide for it to do so.
58.	Schedule 5, Item 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.
59.	Schedule 5, Item 7(1)	A person holding office as a director, prescribed officer, company secretary or auditor of a pre-existing company immediately before the effective date continues to hold that office as from the effective date, subject to the company's Memorandum of Incorporation, and this Act.

Annexure B – Considerations relating to MOI

Considerations relating to the content of the Articles/MOI and shareholders' agreements

- **Each of the matters below should be considered in light of:**
  - The applicable provisions of the Act
  - Applicable commercial realities
  - The general anti-avoidance provisions in S6 and the provisions of S15(2)(a)
- **Consider any provisions in shareholders' agreements which are not in the Articles of Association**

These provisions will need to be included in the MOI prior to the expiry of the two-year grace period.

- **Voting percentages prescribed in the different documents (the Act, the MOI and shareholders' agreements) and whether these could or should be adjusted in light of:**
  - the ability to move percentages required for special and ordinary resolutions (S65(8) and (10));
  - the new voting thresholds which are relevant for fundamental transactions (S115).
- **Effect of S20(2) and S20(6) of the Act**

Contravention of the MOI by the directors may be ratified by a special resolution, in which event there will be no claim for damages against the directors.

However, this may negatively affect minority protection, if the minority is not enough to prevent the passing of a special resolution.

The MOI can, for example, place a responsibility on shareholders to ratify an action only if it is ratified by all shareholders, including minorities.

- **Amendment of rights attaching to shares of one class by the holders of another class: consider the requirements for the amendment of share rights of each class of shares.**
- **Whether restrictions are required, and the extent of restrictions required, on the powers of directors to:**
  - increase or decrease the authorised shares;
  - reclassify non-issued shares;
  - classify unclassified non-issued shares;
  - determine the preferences, rights, limitations and other terms associated with a class, not yet determined and not yet issued;
  - amend the rights attaching to classes of shares; and
  - make rules which are binding on the company and shareholders.

Note, however, that the powers contemplated above are all subject to the standard of conduct and prescribed liability of directors (see S75 to S78).

- **Deadlock provisions**

If the shareholders or directors are deadlocked, this is grounds for the winding-up of a company (S81).

Consider including a resolution mechanism in the MOI so that a deadlock cannot arise, for example "***resolutions deadlocked between directors referred to …***"

- **Solvency and liquidity**

Consider providing guidance to directors on the solvency and liquidity test.

- **Limitation of statutory pre-emptive right**

The statutory pre-emptive right applies equally to all classes of shares (S39(2) to (4)). For example, if a private company proposes to issue ordinary shares, all preference shareholders will also have a pre-emptive right to these shares, unless this pre-emptive right is amended by the MOI.

- **Restrictions on issue of debt instruments (S43)**

The Act states that debt instruments can be issued unless prohibited by MOI. Companies should consider whether they would want this prohibited.

- **Consider limiting the ability to hold the company's securities for the beneficial interest of another (S56)**
- **Voting rights of directors**

The Act states that each director has only one vote unless the MOI provides otherwise.

- **Round robin resolutions**

Currently the MOI will generally require 100% agreement for a round robin resolution to be passed by the directors. Consider removing the restriction (if it is in the MOI) to give more flexibility. The Act provides that a majority of directors may pass a round robin resolution, unless the MOI provides otherwise (S74).

Consider whether any shareholders' resolutions would be better dealt with in a meeting and how to include this requirement.

- **Quorum**

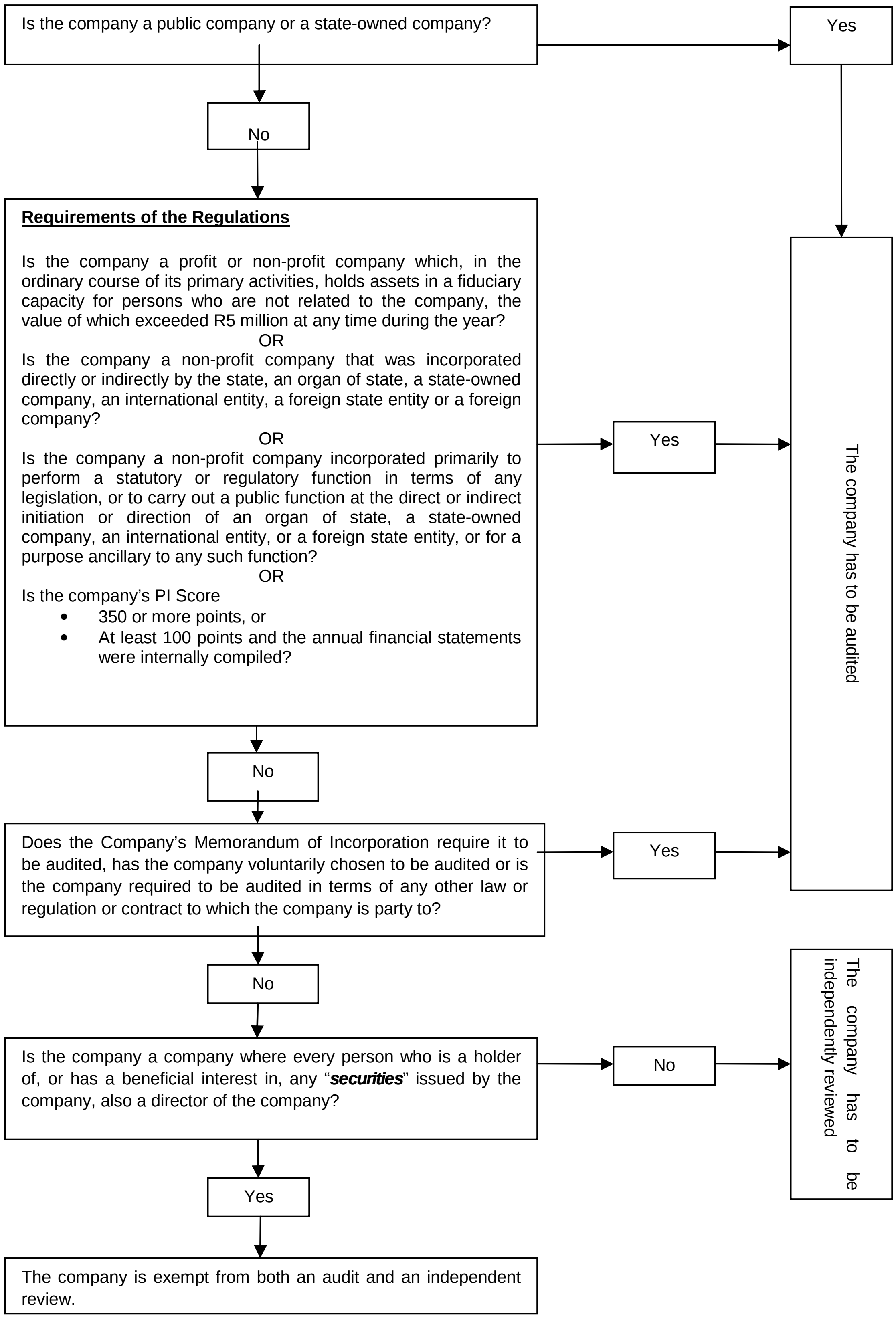
The MOI can alter the percentage required for a quorum. The default percentage for a quorum, regardless of whether an ordinary or special resolution is being considered, is 25% (S64).

Consider possible additional requirements, for example that a specific shareholder must be present at a meeting before a matter can be considered.

- **General meetings**

Consider whether the company, as private companies will no longer be required to have AGMs, should be required, by way of its MOI, to hold AGMs.

Annexure C – Decision tree on audit or review



Annexure D – Audit, review and reporting standards

<u>Information regarding audit, review and financial reporting standards that should be applied</u>

Calculation of the public interest score (section applicable to all companies and close corporations)

To ascertain whether a company or CC requires an audit or review, and which financial reporting standard should be applied, it should calculate its public interest score for the financial year.

A company's public interest score is calculated at the end of each financial year as follows (Regulation 26(2)):

- a number of points equal to the average number of employees of the company during the financial year;
- one point for every R1 million (or portion thereof) in third party liability of the company at the financial year end;
- one point for every R1 million (or portion thereof) in turnover during the financial year; and
- one point for every individual who, at the end of the financial year, is known by the company to directly or indirectly have a beneficial interest in any of the company's issued securities.

Practical issues to be considered when calculating the public interest score

- This calculation should be made at a company level and not at a consolidated group level.
- When making the calculation, "employee" has the meaning set out in the Labour Relations Act, 1995 (Act No. 66 of 1995). In this Act, an employee is defined as:

> ***"a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and***
>
> ***b) any other person who in any manner assists in carrying on or conducting the business of an employer,***
>
> ***and 'employed' and 'employment' have meanings corresponding to that of 'employee'."***

The following additional guidance is provided in S200A of the Labour Relations Act, 1995 (Act No. 66 of 1995):

"Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

> ***a) the manner in which the person works is subject to the control or direction of another person;***
>
> ***b) the person's hours of work are subject to the control or direction of another person;***

- *__c)__* ***in the case of a person who works for an organisation, the person forms part of that organisation;***
- *__d)__* ***the person has worked for that other person for an average of at least 40 hours per month over the last three months;***
- *__e)__* ***the person is economically dependent on the other person for whom he or she works or renders services;***
- *__f)__* ***the person is provided with tools of trade or work equipment by the other person; or***
- *__g)__* ***the person only works for or renders services to one person."***

- "Third party liabilities" is not defined in the Act. These liabilities are viewed to be all liabilities (on commercial terms) of a company that are <u>payable</u> to an identifiable third party. The following practical issues need to be considered:
  - items should meet the definition of a "liability" AND involve a "third party";
  - all loans from shareholders are seen to be with a directly related party of the company and should be excluded from the public interest score calculation;
  - provisions recognised in terms of the prescribed financial reporting standards should only be included if reasonably deemed to be payable and the third party can be clearly identified (for example, deferred tax would be excluded);
  - when calculating the public interest score the company should be considered and not the group, and therefore loans from other companies within a group should be included in the calculation of the public interest score. For example, intercompany creditors should be included in the calculation. However, loans not provided on normal commercial terms should be excluded as favourable terms would be deemd to compromise the "third-party" status of the counterparty; for example, loans with no specific repayment terms and interest charge.
- For the purposes of this calculation, "beneficial interest" is defined as:

  "when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to—

  - ***(a) receive or participate in any distribution in respect of the company's securities;***
  - ***(b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or***
  - ***(c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities,***

  but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002)."

  A person is also regarded as having a beneficial interest in a security if the security is held ***nomine officii*** by another person on that first person's behalf.

As Regulation 26 requires one point to be allocated to each individual known to the company with a direct or indirect beneficial interest, another practical issue has developed. The reference to “indirect beneficial interest” could imply that a subsidiary of a holding company could be required to include the individuals with a beneficial interest in the holding company in its public interest score, as these individuals could be seen as having an indirect interest through its shareholding in the subsidiary.

Currently there are two views regarding this matter. The first opinion is that the shareholders of a holding company should be included in the calculation of the public interest score of its subsidiary as they are seen to have an indirect beneficial interest. The second view is that the shareholders of a holding company are not entitled to receive and participate in the distributions of the subsidiary and therefore they are not seen as having a beneficial interest and should therefore be excluded from the calculation of the public interest score.

The JSE Ltd (JSE), however, has indicated that all subsidiaries of a company listed on the JSE should be audited with the view that the status quo under the Companies Act, 1973, should be maintained in relation to publicly listed groups.

- “Turnover” is defined in Regulation 164 as:

“At any particular time, the annual turnover of––

(a) a company other than a holding company is the gross revenue of that company from income in, into or from the Republic, arising from the following transactions or events, as recorded on the company’s most recent annual financial statements:

(i) the sale of goods;
(ii) the rendering of services; or
(iii) the use by other persons of the company’s assets yielding interest, royalties, or dividends; or

(b) a holding company is the consolidated gross revenue of that company and each of its subsidiaries from income in, into or from the Republic, arising from the following transactions or events, as recorded on the company’s most recent annual financial statements:

(i) the sale of goods;
(ii) the rendering of services; or
(iii) the use by other persons of the company’s assets yielding interest, royalties, or dividends, adjusted in accordance with sub-regulations (5) and (6), in either case.

(5) In calculating the annual turnover of a company––

(a) any amount contemplated in sub-regulation (4) may be excluded to the extent that it is properly excluded from gross revenue in accordance with the applicable financial reporting standards referred to in sub-regulation (1);

(b) taxes, rebates, or similar amounts calculated and paid or to be paid in direct relation to revenue as, for example, sales tax, VAT, excise duties or sales rebates, may be deducted from gross revenue; and

(c) gains arising from non-current assets or from foreign currency transactions may be excluded from gross revenue."

The issue is that this definition is the same as the definition provided for "revenue" in all the prescribed financial reporting standards (FRSs), whereas "turnover" is not defined in the FRSs. As general practice, turnover is determined as the revenue generated from the primary activities of a company. It would, however, be more conservative to include all revenue generated by a company for the calculation of the public interest score as this definition is more in line with the guidance provided in Regulation 164. An alternative, potentially more aggressive, approach would be to use "turnover" as it is currently used in the preparation of the financial statements.

- Regulation 26 requires every company to calculate its public interest score at the end of each financial year. This could, however, cause a practical problem for the audit or review process applicable to the company. If a company is required to be audited in terms of its public interest score calculated at the end of the financial year, certain procedures, such as a stock count that should have been conducted on the last day of the financial year, would not have been performed. A solution to this problem is to calculate an additional public interest score based on the average results of the last few years. This will eliminate the impact of major fluctuations experienced in a business on the results of the public interest score.
- The public interest score calculated before the audit adjustments may change substantially after the audit adjustments are made. This can have a material impact on whether an audit or independent review is required and what financial reporting standard should be applied. The final public interest score on which these requirements are based should reflect the results of a company after the audit adjustments are processed and, therefore, could impact on the requirement to be reviewed or audited.

Summary of which entities require an audit or independent review and the financial reporting standard that should be applied (section applicable to all companies and closed corporations)

The following table summarises the requirements of Regulation 27, which deals with the required financial reporting standards, and Regulations 28 and 29, which deal with the audit and independent review requirements.

Legend	
IR	Independent Review
MOI	Memorandum of Incorporation
FRS	Financial Reporting Standards
PIS	Public interest score as calculated in terms of Regulation 26

Table 5: Financial Reporting Standards applicable to Public and State-owned Companies

	Audit/IR	**FRS**
State-owned Company	Audit	IFRS or whatever PFMA requires
Public – Listed	Audit	IFRS
Public – Unlisted	Audit	IFRS or IFRS for SMEs*

*Subject to meeting the scoping restrictions of the Standard

Table 6: Financial Reporting Standards applicable to Private Companies (including Close Corporations)

		Non-owner Managed		**Owner Managed**	
<u>Compiled:</u>		**Internally**	**Independently**	**Internally**	**Independently**
PIS 350+	**Audit/IR**	Audit	Audit	Audit	Audit
	FRSs	IFRS or IFRS for SMEs	IFRS or IFRS for SMEs	IFRS or IFRS for SMEs	IFRS or IFRS for SMEs
PIS 100-349	**Audit/IR**	Audit	IR	Audit	No Audit or IR
	FRSs	IFRS or IFRS for SMEs or SA GAAP	IFRS or IFRS for SMEs or SA GAAP	IFRS or IFRS for SMEs or SA GAAP	IFRS or IFRS for SMEs or SA GAAP
PIS <100	**Audit/IR**	IR	IR	No Audit or IR	No Audit or IR
	FRSs	FRS as determined by the company	IFRS or IFRS for SMEs or SA GAAP	FRS as determined by the company	IFRS or IFRS for SMEs or SA GAAP

Table 7: Financial Reporting Standards applicable to Non-profit Companies

		Non-owner Managed		Owner Managed	
Compiled:	-	**Internally**	**Independently**	**Internally**	**Independently**
PIS 350+	**Audit/IR**	Audit	Audit	Audit	Audit
	FRSs	IFRS or IFRS for SMEs	IFRS or IFRS for SMEs	IFRS or IFRS for SMEs	IFRS or IFRS for SMEs
PIS 100-349	**Audit/IR**	Audit	IR	Audit	No Audit or IR
	FRSs	IFRS or IFRS for SMEs or SA GAAP	IFRS or IFRS for SMEs or SA GAAP	IFRS or IFRS for SMEs or SA GAAP	IFRS or IFRS for SMEs or SA GAAP
PIS <100	**Audit/ IR**	IR	IR	No Audit or IR	No Audit or IR
	FRSs	FRS as determined by the company	IFRS or IFRS for SMEs or SA GAAP	FRS as determined by the company	IFRS or IFRS for SMEs or SA GAAP

An audit will always be required if:

(1) it is stipulated in the MOI that a company should be audited;
(2) the company holds assets greater than R5 million in a fiduciary capacity in the course of its primary business.

A voluntary audit can be decided on by a board or shareholders' resolution, but this will not in itself impact on the FRSs that should be applied in terms of the tables above.

Additionally, Regulation 26 provides the following definitions that should be applied in conjunction with Regulation 27 when determining the FRSs that should be applied:

"IFRS means the International Financial Reporting Standards as issued from time to time by the International Accounting Standards Board or its successor body

IFRS for SMEs means the International Financial Reporting Standards for Small and Medium Enterprises, as issued from time to time by the International Accounting Standards Board or its successor body

SA GAAP means the South African Statements of Generally Accepted Accounting Practice, as adopted from time to time by the Accounting Practices Board or its successor body."

Example of the calculation of the public interest score

- Company X had a turnover of R22.56 million for the 20X financial year.
- The number of employees was 89 for every month except for June when the company appointed three additional temporary staff members for the full month.
- The company had liabilities of R16.7 million that consisted of the following:
  - trade creditors of R10.7 million;
  - intercompany loans of R3 million (on commercial terms);
  - shareholders' loans of R3 million (on commercial terms).
- The company has three shareholders.
- The financial statements are prepared independently by an independent accounting professional.

Solution

- **Step 1 Calculation of the public interest score**

  23 points for turnover

  89.25 points for the average number of employees ((89 X 11 months + 92 X 1 month)/12 months))

  14 points for third party debt (excluding shareholders' loans)

  3 points for the shareholders

  = public interest score of 129.25

- **Step 2 Audit or review**

  The public interest score is 129.25 and therefore falls within the category "greater than 100 and smaller than 350". As the financial statements are prepared by an independent accounting professional, an independent review is required to be performed by a member of SAICA or a registered auditor with IRBA.

- **Step 3 Financial reporting standard**

  The public interest score is 129.25 and therefore falls within the category "greater than 100 and smaller than 350". The company will have a choice of IFRS, IFRS for SMEs and SA GAAP. Before IFRS for SMEs can be applied, the company should first meet the scope requirements of this standard.

Annexure E – JSE Listings Requirements

Summary of differences between the Act and the JSE Listings Requirements

Act Reference	Companies Act requirement	JSE Requirements Number	JSE Listings requirements
Regulation 28	All the subsidiaries of listed companies must apply the Public Interest Score and if they qualify for audit then they will have to be audited.	Schedule 10 Paragraph 10.22	All the subsidiaries of listed companies must be audited. Foreign subsidiaries, not registered in the Republic of South Africa need not be audited in terms of the JSE Listings Requirements.
Section 29(3) Section 29(4)	A company may provide any person with a summary of any particular financial statements but any such financial statements must satisfy the Financial Reporting Standards. The Minister may make regulations prescribing (b) form and content requirements for summaries contemplated in subsection(3).	Section 8 Paragraph 8.57	The JSE states that the Act allows for summary financial statements to be sent to shareholders, unfortunately neither the Act nor the Regulations provided for the prescribed requirements for a summary. Should you prepare a summary certain JSE requirements should be met, but the JSE advise that listed companies obtain the necessary advice to determine the legality of the action. The summary of Financial Statements must • be prepared in accordance with the framework concepts and measurements and recognition requirements of IFRS and the AC 500 standards as issued by the Accounting Practices Board or its successor and • must also as a minimum contain (i) the information required by IAS 34

			:Interim Financial Reporting (in other words the disclosure requirements) and (ii) a statement confirming that it has been prepared.
Definition	**"**'special resolution" means— (***a***) in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution, or a different percentage as contemplated in section 65 (10)— (i) at a shareholders meeting; or (ii) by holders of the company's securities acting other than at a meeting, as contemplated in section 60";	Definition	"'special resolution' means a resolution adopted at a shareholders' meeting and which constitutes a special resolution as contemplated in section 65(9) of the Act, a special resolution in terms of the MOI, with the support of at least 75 percent of the votes cast by all equity securities holders present or represented by proxy at the general meeting or annual general meeting convened to approve such resolution."
Section 15(3)	The board of the company may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in this Act or the Memorandum of Incorporation by; (a) publishing a copy of those rules, in any manner required or permitted by the Memorandum of Incorporation or the rules of the company and (b) filing a copy of those rules	Schedule 10 Paragraph 10.4	The directors' power to make rules as contemplated in Section 15(3) of the Act must be prohibited.

Section 40(5)	If the consideration for any shares that are issued or to be issued is in the form of an instrument such that the value of the consideration cannot be realised by the company until a date after the time the shares are to be issued, or is in the form of an agreement for future services, future benefits or future payment by the subscribing party; (a) the consideration for those shares is regarded as having been received by the company at any time only to the extent (i) that the value of the consideration for any of those shares has been realised by the company or (ii) that the subscribing party to the agreement has fulfilled its obligation in terms of the agreement	Schedule 10 Paragraph 10.2	Notwithstanding the provisions of Section 40(5) of the Act, the JSE will not list shares that are not fully paid for upon listing.
Section 11 (b)	A company name in the case of a profit company may be the registration number that must be immediately followed by the expression (South Africa)	Schedule 11 Paragraph 2(b)	A name of a company may not be a registration number.

Annexure F – UN Global Compact

The following is an extract from the United Nations Global Compact website pertaining to the ten principles referred to in Regulation 43(5) regarding the duties of the social and ethics committee. The rights are subject to change.

“The UN Global Compact's ten principles in the areas of human rights, labour, the environment and anti-corruption enjoy universal consensus and are derived from:

- The Universal Declaration of Human Rights
- The International Labour Organization's Declaration on Fundamental Principles and Rights at Work
- The Rio Declaration on Environment and Development
- The United Nations Convention Against Corruption

The UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption:

Human Rights

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: make sure that they are not complicit in human rights abuses.

Labour

- Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

- Principle 7: Businesses should support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.”

Further information can be found on the website. Please refer to www.unglobalcompact.org/

Annexure G – Comparison of forms

Forms of Companies Act No. 61 of 1973 and Companies Act No. 71 of 2008

Companies Act No. 61 of 1973		**Companies Act No. 71 of 2008**	
Form number	**Description**	**Form number**	**Description**
CM1	Certificate of Incorporation of a company having a share capital	CoR14.3	Registration Certificate
CM2 – CM2D CM44 CM44A CM 44C Schedule 1, Table B	Payment of fees on increase of capital Articles of association of a company having a share capital adopting schedule 1 Articles of association of a company having a share capital not adopting schedule 1 Signatories to articles of association Articles for a private company having share capital	CoR15.1A	Memorandum of Incorporation – Short Standard Form for Private Companies
CM2 – CM2D CM44 CM 44A CM44B CM44C Schedule 1, Table A Schedule 1, Table B	Payment of fees on increase of capital Articles of association of a company having a share capital adopting schedule 1 Articles of association of a company having a share capital not adopting schedule 1 Articles of association of a company having a share capital Signatories to articles of association Articles for a public company having a share capital Articles for a private company having share capital	CoR15.1B	Memorandum of Incorporation – Long Standard Form for Profit Companies
CM2, clause 7	Payment of fees on increase of capital – pre-incorporation contracts	CoR35.1	Notice of Pre-Incorporation Contract
CM3	Certificate of Incorporation for	CoR14.3	Registration Certificate

Companies Act No. 61 of 1973		Companies Act No. 71 of 2008	
Form number	**Description**	**Form number**	**Description**
	Section 21 company		
CM4	Memorandum of Association for a company not having a share capital	CoR15.1C	Memorandum of Incorporation – Short Standard form for Non Profit Companies without members
CM4A	Guarantee		
CM4B	Association clause	CoR15.1D	Memorandum of Incorporation – Long Standard form for Non Profit Companies without members
CM44	Articles of association of a company having a share capital adopting schedule 1		
CM44C	Signatories to articles of association	CoR 15.1E	Memorandum of Incorporation – Long Standard form for Non Profit Companies with members
CM5	Application reservation of name or translated form of shortened form or defensive name	CoR9.1	Reservation of Name
CM6	Application for extension of the reservation of name	CoR9.2	Application to extend a Name Reservation
CM7	Application for registration of a translated form or a shortened form of a name of a company		No new prescribed form
CM8	Application for registration of a defensive name	CoR10.1	Application for Defensive Name Registration
CM8A	Application for the renewal of registration of a defensive name	CoR10.2	Application for Renewal of Defensive Name Registration
CM9	Certificate of change of name		No new prescribed form
CM9A	Certificate of change of translation / shortened form of name of company		No new prescribed form
CM9B	Application to deregister a former translation / shortened form of name		No new prescribed form
CM10	Certificate of consolidation of articles		See CoR15.5 and 15.6
CM11	Payment of fees on increase of capital		No new prescribed form
CM12	Statement of payment of commission on shares		No new prescribed form
CM14A	Return of acquisitions by a company of shares issued by it /		No new prescribed form

Companies Act No. 61 of 1973		**Companies Act No. 71 of 2008**	
Form number	**Description**	**Form number**	**Description**
	payments to shareholders		
CM15	Return of allotment of shares		No new prescribed form
CM16	Return of allotment which has become void		No new prescribed form
CM17	Application for extension of time		No new prescribed form
CM18	Order of court for registration		No new prescribed form
CM19	Notice of redemption of redeemable preference shares		No new prescribed form
CM20	Notice of variation of rights in respect of shares		No new prescribed form
CM21	Notice of place where registers are kept	CoR22	Notice of Location of Company Records
CM22	Notice of registered office and postal address of company	CoR21.1	Notice of change of Registered office for company or external company
CM23	Annual return	CoR30.1	Annual Return
CM25	Consent to waive period of notice to pass a special resolution		No new prescribed form
CM25A	Consent to propose and pass special resolution at meeting for which notice has not been given		No new prescribed form
CM26	Special resolution		No new prescribed form
CM27	Consent to act as director or officer and other directorships		No new prescribed form
CM27A, section A	Notice of, consent to appointment, change of name, or resignation by company secretary or removal of company secretary		No new prescribed form
CM27A, section B & C	Notice of change of name or resignation by company secretary or removal of company secretary	CoR44	Notice of change of Auditor or Secretary
CM28	Directors contract to take shares of company as qualification shares		No new prescribed form

Companies Act No. 61 of 1973		**Companies Act No. 71 of 2008**	
Form number	**Description**	**Form number**	**Description**
CM29	Contents of register of directors, auditors and officers	CoR39	Notice of change of directors
CM29	Contents of register of directors, auditors or officers	CoR20.1 Annexure A	Directors of External Company
CM30	Notice of failure to appoint or reappoint auditor at annual general meeting		No new prescribed form
CM31 Part I and Part II	Notice of, consent to appointment, change of name or resignation by auditor or removal of auditor		No new prescribed form
CM31 Part III	Notice of, consent to appointment, change of name or resignation by auditor or removal of auditor	CoR44	Notice of change of auditor or company secretary
CM32	Change of the end of the current financial year	CoR25	Notice of change of financial year end
CM33	Application to registrar by companies not to deal in group annual financial statements with subsidiary		No new prescribed form
CM34	Lodgement of financial statements / interim reports		No new prescribed form
CM35	Application not to issue interim reports		No new prescribed form
CM37	Notice of person authorised to accept service on behalf of external company	CoR21.2	Notice of person authorised to accept services
CM38	Notice by person authorised to accept services on behalf of external company to terminate his authorisation		No new prescribed form
CM39	Alteration to memorandum of external company		No new prescribed form
CM40	Appointment as liquidator or provisional judicial manager or judicial manager	CM40	Appointment as liquidator or provisional judicial manager or judicial manager (As chapter 14 of Companies Act, 1973 still

Companies Act No. 61 of 1973		**Companies Act No. 71 of 2008**	
Form number	**Description**	**Form number**	**Description**
			applies, the form will still apply – Companies Act, 2008 Schedule 5, section 9).
CM41	Broker's transfer form		No new prescribed form
CM42	Securities transfer form		No new prescribed form
CM43	Director of dissolved company within the meaning of section 421(1)		No new prescribed form
CM45	Amended certificate of incorporation relating to the conversion of one type or form of company into another type or form of company	CoR14.1	Notice of Incorporation
CM45	Application to register the conversion of one type or form of company into another type or form of company	CoR15.2	Notice of Amendment of Memorandum of Incorporation
CM46	Certificate to commence business		No new prescribed form – check with CoR14.3
CM47	Statement by each director regarding adequacy of capital of company		No new prescribed form
CM48	Affidavit pursuant to section 172(2)		No new prescribed form
CM49	Certificate of registration of memorandum of external company	CoR20.2	Registration Certificate of External Company
M50	Requesting the submission of provisional financial statements of a private company		No new prescribed form
CM51	Certifying additional copies of documents lodged for registration		No new prescribed form
M52	Granting of exemption from lodging annual financial statements of a subsidiary		No new prescribed form

Annexure H – List of new prescribed forms not replacing other forms

New forms prescribed by the Companies Act No. 71 of 2008

Form number	Description
CoR9.3	Notice requiring further particulars, issued by the Commission
CoR9.4	Confirmation Notice of Name Reservation
CoR9.5	Notice refusing Name Reservation or Defensive Registration
CoR9.6	Notice of Potentially Contested Name
CoR9.7	Notice of Potentially Offensive Name
CoR11.1	Application to Transfer a Reserved or Defensively Registered Name
CoR11.2	Notice refusing Name Transfer
CoR12.1	Notice Alleging Reservation System Abuse
CoR14.1 Annexure A Annexure B Annexure C Annexure D	Notice of Incorporation Initial directors of the company Alternative named for the company Notice of Ring Fencing Provisions Notice of Company Appointments
CoR14.2	Notice Rejecting a Notice of Incorporation
CoR15.2 Annexure A	Notice of Amendment of Memorandum of Incorporation Notice of Ring Fencing Provisions
CoR15.3	Notice of Alteration of Memorandum of Incorporation
CoR15.4	Notice of Translation of Memorandum of Incorporation
CoR15.5	Notice of Consolidation of Memorandum of Incorporation
CoR15.6	Notice to Consolidate the Memorandum of Incorporation
CoR16.1	Notice concerning company rules
CoR16.2	Notice of results of vote on company rules
CoR17.1	Application to transfer registration of foreign company
CoR17.2	Notice requiring further particulars
CoR17.3	Registration certificate of Foreign Company transferring registration to the Republic
CoR17.4	Refusal to transfer registration of foreign company
CoR18.1	Application to convert a close corporation
CoR18.2	Notice requiring further particulars for a close corporation conversion
CoR18.3	Registration certificate of conversion of close corporation to company
CoR19.1	Notice to show cause regarding reckless trading or trading under insolvent circumstances
CoR19.2	Confirmation notice
CoR24	Request for access to company information
CoR30.2	Financial accountability supplement

Form number	Description
CoR30.3	Annual return (External company)
CoR31	Notice of Board resolution to convert par value shares
CoR35.2	Notice of action concerning pre-incorporation contract
CoR36.1	Security holder notice to company and proxies
CoR36.2	General company notice to security holders
CoR36.3	General company notice to holders of beneficial interest
CoR36.4	Notice of director's personal financial interest
CoR40.1	Notice of resolution to wind-up solvent company
CoR40.2	Notice of foreign registration of company
CoR40.3	Demand notice concerning inactive company
CoR40.4	Notice of pending deregistration
CoR40.5	Application for re-instatement of deregistered company
CoR46.1	Notice of employee share scheme
CoR46.2	Annual certificate of employee share scheme
CoR46.3	Application concerning rights offer exclusion
CoR46.4	Registration of prospectus or letter of alteration
CoR46.5	Registration certificate
CoR46.6	Application to exclude information from prospectus
TRP84	Declaration of coming into or out of concert
CoR89	Notice of Amalgamation or Merger
TRP98	Disclosure of dealings in securities
TRP121.1	Disclosure of acquisition of securities
TRP121.2	Notice of acquisition or disposal of securities
CoR123.1	Notice of Beginning of Business Rescue Proceedings
CoR123.2	Notice of Appointment of Business Rescue Practitioner
CoR123.3	Notice of Decision Not to Begin Business Rescue
CoR125.1	Business Rescue Status Report
CoR125.2	Notice of Termination of Business Rescue Proceedings
CoR125.3	Notice of Substantial Implementation of Business Rescue Plan
CoR126.1	Application for Practitioner's Licence
CoR126.2	Registration Certificate
CoR130	Consent to Commission to act for complainant – ***Note: Form not yet active***
CTR132.1	Application for Alternative Dispute Resolution
CTR132.2	Referral for Alternative Dispute Resolution
CTR132.3	Certificate of Failed Alternative Dispute Resolution
CoR134.1	Application for Accreditation
CoR134.2	Registration Certificate
CoR135.1	Complaint
CoR135.2	Notice of Non-Investigation of Complaint
CoR137.1	Notice to Investigate Complaint
CoR137.2	Summons to provide evidence to Companies Commission

Form number	Description
CoR137.3	Request for Additional Information
CoR137.4	Demand for Corrected Information
CoR138	Notice of Consent Order
CoR139.1	Compliance Notice
CoR139.2	Compliance Certificate
CoR140.1	Referral of Complaint to alternative authority
CoR140.2	Notice of Non-referral of Complaint
CTR140	Complaint Referral to Tribunal
CTR142	Application for Relief to Tribunal
CTR145	Notice of Motion
CTR147	Application for Condonation
CTR148	Notice of Withdrawal or Postponement
CTR151	Notice of hearing before Companies Tribunal
CTR160	Summons to appear before Companies Tribunal
CoR168	Notice of Challenging Filed Information
CoR178	Request for Additional Information