

CIPC Compliance Checklist

SAICA wishes to alert members and associates to a new Compliance Checklist that will be implemented by the CIPC from 1 January 2020 and to highlight some of the challenges with the process as it is currently proposed. We would like to advise members of matters to consider when engaging with their clients on this new requirement.

The Compliance Checklist is applicable to all companies, including state-owned companies, non-profit companies, private companies, personal liability companies and public companies. The checklist currently does not apply to close corporations.

The CIPC has, as one of its functions, the monitoring of compliance with the Companies Act 71 of 2008 ("Companies Act"). As part of the monitoring the CIPC is implementing the Compliance Checklist. The CIPC states that the objectives of the Compliance Checklist are:

- To ensure compliance with the mandatory requirements of the Companies Act;
- To serve as an educational tool for directors and company secretaries, in guiding them with regards to their responsibilities in terms of the Companies Act;
- To utilise the Checklist to monitor and regulate proper compliance with the Companies Act and, if trends of non-compliance appear, to act accordingly.

The Compliance Checklist comprises of 24 questions with "yes", "no" or "not applicable" answer options. Companies are prompted to indicate if they complied with a particular section during the previous calendar year. The questionnaire does not allow respondents an opportunity to explain their responses. The CIPC has indicated that further correspondence regarding particular answers may be e-mailed to COR135.1complaints@cipc.co.za. (The CoR135.1 form is prescribed when reporting an alleged contravention of the Companies Act, but we understand that an e-mail submitted to the proposed address will reach the correct recipients at the CIPC.)

Companies will be required to complete the Compliance Checklist, prior to submitting their annual returns.

Who is responsible?

The Companies Act states that the business and affairs of a company must be managed by or under the direction of the board and the directors take responsibility for compliance with the Companies Act. Directors need to ensure that they are aware of their compliance obligations as the questionnaire only refers to sections of the Companies Act with no further detail or guidance provided on what the compliance requirement(s) in the relevant section is.

When completing the questionnaire companies are reminded that in terms of section 215(2)(e) a person commits an offence if they knowingly provide false information to the Commission and that if a person is convicted on an offence they could be liable to a fine, imprisonment not exceeding 12 months or both a fine and imprisonment in terms of section 216(b).

Concerns

Questions that have been raised by SAICA members and associates include concerns such as what the CIPC will do with the information provided and how differences in interpretation of the Companies Act will be dealt with. Members are also concerned about the potential increase in costs to be incurred by clients.

The CIPC has indicated that it will use the checklist to monitor compliance with the Companies Act and that it will reach out to companies that submit information that is in contradiction with the annual financial statements or the Companies Act.

With regards to difference of interpretation, SAICA recommends that directors and accountants document their interpretations and subsequent answers to the questions.

As an example, the first question of the Compliance Checklist is: **“Does the company comply with section 4 of the Companies Act?”**. However, section 4, in SAICA’s view, does not *per se* contain a compliance obligation. Rather, section 4 explains how the solvency and liquidity test should be applied, where this test is mentioned in other sections of the Companies Act, such as sections 45 or 46.

Another example is section 86. Section 86 lists a number of compliance obligations, including section 86(4) that deals with the appointment of a company secretary. Section 86(4) requires that a vacancy of the company secretary position must be filled within 60 days after the vacancy arose. If the Compliance Checklist is, however, completed during the 60 day period in which the vacancy must be filled (but has not yet been filled), the respondent may be hesitant to affirm compliance with section 86. The fact that the Compliance Checklist does not indicate which sub-sections of section 86 it refers to and does not provide an opportunity to explain the particular facts of a situation, makes the appropriate completion of the Compliance Checklist very difficult.

Most sections of the Companies Act have a number of compliance obligations grouped into subsections. Section 15, for example, deals with the content of the Memorandum of Incorporation. The section further deals with company rules and provides that the rules must not be inconsistent with the Act. Should the shareholders have a shareholders’ agreement then it should also be consistent with the Act’s requirements. In our view, section 15 includes too many requirements for compliance to be affirmed in one question. A question with sub questions would probably achieve a more focused and valuable answer to the CIPC for it to achieve its objective in monitoring compliance.

Calendar year

The Checklist requires a response in respect of the past calendar year. Calendar year is not defined in the Companies Act and the annual return must be filed within 30 business days after the anniversary date of the company’s date of incorporation. It is therefore not clear to which period the Checklist refers. The annual financial statements submitted with the annual return normally represents the financial position of the previous financial year. This could lead to a mismatch in financial and compliance reporting periods.

Example:

Company's year-end is 30 June 2019 and its anniversary date is 1 September 2019.

Annual return to be submitted by 1 October 2020 with the annual financial statements for the year ended 30 June 2019 and compliance checklist for the calendar year 1 January to 31 December 2019

Way forward

SAICA advocates compliance with laws and regulations and that members and associates should also support and encourage clients to comply. SAICA supports CIPC in its endeavours to ensure and monitor compliance with the Companies Act. The current format of the Compliance Checklist is however both onerous and vague. SAICA encourages the CIPC to focus the questions in the questionnaire and to provide a reasonable opportunity for explanations for areas of non-compliance or interpretation. At the very least, more guidance is required.

SAICA members and associates are advised to engage with their clients with regards to the completion of the Compliance Checklist. Members and associates should specifically agree the accountants' responsibility when completing the Checklist on behalf of clients. These matters should ideally be incorporated in an engagement letter. Members should be mindful of the restrictions in the Legal Practices Act and agree with clients on the treatment of potential interpretational differences of the Companies Act, for example where a client believes that it is in compliance with the Companies Act while the accountant or registered auditor has a different view. Members and associates are also reminded of their responsibility under the SAICA Code of Professional Conduct (Revised 2018) when they become aware of non-compliance of legislation.

The CIPC has indicated that questions, corrections and interpretation guidance can be requested by submitting an email to COR135.1complaints@cipc.co.za

CIPC Compliance Checklist questions

Questions

1. Did the company comply with section 4 (*solvency and liquidity test*) during the previous calendar year?
2. Did the company comply with section 15 (*Memorandum of Incorporation, shareholders' agreement and rules of the company*) during the previous calendar year?
3. Did the company comply with section 26 (*Access to company records*) during the previous calendar year?
4. Did the company comply with section 27 (*Financial year of company*) during the previous calendar year?
5. Did the company comply with section 28 (*Accounting records*) during the previous calendar year?
6. Did the company comply with section 29 (*Financial statements*) during the previous calendar year?
7. Did the company comply with section 30 (*Annual financial statements*) during the previous calendar year?
8. Did the company comply with section 32 (*Use of company name and registration number*) during the previous calendar year?
9. Did the company comply with section 33 (*Annual return*) during the previous calendar year?
10. Did the company comply with section 44 (*Financial assistance for subscriptions of securities*) during the previous calendar year?
11. Did the company comply with section 45 (*Loans of other financial assistance to directors*) during the previous calendar year?
12. Did the company comply with section 50 (*Securities register and numbering*) during the previous calendar year?
13. Did the company comply with section 61 (*Shareholders meeting*) during the previous calendar year?
14. Did the company comply with section 66 (*Board, directors and prescribed officers*) during the previous calendar year?
15. Did the company comply with section 69 (*Ineligibility and disqualification of persons to be director or prescribed officer*) during the previous calendar year?
16. Did the company comply with section 70 (*Vacancies on board*) during the previous calendar year?
17. Did the company comply with section 72 (*Board committees*) during the previous calendar year?
18. Did the company comply with section 86 (*Mandatory appointment of company secretary*) during the previous calendar year?
19. Did the company comply with section 90 (*Appointment of auditor*) during the previous calendar year?
20. Did the company comply with section 92 (*Rotation of auditor*) during the previous calendar year?
21. Did the company comply with section 94 (*Audit committee*) during the previous calendar year?
22. Did the company comply with regulation 21 (*Registered office of the company*) during the previous calendar year?

23. Did the company comply with regulation 43 (*Social and Ethics Committee*) during the previous calendar year?
24. Did the company comply with schedule 1 (*Provisions concerning Non-Profit Companies*) during the previous calendar year?