



# SAICA Companies Act Guide

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## Important notice

This guide is based on selected sections of the Companies Act 71 of 2008 (as amended by the Companies Amendment Act 3 of 2011, and referred to as the “Act”) and the Companies Regulations, 2011, as published under GN R351 in GG 34239 dated 26 April 2011.

Please note that this guide is not a comprehensive summary of the Act or its Regulations. It includes information on matters which are practical and relevant to SAICA members. In the interest of brevity, the guide summarises certain provisions of the Act and the Regulations or refers to extracts. The guide is not intended to be exhaustive and should not be viewed as a substitute for reading the Act and the Regulations. The information given in this document does not constitute legal advice and should be treated with caution.

At the time of compiling this guide certain of the interpretations of the Act have not been tested in a court of law. Therefore, where the guide suggests a particular interpretation or approach to any matter, this is based only on SAICA’s current view of the interpretation of the Act. Although SAICA has 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.

SAICA recommends that any decision or actions being considered in relation to the Companies Act and its Regulations be checked with appropriately qualified legal advisors, the Companies and Intellectual Property Commission or another appropriate expert.

This guide does not consider the JSE Listings Requirements, King IV or any other legislation or regulation that affects the compliance requirements of businesses.

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# 1 Introduction

The Companies Act 71 of 2008 (“the Act”) replaced the Companies Act 61 of 1973 (the “1973 Act”) in its entirety on 1 May 2011, except for the provisions related to winding-up and liquidation. As such, it has had 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 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. Annexure A contains a list of alterable provisions;
APA	Auditing Profession Act 26 of 2005;
CIPC	the Companies and Intellectual Property Commission, which replaced the Companies and Intellectual Property Registration Office (CIPRO). In terms of Schedule 5 item 12 to the Act, the CIPC took over all the assets, liabilities and contractual arrangements of the 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, the term “Effective Date” is used, which is 1 May 2011;
ECT	Electronic Communications and Transactions Act 25 of 2002;
FRS	Financial reporting standards;
IFAC	International Federation of Accountants;
IRBA	Independent Regulatory Board for Auditors
Issue	debate on or discussion of potential issues to be considered and which arises from the provisions of the Act and its application;
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;

King IV	“King IV™” or the “King IV Report on Corporate Governance™ for South Africa, 2016”  [Note: Copyright and trade marks are owned by the Institute of Directors in Southern Africa NPC and all of its rights are reserved.]
MOI	Memorandum of Incorporation
NPC	non-profit company;
OECD	Organisation for Economic Co-operation and Development;
1973 Act	the Companies Act 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;
SOC	state-owned company;
the Act	the Companies Act 71 of 2008, read with the Companies Amendment Act 3 of 2011;
transitional arrangements	the provisions contained in Schedule 5 to the Act.



## **3 Important information**

### **3.1 Continuation of existing companies, rights and obligations**

- 3.1.1 Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the 1973 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 Act. (Schedule 5, item 11 to the Act)
- 3.1.2 Every company that 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 as those previously assigned (Schedule 5, item 2 to the Act). Certain companies which are 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 (this type of company will attach the suffix “NPC” to its name, instead of the suffix “Association incorporated under section 21”); and
  - state-owned companies (this type of company will change its name to include the suffix “SOC Ltd”).

### **3.2 Interpretation of the Act**

- 3.2.1 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.
- 3.2.2 Section 5 also provides specifically that a court may consider foreign company law to the extent appropriate for the interpretation or application of the Act.
- 3.2.3 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. The exceptions that will prevail over the Act are:
- Auditing Profession Act 26 of 2005 (the APA);
  - Labour Relations Act 66 of 1995;
  - Promotion of Access to Information Act 2 of 2000;
  - Promotion of Administrative Justice Act 3 of 2000;
  - Public Finance Management Act 1 of 1999;
  - Financial Markets Act 19 of 2012 (replaced the Securities Services Act 36 of 2004);
  - Banks Act 94 of 1990;

- Local Government: Municipal Finance Management Act 56 of 2003;
  - Section 8 of the National Payment System Act 78 of 1998.
- 3.2.4 If a conflict exists between a provision of Chapter 8 of the Act and a provision of the Public Service Act, 1994 (Proclamation 103 of 1994), the provisions of that Public Service Act shall prevail.
- 3.2.5 Notably, the Income Tax Act 58 of 1962, is not on the list of legislation that will prevail over the Act in the event of an inconsistency. Some amendments have been effected to the Income Tax Act to align it with the provisions of the Companies Act (e.g. the concept of “contributed capital” to move away from the distinction between “share capital” and “share premium” accounts). It is likely, however, that further amendments will be required to the Income Tax Act as a result of the implementation of the Act.
- 3.2.6 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.
- 3.2.7 Practical example of “conflict”
- Different types of conflict may arise. In most instances, the differences between the Act and the other legislation can be dealt with by complying with the “higher” standard. There were a number of conflicts between the requirements of the Long-term Insurance Act 52 of 1998, and the Companies Act.
- The Long-term Insurance Act required that the board must appoint the audit committee, which is in conflict with the requirement of the Companies Act that the audit committee be appointed by shareholders. As it was not, in this instance, possible to comply with both the relevant Acts, the Companies Act requirement that the audit committee be appointed by shareholders prevailed. The Long-term Insurance Act has since been amended and now states that despite the Companies Act requirements the board of directors shall appoint the audit committee.
- 3.2.8 The JSE Listings Requirements have been amended substantially. Schedule 10 to the Listings Requirements regulates the content of a Memorandum of Incorporation (MOI) of a company that is listed, as well as some aspects of the content of the MOIs of the subsidiaries of these companies. Schedule 10, for example, provides that the MOI of a listed entity must require that the shareholders pass a special resolution to convert ordinary shares into redeemable preference shares, even though the Act provides that only a directors’ resolution is required (except to the extent that the MOI provides otherwise). This example illustrates a scenario where it is possible to comply with the provisions of the Listings Requirements without contravening the Act. Therefore, even though the Listings Requirements provide for a more onerous standard than the Act (i.e. there is an inconsistency between the requirements of the Act and the Listings Requirements), a company is able to manage this “inconsistency” by complying with the more stringent requirements.

- 3.2.9 In terms of S6 of the Act, a court may declare an agreement, transaction, resolution or 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.
- 3.2.10 Application may be made to the Companies Tribunal for an administrative order that exempts an agreement, transaction, resolution or provision of a company's MOI from the requirements of the Act.
- 3.2.11 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.
- 3.2.12 It is suggested 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."*<sup>1</sup>

### 3.3 Non-compliance

The Act decriminalised South African corporate law. Although a very few incidents of non-compliance are still deemed to be an offence (e.g. where a person hinders the administration of the Act, or where they issue a prospectus that contains false or misleading information), the Act is mostly now based on civil liability. In terms of S218(2), any person may now hold any other person liable if he or she suffered loss or damage as a result of the first person's not complying with the provisions of the Act. The Act also allows for class action, which means that groups of aggrieved parties (such as shareholders, creditors and communities) may now institute action

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<sup>1</sup> Quoted from Miers, DR & Page, AC 1990. *Legislation*. 2nd edition. London: Sweet & Maxwell (Miers & Page 1990:177) as quoted by Goldswain, GK 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.

against the company, a director, prescribed officer or any other official where they can show loss or damage as a result of non-compliance.

### **3.4 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 within a reasonable time and at a reasonable cost (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. Note that the provisions of the Electronic Communications and Transactions Act 25 of 2002 (ECT) are relevant in the facilitation and regulation of electronic communication and transactions. Although the ECT does not limit the operation of the Act, it regulates matters such as the admissibility and evidential weight of data messages and documents kept electronically, such as e-mails. It also, *inter alia*, regulates the date, time and place of the receipt and dispatch of e-mails. This is relevant if, for example, a dispute arises and it is alleged that a particular electronic notice was not dispatched or received within the time limits prescribed by the Act.

### **3.5 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 a 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)).

### **3.6 Plain language**

Section 6(4) and (5) contains various provisions that 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, in “*plain language*”.

### **3.7 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.

### **3.8 The doctrine of constructive notice**

- 3.8.1 In terms of the 1973 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.”*

3.8.2 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.

3.8.3 The MOI of a company with the expression “(RF)” after its name is the exception to this rule (see S19(5)). Should there be a limitation on the powers of the company, then a person would be bound by this if the company’s name included the abbreviation “RF”.

### 3.9 The validity of company actions

3.9.1 Section 20 of the Act deals with the validity of company actions. The Act states that if the company’s MOI limits, restricts or qualifies the purposes, powers or activities of the company, no action of the company will be void because of the MOI limitation or because the directors had no authority to act.

3.9.2 The following illustrates the principle: if the MOI states that the company may only buy property and the director agrees to a contract to purchase a truck, in this case the transaction will not be void because director did not have the authority to conduct the transaction.

3.9.3 Section 20(2) states that if the company’s MOI limits, restricts or qualifies the purposes, powers or activities of the company or limits the authority of the directors, the shareholders are allowed by special resolution to ratify any action by the company or directors that is inconsistent with the MOI requirements. The shareholders cannot ratify actions that are in contravention of the Act.

3.9.4 Henochsberg<sup>2</sup> on the Companies Act 71 of 2008 defines the Turquand rule in terms of common law: *“the Turquand rule states that although a bona fide third party who contracts with a company is presumed to be aware of any requirements which in terms of its public documents must be observed “internally”, ie as between the company and its members, in order that the company should effectively be bound by the contract, he is neither presumed to know, or bound, for the purpose of holding the company to the contract, to ascertain, whether it has in fact been observed.”*

3.9.5 According to Henochsberg, the Turquand rule has been retained in a modified form as S20(7) states that a person dealing with the company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company has complied with all the procedural requirements of the Act, MOI

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<sup>2</sup> Quoted from *Henochsberg on the Companies Act 71 of 2008*, Service Issue 9, dated October 2014 and published by LexisNexis, edited by Professor PA Delpoit, on page 91.

and other company rules, unless the person knew or reasonably ought to have known of the company's failure.

### 3.10 Application of the Act

3.10.1 The Act only applies to legal entities incorporated in South Africa (see definition below) and does not apply to other juristic persons.

3.10.2 The Act defines a company as follows:

*“‘company’ means a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that immediately before the effective date –*

*(a) was registered in terms of the –*

*(i) Companies Act, 1973, other than an external company as defined in that Act; or*

*(ii) Close Corporations Act, 1984, if it has subsequently been converted in terms of Schedule 2;*

*(b) was in existence and recognised as an ‘existing company’ in terms of the Companies Act, 1973; or*

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

3.10.3 Where the Act refers to a “company”, it is referring to a company as defined above, which would, *inter alia*, exclude a company incorporated in a foreign jurisdiction. A company incorporated in a foreign jurisdiction, but registered as an external company in South Africa, is subject to specific sections that relate to external companies only (see detailed discussion under Chapter 6 of this guide).

### 3.11 Categories of companies

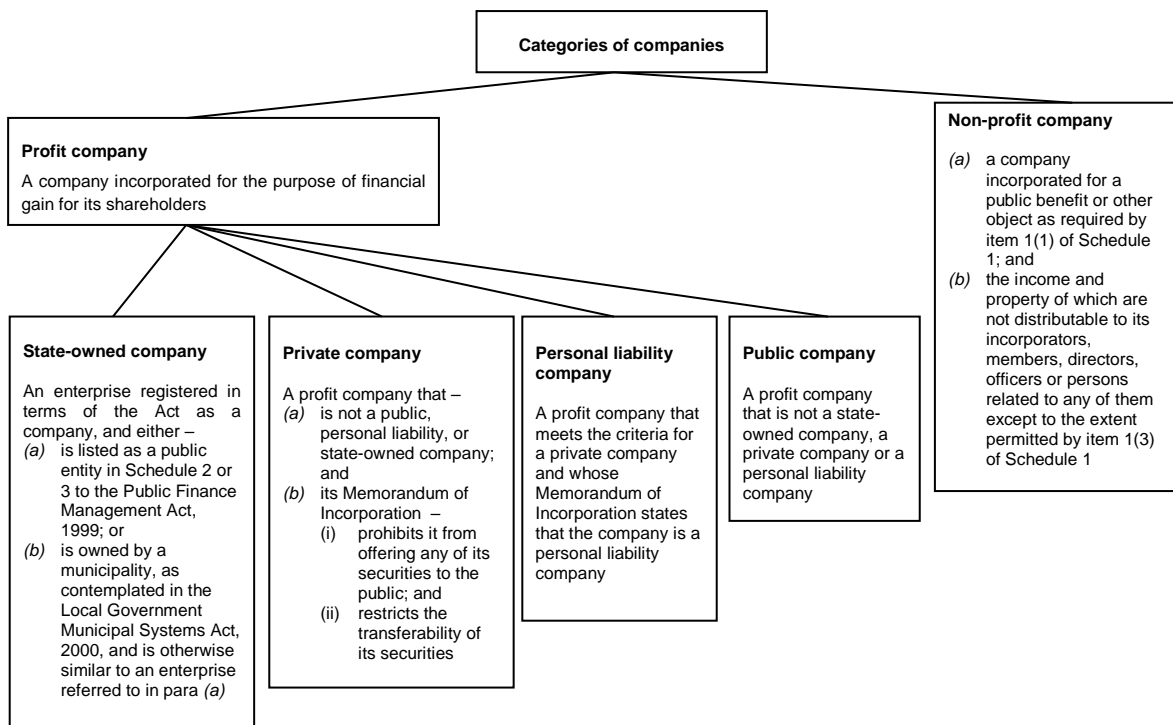
**Reference:** Sections 8 and 11

3.11.1 The following categories of companies exist:

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

Also refer to Figure 1 below for a summary of the categories of companies.

### 3.11.2 Figure 1 – Categories of companies



### 3.11.3 Profit companies are divided into the following subcategories:

- 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”.

3.11.4 If a company’s MOI includes “special conditions”, the name of the company must include the expression “RF” (refer to 5.7). 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 that relates 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.

3.11.5 The Act does away with the categories “widely-held” and “limited interest” companies, which were previously provided for in the 1973 Act.

### Non-profit companies

3.11.6 Non-profit companies replace the section 21 companies under the 1973 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.

- 3.11.7 Overall the provisions applicable to non-profit companies are less formalistic and restrictive than used to be the case under the 1973 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*

- 3.11.8 The provisions and requirements applicable to private companies are similar to those that relate to private companies under the 1973 Act. However, private companies are no longer limited to 50 members as was previously the case.
- 3.11.9 The MOI of a private company must restrict the transfer of securities and prohibit the offering of securities to the public. The 1973 Act referred to the restriction of the transferability of **shares** and the prohibition on the offering of *shares* to the public, as opposed to the wider concept of **securities**. It is very important for private companies to ensure that their MOIs refer to the restriction on the transferability of the company's securities and the prohibition on offering its securities to the public, as opposed to just referring to the restriction on the transferability of the company's shares and the prohibition on offering its shares to the public. Since the expiry of the two-year transitional period, a company that does not restrict the transferability of its securities and does not prohibit the offering of its securities to the public (as opposed to just referring to the restriction on the transferability of the company's shares and the prohibition on offering its shares to the public) may inadvertently be classified as a public company.
- 3.11.10 It should be noted that where a company has issued only one class of securities, e.g. shares, and the MOI of that company refers to the prohibition on the offering of any of its shares (rather than "securities") to the public and/or restricts the transferability of its shares (rather than "securities"), such a company may be classified as a private company. However, it must be confirmed that the company has *no* other securities in issue. A similar principle applies if the MOI refers to "debentures" rather than "securities".
- 3.11.11 Additional matters which should, as a minimum, be considered when drafting an MOI of a private company are:
- in respect of directors: election of directors – exclude the statutory requirement that the appointment of directors be voted on separately per director (S68(2)(a)). In other words, specifically state in the MOI that more than one director may be elected by a combined shareholders' vote;
  - directors' round robin resolutions: it is suggested that the provisions of S74(1) be altered in the MOI to provide that a decision that could be voted on at a board meeting may instead be adopted by written consent only with the consent of all the members of the board (instead of the majority of the board as provided for in S74(1));
  - pre-emptive rights in respect of shares: consider whether the company wishes specifically to:



- exclude the statutory right of pre-emption on the issue of shares (S39(2)); and/or
- include a right of pre-emption on sale of shares to third parties by existing members as a matter of course;
- right of directors to amend the MOI: consider, in respect of shares, that directors be specifically prevented from amending the authorisation 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 the company's MOI. In other words, consider limiting the right granted to directors to amend the MOI in this regard in terms of S36(2);
- any other provisions specifically selected for alteration by the company from the list of alterable provisions.

#### *Personal liability companies*

- 3.11.12 The personal liability company is a private company of which the directors and past directors 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 1973 Act. The MOI of a personal liability company must state that it is a personal liability company.

#### *Public companies*

- 3.11.13 These companies are similar to public companies under the 1973 Act, although only one member is required (compared to the requirement for seven members previously).

#### *State-owned companies*

- 3.11.14 A state-owned company (SOC) is a company that is listed as a public entity in Schedule 2 or 3 to the Public Finance Management Act 1 of 1999 (PFMA), or is owned by a municipality and is similar to a public entity as listed in Schedule 2 or 3 to the PFMA.
- 3.11.15 The majority of the provisions of the Act that apply to a public company will apply to an SOC, unless the Minister has granted an exemption from any such provisions.

## **3.12 Filing of forms**

**Reference:** Sections 1, 16, 27 and 66, and Regulation 7

**Issue:** Classification of when a form is filed

### **Issues for consideration**

- 3.12.1 The Companies Act has now been effective since 1 May 2011 and one of the contentious issues still being discussed is the filing of documents or forms with the CIPC. In the Non-Binding Opinion of the CIPC in terms of S188(2)(b), dated 2 November 2011: *"Interpretation of section 16(9) of the Companies Act, 2008 in relation to the date on which an amendment of a Memorandum of Incorporation of*

*a company takes effect and the meaning of ‘filing’*<sup>3</sup>, the CIPC states that the CIPC does not regard a document as effectively filed unless it has been accepted as complying with further requirements of the Act and Regulations by the CIPC’s reviewing and accepting the document filed.

#### *Responsibility of directors*

- 3.12.2 A key feature of the Act is that it clearly emphasises the responsibility and accountability of directors. By accepting their appointment to the position, the directors indicate that they will perform their duties to a certain standard. It is a reasonable assumption of the shareholders that every individual director will apply his or her particular skills, experience and intelligence to the advantage of the company.
- 3.12.3 The Act codifies the standard of directors’ conduct in section 76. The standard sets the bar very high for directors, with personal liability where the company suffers loss or damage as a result of the director’s conduct not meeting the prescribed standard. 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. With the standard set so high, the unintended consequence might be that directors would 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 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 Act has codified the business judgement rule<sup>4</sup>, and provides for the indemnification of directors under certain circumstances and for the possibility of insuring the company and its directors against liability claims under certain circumstances.
- 3.12.4 In addition to the codified standard of directors’ conduct, the Act also provides for personal liability in instances where anybody suffers loss or damage as a direct result of non-compliance with the provisions of the Act (refer to S218(2)). The intention of the legislature here seems to be to decriminalise corporate law and to move the onus for ensuring compliance to the directors individually, and to the company. The regulator and the state will only be required to ensure compliance in very specific instances (i.e. where the Act provides for the CIPC to issue a compliance notice or where non-compliance is specifically classified as an offence). In every other instance, the provisions of the Act may be “enforced” by means of civil action by the stakeholders of the company (e.g. shareholders, employees, creditors and members of the community).

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<sup>3</sup> Non-binding opinion available on the SAICA website.

<sup>4</sup> In terms of the business judgement 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 had a rational basis for believing that the decision was in the best interest of the company.

### *Revised role of the CIPC*

- 3.12.5 The Act specifically reduces the company's reliance on the regulator, the CIPC. The company still has to comply with an administrative process to inform the CIPC of its decisions (e.g. the appointment of directors, changing of auditors, change of year end and amendment of the MOI). In most instances, the company's decision is effective immediately and it needs to inform the CIPC of decisions or actions. However, in a few instances the effect of the decision is delayed until the necessary notices have been "filed" with the CIPC.
- 3.12.6 Companies are often required to "file" a notice with the CIPC. Section 1 provides that "file", when used as a verb, means to deliver a document to the Commission in the manner and form, if any, prescribed for that document. The Regulations (Regulation 7 and Annexure 3) specify that, when a document is "delivered" to the CIPC, the date and time of delivery are determined as shown in Table 1.

3.12.7 *Table 1 – Method and time of delivery*

<b>By entering the required information in an electronic representation of that form on the internet website, if any, maintained by the Commission, if the document is a prescribed form; or</b>	On the date and at the time recorded by Commission's computer system, as verified by fax reply to the sender of the information.
<b>By transmitting the document as a separate file attached to an electronic mail message addressed to the Commission; or</b>	On the date and at the time recorded by the Commission's computer system, unless, within 1 business day after that date, the Commission advises the sender that the file is unreadable.
<b>By sending a computer disk containing the document in electronic form, by registered post addressed to the Commission; or</b>	On the date and at the time of delivery of the registered post to the Commission, as recorded by the post office, unless, within 1 business day after that date, the Commission advises the sender that the disk is unreadable.
<b>By handing the document, or a computer disk containing the document in electronic form, to the Commission, or a responsible employee who is apparently in charge of the Commission's office.</b>	On the date and at the time noted in a receipt issued by the Commission unless the document is on a computer disk and, within 1 business day after that date, the Commission advises the sender that the disk is unreadable.

- 3.12.8 It should be clear from the table above that "file" and "deliver" are defined so as to mean simply that a document must be submitted to the CIPC. There is no subsequent requirement for the CIPC to check or approve the particular action. Of course, the company needs to ensure that the particular filing complies with the provisions of the Act (relevant form completed correctly, required supporting documents attached and the prescribed fee paid). Where the company fails to comply with the provisions of the Act, the company and its directors may be liable.

- 3.12.9 It is prudent for companies to retain proof of receipt and acceptance by the CIPC in these cases.

#### *Appointment of directors*

- 3.12.10 In terms of section 66(7):

*“A person becomes entitled to serve as a director of a company when that person –*

*(a) has been appointed or elected in accordance with this Part, or holds an office, title, designation or similar status entitling that person to be an ex officio director of the company; and*

*(b) has delivered to the company a written consent to serve as its director.”* (Own emphasis.)

In turn, S70(6) requires every company to file a notice (CoR39) within 10 business days after a person becomes or ceases to be a director of the company.

- 3.12.11 Thus, in terms of the Act, appointments of directors are effective as soon as directors are appointed or elected and have confirmed in writing that they are prepared to accept the appointment to the board. The filing of the relevant notice does not affect the validity or the time of an appointment.

- 3.12.12 Despite the requirement to file a notice of the appointment or removal of a director with the CIPC, the company is obliged to keep a record of its directors (S24(3)(b) and 24(5)). This record may be accessed by any person who holds or has a beneficial interest in any securities issued by a profit company, or who is a member of a non-profit company. Any other person has a right to inspect or copy the register of directors of a company, on payment of a prescribed amount. As such, one may conclude that the register held by the company should be regarded as the “official” register of its directors, and it is this register that should be consulted where a discrepancy exists between the company’s register and the CIPC’s register, or where there is confusion or uncertainty as to the identity of the company’s directors.

#### *Change of the financial year end*

- 3.12.13 In order to determine exactly when the financial year end can be changed, one needs to look at the provisions of the Act. Section 27(4) of the Companies Act determines that:

*“The board of a company may change its financial year end at any time, by filing a notice of that change, but –*

*(a) it may not do so more than once during any financial year;*

*(b) the newly established financial year end must be later than the date on which the notice is filed; and*

*(c) the date as changed may not result in a financial year ending more than 15 months after the end of the preceding financial year.”*

- 3.12.14 The changing of the company’s financial year end will be complete once the relevant notice (CoR25) has been received by the CIPC.

### *Change of auditor*

- 3.12.15 The Act requires certain companies (public companies, SOCs and any other category of company that meets the requirements set out in the Regulations) to appoint an auditor. The Act provides for the appointment of the auditor by shareholders at the annual general meeting (AGM) and, where a vacancy exists, for the directors to fill the vacancy within 40 business days. Section 85(3) requires the company to file a notice (CoR44) within 10 business days after making the appointment. In addition, the company has to maintain a record of its auditors (S85(1)). Again, the Act does not link the filing of the relevant notice to the effectiveness of the appointment. However, where an auditor resigns, the Act expressly states that the resignation of the auditor is effective when the notice is filed (S91(1)). This implies that a resignation letter submitted to the company by the auditor is not sufficient to terminate the appointment of the auditor. In order to complete the action, the company has to file the CoR44. The resignation will only be effective on the date and time when the notice was received (and recorded) by the CIPC.

### *Amendment of the Memorandum of Incorporation*

- 3.12.16 Where a company amends its MOI, it has to file a Notice of Amendment (CoR15.2) within 10 days after making the amendment (S16(7), read with Regulation 15(3)). Where a company amends its MOI by means of a special resolution of shareholders (as provided for in S16(1)(c)), the amendment will not be effective immediately. This constitutes the one instance where the Act delays the effectiveness of a special resolution of shareholders. Under other circumstances, a special resolution will take effect as soon as the required number of votes is obtained. However, where a special resolution is obtained to amend the MOI, the amendment to a company's MOI takes effect on the later of the date on, and time at, which the Notice of Amendment is filed, or the date, if any, set out in the Notice of Amendment (S16(9)).

## **4 Interpretation of certain issues**

### **4.1 Subsidiary relationships**

**Reference:** Sections 1 and 3

**Issue:** Definition of subsidiary relationships

#### **Discussion**

- 4.1.1 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:
- 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
  - 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.

- 4.1.2 For the purposes of determining whether a person controls all or a majority of the general voting rights:
- voting rights attached to securities that will only be exercisable 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;
  - 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;
  - voting rights held by a person in a fiduciary capacity are to be treated as held by the beneficiary of those voting rights.
- 4.1.3 Note that it is possible for a company to be a subsidiary of another legal entity, even if that legal entity does not hold shares in the company.
- 4.1.4 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.
- 4.1.5 The definitions provided in S3 of a “subsidiary” and a “wholly-owned subsidiary” are for the purposes of the Act and are different from the definitions provided in the financial reporting standards (FRS) as identified in Regulation 27. For example, in accordance with S3 of the Act, only a company can be a subsidiary as defined in S1 of the Act. In accordance with International Financial Reporting Standards (IFRS), International Financial Reporting Standards for Small and Medium Enterprises (IFRS for SMEs) and South African Statements of Generally Accepted Accounting Practice (SA GAAP) (refer to Annexure C of this 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 FRS as prescribed by Regulation 27 should be applied. The definition of “control” in the applicable accounting framework is different from the definition of “control” in terms of the Act. It would therefore be possible for a company to be classified as a subsidiary of another company in terms of the accounting framework, but not in terms of the Act, and vice versa.
- 4.1.6 Section 1 of the Act defines a “juristic person” as including a foreign company and a trust (irrespective of whether the trust was established within the Republic or outside the Republic). Given the definition of a subsidiary discussed in 4.1.1, read with the definition of a juristic person, it would therefore be possible for a trust or a foreign company to be a “holding company” without necessarily meeting the definition of a “company”.
- 4.1.7 When applying any section of the Act that refers to “a group of companies”, “a holding company” or “a subsidiary”, the requirements of those sections would apply to every juristic person in that group that satisfies those definitions at that date. The matters outlined in 4.1.5 above may result in a different classification at different times. Whenever a decision is considered to pertain to a matter affected by the definitions discussed above, the board of directors will need to take into consideration all the relevant information available at that time, to determine whether an entity is a subsidiary or holding company of another entity at that time.

## 4.2 Performing the solvency and liquidity test

**Reference:** Section 4

**Issue:** The solvency and liquidity test

### Discussion

- 4.2.1 The Act requires the application of the solvency and liquidity test in specific circumstances.

### Issues for consideration

- 4.2.2 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 interrelated company (S45);
- making distributions (S46);
- issuing capitalisation shares (S47) or a cash payment in lieu of shares (S47(1)(c));
- acquiring own securities or subsidiary acquiring holding company securities (S48); and
- amalgamating or merging (S113).

- 4.2.3 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.

- 4.2.4 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 12 months after the relevant action 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 demonstrate 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 and 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

- 4.2.5 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.

- 4.2.6 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 and contingent liabilities (e.g. 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.

4.2.7 Note: The determined fair value is not limited to a fair valuation as defined in the FRS. In the context of S4, the fair value of an asset or liability should be regarded as a “legal” test. In other words, it is the value placed on a particular asset or liability that is reasonable under the circumstances.

4.2.8 When considering the value of assets and liabilities for purposes of S4, it is advisable to keep in mind that the purpose of this test, in each instance where it is required, is to safeguard third parties from an abuse of power by the directors and shareholders of the company. For example, the “stripping” of assets from a company by a shareholder while failing to pay creditors’ claims is prevented. Therefore, whether any valuation is fair (reasonable under the circumstances) should be considered from a third party’s point of view and the position that third parties would be left with if the anticipated transaction goes ahead.

4.2.9 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 under these circumstances.

4.2.10 Directors should, however, be cautious about using another valuation basis as permitted in S4(2)(b)(ii). When deviating from the values arrived at by using the accounting principles, directors would need to be in a position to motivate the use of another valuation that is “reasonable in the circumstances” to meet the solvency and liquidity test (to pay a distribution, for example). If the company is challenged at a later stage and directors do not have a robust basis for supporting alternative valuations, this could result in the directors incurring personal liability for losses suffered.

4.2.11 The following practical issues should be considered:

- SAICA is of the view that a subordination agreement could effectively impact the solvency and liquidity of a company, provided that the wording of the agreement is wide enough to ensure the subordination of claims while and to the extent that the company is either or both insolvent and illiquid.
- The solvency and liquidity test is intended to be conducted prospectively, before the relevant transaction is executed.
- If the solvency and liquidity test is not performed diligently and with due care, the company is in peril of undertaking a transaction or event that may cause the company not to be able to pay its debts as they fall due or to be in a position where its liabilities exceed its assets. This may inadvertently place the company



in financial distress as per S128 or even cause the company to trade recklessly, which could have severe consequences in terms of S22. The test must, thus, be seen in a serious light by the board as a business-continuity mechanism and must be performed in anticipation of performing the required transaction and not after the fact.

- Directors should also be reminded that they will need to refer to the company's MOI to identify any additional restrictions that may apply. For example, if the company's MOI contains a clause that states that a dividend may be paid out of profits only, the company may find itself in a position where it may be able to justify satisfying the solvency and liquidity test (through using a "fair value" other than those recorded in the financial statements), but that the additional restriction in the MOI would prevent the payment of the dividend as the company might not have sufficient profits to pay the dividend.
- In practice, it is seldom possible to prepare financial statements right up to the actual date on which the test is conducted. When financial statements made up to an earlier date are used, care should be taken to ensure that all material post-balance sheet events have been allowed for.
- Section 4(2)(b)(i) requires the fair valuation of a company's assets and liabilities to include "any reasonably foreseeable contingent assets and liabilities". At the same time, S4(2)(a)(ii) requires that the financial information should be based on financial statements that satisfy the requirements of the appropriate FRS. Contingent liabilities are classed as such in terms of FRS only when their likelihood is remote. The concepts of remoteness and of being "reasonably foreseeable" are very different. SAICA suggests that in performing the solvency and liquidity test companies should consider the likelihood that the contingent assets and liabilities will actually occur before including them in the calculation. SAICA does not suggest that contingent assets should be brought to account for this purpose.

## 5 Memorandum of Incorporation (MOI)

### 5.1 Scope of the Memorandum of Incorporation

**Reference:** Section 15(6)

**Issue:** Scope of the MOI

#### **Issues for consideration**

- 5.1.1 Under the 1973 Act, the Memorandum and Articles of Association were binding between the company and its shareholders and also among the shareholders themselves.
- 5.1.2 The MOI under the Act is binding on a significantly extended group of people, being –
- (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.”*

## 5.2 Form and content of the Memorandum of Incorporation

**Reference:** Sections 13, 16 and 66(1) and Forms CoR15.1A–E

**Issue:** Form and content of the MOI

### Issues for consideration

- 5.2.1 Under the 1973 Act, companies registered both a “Memorandum of Association” and “Articles of Association”.
- 5.2.2 The Memorandum of Association dealt mostly with the purpose and powers of the company as a juristic person, while the Articles of Association prescribed administrative matters, contained the rights (and obligations) attaching to securities of the company and, importantly, bestowed extended powers on the board
- 5.2.3 The content of the Articles was not prescribed, but Table A or Table B of the 1973 Act could have been used, unless excluded or modified by the company.
- 5.2.4 The Act replaces the previous requirement for both a Memorandum and Articles with a single Memorandum of Incorporation (MOI). On the incorporation of a new company, the MOI must be completed and filed, together with a Notice of Incorporation.
- 5.2.5 For pre-existing companies (that is companies that were incorporated prior to the Effective Date), the Memorandum and Articles of Association became the new MOI by operation of law, in terms of the definition of MOI in S1. (For the sake of simplicity, this guide refers to the “Memorandum” and “Articles of Association” when discussing documents prepared prior to the Effective Date, although such documents became the company’s MOI on the Effective Date.)
- 5.2.6 Forms CoR15.1A to CoR15.1E are contained in the Regulations as “templates” that may be used when preparing a company’s MOI in terms of the Act. Section 13(1)(a)(ii) provides that an MOI can also take a form unique to the company. In other words, companies may use the various CoR15.1 templates when preparing an MOI, but, as was the case under the 1973 Act, may also use a customised format, if preferred.
- 5.2.7 The provisions of the MOI must be consistent with the Act, unless the Act permits otherwise. Companies cannot “contract out” of the Act.
- 5.2.8 The MOI, as the constitution of the company, remains the document that will deal with administration matters and set out the rights (and obligations) of security holders. However, it is now also the only document in which the alterable provisions of the Act can be altered (refer to 5.8). In addition, as the Act empowers directors to exercise all of the powers of the company (in terms of S66(1)), an important purpose of the MOI is to restrict the powers of directors (rather than grant them, as was done in the Articles under the 1973 Act).
- 5.2.9 Form CoR15.1A for private companies, or the CoR15.1B for profit companies, can be used as a template for a profit company’s MOI. SAICA also has an MOI available

on its website, which can be referred to when preparing a new MOI for a private company. (Please note that, in terms of S83(8) of the Attorneys Act 53 of 1979, only practising attorneys may draft an MOI for a fee. It is likely that this restriction will fall away when the proposed Legal Practices Act comes into operation.)

### Issues for discussion

- 5.2.10 The purpose of the MOI under the Act differs fundamentally from the purpose of the Memorandum and Articles of Association under the 1973 Act. As the 1973 Act granted only limited powers to directors, the Articles of Association were typically an extensive document that set out additional powers for directors.
- 5.2.11 Under the Act in S66(1), the board has the authority to “*exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise*”.
- 5.2.12 As a result, the purpose of the MOI is to restrict the powers of directors, rather than grant them. (In fact, granting powers to directors in the MOI simply leads to an overly long and complicated MOI.)
- 5.2.13 It is not ideal for companies to continue with an unrevised MOI that consists of the Memorandum and Articles of Association. Companies that adopted the former Table B articles should take note that this standard set of Articles stated that the company requires an audit and an AGM. SAICA is of the view that if the MOI requires the appointment of an auditor then the company will require an audit. (Please refer to the CIPC Practice Note 1 of 2012, *Position of pre-existing companies on the adoption of a new Memorandum of Incorporation (MOI) or the amendment of an existing MOI under the Companies Act, 2008*.) Companies will have to update their MOIs to take advantage of the Act’s provisions for not having an audit under certain circumstances or not requiring an AGM. If these requirements remain in the Articles, a company will have to comply with these requirements of its MOI. Furthermore, these documents may inappropriately classify the company as the MOI might not contain the appropriate classification provisions as per the Act (e.g. a private company may not include the required provisions around the restriction of transferability of securities or the prohibition of public offering of the securities).
- 5.2.14 In many instances, for example those relating to the majority required to pass certain resolutions and the powers of directors, the Act provides for a “default” position that will apply, unless the company provides differently in its MOI (the so-called “alterable provisions” – refer to 5.8). SAICA advises that MOIs not be made unnecessarily long by repeating the provisions of the Act, unless such provisions are, in fact, altered. Typically, an MOI that is aligned with the Act should be much shorter and simpler than was previously the norm for Memoranda and Articles of Association.
- 5.2.15 SAICA also cautions that it would not typically be ideal to “update” existing Memoranda and Articles of Association for purposes of the Act. It is likely to be simpler to start with an MOI template drafted in terms of the Act and then to consider whether any “special” arrangements are made in the existing Memorandum and Articles of Association that the parties would like to retain in the company’s updated MOI.
- 5.2.16 If a shareholders’ agreement has been concluded in respect of a company, this is likely to impact on the content of the MOI. Firstly, the provisions of the shareholders’

agreement will not be enforceable to the extent that such provisions are not consistent with the MOI. Secondly, alterable provisions cannot be altered by way of a shareholders' agreement – this must be done in the MOI (see S15(7)). Shareholders will therefore not be protected by a shareholders' agreement unless the shareholders' agreement and MOI have been aligned.

5.2.17 Minimum content required for private companies in terms of the Act is as follows:

- private company requirements: that is (1) prohibit offering of any securities to the public and (2) restrict the transferability of securities (something along the line of “The Company must not make an offer to the public of any of its securities and an issued share must not be transferred to any person other than –
  - the company, or a related person;
  - a shareholder of the company, or a person related to a shareholder of the company;
  - a personal representative of the shareholder or shareholder's estate;
  - a beneficiary of the shareholder's estate; or
  - another person approved by the company before the transfer is effected”);
- shares: authorised classes of shares, number of shares (S36(1)(a)), designation and rights of each class (S36(1)(b));
- any provisions in the previous version of the MOI (for many companies this will still be the previous set of Memorandum and Articles of Association) that are specific to the business/company/industry and that the company wishes to retain.

5.2.18 When looking at the provisions made regarding restrictions, it is important to distinguish restrictions on:

- the **issue** of securities (which generally happens between the Company (juristic person) and the holder); or
- the **transfer** of securities (which happens between the holder of the security and a third party **OR** between holders of securities).

5.2.19 A transfer of securities will not change the number of securities in issue, but rather the person **who holds** the securities. The restriction referred to in S8(2)(b) must be **levied against the holder** of a security regarding **transferring** the security to another person. In terms of the restriction of transferability of securities (which includes shares and debentures), the Act is not specific as to how onerous that restriction should be. It also does not state that an equal restriction must apply across all securities. Accordingly, even a compulsory board approval before securities can be transferred may be interpreted as a transferability restriction for S8(2)(b).

5.2.20 The restriction of security holders' having to offer the securities to existing holders first, before they may offer them to third parties would be an example of a restriction of transferability.

5.2.21 Transferability restrictions should be applied to every security (i.e. not just one type of security), although it appears that the kinds of transferability restrictions applied to different classes of securities may be different.

- 5.2.22 Where an MOI refers to transferability restrictions in a shareholder agreement, without explicitly stating the restrictions in the MOI, this would not be considered to be sufficient. Where such a company only includes transferability restrictions in this “referred” manner, it would not be considered to be a private company. The actual transfer restrictions need to be included in the wording of the MOI.

### 5.3 Filing of the Memorandum of Incorporation

**Reference:** Sections 1, 15 and 16, and Schedule 5, Transitional Arrangements, Paragraph 4

**Issue:** When must the MOI be filed?

#### Discussion

- 5.3.1 New companies must on incorporation complete and file the MOI by way of a notice of incorporation (CoR14.1). If the “standard” MOI in Form CoR15.1A or CoR15.1C is used, the filing fee is R175. If any other form of MOI is used, the fee is R475 (unless a names’ reservation was made prior to the filing of the Notice of Incorporation, which will reduce the fee).
- 5.3.2 On the Effective Date, the Memorandum and Articles of Association of companies that existed before the Effective Date, became the new MOI by operation of law (in terms of the definition of MOI in S1).
- 5.3.3 Despite the legislated change of name, the Act did not amend the contents of existing Memoranda and Articles of Association. Therefore, as indicated above (refer to 5.2.15), companies are strongly advised to adopt a new version of the MOI that is aligned with the requirements of the Act.
- 5.3.4 Where the MOI is amended in terms of S16 (which includes any amendment or the adoption of a new form of MOI), the following should be filed with the Commission within 10 business days after the amendment has been effected:
- a Notice of Amendment, on Form CoR15.2, with a fee of R250;
  - a copy of the amendment or, if preferred, a complete MOI that contains the amendment; and
  - a copy of a special resolution approving the amendment to the MOI.
- 5.3.5 An “amendment” to the MOI involves a completely new document. In other words, it is not necessary to use the existing version of the MOI as a basis for the amended document.
- 5.3.6 The transitional arrangements initially provided for a two-year period within which a new version of the MOI could be filed without cost. During this period, provisions in the MOI that were inconsistent with the Act would nevertheless remain valid. However, this interim period ended on 30 April 2013.
- 5.3.7 The norm in terms of the Act is that resolutions take effect on the date on which they are passed, unless a different date is specified in a resolution itself.
- 5.3.8 However, an amendment to the MOI is an exception and cannot take effect until the date on which the amendment is filed. An amendment that changes the name of a

company takes effect on the date that the CIPC issues the amended registration certificate (CoR14.3).

### **Issues for consideration**

- 5.3.9 Companies are not obliged to update their Memoranda and Articles of Association to align with the Act. However, provisions in the MOI that contradict the provisions of the Act will be void. Also, as discussed in 5.2.8, provisions that (intentionally or inadvertently) alter the alterable provisions of the Act will be effective and apply to the company. Therefore, regardless of the expiry of the interim period, SAICA strongly recommends that companies do update their MOIs to align with the Act where this has not yet been undertaken.
- 5.3.10 A number of provisions are often encountered in practice where companies have failed to update their Memoranda and Articles of Association and are thereby inadvertently altering alterable provisions. These provisions typically impose more onerous requirements on companies than the Act does. Examples of such provisions include:
- that the company is obliged to conduct an audit (therefore the company is not able to conduct a review, even if the company otherwise meets the review criteria in the Act);
  - that the company is obliged to hold an AGM (even where the company is a private company that is not required by the Act to hold AGMs – refer to appointment of auditor at AGM in 10.3.1);
  - that restrictions are placed on the issue and transfer of “shares” and not “securities” as required by the Act (which may have the result that the company is inadvertently classified as “public” in terms of the Act).
- 5.3.11 At the moment, it is the CIPC’s practice to review all amendments of the MOI that are submitted to it. The CIPC regards an MOI as “filed” only when it “approves” the changes (and issues the CoR14.3). Unfortunately, the practice by the CIPC of reviewing all MOIs has on occasion resulted in a significant backlog with the issuing of the new CoR14.3 certificates.

## **5.4 Correction of errors**

**Reference:** Section 17

**Issue:** Can an error in the MOI be corrected without a special resolution?

### **Discussion**

- 5.4.1 The Act provides a mechanism for correcting a patent error in the MOI, without the need for extensive formalities.
- 5.4.2 The Act refers to this as an “alteration” of the MOI (which is, unfortunately, a term that can easily be confused with the term “amendment” used in S16).
- 5.4.3 The board, or an individual authorised by the board, may alter the MOI in any manner required to correct the error, by:
- publishing a notice of the alteration in a manner permitted by the MOI or rules of the company; and

- by filing a notice of the alteration with the CIPC (using Form CoR15.3 and paying a filing fee of R250).

#### **Issues for consideration**

- 5.4.4 We propose that companies include an express provision in their MOIs to regulate the publication to shareholders of any alterations.
- 5.4.5 Such a provision in the MOI can read something like the following: “The board, or its authorised representative, may publish the alteration of the Memorandum to shareholders and directors, to correct a patent error in spelling, punctuation, reference, grammar or similar defect on the face of the Memorandum, in the same manner and by the same means, including electronic transmission, as prescribed in Regulation 7 of the Companies Act Regulations regarding the delivery of notices.”

### **5.5 Par value shares**

**Reference:** Section 35; item 6 of Schedule 5; Regulation 31

**Issue:** How does the change to no par value shares affect the MOI?

#### **Discussion**

- 5.5.1 The Act prohibits the authorisation of new classes of shares with a par or nominal value. In other words, shares may no longer be described as, for example, “ordinary shares with a par value of R1 each”.
- 5.5.2 Existing classes of shares that were issued with a par value may continue indefinitely and no obligation exists to convert such shares to no par value shares. However, future issues of shares may give rise to an obligation to convert the existing classes of shares.

#### **Issues for consideration**

- 5.5.3 On any conversion, the MOI should be updated to indicate the number of authorised shares (no par value) and remove any reference to “par value”. Even where a company is not under an immediate obligation to convert to no par value shares, it may be prudent to initiate a conversion process in any event. It may be particularly opportune to convert to no par value shares at the same time that a company is making other amendments to its MOI.
- 5.5.4 The risk in delaying the conversion to no par value shares is that such a conversion may be required when a new issue of shares is being carried out, at which time the process of registering the amendment to the MOI (which may take up to several months) can cause unwanted delays to the parties concerned.

### **5.6 Changes to share capital by the board**

**Reference:** Section 36(3)

**Issue:** How do the directors’ powers in terms of S36(3) interact with the MOI?

#### **Discussion**



- 5.6.1 The board has wide powers in respect of changes to the share capital of the company; for example, it has the authority to change rights attaching to shares and increase or decrease authorised shares.
- 5.6.2 If the board has exercised its authority to make changes to the share capital, it must file a Notice of Amendment of the MOI with the CIPC.

#### **Issues for consideration**

- 5.6.3 The Act does not clarify the interaction between S16, which requires a special shareholders' resolution and determines the effective date of an amendment to the MOI as the date of filing the amendment, with the apparent authority of the board to effect an amendment to the share capital in S36(3), without shareholders' consent.
- 5.6.4 Where the board increased the authorised shares (as the MOI of the company did not limit this power of the directors), then the increase in authorised shares would be effected once the board resolution was taken.
- 5.6.5 Where the board was not allowed to increase the authorised shares (owing to limitations imposed by the MOI), then the increase in authorised shares would have to be made by special resolution of the shareholders and would only be effective on the filing of the Notice of Amendment with the CIPC as per S16.
- 5.6.6 Furthermore, in other instances, the Act will state when the effective date is delayed (e.g. "the decision will only be effective on filing of the form....").

### **5.7 Special conditions in the Memorandum of Incorporation**

**Reference:** Sections 11(3), 13(3), 15(2) and 19(5)

**Issue:** Inclusion of special conditions in the MOI

#### **Discussion**

- 5.7.1 Section 15(2) of the Act permits a company to include in its MOI:
- restrictive conditions applicable to the company and any requirements for the amendment of these conditions (S15(2)(b)); or
  - a prohibition on the amendment of any provisions (S15(2)(c)).
- 5.7.2 If an MOI has any of the above provisions (for the sake of brevity referred to here as "special conditions"), the relevant company should use "(RF)" after its name (S11(3)(b)), e.g. "ABC Properties (Pty) Ltd RF".

#### **Issues for consideration**

- 5.7.3 The application of the special conditions and RF provisions of the Act is not entirely clear.
- 5.7.4 In SAICA's view, if one considers S15(2)(b) to apply then the relevant provisions in the MOI must 1) be "restrictive" and 2) contain special requirements regarding the amendment of the relevant provisions.
- 5.7.5 A provision is regarded as a "special requirement for amendment" if it entails steps in addition to the requirements that generally apply (in terms of S16) to the amendment of an MOI.



- 5.7.6 For example, although a private company must always contain “restrictive conditions” on the transfer of its securities, such conditions can be changed in terms of S16 and therefore do not meet the second requirement in 15(2)(b) (i.e. an additional requirement (not just S16) regarding amendment of that provision).
- 5.7.7 S15(2)(c) only applies where a particular provision cannot be amended at all.
- 5.7.8 In respect of the interpretation of S11, the emphasis appears to be on the way in which the provision can be changed and not on whether it is a “special” or “restrictive” provision. Therefore, SAICA is of the view that “(RF)” will only be used if a particular provision of an MOI cannot be changed at all, or can only be changed if additional requirements (e.g. additional to the special resolution or court order) are met.
- 5.7.9 Although “(RF)” does not appear to be widely used, it should find application in practice in respect of structured entities (here referred to as “Structured Entity”) or joint venture (JV) companies that are created for a very specific purpose (e.g. to hold immovable property) and where the parties involved do not want the company ever to be able to trade, incur debt etc. Such companies can use “(RF)” if the MOI states that the limitation on the powers of the company can only be amended under specific circumstances.
- 5.7.10 The effect of the (RF) expression is to protect the shareholders of a company against unscrupulous directors who exceed their powers in terms of the MOI.
- 5.7.11 As discussed in 3.8, third parties are not deemed to know the contents of a company's MOI, although it is available for inspection or has been filed with the CIPC (S19(4)). If *bona fide* third parties enter into transactions with the company, such transactions are valid, regardless of any restrictions in the MOI (S20(7)).
- 5.7.12 The exception to this rule is when the company uses “(RF)” after its name and thereby draws attention to the restriction of the powers of the company/directors (see S19(5)). In terms of S19(5)(a) a person is regarded as having both notice and knowledge of a special condition if the company's name includes “(RF)” as contemplated in S11(3)(b), and the company's Notice of Incorporation or a subsequent Notice of Amendment has drawn attention to the relevant provision, as contemplated in S13(3).
- 5.7.13 For example, if a Structured Entity is created to hold immovable property, and the MOI provides that the company cannot trade, incur debt etc. and that these restrictions cannot be changed only by complying with S16 (i.e. more than a special resolution is required for the company to change its MOI), then the company may add the letters “(RF)” to its name. If one of the directors of the company then tries to incur debt, for example, the transaction will not be valid, as any third party is deemed to know that the company cannot incur debt. In other words, “(RF)” warns third parties that the company's powers are restricted *and* that they have an obligation to find out what those restrictions are.
- 5.7.14 If the Structured Entity referred to above does not use “(RF)”, and a director of the company tries to incur debt with a *bona fide* third party, the transaction will be valid (third parties are then not deemed to know what is in the MOI (S19(4))). If the company suffers damages, it will still be obliged to honour the contract (but will, of course, have a claim against the director, who is bound by the MOI).

- 5.7.15 If a company's MOI meets the requirements for "(RF)", but the company does not use "(RF)" next to its name, the company (and its shareholders) will then be subject to risk, as illustrated in the example above. However, there is no other sanction in the Act for not using "(RF)".
- 5.7.16 (Note: Despite the use of the word "must" in S11(3)(b), reading all the provisions of the Act pertaining to (RF) companies, we suggest that a company is not obliged to use the protection afforded by "(RF)" (S19(5)), but "may" decide to do so.)

## 5.8 Alterable and unalterable provisions

**Reference:** Sections 1, 15(2) and 19, and Annexure A of the Guide

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

### Discussion

- 5.8.1 Unlike the 1973 Act, the Act offers flexibility to companies by entitling them to alter certain alterable provisions of the Act.
- 5.8.2 Alterable provisions are defined in S1 as provisions of the Act that 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.
- 5.8.3 These alterable provisions merit careful consideration as, 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 a company.
- 5.8.4 In other words, an alterable provision contemplates a particular "default" position, such as that ordinary resolutions require a majority vote, but then expressly indicates that this default position could be changed, as well as the extent to which it can be changed.
- 5.8.5 Alterable provisions mainly relate to the allocation of power between shareholders and directors, the procedure dealing with the convening of shareholders' 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 shareholder meetings, where the company may specify a lower or higher percentage in place of the 25% required; and
  - 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.
- 5.8.6 Provisions that do not expressly contemplate that their effect may be changed in the MOI are referred to as "unalterable" provisions.
- 5.8.7 However, even in respect of unalterable provisions, S15(2)(a)(iii) specifically allows the MOI 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 Act. A company cannot therefore remove or diminish an unalterable provision by way of a different requirement in the MOI, but may impose on the company a more onerous

requirement pertaining to that unalterable provision by way of additional stipulations in the MOI.

#### **Issues for consideration**

- 5.8.8 In drafting an MOI, the alterable provisions should be carefully considered to ensure that the requirements of the company are best served.
- 5.8.9 Alterable provisions are particularly important in respect of companies that still operate in terms of an MOI that was prepared under the 1973 Act (referred to as the “Memorandum” and “Articles of Association”). Typically, these documents contain requirements for private companies to be audited, hold AGMs and declare dividends at AGMs. These requirements may not otherwise be applicable to a private company, but as long as these provisions remain in a company’s MOI, that company will be bound to comply with them. In other words, the company’s MOI alters an alterable provision.
- 5.8.10 It is not in itself problematic if a company’s MOI continues to require a company to comply with the more formalistic requirements of the 1973 Act but can be costly and inconvenient for the company involved if such a company has not specifically considered whether a particular requirement is suitable for the needs of the company or not.

### **5.9 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**

- 5.9.1 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).
- 5.9.2 Note that a shareholders’ agreement cannot alter any alterable provisions of the Act. The alternation of an alterable provision will only be effective if made by way of the company’s MOI.

#### **Issues for consideration**

- 5.9.3 SAICA cautions that providing in the shareholders’ agreement that the shareholders’ agreement will override the constitution of the company, as was the norm under the 1973 Act, is not an enforceable provision.
- 5.9.4 All shareholders’ agreements entered into while the 1973 Act was in force should therefore be updated to ensure that:
- all the provisions of the agreement are consistent with the Act and the MOI (which may require an amendment to the MOI); and
  - where an agreement alters an alterable provision of the Act, the relevant provision is also contained in the MOI.

- 5.9.5 In the context of shareholders' agreements, the following matters are often problematic:
- The shareholders' agreement provides for the appointment/nomination of directors and does not make provision for the election of 50% of the directors, as is required by the Act;
  - The shareholders' agreement prescribes specific voting percentages for some resolutions, often as a minority protection mechanism. For such provisions to be effective, they would also need to be contained in the MOI;
  - The shareholders' agreement contains provisions regarding distributions to shareholders that do not take into account the necessity for a company to meet the solvency and liquidity test prior to making a distribution.

## 5.10 Rules

**Reference:** Section 15(3) to (6)

**Issue:** Rules relating to the governance of the company

### Discussion

- 5.10.1 The Act provides for a process in terms of which the directors may make rules that relate to the governance of the company. The board is required to comply with some formalities, which are set out in S15(3) to (5A).
- 5.10.2 Once ratified by shareholders, by way of an ordinary resolution, the rules become binding on all the parties that are bound by the MOI.

### Issues for consideration

- 5.10.3 It is not entirely clear what the interpretation of "governance of the company" is.
- 5.10.4 We suggest that documents such as board charters or terms of reference could be formalised in this way.
- 5.10.5 Rules do not appear to be widely used in practice, but directors appear to have wide and far-reaching authority in this regard (e.g. the board and shareholders are bound by the rules), should they choose to exercise it.

## 6 External companies

**Reference:** Sections 13, 23, 32, 33, 115 and 159

**Issue:** How does the Act affect external companies?

### Discussion

- 6.1 The 1973 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 only those sections of the Act that make specific reference to external companies apply.
- 6.2 An external company is 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.

6.3 When applying the test in determining whether an external company is doing business in South Africa, the items noted below may be indicators of a foreign company conducting business in the Republic. However, a foreign company must not by default be regarded as conducting business activities if it solely 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.

6.4 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.

6.5 The Act does not contain the onerous provisions that apply to external companies in terms of the 1973 Act. External companies will not be required to be audited or independently reviewed and do not have to meet the requirements in terms of the enhanced accountability requirements set out in Chapter 3 of the Act.

6.6 Table 2 below highlights some of the salient differences between the requirements of the 1973 Act and the 2008 Act. This table is not intended to be exhaustive.

6.7 *Table 2: Companies Act requirements for external companies in comparison with the 1973 Act*

<b>1973 Act</b>	<b>Act</b>
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 to lodge AFS or financial accountability supplement
Need to lodge an annual return	Need to lodge an annual return
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 a 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

- 6.8 If an external company does not register within three months after commencing business activities in the Republic, the Commission may issue a compliance notice that requires 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.
- 6.9 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.

## 7 Accounting, company records, financial statements and auditing

### 7.1 Company records and retention of records

**Reference:** Sections 24, 25 and 26

**Issue:** Records can be kept electronically.

**Discussion**

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

- records of the company referred to in S24 (as included in Table 3) 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 that 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 7.5 of this guide for the requirements relating to the form and content of accounting records;
- the company must maintain records in written or any other form. Where records are kept electronically, it must be possible to convert the documents and information into written form within a reasonable time. This means that all records, including minutes, can be kept in electronic form.

#### **Issues for consideration**

7.1.2 The company is obliged to comply with the administration and recordkeeping provisions of the Act. It is therefore suggested that systems and practices are monitored on an ongoing basis to ensure that the company complies with the requirements.

7.1.3 Table 3: 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, uncertificated securities register and members' register in case of non-profit company	Indefinite
6.	Register of company secretary and auditors	Indefinite
7.	Regulated companies (companies to which Parts B and C of Chapter 5, and the Takeover Regulations apply) – Register of disclosures of persons who hold beneficial interest equal to or more than 5% of the securities of that class issued	Indefinite
8.	Notice and minutes of all shareholder meetings, including: <ul style="list-style-type: none"> <li>• resolutions adopted</li> <li>• documents made available to holders of securities</li> </ul>	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

This guide has referred to the Act's retention requirements only. Other legislation deals with other information to be retained and companies must also refer to those requirements. SAICA has



released a document, *SAICA Guide on the Retention of Records*, which provides more information on these issues.

## 7.2 Annual returns

**Reference:** Section 33 and Regulation 30

**Issue:** All companies have to complete and file an annual return on an annual basis with the CIPC.

### 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 by the Act or Regulation 28 to be audited are obliged to submit copies of the latest approved audited annual financial statements (AFS) with their annual returns (S33(1)). All other companies not required to be audited can either submit their independently reviewed AFS or complete a Financial Accountability Supplement (Form CoR30.2).
- It is possible that the date of incorporation does not coincide with the year end of the company. In this instance, the company would be required to provide the latest approved audited AFS.
- 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 of the Act.
- Companies, once deregistered, are not required to file an annual return supported by the audited/independently reviewed AFS or a Financial Accountability Supplement since the company no longer exists.
- The purpose of lodging such annual returns is to confirm whether a registered company is still in business/trading, or if it will be in business in the near future. This means that, if annual returns are not filed within the prescribed time period, the assumption is that the business is inactive and, as such, the CIPC will start the deregistration process to remove the company from its active records. The legal effect of the deregistration process is that the juristic personality is withdrawn and the company ceases to exist.
- The company may be reinstated after it was deregistered by the lodging of a Notice of Reinstatement (Form CoR40.5). The request for reinstatement may be submitted by the company or close corporation, a duly authorised representative or any third party. On the processing of the reinstatement application, the legal persona is reinstated, and all outstanding annual returns must be filed for the reinstatement to become effective.
- Once the status of a company has been recorded as “*final deregistered*”, the company or any third party may apply for reinstatement. The CIPC will only process the reinstatement application if:

- the company was in business at the time of deregistration and proof of that fact is provided;
- immovable property is registered in the name of the company; or
- a creditor provides proof that it will be unfairly prejudiced if the company is not reinstated.<sup>5</sup>
- On the processing of the reinstatement application, the status will be changed to “reinstatement process”, after which all outstanding annual returns must be filed in order to change the status to “in business”, although the legal personality would have been reinstated on the processing of the reinstatement application.
- As an alternative to reinstatement, the incorporation of a new company may be considered. Further, the name of the finally deregistered company or close corporation may still be available for reservation if the name has not been reserved by another person after its final deregistration.

## 7.3 Right to access information

### 7.3.1 Enhanced right by security holders to access information

**Reference:** Sections 26, 31 and 187(5). Also refer to section 56 of the Act, which deals with beneficial interest.

**Issue:** A person who holds or has a beneficial interest in any securities issued by a profit company, or who is a member of a non-profit company, has enhanced rights to access information.

#### 7.3.1.1 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 (as defined) 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;

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<sup>5</sup> Refer to *ABSA Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC) (case no A29/13 19 April 2013 (WCC)).

- 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; and
  - the securities register.
  - Security holders do not, in terms of S26, have an automatic right to access the company's accounting records, minutes of directors' meetings or board committee meetings.
  - The MOI may provide for the accessing of further information by security holders or people who have a beneficial interest.
- 7.3.1.2 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.
- 7.3.1.3 Other people not contemplated in S26(1) have a right to inspect or copy the securities register of a profit company, or the member register of a non-profit company that has members, or the register of directors of a company, on payment of an amount not exceeding the prescribed maximum fee for any such inspection.<sup>6</sup>

#### **Issues for consideration**

- 7.3.1.4 Consider whether the MOI should grant the additional right to access information.
- 7.3.1.5 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. Where access to records is requested, information or access to the information must be provided within 14 business days.
- 7.3.1.6 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 applicable – the prescribed fee to inspect the registers.
- 7.3.1.7 Companies should take note that it is an offence not to provide the information based on a reasonable request or to refuse access to the information unreasonably.
- 7.3.1.8 Companies should also note the provisions of S187 (discussed under 7.3.4 below) that, *inter alia*, determine that the Commission must receive and deposit in the registry any documents required to be filed in terms of the Act and make the information in those registers efficiently and effectively available to the public and to other organs of state.
- 7.3.1.9 The Act does not diminish the rights of any person to assert his or her rights in terms of the Promotion of Access to Information Act, 2000, either against the company directly or against the Commission.

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<sup>6</sup> Refer to *Basson and Another v On-Point Engineers (Pty) Ltd and Others*, Case 64107/11, 7 November 2012 (GNP); 2012 JDR 2126 (GP) ([2012] ZAGPPHC 251).

### 7.3.2 Right of creditors

**Reference:** Section 31(2)

**Issue:** Right of judgement creditor to access AFS

#### **Discussion**

- 7.3.2.1 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**

- 7.3.2.2 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 66 of 1995, regardless of the level of representation of union members in a particular company.

#### **Issues for consideration**

- 7.3.3.2 The company should ensure that it puts steps in place in anticipation of a request by any trade union for access to financial statements.
- 7.3.3.3 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 Right 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 people 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.
- 7.3.4.2 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 that explains why the information is confidential. The Commission must then consider the claim of confidentiality and decide on the confidentiality of the information. If the Commission concludes that the information is not to be considered confidential, the party that claims confidentiality may apply to a court for an appropriate order.

#### **Issue for consideration**

- 7.3.4.3 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 AFS to the annual return; there is thus a possibility 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 and Guidance Note 1 of 2012

**Issue:** Requirements for the year end of a company

#### **Discussion**

- 7.4.1 The board of a company may change its financial year end at any time, by filing a notice of that change using Form CoR25.
- 7.4.2 The first financial year of a company may not end more than 15 months after the date of registration of the company. Although there is a limitation on the maximum number of months a company's new financial year end can be, there does not appear to be any limitation of period if a company is reducing its financial year.
- 7.4.3 A company is allowed to change its financial year end only once during a financial year. After the change, the following financial year end should not be more than 15 months after the end of the preceding financial year. The newly established financial year end must be later than the date on which Form CoR25 is filed. A company cannot change its year end (e.g. December) to a later month (February) after the company's year end has already passed (in January).
- 7.4.4 Section 27(3) of the Act does not allow for the company to change its financial year in the past since a company may only file a change of its financial year end while it is still within the financial year.
- 7.4.5 Form CoR25 must comply with the following requirements:
- It must be the first change of the financial year end, as a company may only change its financial year end once during a particular financial year;
  - The current financial year must not have ended;

- The new financial year end must be later than the date of the lodgement of Form CoR25 with the CIPC;
- The new financial year end may not result in a financial year of longer than 15 months;
- Form CoR25 must be signed by an active director, company secretary or other authorised person of the company.

7.4.6 In order to determine whether Form CoR25 complies with the above requirements, the day, month and year of the current financial year end, as well as the new financial year end, must be clearly specified on the form.

#### **Issues for consideration**

- 7.4.7 The Act is silent on whether the date of the end of the accounting periods of subsidiary companies should be the same as the date of the end of the accounting period of the holding company within a group of companies. Since this is not a requirement in the Act, the financial year of a subsidiary company may differ from the financial year of its holding company. SAICA advises that the applicable financial reporting framework applied in the preparation of the financial statements should be considered with respect to different reporting dates in the preparation of consolidated financial statements. For example, in terms of IFRS, IFRS 10 *Consolidated financial statements* requires that the financial statements of a parent and its subsidiaries are prepared using the same reporting date unless impracticable, in which case a difference of three months in reporting periods is permitted with adjustments made for any significant transactions or events. To enable comparability of financial statements, consistency of the length of the reporting periods and the chosen reporting dates is necessary.
- 7.4.8 The JSE Limited Listings Requirements require an applicant issuer to notify the JSE in writing with respect to a proposed change in the financial year.
- 7.4.9 It is common practice in certain industries, for example, retail, manufacturing and parking, to apply a 4-4-5 calendar (52-53 week) accounting period where companies desire that their year end always ends on the same day of the week. The Act prescribes that the financial year of a company is its annual accounting period, which ends on the date set out in the company's Notice of Incorporation. A company that makes use of this practice should annually file Form CoR25 to change the year-end date, if necessary. In addition to this, consideration should be given to the requirements of the relevant reporting framework; i.e. in terms of IFRS, International Accounting Standard (IAS) 1 *Presentation of Financial Statements* requires that financial statements be prepared at least *annually*, which is usually a one-year period and the standard does not preclude the use of other periods for practical reasons.

## **7.5 Accounting records**

**Reference:** Section 28 and Regulation 25

**Issue:** Accounting records required

**Discussion**

- 7.5.1 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.
- 7.5.2 Section 28 requires a company to keep accurate and complete accounting records:
- to enable the company to satisfy its obligations in terms of the Act (or any other law) with respect to the preparation of financial statements; *and*
  - that must include any prescribed accounting records, which must be kept in the prescribed manner and form.
- 7.5.3 Regulation 25 states that a company must keep accounting records as necessary to provide an adequate information base sufficient to:
- enable the company to satisfy all reporting requirements applicable to it as set out in S28(1), read with S29(1), of the Act; *and*
  - provide for the compilation of financial statements, and the proper conduct of the audit or independent review, of its AFS.
- 7.5.4 Regulation 25(3) then states: “*To the extent necessary for a particular company to comply with section 28(1), read with section 29(1), the accounting records of that company must include...*” certain minimum records.
- 7.5.5 A company is thus required to keep all the details set out in Regulation 25 to the extent that they are applicable to the company; i.e. if the company has non-current assets, then it must keep the required register containing all the prescribed information, but if the company does not have non-current assets then the company is not required to keep the register.
- 7.5.6 It is SAICA’s view that directors have access to the accounting records of the company as the business and affairs of the company are managed by the board of directors.

## 7.6 Financial statements and annual financial statements

### 7.6.1 Preparation of financial statements and annual financial statements

**Reference:** Sections 29 and 30

**Issue:** What does the Act require with respect to a company preparing financial statements?

#### **Discussion**

- 7.6.1.1 All companies are required to prepare AFS within six months after the end of its financial year.
- 7.6.1.2 Financial statements must:
- satisfy the FRS as to form and content, if any such standards are prescribed;
  - present fairly the state of affairs and business of the company, and explain the transactions and financial position of the business of the company;

- show the company's assets, liabilities and equity, as well as its income and expenses, and any other prescribed information;
- set out the date on which the statements were published, and the accounting period to which the statements apply; and
- bear, on the first page of the statements, a prominent notice that indicates –
  - whether the statements have been audited in compliance with any applicable requirements of this Act;
  - if not audited, whether the statements have been independently reviewed in compliance with any applicable requirements of this Act; or
  - whether they have not been audited or independently reviewed; and
  - the name, and professional designation, if any, of the individual who prepared, or supervised the preparation of, those statements.

**7.6.1.3 The AFS of a company must:**

- include an auditor's report, if the statements are audited;
- 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:
  - any matter material for the shareholders to appreciate the company's state of affairs; and
  - any prescribed information;
- be approved by the board and signed by an authorised director; and
- be presented to the first shareholders' meeting after the statements have been approved by the board.

**Issues for consideration**

**7.6.1.4** All companies are required to prepare their AFS within six months after the end of their financial year, irrespective of the company Public Interest (PI) Score or whether the company is required to be audited or independently reviewed. Companies should ensure that they meet the six-month deadline for preparing the financial statements as currently no extension of the six months is allowed and companies would be in breach of the Act should they not prepare their financial statements within the six months. A breach may result in the CIPC's issuing a compliance notice to the company. The auditor and the independent reviewer should consider whether such a breach meets the definition of a reportable irregularity, in terms of the APA in the case of an audit, or Regulation 29 to the Act in the case of an independent review.

**7.6.1.5** The AFS may report and present financial information for more than one year; e.g., it may present three columns with financial information relating to 20X1, 20X2 and 20X3 and the notes. Consideration should also be given to the requirement of the applicable reporting framework, which may require the disclosure of additional information. However, the company must prepare AFS within six months after the end of each of the relevant financial year ends. Reporting in this manner, i.e. playing catch up by reporting three financial year ends in one calendar year, will not negate



a prior period breach where AFS were not prepared within six months after the end of the company's financial year. The company may also present consolidated and separate financial statements in one set of AFS if the reporting framework requires the preparation of consolidated financial statements.

- 7.6.1.6 Every company within a group of companies should prepare separate AFS for each company, irrespective of the applicable accounting framework applied. Only preparing consolidated AFS for the group will not meet the requirements of the Act, even though it may meet the requirements of the applicable financial reporting framework.
- 7.6.1.7 A question that is frequently asked is whether companies that do not trade, e.g. dormant companies, are required to prepare financial statements and whether those financial statements should be audited or independently reviewed. SAICA reminds practitioners that section 30 requires all companies to prepare AFS. The fact that the company is not trading does not mean that the company is exempt from preparing AFS. That company may even be subject to an audit or an independent review. If a company is deregistered before its next financial year end, it is SAICA's view that the company is not required to prepare AFS for that financial year end since the company will no longer exist.
- 7.6.1.8 The AFS will be complete only when they meet all the requirements in terms of section 30 of the Act and should include the company secretary certificate and the audit committee report, when applicable, as well as the directors' report, the audit report where a company is audited or the independent reviewer's report where the company is subject to an independent review. The Act is silent on the inclusion of the independent reviewer's report in the AFS. It is SAICA's view that the independent reviewer's report must be included in the AFS.
- 7.6.1.9 The AFS should be approved by the board of the company and signed by an authorised director. The AFS should then be presented to the first shareholders' meeting after the statements have been approved by the board.
- 7.6.1.10 It is 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 may be signed by only one director (who has the proper authorisation) where the 1973 Act required at least two directors' signatures;
  - ultimately the board remains accountable for the financial statements and the director's signature merely indicates that the board has approved the AFS.
- 7.6.1.11 Regulation 27 additionally provides guidance on what financial reporting framework should be applied when the AFS are prepared (refer to Annexure D of this guide for detailed guidance on the application of Regulation 27). SA GAAP may still be used for financial reporting periods ending on or before 1 December 2012 (i.e. SA GAAP is withdrawn for financial years commencing on or after 1 December 2012) and may be applicable to Government Business Enterprises, the entities listed in Schedules 2, 3B and 3D to the Public Finance Management Act 1 of 1999, as amended. The AC 500 Standards formerly formed part of SA GAAP and have been replaced by the *SAICA Financial Reporting Guide* as issued by the Accounting Practices Committee.

- 7.6.1.12 All financial statements prepared by a company, including AFS, should set out on the first page (the cover page or page number 1 following the cover page of the financial statements):
- the name and professional designation, if applicable, of the person who prepared, or supervised the preparation of, the financial statements; and
  - the fact that the financial statements were subjected to an audit, or an independent review or neither.
- 7.6.1.13 The requirement to include the name and professional designation of the person who prepared, or supervised 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. It is SAICA's view that the name of the person who supervised the preparation of the financial statements should be stated.
- 7.6.1.14 An independent accounting professional's (IAP's) details may also be included as the preparer and compiler where relevant.
- 7.6.1.15 The CIPC may issue a compliance notice when a company fails to prepare AFS. Failure to comply with a compliance notice is an offence and subject to penalties in terms of the Act.

## 7.6.2 Directors' remuneration

**Reference:** Section 30

**Issue:** What does the Act require with respect to a company's disclosing directors' remuneration?<sup>7</sup>

### Discussion

- 7.6.2.1 Section 30(4) states that "*The annual financial statements of each company that is required in terms of the Act to have its annual financial statements audited must include particulars showing:*
- (a) *the remuneration, and benefits received by each director, or individual holding any prescribed office in the company;*
  - (b) *the amount of –*
    - (i) *any pensions paid by the company to or receivable by current or past directors or individuals who hold or have held any prescribed office in the company;*
    - (ii) *any amount paid or payable by the company to a pension scheme with respect to current or past directors or individuals who hold or have held any prescribed office in the company;*

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<sup>7</sup> Please refer to *Frequently asked questions on the disclosure of directors' and prescribed officers' remuneration*, released by SAICA in September 2015, for more information.

- (c) *the amount of any compensation paid in respect of loss of office to current or past directors or individuals who hold or have held any prescribed office in the company;*
- (d) *the number and class of any securities issued to a director or person holding any prescribed office in the company, or to any person related to any of them, and the consideration received by the company for those securities; and*
- (e) *details of service contracts of current directors and individuals who hold any prescribed office in the company.”*

7.6.2.2 The remuneration information to be disclosed must satisfy the prescribed standards, and must show the amount of any remuneration or benefits paid to or receivable by people in respect of:

- services rendered as directors or prescribed officers of the company; or
- services rendered while being directors or prescribed officers of the company:
  - as directors or prescribed officers of any other company within the same group of companies; or
  - otherwise in connection with the carrying on of the affairs of the company or any other company within the same group of companies.

7.6.2.3 “Remuneration” includes:

- fees paid to directors for services rendered by them to or on behalf of the company, including any amount paid to a person in respect of the person’s accepting the office of director;
- salary, bonuses and performance-related payments;
- expense allowances, to the extent that the director is not required to account for the allowance;
- contributions paid under any pension scheme not otherwise required to be disclosed;
- the value of any option or right given directly or indirectly to a director, past director or future director, or person related to any of them, as contemplated in S42;
- financial assistance to a director, past director or future director, or person related to any of them, for the subscription of options or securities, or the purchase of securities, as contemplated in S44; and
- with respect to any loan or other financial assistance by the company to a director, past director or future director, or a person related to any of them, or any loan made by a third party to any such person, as contemplated in S45, if the company is a guarantor of that loan, the value of:
  - any interest deferred, waived or forgiven; or
  - the difference in value between:
    - the interest that would reasonably be charged in comparable circumstances at fair market rates in an arm’s length transaction; and
    - the interest actually charged to the borrower, if less.

## Issues for consideration

- 7.6.2.4 All companies should comply with the Act's requirements in this regard when required to be audited. If the company is "required" by the Act to be audited, the directors' and prescribed officers' remuneration must be disclosed. A company that (voluntarily) chooses to be audited by way of this requirement being included in the MOI of the company is not required by S30 of the Act to disclose the directors' remuneration information. For companies that voluntarily choose to be audited (where this requirement is included in, or has been omitted from, the MOI of the company), and such companies are not required to be audited in terms of the Act, such audits will be regarded as "voluntary" and remuneration will not be required to be disclosed.
- 7.6.2.5 Section 30(4) of the Act requires the company's AFS to "include particulars" regarding directors' and prescribed officers' remuneration. The AFS include the financial information required by the prescribed FRS but, in addition, S30(3) of the Act makes it clear that the AFS must also include the audit report and the directors' report. Accordingly, SAICA recommends that the remuneration be disclosed in the notes to the AFS. It is permissible for the directors to include the disclosure required by S30(4) in the directors' report. Note, however, that the auditor remains responsible for auditing the S30(4) disclosure information and the information is covered by the auditor's opinion, even if it is contained in the directors' report. The information disclosed would require comparative information to be disclosed in light of the fact that the prescribed FRS would require comparative information.
- 7.6.2.6 The remuneration disclosures for a company must include amounts paid for services rendered as director to the company to which such an individual is appointed as a director or acts in the capacity as a prescribed officer. The amounts paid to these individuals for their services as directors, prescribed officers or employees in connection with the carrying on of the affairs of any other company within the same group of companies must also be disclosed. The information to be disclosed for "each director or individual holding any prescribed office in the company" must be disclosed by the individual. Replacing the detailed disclosure by persons with information pertaining to the directors and prescribed officers in aggregate is not permissible.
- 7.6.2.7 SAICA recommends that companies name the individual directors and prescribed officers in the required disclosure and that they do not use a numbering or lettering disclosure format. Naming individuals would align with the objective of transparency set out in S7 of the Act.
- 7.6.2.8 The requirement for the remuneration disclosure of amounts paid for services rendered as directors or prescribed officers of the company who render services that are "otherwise in connection with the carrying on of the affairs of the company or any other company within the same group of companies" implies that the amounts received by such individuals need to be disclosed for all services rendered by the individual. These services include those services rendered as employees of the company and those rendered to other companies in the group.
- 7.6.2.9 In terms of the Companies Act, a "company" is a juristic person incorporated in terms of the previous or current Companies Act, i.e. only South African companies. Therefore, any amounts paid to directors and prescribed officers for services

rendered to a trust or a foreign subsidiary within the group would not be included in the disclosure, since a trust or a foreign subsidiary (company) is not a “company” for the purposes of the Companies Act. SAICA recommends that external legal opinion is obtained in the event of any uncertainty.

- 7.6.2.10 In circumstances where the holding company of the group is a trust or a foreign company, all companies controlled by that trust or foreign company form a group for the purposes of the Companies Act, since a holding company is defined as any juristic person that controls a subsidiary. (Note: in terms of the definitions of the Act, both a trust and a foreign company qualify as a “holding company”, even though they are not “companies” as defined in the Act.) Therefore, all the companies within this group need to disclose the remuneration paid to directors and prescribed officers for their services to all of the companies within the group, although anything paid in respect of their services to a trust or a foreign company, including the “holding trust” or the foreign holding company, need not be disclosed.
- 7.6.2.11 The Act requires all remuneration paid to or receivable by directors and prescribed officers to be disclosed – it does not only account for remuneration paid by the company or another company in the group. Rather, it focuses on the amounts a director or prescribed officer earns for services as a director or prescribed officer (to the company or any other company within the group), or for carrying on the affairs of the company (or any other company within the group). This means that where a person is employed by one company (e.g. an employment company), but spends 100% of their time on rendering services as director to another company (within the same group of companies), the full salary paid by the employment company to that person (as its employee) should be disclosed in the AFS of the other company. This is so because the Act requires disclosure of all remuneration paid to or receivable by the director or prescribed officer for services to the company.
- 7.6.2.12 The source of the remuneration is not relevant – the deciding factor to be considered is all amounts paid for their services to the company or group of companies, regardless of who paid these amounts. Therefore, if a “holding trust” or foreign company, or any other entity for that matter, paid remuneration to directors for their services to a South African company, it should be included in the disclosure.
- 7.6.2.13 In addition to the disclosure required by the Act, a listed company must also consider the disclosure requirements of the JSE Listings Requirements. For entities listed on the JSE, the JSE Listing Requirements require directors’ remuneration to be disclosed on an individual basis and each director should be identified or named in the group financial statements (note that this does not apply to prescribed officers or the subsidiaries of the listed entity in terms of the Listings Requirements; this should, however, be disclosed in terms of the Companies Act).
- 7.6.2.14 The additional accountability provisions of the Act, read with the changes required by the context, are applicable to close corporations. Therefore, close corporations that are subject to an audit should consider and apply the guidance contained in this chapter of the Act with respect to member remuneration.

### 7.6.3 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

- 7.6.3.1 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.
- 7.6.3.2 Specifically, regarding the notice of the AGM to shareholders, the Act requires the notice to include either the financial statements or a summarised form of these statements to be presented.
- 7.6.3.3 The Act does not mandate the preparation of summarised financial statements but, where a summary of any particular financial statement is provided to any person in terms of S29(3), it 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 obtain a copy of the financial statements that it summarises.”*
- 7.6.3.4 Currently IFRS, SA GAAP and IFRS for SMEs do not contain specific guidance for the preparation of summarised financial statements. However, reference may be made to IFRS, IAS 34 *Interim Financial Reporting* for guidance.
- 7.6.3.5 It is SAICA's view that the requirements of S29(3) extend to newspaper advertisements or SENS notices of company results. These are advertisements and compliance notices respectively and fall within the ambit of “summaries” in addition to official company documents in book/let or other form.
- 7.6.3.6 Similarly, summarised financial information contained in an integrated report, presentations or result booklets does need to meet the requirements of S29(3). For summarised financial information that is included in an integrated report, presentations or booklets, the basis of preparing such information should be clearly stated.

#### Issues for consideration

- 7.6.3.7 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.

7.6.3.8 Condensed financial statements prepared in accordance with IFRS, IAS 34 *Interim Financial Reporting* are not necessarily summarised financial statements. The Minister of Trade and Industry published Financial Reporting Pronouncement 5: Summary Financial Statements on 16 March 2018 to provide guidance on the requirements for preparing summary financial statements.<sup>8</sup> 7.6.3.9 Companies that prepare summary financial statements should also consider other requirements such as:

- the requirements stated in the company's MOI;
- the JSE Limited Listings Requirements; and
- the King IV Report on Corporate Governance™ for South Africa, 2016 ("King IV")

7.6.3.10 Care should be exercised not to refer to any information that is merely an extract from part of the financial statements in such a way that it may be interpreted as summarised financial statements.

7.6.3.11 SAICA recommends that when financial information is extracted from the AFS to prepare summarised financial information, the source of the extracted financial information should be adequately disclosed.

7.6.3.12 The preparation (and distribution) of a summary AFS does not negate the requirement of S30 for all companies to prepare a complete set of AFS for each financial year end.

#### 7.6.4 Independent accounting professional

**Reference:** Regulation 26

**Issue:** In order for the AFS to be independently compiled and reported, they need to be prepared by an IAP.

##### **Discussion**

7.6.4.1 The Regulations define an IAP as a person who is:

- a registered auditor in terms of the APA;
- a member in good standing of a professional body that has been accredited in terms of S33 of the APA; 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 69 of 1984. See Table 4 for people eligible to be appointed as accounting officers.

7.6.4.2 Such a person must meet all 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 –*

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<sup>8</sup> Published in Government Gazette No 41503, dated 16 March 2018

- (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) or (iii)."* (The term "related" is defined in S2 of the Act.)

### **Employee compiling AFS**

- 7.6.4.3 Reference should be made to the definition of an employee as defined in S213 of the Labour Relations Act 66 of 1995:
- (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 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".
- 7.6.4.4 The question arises as to whether an employee of a company who meets the qualifications of an IAP may compile the AFS of the company, and whether such AFS can be considered to be independently compiled.
- 7.6.4.5 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 the employee related to anyone performing such functions.
- 7.6.4.6 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 45 of 2002, unless that person has direct control over the investment decisions of that fund or investment."*
- 7.6.4.7 Views on these issues differ. SAICA's view is included under the issue for consideration.

### **Issues for consideration**

- 7.6.4.8 The salary that the employee (e.g. Ms Smith) earns from the company represents a direct material interest of her in the Company A, as her salary represents a material source of her personal income. As such, if the employee were to compile the AFS, such statements would not be regarded as being independently compiled.
- 7.6.4.9 One could argue that as a result of her membership of a professional body, such as the South African Institute of Chartered Accountants (SAICA), she would be required to satisfy any independence requirements as contained in the applicable



professional code, such as the SAICA Code of Professional Conduct (“the Code”). Although some comfort may be obtained from the fact that the employee will not conduct herself in a manner contrary to this code, her position as employee means that she is subject to an employment contract. In order to fulfil this role, she is likely to be influenced by instruction from her superiors. This means that she cannot be considered to be independent of the company or fellow group companies.

- 7.6.4.10 It is thus SAICA’s view that employees of companies will not meet the independence criteria for IAPs and thus cannot be appointed as IAPs for the company that employs them.

***Employee compiling related company’s AFS***

- 7.6.4.11 Similarly the question arises as to whether an employee of group Company A who meets the qualifications of an IAP may compile the AFS of fellow group Company B, and whether such AFS may be considered to be independently compiled.
- 7.6.4.12 Assume that the employee (“Mr Pillay”) 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.
- 7.6.4.13 The matter to be considered is whether he can be said to have a personal financial interest in either Company A or Company B.
- 7.6.4.14 There are differing views on these issues. SAICA’s view is included under the issue for consideration.

**Issues for consideration**

- 7.6.4.15 The salary that the employee (e.g. Ms Mahlangu) earns from Company A represents a direct material interest of her in Company B (a related company), as her salary represents a material source of her personal income. As such if she were to compile the AFS of Company B, such statements would not be regarded as being independently compiled.
- 7.6.4.16 One could argue that as a result of her membership of a professional body, such as the South African Institute of Chartered Accountants (SAICA), she would be required to satisfy any independence requirements as contained in the applicable professional code, such as the Code. Although some comfort may be obtained from the fact that she will not conduct herself in a manner contrary to this code, her position as employee will mean that she is subject to an employment contract and in order to fulfil this role she is likely to be influenced by instruction from her superiors. This means that she cannot be considered to be independent of the company or fellow group companies.
- 7.6.4.17 It is, thus, the view of SAICA that employees of group companies will not meet the independence criteria for IAPs and thus cannot be appointed as IAPs for fellow group companies.

7.6.4.18 Table 4 People eligible to be appointed as accounting officers

	<b>Professional bodies whose members qualify to act as accounting officers</b>
1.	<p>The South African Institute of Chartered Accountants – SAICA</p> <ul style="list-style-type: none"> <li>• A Chartered Accountant (SA) – CA(SA); or</li> <li>• An Associate General Accountant (SA) – AGA(SA)</li> </ul>
2.	<p>Auditors registered in accordance with the provisions of the Auditing Profession Act 26 of 2005</p> <ul style="list-style-type: none"> <li>• A Registered Auditor (RA)</li> </ul>
3.	<p>Chartered Secretaries South Africa (formerly known as The Southern African Institute of Chartered Secretaries and Administrators – ACIS/FCIS)</p> <ul style="list-style-type: none"> <li>• Fellow member</li> <li>• Associate member</li> </ul>
4.	<p>The Chartered Institute of Management Accountants – CIMA</p> <ul style="list-style-type: none"> <li>• Chartered Global Management Accountant</li> </ul>
5.	<p>The South African Institute of Professional Accountants – SAIPA</p> <ul style="list-style-type: none"> <li>• Professional Accountant (SA)</li> </ul>
6.	<p>The Chartered Association of Certified Accountants – ACCA</p> <ul style="list-style-type: none"> <li>• Chartered certified accountant (FCCA / ACCA)</li> <li>• Certified accountant (FCCA / ACCA)</li> </ul>
7.	<p>The Institute of Administration and Commerce of Southern Africa – IAC</p> <ul style="list-style-type: none"> <li>• Members who have obtained the following IAC diplomas: <ul style="list-style-type: none"> <li>○ Diploma in Accountancy</li> <li>○ Diploma in Cost and Management Accounting</li> <li>○ Diploma in Company Secretary</li> </ul> </li> </ul>
8.	<p>The South African Institute of Business Accountants – SAIBA</p> <ul style="list-style-type: none"> <li>• Business Accountant in Practice</li> </ul>
9.	<p>The Members of the Chartered Institute for Business Management</p> <ul style="list-style-type: none"> <li>• Only certain members</li> </ul>
10.	<p>The South African Institute of Government Auditors</p> <ul style="list-style-type: none"> <li>• Registered Government Auditor</li> </ul>

## 7.6.5 Internal versus independent compilation of financial statements

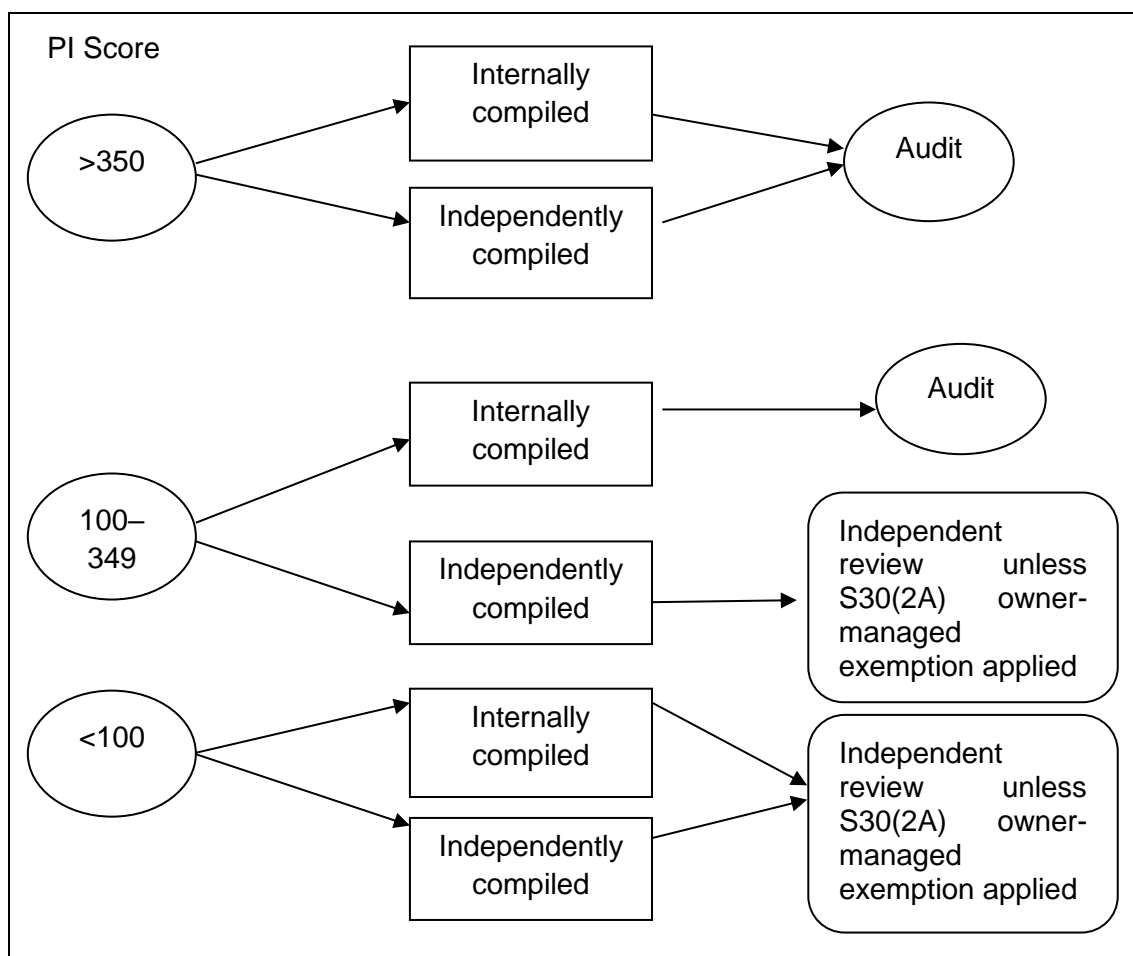
**Reference:** Section 30 and Regulation 26

**Issue:** Internal versus independent compilation of financial statements

### Discussion

- 7.6.5.1 A question that is frequently asked is: who may prepare the AFS? SAICA's view is that any person may prepare the AFS. A more important question to consider is whether the financial statements are independent or externally compiled as this has a bearing on the audit or independent review requirement.
- 7.6.5.2 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 IAP;
  - they are prepared based on financial records provided by the company; and
  - they are compiled in accordance with any relevant FRS.
- 7.6.5.3 The default position is that AFS are deemed to be internally compiled unless it is asserted that they are independently compiled and reported subject to the above criteria being met.
- 7.6.5.4 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 the Oxford Dictionary:
- "Compile"** – Produce (a list or book) by assembling information collected from other sources
- 'Prepare'** – Make (something) ready for use or consideration."
- 7.6.5.5 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.
- 7.6.5.6 The distinction between internal and independent compilation is important when clarifying whether a company should be audited or reviewed under certain circumstances.

7.6.5.7 *Figure 2: Requirements for independent or internally compiled financial statements*



For more detail regarding audit and review requirements see Annexure C of this guide.

7.6.5.8 SAICA believes that companies should decide whether they want their financial statements to be independently compiled. Should this 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.

7.6.5.9 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 will be considered internally compiled.

#### **Issues for consideration**

7.6.5.10 The company must ensure that an appropriately qualified person is appointed to act as the IAP.

7.6.5.11 The APA states in S44(4) that a registered auditor must indicate that the registered auditor or another member of the firm was responsible for keeping the accounting records. The APA then states that a person cannot be regarded as responsible for keeping the books, records or accounts by only making closing entries, adjusting entries or framing the financial statements.

- 7.6.5.12 The APA would seemingly allow a registered auditor to carry out some related accounting work and be the auditor, but the Code does identify this as a self-review threat. In terms of the Companies Act, however, this is no longer allowed for an audit specified in terms of the Companies Act, the so-called statutory audit.
- 7.6.5.13 Companies that chose to be audited according to the voluntary provisions in the Act (including a board resolution) would not have to comply with the Act's independence requirements but would still have to apply the Code.
- 7.6.5.14 Although no legislative requirement for using a specific standard when compiling financial statements exists, Chartered accountants / associate general accountants are expected to apply the relevant pronouncements issued by the International Auditing and Assurance Standards Board (IAASB).<sup>9</sup> International Standard on Related Services (ISRS) 4410 (Revised) – *Compilation Engagements* deals with the practitioner's responsibilities when engaged to assist management with the preparation and presentation of historical financial information without obtaining any assurance on that information and to report on the engagement in accordance with the standard. Readers of this guide should refer to ISRS 4410.3, which provides guidance on matters to consider in deciding whether a compilation engagement should be undertaken in accordance with ISRS 4410. It is expected to be extremely rare for a chartered accountant / associate general accountant in public practice to conduct a compilation engagement without applying ISRS 4410. This considers the capacity in which the chartered accountant / associate general accountant compiles the financial statements, as well as whether and the way in which the practitioner's name is identified with the financial statements and how users of the financial statements will understand the practitioner's involvement with those financial statements. If applicable, the practitioner should document his/her decision not to undertake a particular compilation engagement in accordance with ISRS 4410.

## 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**

- 7.7.1.1 The Act requires all public companies and SOCs 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 7.7.2).
- 7.7.1.2 Companies can also voluntarily choose to be audited by including the requirement in their MOI or by board resolution or shareholder resolution.

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<sup>9</sup> SAICA is a member of the International Federation of Accountants (IFAC). In pursuing their mission, the IFAC Board has established the International Auditing and Assurance Standards Board (IAASB) to function as an independent standard-setting body under the auspices of IFAC. Member bodies have an obligation to support the adoption and implementation of international standards.

## **Issue for consideration**

7.7.1.3 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 of this guide

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

### **Discussion**

7.7.2.1 The Regulations provide that, in addition to public companies and SOC, 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 following prescribed criteria indicate that an audit is required:

- if in the ordinary course of its primary activities, a profit or non-profit company holds assets in a fiduciary capacity for people 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 that was incorporated:
  - directly or indirectly by the state, an organ of state, an SOC, 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, an SOC, an international entity, or a foreign state entity, or for a purpose ancillary to any such function;
- any other company whose PI Score in that financial year is 350 or more; or
- any other company whose PI Score in that financial year is at least 100 (but less than 350) and whose AFS for that year were internally compiled. For this category of company, the decision as to whether to compile the AFS internally or independently will affect whether the company is subject to audit or will qualify for independent review.

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

7.7.2.3 Assets held in a fiduciary capacity must be held in the ordinary course of the company’s primary business, not incidental to it, 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. These assets may be financial or non-financial assets.

7.7.2.4 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 to it. Incidental activities will not be included in a company’s primary activities, for example the holding of deposits. The first step is to determine what the primary activities of the business are. The second step is to determine what comprises the activities in the ordinary course of the primary activities. If any of the

activities in steps 1 and 2 involve the taking of deposits then the criterion of holding assets in a fiduciary capacity on behalf of an unrelated party could potentially apply.

### **Issues for consideration**

- 7.7.2.5 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)).
- 7.7.2.6 Companies should also evaluate whether they will be in the category where the PI 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 affect the audit of opening balances and possibly require more audit work when this occurs.
- 7.7.2.7 The PI Score should be calculated at the end of the financial year for the year that has passed. Companies should ensure that where they foresee that the PI Score for the following year will exceed audit requirements they should prepare for an audit for the following year.
- 7.7.2.8 Companies that do not calculate the PI Score are in contravention of Regulation 26 of the Companies Act. Refer to Annexure D for further details with regard to the calculation of the PI Score.

### **7.7.3 Memorandum of Incorporation requires a company to have an audit**

**Reference:** Section 30 and Regulations 26 and 28

**Issue:** What is the position of a company where its MOI has not yet been updated to align with the Act and where the company is required in terms of its MOI to conduct an audit?

#### **Discussion**

- 7.7.3.1 As it was the norm under the 1973 Act for all companies to conduct an audit, many companies will still have the requirement to conduct an annual audit or appoint an auditor in their MOI (the Memorandum and Articles of Association that became the MOI by operation of law). A company that retains this requirement in its MOI will be bound to conduct an audit (S30(2)(b)(ii)(aa)) regardless of whether it will otherwise meet the audit requirements.
- 7.7.3.2 If a profit company's MOI does not require an audit in terms of the Act or its MOI, either the shareholders or the directors may still appoint an auditor. If the audit requirement is entrenched in the company's MOI, however, additional requirements will apply that do not apply to a company that audits voluntarily pursuant to an appointment made by the shareholders or the directors.
- 7.7.3.3 A company that 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 deal with the

appointment, resignation, rotation and rights of an auditor. All other sections in Chapter 3 that relate to audit committees and the company secretary will not apply.

- 7.7.3.4 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.

#### **Issue for consideration**

- 7.7.3.5 If a company is not otherwise, in terms of the Act, required to conduct an audit, but is required to conduct an audit in terms of its MOI, the company should consider removing such a requirement. This is because (i) the requirement does not provide the company with an option to consider whether an independent review would better suit its requirements and (ii) additional provisions of the Act apply that will not apply in the event of a voluntary appointment of an auditor by the shareholders or directors.

### **7.7.4 Voluntary audit required by the Memorandum of Incorporation**

**Reference:** Sections 30 and 90–93

**Issue:** What requirements will apply to companies that voluntarily choose an audit?

#### **Discussion**

- 7.7.4.1 A private, personal liability or non-profit company may voluntarily elect an audit by including the requirement in the company's MOI.
- 7.7.4.2 The provisions of the Act that relate to mandatory audits (specifically the provisions in S90 to S92) will also apply to any company that voluntarily chooses to have audited financial statements and includes this requirement in its MOI.
- 7.7.4.3 A company that 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 deal with the appointment, resignation, rotation and rights of an auditor. All other sections in Chapter 3 that relate to audit committees and the company secretary will not apply.
- 7.7.4.4 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.
- 7.7.4.5 In the case of listed companies, the JSE Listings Requirements clarify that subject to the provisions of the Act and the MOI of the applicant issuer, subsidiaries of the applicant issuer are not required to be audited.

### **7.7.5 Voluntary audit required by shareholder resolution or board decision**

**Reference:** Sections 30 and 90–93

**Issue:** What requirements will apply to companies that voluntarily choose an audit?

#### **Discussion**

- 7.7.5.1 A private, personal liability or non-profit company may voluntarily elect an audit:
- by a shareholders' resolution; or
  - in terms of a board decision.



- 7.7.5.2 If a company voluntarily elects by shareholders' 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.

## 7.7.6 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

- 7.7.6.1 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.
- 7.7.6.2 This independent review must be performed in accordance with ISRE 2400, which is the International Standard for Review Engagements, as issued from time to time by the IAASB or its successor body.
- 7.7.6.3 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 PI Score in that financial year is at least 100 (but less than 350) and whose AFS for that year were independently compiled; and
  - private, personal liability and non-profit companies whose PI Score in that financial year is less than 100 and who do not satisfy the criteria for exemption from audit and review.

## 7.7.7 Exemptions from independent review

**Reference:** Section 30(2A) and Regulation 29

**Issue:** Certain companies do not require an independent review.

### Discussion

- 7.7.7.1 The Regulations clarify that the following categories of companies will not be required to perform an independent review:
- a company that is exempt, in terms of S30(2A) of the Act;
  - a company that 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 that has voluntarily had its AFS for that year audited.
- 7.7.7.2 A company may qualify for an exemption from having its AFS 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 independently reviewed. It is important to note that this exemption:
- does not apply to the company if it falls into a class of company that is required to have its AFS audited in terms of the Regulations; and

- 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.

### **Issues for consideration**

- 7.7.7.3 While the definition of person in S1 includes a juristic person, S69 clarifies that a juristic person is ineligible to be appointed as a director. For 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 company will not qualify for the exemption from independent review.
- 7.7.7.4 If a company is held by another company or a trust, then the exemption stated in S30(2A) does 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”.
- 7.7.7.5 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 independent review.
- 7.7.7.6 A frequently asked question is: what happens if the company's shareholding changes during a financial year, resulting in the company now meeting the requirement for exemption from qualifying for an independent review? This is explained in the following example: The shareholding of a company, for the financial year ended 28 February 2015, was as follows:
- for eight months of the year the shareholding was held by trust A and individual B;
  - for four months during the same year the shareholding was transferred by trust A to individual B; and
  - at year end all the shares issued were in the name of individual B, who is now the sole director and shareholder of the company.
- 7.7.7.7 At year end the requirement to calculate the PI Score arises. At year end the company is owner managed and exempt from an independent review. The other shareholders (trust A) are no longer shareholders and do not need the protection of an audit or independent review. If trust A were to transfer the shareholding after the financial year end (before or after the six months after the financial year end), an independent review may be required based on the company PI Score.

### **7.7.8 People who meet the requirements to perform an independent review**

**Reference:** Regulation 29

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

#### **Discussion**

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

- 7.7.8.2 *“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 section 33 of the Auditing Profession 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 section 60(1), (2) and (4) of the Close Corporations Act, 1984 (Act 69 of 1984).”*
- 7.7.8.3 The independent reviewer must refer to the Code and ISRE 2400 regarding the independence requirements.
- 7.7.8.4 The independent reviewer may not be the same individual who was involved in the preparation of the said AFS and who acted as the IAP with respect to those AFS.
- 7.7.8.5 The Act and the Regulations do not state any requirements for the appointment of the independent reviewer. There is also no requirement to submit any additional forms to the CIPC. SAICA believes that the board of a company should appoint the independent reviewer.

#### **Issues for consideration**

- 7.7.8.6 Each company that is subject to an independent review must appoint an appropriate independent reviewer who meets the prescribed criteria and qualifications.
- 7.7.8.7 The Act and Regulations do not prohibit the compiler of the AFS and the independent reviewer from being in the same firm. The compiler or IAP can be employed in the same firm as the independent reviewer.
- 7.7.8.8 With regard to the signing off of the independent review report, the independent reviewer will have to refer to the standard, ISRE 2400 for guidance. Regarding Regulation 29(b)(ii), the Regulations state that an independent reviewer can be a person who is qualified to be appointed as an accounting officer in terms of the Close Corporations Act, 1984, section 60(1), (2) and (4). The Close Corporations Act only refers to other close corporations, firms and personal liability companies to be appointed as accounting officers.
- 7.7.8.9 Where no audit or independent review is required, an independent review can be requested by a company and the independent review will not have to meet the strict requirements of the Act, although the person wishing to perform the independent review will have to meet the requirements for the use and the performance of the independent review.

#### **7.7.9 Reportable irregularities for independent reviewers**

**Reference:** Regulation 29

## Issue

The Regulations introduce reporting requirements for independent reviewers regarding any reportable irregularities.

## Discussion

- 7.7.9.1 The Regulations provide that an independent reviewer of a company that is satisfied or has reason to believe that a reportable irregularity, as defined in the Regulations, has taken place or is taking place must, without delay, send a written report to the CIPC. The Commission is empowered to investigate any alleged contravention of the Act.
- 7.7.9.2 The Regulations define a reportable irregularity as any act or omission 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.
- 7.7.9.3 The requirement to report instances where a company is trading under insolvent circumstances should be interpreted in line with the purposes of the Act (see sections 5 and 7). As such, this provision is interpreted to refer to a situation where a company cannot pay its debts in the ordinary course of business (commercial insolvency). A reportable irregularity must be reported where the company cannot continue to pay its debts in the ordinary course of business as they become due.
- 7.7.9.4 With reference to the *Boschpoort* case (discussed in 13.4), if one assumes that the court will follow similar reasoning when interpreting the meaning of the word “insolvent” in the definition of a reportable irregularity, then a company is insolvent if it cannot pay its debts in the ordinary course of business (otherwise referred to as commercial insolvency).
- 7.7.9.5 These requirements contrast with the provisions of the APA, 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 APA, has taken place or is taking place must, without delay, send a written report to the IRBA.
- 7.7.9.6 The APA defines a reportable irregularity as any unlawful act or omission committed 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

- 7.7.9.7 The definition of and reporting requirements in respect of reportable irregularities in terms of the Act differ from the requirements provided for in the APA. The “Reportable Irregularity” under Regulation 29 does not refer to the “Reportable Irregularity” as defined and reported under the APA. Further guidance relating to reportable irregularities that are reported under the APA can be found in the IRBA *Revised Guide for Registered Auditors: Reportable Irregularities in terms of the Auditing Profession Act*, issued on 24 June 2015.
- 7.7.9.8 More information regarding trading under insolvent circumstances can be found in the *SAICA Guide on Trading Whilst Factually Insolvent*.

## **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**

- 7.8.1 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
  - receipts
  - bills of exchange
  - promissory notes
  - cheques
  - orders for money or goods
  - delivery notes
  - letters of credit
- 7.8.2 This is different from the 1973 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 1973 Act, has also not been included in the Act.

### **Issues for consideration**

- 7.8.3 Companies should ensure that they meet the requirements of having their name and registration number appear on all the applicable documentation. The Act specifically mentions notices and publications in electronic format as contemplated in the ECT in all bills of exchange, promissory notes, cheques and orders for money or goods and in all letters, delivery notes, invoices, receipts and letters of credit of the company. It is good practice to include the company name and registration number on electronic communications.
- 7.8.4 The use of an unregistered “trading as” business name is not recognised in terms of the Act. The “trading as” name is only protected under the common law.

## 8 Capitalisation of companies

### 8.1 Authorisation for shares

**Reference:** Sections 36, 37(8), 39(3), 41 and 164

**Issue:** Authorising and issuing shares

#### Discussion

- 8.1.1 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 in the manner prescribed by the Act.
- 8.1.2 Such an amendment may be made by special resolution of the shareholders (that is, by way of the process that applies to all types of amendments to the MOI).
- 8.1.3 However, the Act also provides that directors may determine the numbers, classes and rights of shares and effect the resultant changes to the MOI (S16(1)(b)). The MOI may limit or negate the right of directors in respect of changes to shares and the MOI. If the board acts pursuant to its authority as prescribed (see S35(3) and (4)), the company must file a Notice of Amendment of its MOI, setting out the changes effected by the board.
- 8.1.4 If changes are made to the rights attaching to shares that have already been issued, all the shareholders of the class affected by the proposed change must be afforded the opportunity to vote on the proposed resolution (presumably only an ordinary resolution is required to enable directors to proceed with their proposed amendment to the MOI).
- 8.1.5 If the rights of shareholders are materially and adversely affected by the change to share rights, the affected shareholders are entitled to exercise appraisal rights in accordance with the process in S37(8) and S164 of the Act. If the correct process is followed, the company is obliged to buy back the affected shares at fair value.
- 8.1.6 Directors have the authority to issue shares (S38(1)) without shareholder approval, unless certain circumstances apply, in which event a special shareholders' approval will be required.
- 8.1.7 In terms of S41(1), a special resolution is required for an issue of shares (also securities convertible into shares, or rights exercisable for shares) if the issue is to –
- people related to or interrelated with the company;
  - the company's directors or future directors, prescribed officers or future prescribed officers; or
  - any nominee of the above.
- 8.1.8 S41(2) provides a list of exemptions from the requirement for a special resolution. A directors' resolution will suffice, regardless of the people to whom the shares are issued, where the issue is:
- under an agreement underwriting the shares, securities or rights;

- in the exercise of a pre-emptive right to be offered and to subscribe for shares, as contemplated in S39;
- in proportion to existing holdings, and on the same terms and conditions as have been offered to all the shareholders of the company or to all the shareholders of the class or classes of shares being issued;
- pursuant to an employee share scheme that satisfies the requirements of S97; or
- pursuant to an offer to the public, as defined in S95(1)(h), read with S96.

8.1.9 An issue of shares (including by way of a series of integrated transactions) requires approval of the shareholders by special resolution if the voting power of the class of shares that is issued 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. (This also applies to the issue of securities convertible into shares and rights exercisable for shares.)

8.1.10 The term “series of integrated transactions” has a specific meaning set out in section 41(4)(b). A series of transactions is integrated if:

- consummation of one transaction is contingent on consummation of one or more of the other transactions; or
- the transactions are entered into within a 12-month period and involve the same parties, or related parties; and
  - they involve the acquisition or disposal of an interest in one particular company or asset; or
  - taken together, they lead to substantial involvement in a business activity that did not previously form part of the company’s principal activity.

**Issue:** Share rights: dissenting shareholders’ appraisal rights

### **Discussion**

8.1.11 When a company gives 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 that informs the 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 in which they object 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.

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

### **Issues for consideration**

- 8.1.13 In the case of a private company, and subject to its MOI, every shareholder of the company has a right to be offered or to subscribe for any shares issued or proposed to be issued. Therefore, every shareholder of a private company has a right to be offered shares in proportion to their voting power of their general voting rights, prior to any other person being offered the shares. The MOI of public companies and SOCs may contain provisions in this regard.
- 8.1.14 Companies should consider whether they are comfortable with the board's powers to authorise shares and change the preferences and rights of the shares, and whether the MOI should limit this authority.

**Issue:** Naming requirements for par value and **no par** value shares

#### **Discussion**

- 8.1.15 The 1973 Act required companies to have share capital that was divided into shares with par value and shares with no par value. The Act requires that shares do not have a nominal or par value.
- 8.1.16 The Act also allows companies to set out classes of shares and, for each class of shares, the company can issue a designation for that class as well as preferences, rights and other terms associated with that class.
- 8.1.17 The Act therefore does not provide the same amount of guidance in terms of terminology used for shares and classes of shares.
- 8.1.18 For guidance about the classes of shares and for further assistance, SAICA refers to the FRS. Where a company has issued shares that have a par value as well as shares with no par value, SAICA refers to the appropriate IFRS terminology for items classified within equity.
- 8.1.19 In terms of IFRS, little specific guidance is available about the naming convention of items within equity. IAS 1 – *Presentation of Financial Statements* provides some guidance but does not prescribe much other than the minimum line items in the statement of financial position and additional disclosure (subclassifications). IAS 1 uses the terms “paid-in capital”, “share premium” and “reserves”. However, this terminology is not mandatory. IAS 1 also outlines minimum disclosures for items within equity.
- 8.1.20 Extracts from IAS 1 state:

*“54 As a minimum, the statement of financial position shall include line items that present the following amounts:*

*(q) non-controlling interests, presented within equity;*

*(r) and issued capital and reserves attributable to owners of the parent.*

*55 An entity shall present additional line items, headings and subtotals in the statement of financial position when such presentation is relevant to an understanding of the entity's financial position.*

*77 An entity shall disclose, either in the statement of financial position or in the notes, further subclassifications of the line items presented, classified in a manner appropriate to the entity's operations.*



78 The detail provided in subclassifications depends on the requirements of IFRSs and on the size, nature and function of the amounts involved. An entity also uses the factors set out in paragraph 58 to decide the basis of subclassification. The disclosures vary for each item, for example:

- (e) equity capital and reserves are disaggregated into various classes, such as paid-in capital, share premium and reserves.

79 An entity shall disclose the following, either in the statement of financial position or the statement of changes in equity, or in the notes:

- (a) for each class of share capital:
  - (i) the number of shares authorised
  - (ii) the number of shares issued and fully paid, and issued but not fully paid;
  - (iii) par value per share, or that the shares have no par value;
  - (iv) a reconciliation of the number of shares outstanding at the beginning and at the end of the period;
  - (v) the rights, preferences and restrictions attaching to that class including restrictions on the distribution of dividends and the repayment of capital;
  - (vi) shares in the entity held by the entity or by its subsidiaries or associates; and
  - (vii) shares reserved for issue under options and contracts for the sale of shares, including terms and amounts; and
- (b) a description of the nature and purpose of each reserve within equity.”

## 8.2 Issue price for shares

**Reference:** Sections 37 and 40

**Issue:** Issue price for shares

### Discussion

- 8.2.1 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.
- 8.2.2 The term “consideration” is widely defined in the Act as anything of value given and accepted in exchange for any property, service, act, omission or forbearance or any other thing of value, including the items as listed in the definition. 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.
- 8.2.3 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.

### Issues for consideration

- 8.2.4 The board must first establish whether the definition of consideration is satisfied and, secondly, whether such a consideration is adequate. It is suggested 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.

- 8.2.5 It is submitted that shares may not be issued for no consideration. Shares must be issued on receipt of the consideration. In addition, S37 determines that all the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class. It is, however, possible that shares in the same class can be issued for different consideration. The class is determined by the rights that attach to the shares and not the consideration.
- 8.2.6 S40, however, allows for payment of future consideration, in which event the shares must be held in trust. If the consideration will only be received in future, the shares must immediately be issued to the subscriber but transferred to a “third party”, to be held in trust in terms of a trust deed, which will determine the position pending receipt of consideration. In the interim, voting rights cannot be exercised and shares may not be transferred, subject to the provisions of the trust deed. S50(2)(b)(iii)(aa) provides that the securities register must indicate shares held in trust in terms of S40(6)(d).
- 8.2.7 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 if the directors’ determination of the “adequate consideration” is challenged.
- 8.2.8 The Act does not require a company to have shareholders on the date of its incorporation. It does not have to issue shares on the date of its incorporation.
- 8.2.9 Neither the Act nor the CoR forms to be lodged on incorporation of a company have a requirement for the subscribers to the MOI to undertake to pay for a number of shares. It is therefore possible to have a company in existence for a period after its incorporation date without having any shares issued. There are, however, a few actions that a company cannot perform without shareholders’ consent, which would require shares to be issued.
- 8.2.10 Existing companies, with sufficient unissued authorised par value shares, may issue further par value shares at a discount to their par value. Unless prohibited by a company’s MOI, directors could issue par value shares after the Effective Date at below their par value, provided they have determined an “adequate consideration” for the shares in terms of S40.

### 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)).

Shares acquired by the company have the same status as authorised unissued shares.

#### Discussion

- 8.3.1 In terms of the Act it is not possible to create new classes of shares with a par value. The Act no longer regulates the use of the share premium account. The historical

share premium account can be utilised for distribution or for anything else that the directors see fit to use it for.

- 8.3.2 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, subject to certain limitations set out in the Regulations.
- 8.3.3 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 a class of par value shares exists 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 a class of par value shares exists of which some shares have been issued:
    - the number of shares may not be increased; but
    - existing authorised par value shares may be issued (and the share premium account increased to the extent that the shares are issued for a price more than par).
- 8.3.4 The Act does not allow for so-called treasury shares, which are shares held by the company for purposes of later use such as a share scheme. As soon as a company acquires its own shares these become authorised but unissued shares.
- 8.3.5 Neither the Act nor the Regulations provide any guidance regarding the disclosure of the share capital or share premium accounts on the financial statements after conversion from par value to no par value shares.

#### **Issues for consideration**

- 8.3.6 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. We propose that, following conversion of par value to no par value shares, all amounts received by the company in respect of shares issued be reflected as “share capital”. We propose that the financial statements would merely reflect one amount for share capital, which would increase to the extent that more shares were issued and decrease to the extent that any distributions were made from this account. The relevant notes in the financial statements would still indicate the number of shares authorised, issued, and other required information.
- 8.3.7 If a pre-existing company with ordinary par value shares intends to issue new shares, but it has no more authorised unissued ordinary par value shares, it is submitted that it is not required to convert its par value shares to no par value shares to effect the issue. The Act does not prohibit a pre-existing company from having both par value and no par value ordinary shares. This also applies to other classes of shares (e.g. preference shares). An existing company may therefore retain its

issued par value shares and create a new class of no par value shares with similar rights (for example "B" ordinary no par value shares) by amending its MOI.

- 8.3.8 When no par value shares are issued for the first time, 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" and "share premium").
- 8.3.9 To the extent that a listed company would prefer to retain shares acquired for future use (to use them as if they were treasury shares), these shares would need to be acquired by a different company in the group (e.g. a subsidiary of the listed entity). Note, however, that various provisions of the Act (e.g. S44) impose onerous requirements that may impact on such an acquisition by a group company.

**Issue:** Reclassification of share premium

As the Act no longer has a requirement for a share premium account, will IFRS permit reclassifications within equity – for example, combining "share capital" and "share premium" into a one-line item called "stated capital" or "issued capital"?

**Discussion**

- 8.3.10 The legal requirements that relate to the different categories of equity capital affect the accounting classifications. Therefore, if there is no legal requirement to retain separate classifications for share capital and share premium within equity, they could be combined from an IFRS perspective. Such a reclassification would be recognised within the statement of changes in equity.

**Issue:** Accounting impact of repayment of share premium

**Discussion**

- 8.3.11 If share premium is paid out to shareholders, this is accounted for as a distribution of shareholders' equity for IFRS purposes.
- 8.3.12 The tax consequences of the repayment of share premium to shareholders will need to be considered.

## 8.4 The concept of capital maintenance

**Issue:** Rules governing distributions from capital

**Discussion**

- 8.4.1 Unlike the 1973 Act, the Act contains fewer rules that relate to the concept of capital maintenance, but rather relies on the principle of solvency and liquidity (S4 of the Act).
- 8.4.2 Owing to the removal of par value shares, no requirements are in place for the creation of share premium.

**Issue for consideration**

- 8.4.3 The reduction of capital, including the redemption of a redeemable security, needs to satisfy the requirements of S4 (*Solvency and liquidity test*) and S46 (*Distributions must be authorised by board*), the provisions of the MOI and the common law.

## 8.5 Financial assistance to directors and related parties

**Reference:** Section 45

**Issue:** Financial assistance may be provided only in terms of the requirements of the Act.

### Discussion

- 8.5.1 The heading of S45 is somewhat misleading, as this section concerns financial assistance to directors and to other people and companies.
- 8.5.2 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 interrelated company;
  - a related or interrelated company or corporation;
  - a member of a related or interrelated corporation; or
  - a person related to any of the above parties.
- 8.5.3 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 not apply to the lending of money in the ordinary course of business where the primary business of the company is to lend money.
- 8.5.4 By extending the provision of financial assistance to related and interrelated 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.
- 8.5.5 It is submitted that the following minimum scenarios fall within the scope of S45. The list is not exhaustive. Companies should obtain independent legal advice where they contend that S45 does not apply to the situations described below:
- long-term loans with related parties;
  - intercompany accounts;
  - cash management or clearing accounts set up for a group;
  - trading accounts;
  - transactions with related parties on commercial terms with an element of financial assistance;
  - subordination agreements;
  - provision of a guarantee or surety for another related party's debt;
  - pledge of an asset as security for another related party's debt;
  - settlement of a liability (including operating expenses and salaries) on behalf of another related party and the recovery of this at a later date;
  - exchange of assets with a related party where the exchange does not take place simultaneously; or
  - company credit cards to directors who use the card for personal expenses, even if these are repaid.

### Issues for consideration

- 8.5.6 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 scheme (that satisfies the requirements of S97); *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.
- 8.5.7 Note: this means that the requirements of this section must be complied with where a holding company provides financial assistance to subsidiaries. The “special resolution” referred to must be obtained from the direct shareholder of the company that provides the financial assistance. The Act does not specifically require that a resolution be passed but merely requires the directors to be satisfied that the company will satisfy the solvency and liquidity test and that the terms are fair. SAICA encourages that a resolution be passed from an evidence perspective.
- 8.5.8 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 for the board 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 a requirement for special resolutions to be registered with the CIPC.
- 8.5.9 In addition to the requirements set out above, the board must ensure that any provision regarding the granting of financial assistance set out in the company's MOI has been complied with.
- 8.5.10 An important development is 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 that represent 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.

- 8.5.11 It should be noted that the Act requires notification to all trade unions. This extends even to trade unions that are not deemed recognised trade unions as per labour law.
- 8.5.12 Any board resolution or an agreement with respect to the provision of such assistance approving the provision of financial assistance that is inconsistent with the requirements of this section is void. Directors may incur personal liability for the damage, cost or loss suffered by the company as a result. Directors should keep sufficient records and minutes that show their compliance with S45. Directors should also be mindful of potential conflict of interest when serving on several boards within a group structure. Refer to the discussion in 9.13.6.
- 8.5.13 Where financial assistance was approved before the Effective Date in terms of the requirements of the 1973 Act, and the assistance was extended before 1 May 2011, the company need not comply with the provisions of S45. Approval by shareholders of such assistance in terms of the Act is not required as the transaction would have been appropriately approved in terms of the requirements of the 1973 Act. However, where the approval was granted prior to 1 May 2011, but the assistance is only extended after 1 May 2011, the company should obtain the necessary approval as per this Act.
- 8.5.14 Note that companies only require shareholder approval at individual company level. Shareholder approval for a wholly owned subsidiary or a subsidiary with a limited number of shareholders should therefore not be an onerous obligation.
- 8.5.15 S45 states that a resolution to provide financial assistance is void if it is inconsistent with S45 or the company's MOI. It is not possible to ratify a resolution that is void. Consequently, any subsequent general meeting cannot cure the defect by passing a special resolution in an attempt to ratify the granting of the loan.
- 8.5.16 A company should consult legal counsel as to whether another solution exists to rectify the situation of financial assistance provided without the necessary approval. Depending on the specific circumstances of that company, the recipient of the financial assistance may consider repaying amounts received, after which the company that provided the financial assistance may give new financial assistance subject to the provisions of S45, in this way extinguishing the first loan with a second compliant loan remaining. Companies should obtain their own legal advice in this regard.
- 8.5.17 Non-compliance with the requirements of S45 may have an impact on the company's audit opinion and the obligation to report a reportable irregularity and will need to be considered on a case-by-case basis.
- 8.5.18 In many groups a company may be tasked with coordinating the flow of funds to and from companies on a group basis. The application of S45 to such a company poses many practical issues; as such, these companies may want to contend that they fall outside the scope of S45 as contemplated by the exclusions contained in this section. A company should obtain legal advice where it contends that it is a company whose primary business is the lending of money and that the company lends money in the ordinary course of business. Whether the financial assistance is the "primary" business of the company will be a question of fact to be answered with reference to, *inter alia*, the provisions of the MOI and the actual business of the company.

- 8.5.19 Example: can the lending of money by a manufacturing company be excluded from the scope of financial assistance in S45, where the client contends that it qualifies for exemption since it is lending money in the ordinary course of its business?
- 8.5.20 The Act describes what financial assistance includes and excludes as opposed to providing a definition. In lieu of a comprehensive definition of the meaning of financial assistance, it is permissible in terms of S5 of the Act for a court to consider foreign company law in interpreting or applying this Act. S677 of the UK Companies Act provides a definition of financial assistance in terms of which “*financial assistance*’ means financial assistance given by way of a loan or any other agreement under which any of the obligations of the person giving the assistance are to be fulfilled at a time when in accordance with the agreement any obligation of another party to the agreement remains unfulfilled”.
- 8.5.21 In applying the UK definition of financial assistance, where related or interrelated companies have an agreement for the purchase of goods on credit, when the seller delivers the goods, it has fulfilled its obligations. At the time of delivery of the goods, the purchaser’s obligation to settle the amounts due remains unfulfilled. The transactions under consideration fall within the ambit of financial assistance. The company that has delivered the goods is exposed to the risk of non-payment, no matter how probable or improbable non-payment may appear to be. Similarly, debtors’ accounts, such as intragroup current accounts, would fall under the scope of “financial assistance” as the list in S45(1)(a) is not exhaustive and as a result “financial assistance” is not restricted to actions such as lending money or guaranteeing a loan.
- Note: where companies have a different view on the interpretation of this section they should obtain a legal opinion to substantiate their view.
- 8.5.22 The board is also required to determine that the terms of the financial assistance are fair and reasonable to the company. The financial well-being of the company should be the most important factor in this consideration and the following questions may also be relevant:
1. Are the terms of the financial assistance fair and reasonable when factoring in the risk profile of the related or interrelated person together with the interest rate, repayment terms, security and other conditions?
  2. Is the company able to provide the financial assistance and will it hinder or prevent the company from exploring other more profitable opportunities?
  3. Is the financial assistance being provided on the instruction of a majority shareholder and will it result in an adverse effect on the profits of the company (for instance earning a lower interest rate than could be obtained elsewhere)?
- 8.5.23 The board is required to consider the company and not to the group as a whole. As a result, the board may be faced with conflict in that the financial assistance may be to the detriment of the company on its own but will benefit the group as a whole. In such circumstances, it would be important for the company that provides the financial assistance to be adequately compensated in order that the benefit obtained by the group is passed on to the company.



**Issue:** Does the solvency and liquidity test set out in S45 apply to each financial assistance transaction or can the test be performed less regularly, such as monthly, for all financial assistance transactions?

#### **Discussion**

- 8.5.24 Before the board may authorise any financial assistance, it has to ensure that all statutory requirements have been met. One of these statutory requirements, which is outlined in S45, is that the board must be satisfied that immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test. Thus, the board would need to be satisfied that the test has been met, in respect of all financial assistance granted.
- 8.5.25 From a practical perspective, some boards may find it difficult to apply this test before each transaction, e.g. where daily intragroup transactions take place. The boards of some companies may have decided that the review of the solvency and liquidity position may occur in advance of such normal intragroup trading transactions taking place and may update the information on a more infrequent basis, such as weekly. If such a process is followed by the board, the directors, who ultimately attract liability for non-compliance with the requirements of S45, will need to consider carefully whether they have sufficient accurate forecast information before they make assumptions about the solvency and liquidity of the company when performing the test in advance of the actual transactions. Such boards are likely to require very accurate management accounts, cash flow projections, profit forecasts and the absence of unforeseen events before they can perform the test. Directors will also periodically need to check their initial assumptions of the solvency and liquidity position against actual results at the time of granting the assistance. It is submitted that in these instances the risk of the company failing the solvency and liquidity test may be minimised because of ample share capital and reserves and robust rolling cash flow budgets. It should be noted, however, that this is not in terms of the Act. In the case of distributions, specific solvency and liquidity tests for those transactions will have to be performed on the date of the resolution.

## **8.6 Financial assistance for subscription of securities**

**Reference:** Sections 44 and 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.

#### **Discussion**

- 8.6.1 Except to the extent that a company's MOI provides otherwise, a company may provide financial assistance in the form of a loan, guarantee, provision of security or other form for the subscription of the company's securities. Section 44 does not apply to companies whose primary business is lending money.
- 8.6.2 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 (that satisfies the requirements of S97) 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:
  - the company will meet the liquidity and solvency test (as discussed in 4.2 of this guide) immediately after the financial assistance has been provided; and
  - the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

8.6.3 Furthermore, the board of directors should ensure that all additional requirements as stipulated in the MOI of the company were adhered to before providing the financial assistance.

8.6.4 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)).

8.6.5 The following should be noted regarding section 44:

- a) It regulates financial assistance of “securities” and is not only limited to shares.
- b) It regulates financial assistance in respect of an entire group; that is, financial assistance by any company that is “related or inter-related” to any other company.
- c) The employee share scheme exemption (that satisfies the requirements of S97) no longer requires a trust in certain instances.
- 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 S46 provides the requirements for a company to make such a distribution.

### Discussion

8.7.1 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) inurrence 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.”*

8.7.2 A company should not make a distribution unless:

- the distribution:
  - is pursuant to an existing legal obligation of the company, or a court order; or
  - has been approved by the board of directors;
- the board of directors has applied the liquidity and solvency test (as discussed in 4.2 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.

8.7.3 Directors should also be reminded that they will need to refer to the company’s MOI to identify any additional restrictions that may apply.

8.7.4 The directors that were present at a meeting where a decision was made to make a distribution not in compliance with the requirements of S46 and failed to vote against this decision could be held personally liable in terms of S77 of the Act.

8.7.5 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.

### **Issues for consideration**

8.7.6 Dividends are expressly included in the widely defined concept of a distribution. Distributions fall exclusively within the powers of directors. A company may, however, introduce additional more stringent requirements in its MOI for distributions to be made. It is not possible to use the MOI or shareholders’ agreement to circumvent the requirements of S46. According to S15(7), any provision of an MOI or shareholders’ agreement that aims to do so will be void to the extent of its inconsistency with the Act.

8.7.7 Section 46 requires distributions to be pursuant to an existing legal obligation or a board resolution. Such a legal obligation or board resolution is always subject to the reasonable conclusion by the board that the solvency and liquidity test will be satisfied after completion of the distribution. This conclusion can only be evidenced by a resolution in which the board acknowledges that it has applied the solvency

and liquidity test as set out in S4 of the Act. Where the distribution originates from a resolution, a total of two board resolutions are thus required: the resolution initiating the distribution and the resolution acknowledging that the solvency and liquidity test has been applied.

- 8.7.8 Entitlement to distribution appears to arise once the second resolution is passed by the board, which acknowledges the requirements of the solvency and liquidity test. This is sometimes referred to as the “effecting resolution”. Section 46 in any event determines in subsections (2) and (3) that once the board has adopted the second resolution the relevant distribution must be fully carried out. However, if the distribution has not been completed within the prescribed 120 business days after the board has passed the “effecting resolution”, the board must reconsider the solvency and liquidity test and may not continue with the distribution unless the board adopts a further “effecting” resolution. This is the requirement despite any law, order or agreement, which presumably includes a shareholders’ agreement and a court order. It is submitted that reference to “completed” or the “completion of a distribution” refers to the actual flow of funds. The creation of a loan account will not constitute the completion of a distribution. Companies should, however, obtain independent legal advice where they disagree with the interpretation provided.
- 8.7.9 Section 46(1)(a)(ii) requires dividend distributions to be authorised by the company’s *board*, rather than the company’s shareholders. Does this have an impact on the timing of recognition of dividends in the company’s financial statements?
- 8.7.10 IAS 10.12 states that if an entity declares dividends to holders of equity instruments (as defined in IAS 32 *Financial Instruments: Presentation*) after the reporting period, the entity shall not recognise those dividends as a liability at the end of the reporting period.
- 8.7.11 Section 90 of the 1973 Act allowed dividend payments to be made to shareholders if authorised by the company’s articles. Companies often adopted the illustrative articles included in Schedule 1 to the 1973 Act as their own articles. The illustrative articles (in both Table 1 and Table 2 in Schedule 1) required that the directors recommend the amount of the dividend to be paid but that shareholders had to approve the declaration at the company’s AGM. The date that the dividend was “declared”, for purposes of IAS 10.12, was generally *after* year end.
- 8.7.12 Section 46(1)(a)(ii) of the Act requires dividend distributions to be authorised by the company’s *board*. It is thus possible that the date that a dividend is “declared” for companies reporting in terms of the Act could be prior to the year end if the directors passed their required resolutions (i) authorising the distribution and (ii) acknowledging that the board has applied the solvency and liquidity test and has reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed transaction prior to year end. A company must, however, consider the provisions of its MOI and the requirements of section 46. A company that retained a provision in its MOI that dividends must be approved by shareholders at the AGM would “declare” dividends, for purposes of IAS 10.12, on the date of the AGM, and not on the date of the directors’ resolution(s).
- 8.7.13 Section 46(1)(a)(ii) is an “unalterable provision” of the Act. Section 15(2)(a)(iii) allows a company’s MOI 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 Act. If a company wanted to retain a provision in its MOI that the shareholders had to approve dividend distributions at the AGM, such a provision would in SAICA's view impose a more onerous requirement on the company than what is required in the Act. It is submitted that such a provision in a company's MOI would thus not be in conflict with the requirements of the Act.

- 8.7.14 May a company that satisfies the requirements of S46 make a distribution from share premium?
- 8.7.15 As stated, the Act does not contain requirements for share premium and contains fewer rules relating to the concept of capital maintenance. The Act does not expressly state or require that distributions should reduce a positive distributable reserve, capital account or any other account. The directors of a company will have to decide whether such a payment to shareholders is a dividend or a repayment of capital, bearing in mind potential tax implications. The tax implication, however, does not change the accounting treatment of a dividend.
- 8.7.16 Will a company satisfy the solvency test as set out in S4 when making a distribution in terms of S46 if its assets exceed its liabilities merely because it excludes a shareholder's loan that is classified and presented in the financial statements as part of equity in terms of IFRS?
- 8.7.17 Section 4 of the Act requires the identification and inclusion of all assets and liabilities for purposes of the solvency test based on the accounting records of the company and its financial statements that satisfy prescribed FRS. IAS 32 – *Financial Instruments: Presentation* should be applied to determine whether the terms of a shareholder's loan result in the loan being classified as debt, equity or a combination of debt and equity. If such an instrument meets the definition of an equity instrument, the loan is classified as part of the borrower's equity.
- 8.7.18 As in the case of a subordinated loan, the loan legally remains a liability of the company until the lender either waives it or converts it into share capital. Even on liquidation of the company such a loan (secured or unsecured) will be recognised as a creditor of the company. If the directors of a company that passes the solvency test merely because a shareholder's loan is classified as part of equity make a distribution, we recommend that they should obtain independent legal advice on the validity of the distribution. Non-compliance with the requirements of S46 may have an impact on the audit opinion and the auditor's obligation to report a reportable irregularity.
- 8.7.19 If a company has passed a board resolution for dividend distribution without the directors having performed a solvency and liquidity test as required by S46, what steps can the company take to ratify this contravention?
- 8.7.20 The Act does not contain provisions for ratification of non-compliance with S46. S46(6) furthermore specifically assigns liability to a director as discussed. Directors should be aware of the breach of S46 and be encouraged to obtain legal advice on how to rectify the situation. Remedial action that will not prejudice creditors should be considered by the directors. S46 does not contain a similar provision as in S45(6) that renders the transaction null and void.

## 8.8 Capitalisation shares

**Reference:** Section 47

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

### Discussion

- 8.8.1 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.
- 8.8.2 Shares of one class may be issued as a capitalisation share in respect of shares of another class.
- 8.8.3 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 on completion of the distribution.

### Issue for consideration

- 8.8.4 The definition of a distribution extends to the holders or beneficial holders of shares held in the company itself and any other company within the same group of companies. Therefore, payments, forgiveness of debt or other distributions to the shareholders of the holding company, fellow subsidiaries etc. would be considered distributions. The treatment of these transactions in terms of the FRS and the Income Tax Act 58 of 1962, would not be consistent with the Act; i.e. it is unlikely that these would be viewed as distributions.

## 8.9 Company or subsidiary's acquiring of the 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, provided that the distribution requirements in S46 have been adhered to.

### Discussion

- 8.9.1 The requirements contained in S46 related to distributions apply to any purchase by a company of its shares.
- 8.9.2 Section 48 does not apply to the redemption of redeemable securities.
- 8.9.3 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 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.
- 8.9.4 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.
- 8.9.5 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.
- 8.9.6 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.
- 8.9.7 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 that failed to vote against this decision could be held personally liable in terms of S77 of the Act.

## 8.10 Securities register

**Reference:** Sections 50 and 56 and Regulation 32

**Issue:** A company is required to keep a "securities" register.

### Discussion

- 8.10.1 Section 50, read with Regulation 32, contains detailed requirements of the securities register of a company. This register can be kept at the registered offices of the company or at any other location, provided that the company has filed a notice setting out the location or locations where the records are kept (S25). The register must be open to inspection by any person who holds or has a beneficial interest in any securities issued by a profit company or who is a member of the non-profit company during business hours. The securities register may be kept electronically, provided that the integrity of the information is protected and the information is readily retrievable (Regulation 32(5)).

- 8.10.2 In the case of uncertificated securities, a record must be kept by a participant or central securities depository that contains certain prescribed information, which forms part of the relevant company's securities register.
- 8.10.3 The Act refers to the concept of "securities" rather than shares. The term "securities" means any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company.
- 8.10.4 What is included in the term "securities" is uncertain, but it appears to include all types of debt evidenced by an instrument issued by the company that can be traded, for example bonds and promissory notes.

#### **Issue for consideration**

- 8.10.5 All companies should ensure that the securities register reflects not only the prescribed information related to shares but also the prescribed information for all other types of securities.

### **8.11 Disclosure of beneficial interest**

**Reference:** Section 56

**Issue:** Onerous requirements apply to public companies in respect of recording and publishing details of beneficial interest in securities.

#### **Discussion**

- 8.11.1 The registered holder of securities in a public company must disclose the identity of each person with a beneficial interest in these securities to the company. This disclosure must be made no later than five business days after the end of a month during which any changes occurred, unless shorter periods apply.
- 8.11.2 As indicated above, the definition of securities is wider than shares and includes debt evidenced by an instrument issued by the company that can be traded, such as bonds and promissory notes.
- 8.11.3 In addition to the definition of the term "beneficial interest" provided in S1 of the Act, which is already very wide, S56 contains an additional list of people that will be "regarded" as holding a beneficial interest in a public company. A person is regarded as having a beneficial interest in any security of a public company if:
- another person holds the security *nomine officii* on that person's behalf;
  - that person is married in community of property to another person with a beneficial interest;
  - that person is the parent of a minor child with a beneficial interest;
  - that person acts in terms of an agreement with another person who has a beneficial interest in that security and the agreement provides for the co-operation of the parties to the agreement in respect of the acquisition, disposal or any other matter that relates to the beneficial interest in that security;
  - that person is the holding company of a company that has a beneficial interest;
  - that person gives directions or instructions to a juristic person that has a beneficial interest and the directors or trustees are accustomed to acting in accordance with that person's directions or instructions.



- 8.11.4 A company is a “regulated company” (that is all public companies and SOC’s as well as private companies if their MOI provides for this or if 10% of a private company’s issued securities have been transferred in the preceding 24 months to people that are not related to or interrelated with the company) (S117(1)(i), S118(1) and (2) and Regulation 91).
- 8.11.5 All regulated companies are obliged to keep a register of disclosures of beneficial interests.
- 8.11.6 All regulated companies must also publish in their AFS (if that company is required to be audited in terms of the Act) the list of people who hold beneficial interests equal to or more than 5% of the total number of securities of that class. The extent of the beneficial interest must also be published in the AFS.
- 8.11.7 In the case of any unlisted company, a person who holds a beneficial interest in that company’s securities must be afforded the opportunity to vote at a meeting of the company, to the extent that the beneficial interest had been disclosed and it includes the right to vote.

#### **Issues for consideration**

- 8.11.8 The meaning of beneficial interest in the securities of a public company is extremely wide and may be difficult to apply in practice.
- 8.11.9 Both public and private companies must be aware of the potential disclosure requirements in their AFS regarding the holders of beneficial interests in securities.
- 8.11.10 Listed companies should refer to the application of paragraph 8.63(c) of the JSE Listings Requirements in this regard. The JSE requires the disclosure to differentiate between the direct and indirect beneficial interest of each individual director’s holding in the share capital of the company when beneficial interest holders are being disclosed.

## **9 Governance of companies**

### **9.1 Exemption from governance requirements for certain companies**

**Reference:** Sections 56, 57, 59 to 65, 71(3) to (7), 74 and 75

#### **Issues:**

It is important to note that the reference to “shareholder” is much broader than the registered shareholder and extends to the beneficial shareholder.

Any profit company (including public companies but excluding SOC’s) that has only one shareholder is not subject to S59 to S65 of the Act. This exemption extends by implication to wholly owned subsidiaries.

A profit company (excluding SOC’s and by implication public companies) that has only one director is not subject to S71(3) to (7), S73 and S74 of the Act.

Special exemptions also apply if every shareholder of the company (other than an SOC) is also a director.

## **Discussion**

### ***Company with only one shareholder***

- 9.1.1 The provisions that relate to record dates, written resolutions, shareholders' meetings, notices of meetings, conduct of meetings, quorums and adjournments, and 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., as mentioned in S59 to S65).

### ***Company with only one director***

- 9.1.2 A single director may perform his or her duties and exercise his or her powers at any time without compliance with any statutory provisions, except where the MOI provides otherwise. The provisions regarding board meetings and round robin resolutions do not apply to companies with only one director.
- 9.1.3 Although prescribed formalities do not apply, the single director will still be required to ensure accurate recordkeeping of all decisions. For example, the single director remains subject to the "Form and standard" of company record requirements in S24. This includes the requirement to keep accurate and complete accounting records and copies of all directors' resolutions. A single director would also be well advised to keep sufficient records to prove that he or she has "taken diligent steps to become informed" and "had a rational basis" for reaching a particular decision (see S76(4)).

### ***Company where each shareholder is also a director***

- 9.1.4 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.
- 9.1.5 The duties, obligations, liabilities and indemnification of directors do not apply to the individuals when they are acting in their capacities as shareholders.

## **9.2 Amendment of shareholders' voting threshold**

**Reference:** Section 65(7) to 65(10), and Annexure I of this guide

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

## **Discussion**

- 9.2.1 S65 provides an opportunity for companies to apply different voting thresholds to different decisions.
- 9.2.2 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.

- 9.2.3 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 for it 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 percentage points 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.

#### **Issues for consideration**

- 9.2.4 We suggest that the assessment to adjust the approval thresholds for resolutions is ultimately a business decision that depends on the current shareholding and the arrangements with business associates.
- 9.2.5 We suggest that the adjustment of approval thresholds be considered as part of the process of evaluating the current provisions of the MOI of the company.
- 9.2.6 The Act provides a list of decisions that should be approved by a special resolution. Certain special resolutions are required to be filed with the CIPC. Refer to Annexure I of this guide for a list of special resolutions required and registration requirements together with a list of matters requiring ordinary resolution in terms of the Act.

### **9.3 Shareholders' resolutions adopted via written resolution**

**Reference:** Section 60

**Issue:** The Act provides that some shareholders' resolutions may be adopted via written resolution.

#### **Discussion**

- 9.3.1 The Act allows for shareholders' resolutions to be passed by the company 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.
- 9.3.2 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 is submitted to them. The resolution will have been adopted if it is supported by people 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.

#### **Issues for consideration**

- 9.3.3 We suggest the viability of this alternative procedure be considered by the company.
- 9.3.4 The Act requires that the company must, within 10 days after adopting the resolution, deliver a statement that describes the results of the vote, consent

process or election to every shareholder who was entitled to vote on or consent to the resolution.

## 9.4 Electronic participation for shareholder meetings

**Reference:** Sections 61(10) and 63(2)

**Issue:** The Act requires public companies to make shareholders' meetings available for electronic participation; other companies can choose to make shareholders' meetings available for electronic participation.

The Act also requires that the identification of the shareholder be established before the shareholder may attend or participate in a shareholders' meeting.

### Discussion

- 9.4.1 The Act determines in S61(10) that public companies and SOCs are obliged to comply with the requirements that every shareholders' meeting must be reasonably accessible within the Republic for electronic participation.
- 9.4.2 The Act determines that, unless prohibited by its MOI, a company may conduct any shareholders' 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 people participating in that meeting to communicate concurrently with each other without an intermediary and to participate reasonably effectively in the meeting.
- 9.4.3 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.
- 9.4.4 The provision for meetings to be conducted by electronic means enables companies to conduct business differently. This provision eliminates the need for shareholders to travel physically to a particular venue to attend a meeting.

### Issues for consideration

- 9.4.5 We recommend that companies investigate the viability of electronic participation as an alternative means of conducting or participating in shareholders' meetings. Public companies and SOCs are obliged to comply with these provisions, as stated in S61(10).
- 9.4.6 If companies provide for electronic participation, shareholders must be informed of the availability of electronic participation when the notice of the meeting is sent out. Shareholders should also be made aware of the fact that access to the medium of communication would be for the expense of the shareholder or proxy, unless otherwise decided by the company.
- 9.4.7 Mechanisms would also need to be established for identifying shareholders participating in a shareholders' meeting by electronic means.

## 9.5 Quorum requirements

**Reference:** Sections 62 and 64

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

### Discussion

- 9.5.1 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.
- 9.5.2 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.
- 9.5.3 When a meeting of shareholders is called, a notice must be sent to all shareholders in the "prescribed manner and form" at least 15 business days before the meeting in the case of a public company or a non-profit company that has voting members and 10 business days for all other companies. A company's MOI may provide for a longer or shorter minimum notice period. Annexure 3 to the Regulations provides methods of delivery and the date and time of deemed delivery, for any purpose contemplated in the Act or Regulations. These arrangements must be considered when determining whether a sufficient notice period has been allowed. After a quorum has been established, the meeting may continue and a particular matter can be discussed as long as the holder of at least one share entitled to vote is present.

## 9.6 Mandatory annual general meeting

**Reference:** Sections 60, 61 and 90

**Issue:** The Act requires only public companies (inclusive of SOCs) to hold AGMs, but some other categories of companies may be required to hold an AGM.

### Discussion

- 9.6.1 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 Companies Tribunal may extend this period on application.
- 9.6.2 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;
  - presentation of any matters raised by shareholders, with or without advance notice to the company; and
  - report by the social and ethics committee.

(Note that in terms of S60(5) the written resolution procedure for shareholders' resolutions provided for in S60 may not be used for any of the matters that must be concluded at an AGM.)

- 9.6.3 The presentation of the directors' report, audited financial statements and audit committee report would include the noting and possible discussion of the reports by the shareholders.
- 9.6.4 However, where the Act requires a private company, personal liability company or 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 hold an AGM in order to appoint an auditor or provide a report from the social and ethics committee where applicable. In practice, this could be achieved by electronic communication.
- 9.6.5 Unless the MOI provides otherwise, the Act allows for the AGM and other shareholders' meetings to be held at a location determined by the board; the AGM may be held anywhere in the Republic or in any foreign country.

#### **Issues for consideration**

- 9.6.6 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, as stated above.
- 9.6.7 Companies should also consider whether the MOI must provide any limitations on the location of the AGM and other shareholders' meetings.

## **9.7 Board composition**

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

**Issue:** Balance of executive directors versus non-executive directors

#### **Discussion**

- 9.7.1 SAICA notes that neither the 1973 Act nor this Act refers to the concepts of executive or non-executive directors, but these terms (derived from **King IV**) are generally used for convenience purposes to distinguish between directors employed by the company and those that are not.
- 9.7.2 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 (see 9.7.3, 9.7.4 and 9.7.5 of this guide).
- 9.7.3 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.
- 9.7.4 As pointed out above, all public companies and SOCs need to appoint an audit committee that comprises at least three directors that meet the prescribed criteria.

- 9.7.5 All listed public companies and SOCs (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 that comprises at least three directors or prescribed officers, of which one director must be an independent non-executive director. 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).
- 9.7.6 Private 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 that comprises at least three directors or prescribed officers, of which one director must be an independent non-executive director. As such, the minimum number of directors in this case is two directors and two prescribed officers (alternatively directors).
- 9.7.7 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 people are ineligible for appointment or are disqualified in terms of the Act from being a director, company secretary or auditor, these people are regarded as having resigned from office as from the Effective Date.

#### **Issues for consideration**

- 9.7.8 When considering the constitution of the board, we suggest that both the provisions of the Act and the requirements of **King IV** be considered.
- 9.7.9 In terms of Regulation 43, every private company with a PI Score of over 500 in any two of the previous five financial years will be required to have a social and ethics committee. The board should consider this threshold annually and re-evaluate its obligations in this regard.

## **9.8 Prescribed officers**

**Reference:** Section 66(10) and Regulation 38

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

#### **Discussion**

- 9.8.1 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.

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

### **Issues for consideration**

- 9.8.3 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 duties to the standards of conduct as they apply to directors. Prescribed officers are subject to the same liability provisions as directors.
- 9.8.4 The following provisions, *inter alia* applicable to directors, also apply to prescribed officers:
- Section 69 – Ineligibility and disqualification of persons to be directors or prescribed officers;
  - Section 75 – Directors’ personal financial interest (9.11);
  - Section 76 – Standards of directors’ conduct (9.11);
  - Section 77 – Liability of directors and prescribed officers (9.11);
  - Section 78 – Indemnification and directors’ insurance (9.11); and
  - Section 30(4) and 30(5) – Disclosure of remuneration (7.6.2).

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

- 9.8.5 Management will have to consider all the relevant provisions of the definition, such as “general executive management” and “control” and “significant portion of the business and activities” in the context of its specific company in order to identify the prescribed officers of the company. Considerations need to be given to the role undertaken in terms of it being “executive” v “operational”.
- 9.8.6 We recommend that the board records the names of all those individuals that are regarded as prescribed officers. This will be necessary and useful for complying with the requirements of the Act, especially when remuneration of the individuals is disclosed in the AFS.
- 9.8.7 Note, however, that whether a particular individual is a prescribed officer will always be a factual question. Therefore, regardless of whether a company has officially identified a particular individual as a prescribed officer or not, that person may nevertheless be classified as a prescribed officer where the person’s role in the company meets the definition.
- 9.8.8 A person does not have to be employed by a particular company to be classified as a prescribed officer of the company. Directors are specifically excluded from being prescribed officers in terms of the definition.
- 9.8.9 Subject to meeting the definition of prescribed officer and subject to the circumstances of each case, people may be classified as prescribed officers under the following circumstances:
- a “mine manager” that controls the activities of a mine that is a significant portion of the business of the company
  - a member of a company’s executive committee
  - the senior financial manager in a company that does not have a financial director
  - a chief executive officer (where not a member of the board)



- a regional manager
  - a business rescue practitioner
- 9.8.10 We propose that a company secretary that performs the role contemplated in King IV (i.e. advising the board but not taking decisions on behalf of the board) would generally not be classified as a prescribed officer. Also, people that perform an important operational role, but not general executive management and control functions, would not be prescribed officers.
- 9.8.11 Under IAS 24, *Related Party Disclosures*, key management personnel are those people with authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly. Therefore, it would stand to reason that individuals identified as key management personnel under IAS 24 may also be prescribed officers in terms of the Act. However, the definition of prescribed officer needs to be considered from a Companies Act perspective. In other words, key management personnel and prescribed officers may be the same people but because different tests apply, the roles may be different.

## 9.9 Remuneration of directors to be approved by special resolution

### Approval of directors' remuneration

**Reference:** Section 66(8) and (9)

**Issue:** A company may pay remuneration to its directors for their services as directors in accordance with a special resolution approved by the shareholders within the previous two years.

### Discussion

- 9.9.1.1 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)."*
- 9.9.1.2 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."*
- 9.9.1.3 These sections refer to "remuneration" and "services as directors".
- 9.9.1.4 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.
- 9.9.1.5 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.
- 9.9.1.6 Executive directors receive an annual remuneration package, including a cash component, pension fund contributions, medical aid and performance bonus.

- 9.9.1.7 Our interpretation of the above is that a special resolution is required for the payment of directors' fees (those fees paid to directors for attending 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.
- 9.9.1.8 We believe that this section does not limit the ability of a company to pay the salaries of executive directors in their capacity as employees.

#### **Issues for consideration**

- 9.9.1.9 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.
- 9.9.1.10 As far as non-executive directors are concerned, we suggest 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.
- 9.9.1.11 However, the Act requires full disclosure of director and prescribed officer remuneration in the AFS. In addition, **King IV** proposes that shareholders pass a non-binding advisory vote on 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 remuneration for "services as directors") in addition to the special resolution required in respect of directors' fees.

## **9.10 Appointment of at least 50% of directors by shareholders**

**Reference:** Section 66(4)

**Issue:** Regarding the appointment of directors, S66:

- requires the election 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**

- 9.10.1 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.
- 9.10.2 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 because of that person holding some other office, title, etc.; or
  - the appointment of one or more persons as alternate directors of the company.

#### **Issues for consideration**

- 9.10.3 Unless the MOI provides otherwise, 50% of the alternate directors must be elected by the shareholders.

- 9.10.4 We suggest 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.

## 9.11 Members of board committees

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

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

### Discussion

- 9.11.1 Except to the extent that the MOI of a company provides otherwise, the board of a company may:
- appoint any number of committees of directors; and
  - delegate to any committee any of the authority of the board.
- 9.11.2 Except to the extent that the MOI of a company or a resolution establishing a committee provides otherwise, board committees may include people who are not directors, provided that these people are not ineligible or disqualified to become directors and that they have no vote.
- 9.11.3 All the duties and liabilities of directors attach to non-director members of board committees, although such people may not be allowed to vote. In our view, this is a particularly onerous stipulation in respect of non-director members of board committees.
- 9.11.4 In terms of S72(2)(b), a board committee may "*consult with or receive advice from any person*".

### Issues for consideration

- 9.11.5 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 people 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 rather substantial risk. Section 76 regarding directors' conduct also applies to all members of a committee of the board.
- 9.11.6 An audit committee is not a board committee and may not appoint non-directors as members but may have consultants.

## 9.12 Social and ethics committee

**Reference:** Section 72(5) to 72(10), Regulation 43 and Annexure F of this guide

**Issue:** Certain companies require a social and ethics committee.

### Discussion

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

- 9.12.2 In terms of the Regulations, the following companies must appoint a social and ethics committee within one year after the Act becomes effective:
- every SOC;
  - every listed public company; and
  - any other company that has, in any two of the previous five years, had a PI Score of at least 500 points, or would have had such a score if the Act had been in effect at that time.
- 9.12.3 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.
- 9.12.4 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 reapply.
- 9.12.5 The social and ethics committee must comprise no fewer 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.
- 9.12.6 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.
- 9.12.7 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.
- 9.12.8 A social and ethics committee has the function of monitoring the company's activities regarding 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](http://www.oecd.org)) and see Annexure F of this guide);
    - the Employment Equity Act 55 of 1998;
    - the Broad-Based Black Economic Empowerment Act 53 of 2003;
  - 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.
- 9.12.9 Neither the Act nor the Regulations provide any requirement in respect of, for example, the number of meetings per annum, the chairperson's appointment or role, and the meeting proceedings. All of these issues can be dealt with as the company sees fit.

### **Issues for consideration**

- 9.12.10 The Regulations refer to the "International Labour Organisation Protocol on decent work and working conditions" (Regulation 43(5)(a)(v)(aa)). The Department of Trade and Industry has confirmed that this document does not exist.
- 9.12.11 SAICA believes that having other committees share the work of the social and ethics committee does not meet the stated requirements. For example, if the company has separate social, ethics and transformation committees that fulfil the duties of the statutory social and ethics committee, the company would need to combine these committees into a social and ethics committee in order to meet the requirements of the Act. The social and ethics committee can have subcommittees, but it would still be the responsibility of the committee to report to the AGM.
- 9.12.12 Consideration also needs to be given as to the consequences of non-compliance with this section, which include receipt of a compliance notice and possible court case. For further guidance see the Institute of Directors (IOD) Practice Note entitled *The Social and Ethics Committee*.

## **9.13 Directors**

### **9.13.1 Directors' meetings: minute keeping**

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

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

#### **9.13.1.1 Discussion**

- Section 24(3)(f) of 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 and are effective as of the date of the resolution, unless the resolution states otherwise.

- 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.
- Section 2 defines the term “related persons” and, *inter alia*, states that an individual is related to another if they are married, live together or are in a relationship similar to a marriage. Individuals separated by no more than two degrees of natural or adopted consanguinity or affinity are regarded by the Act as related.
- 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 people who may not necessarily attend 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 judgement rule” set out in S76(4), a director has to prove that he or she 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 if 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 director 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 people attending any board meeting, (ii) the identity of the directors who voted for or against any resolution and (iii) any abstentions. Also refer to 9.13.6 on conflict of interest in this regard.

### **Issues for consideration**

- 9.13.1.2 For directors to demonstrate that they have fulfilled their responsibilities, attention needs to be paid to minutes taken at directors’ meetings. 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 that the board believed 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.

9.13.1.3 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 2 of 2000 (S26).

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

- determines as soon as possible which of its employees may potentially be classified as prescribed officers;
- informs these employees of the additional responsibilities in terms of the Act; and
- implements formal processes to record the communication between the prescribed officers and the board.

## 9.13.2 Resignation of directors

**Reference:** Section 70(6)

**Issue:** Resignation of directors

### Discussion

9.13.2.1 The Act states that, where a person resigns as a director, the company must file a notice with the CIPC within 10 days. There seems to be no other way in which a director can resign if the remaining directors refuse to sign the applicable CoR39 notice and lodge the resolution with the CIPC.

### Issues for consideration

9.13.2.2 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 notice, if applicable.

9.13.2.3 It is also important to note that the resignation of a director is effective when the letter of resignation is tendered and is not delayed by the CoR39 notice. However, the director remains responsible and accountable for the term of the appointment (in other words up to the date on which the resignation letter is tendered).

## 9.13.3 Removal of directors

**Reference:** Section 71

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

## Discussion

- 9.13.3.1 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%".
- 9.13.3.2 If a company has more than two directors, the directors may remove a fellow director, subject to certain rights, such as the right to make representations (S71(3) to (10)). The board must determine the matter by resolution and may remove a director.
- 9.13.3.3 In either instance the director must be given notice of the meeting and the proposed resolution regarding his or her removal. The director must also be given a reasonable opportunity to make representation to the meeting before the resolution is put to the vote.

## 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 because of certain conduct.

## Discussion

- 9.13.4.1 The declaration of a director as delinquent or placing of a director on probation 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 a 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 or similar penalty;
      - 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 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 that 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 their creditors fully or meet their obligations, except if this was in terms of a business rescue plan or a compromise with creditors.

9.13.4.2 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 with a probation order. A probation order will lapse automatically after five years.

#### **Issues for consideration**

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

9.13.4.4 Note that the CIPC is obliged to keep a public register of people who are disqualified from serving as a director or who are subject to an order of probation as a director in terms of the Act or any other law.

### **9.13.5 Directors' resolutions adopted via written resolution**

**Reference:** Section 74

**Issue:** The Act provides that directors' decisions may be voted on by electronic communication.

#### **Discussion**

9.13.5.1 Unless the MOI states otherwise, a decision that could be voted on at a meeting of the board of that company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided.

9.13.5.2 A decision made in this manner is of the same effect as if it had been approved by voting at a meeting.

#### **Issue for consideration**

9.13.5.3 Every director must receive notice of the matter to be discussed, and in order to adopt the resolution there must be a majority vote of the total number of directors, unless the MOI requires otherwise.

9.13.5.4 We suggest that the viability of this alternative procedure be considered by the company.

### 9.13.6 Conflict of interest

**Reference:** Section 75

**Issue:** Conflict of interest should be declared.

#### **Discussion**

- 9.13.6.1 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.
- 9.13.6.2 Section 75 of the 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 these people are not directors).
- 9.13.6.3 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. 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.
- 9.13.6.4 Section 75(4) and (5) requires 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, (d) if present at the meeting, must leave the meeting immediately after making the disclosure, (e) must not take part in the consideration of the matter, and (f) while absent from the meeting is to be regarded as being present at the meeting for quorum purposes but is not to be regarded as being present at the meeting for determining support for a resolution.
- 9.13.6.5 The term "personal financial interest" is defined. It refers to any material interests of a person of a financial, monetary or economic nature, or to which a monetary value may be attributed. An interest is "material" if it is significant in the circumstances of a particular matter to a degree that is of consequence in determining the matter or if it might reasonably affect a person's judgement or decision making in the matter.
- 9.13.6.6 Note that the phrase "related person" is given an extended meaning in S75. It provides that a second company or close corporation of which the relevant director

is also a director (or member in the case of a close corporation) would be regarded as related to the director. This affects S75(5), which requires the disclosure of a personal financial interest of that director or of any person that is a related to the director that has a personal financial interest. In addition to the ordinary definition of “related person”, which refers to, for example, spouses and children, other companies of which the director is a board member also become “related” to the board member. If the transaction under consideration at one board will constitute a personal financial interest for a second company or close corporation of which the director is also a director or member, the director is obliged to recuse him- or herself.

9.13.6.7 Directors are not required to disclose their personal financial interest if:

- the decision may generally affect all the directors of the company in their capacity as directors;
- the decision may generally affect a class of people;
- the decision relates to a proposal to remove the relevant director; or
- the company has only one director that holds all the beneficial interests in the securities of the company.

9.13.6.8 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. The consequence of this is that the decision would be invalid and would need to be taken again or ratified by either board resolution, shareholder resolution or both. S75(7) allows for a board decision, transaction or agreement approved by the board where a personal financial interest was not declared as per S75 to be subsequently ratified by an ordinary shareholders’ resolution, following the disclosure of that interest. It is important to emphasise that the shareholders’ resolution must be made with the knowledge that the decision, agreement or transaction was approved by the board whilst a conflicted director was party to such a decision, agreement or transaction. Furthermore, the aforementioned subsequent shareholders’ ratification does not absolve the directors from liability if they took the decision in contravention of their responsibilities in terms of S76 of the Act.

### **Issues for consideration**

9.13.6.9 The conflict of interest provisions apply equally to people 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.

9.13.6.10 The provisions of S75 do not apply where there is one director who also holds all the beneficial interest in all the issued securities of the company. If that director does not hold all the beneficial interest, then shareholder approval by ordinary resolution is required for such agreements. Section 75 also does not apply where it generally affects all the directors or a class of people (unless the director is the only member of that class).

9.13.6.11 Directors that serve more than one company should be particularly careful to comply with the requirements of S75, as such directors will be obliged to recuse themselves

under all circumstances where a transaction being discussed by a board of a company would be material for a second company on which that director sits. This obligation arises from the extended definition of “related”, which results in all companies where the director serves as director being “related” to that director (to the same extent that close family would be “related”) for purposes of the disclosure of personal financial interest in S75.

- 9.13.6.12 In a group situation where there are cross directorships and the directors do not recuse themselves, decisions taken at board meetings must be ratified by shareholder resolution in order to validate the board decision as it relates to the conflict of interest only. For example, a decision made at a board meeting where the directors are conflicted to make a distribution without complying with the solvency and liquidity provisions can only be ratified through a shareholders’ meeting to the extent of the conflict of interest and not regarding the non-compliance with the solvency and liquidity test.
- 9.13.6.13 In cases where all directors are conflicted, the Act does not provide guidance and consideration would need to be given to ratification of board decisions or to changing to the composition of the board. Members are encouraged to seek legal advice under such circumstances.

#### 9.13.7 **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 (i.e. formally incorporated in a statute) and directors, including alternate directors, prescribed officers and members of board committees need to understand the Act’s requirement in this regard.

##### **Discussion**

- 9.13.7.1 By accepting their appointment to the position, directors, prescribed officers and members of board committees agree that they will perform their duties to a certain standard, and it is a reasonable assumption of the shareholders that all directors, prescribed officers and members of board committees will apply their particular skills, experience and knowledge to the advantage of the company.
- 9.13.7.2 The prescribed standard of conduct applies to all directors and prescribed officers, and to 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.
- 9.13.7.3 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. Since calculated risk taking and risk exposure form an integral part of any business, the 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 Act includes the business judgement rule (which provides a defence to directors under certain circumstances (see S76(4)) and provides for the indemnification of directors

under certain circumstances. The Act also provides for the possibility of insuring the company and its directors against liability claims in certain circumstances.

9.13.7.4 In terms of this standard, a director, prescribed officer or member of a board committee 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.

9.13.7.5 The 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 knowingly to cause harm to the company or a subsidiary of the company.

9.13.7.6 Directors are obliged to communicate to the board at the earliest opportunity any information that comes to their attention, unless

- the director reasonably believes that the information is immaterial to the company, is generally available to the public or is known to the other directors; or
- the director is bound not to disclose the information by a legal or ethical obligation of confidentiality.

9.13.7.7 Directors have a fiduciary duty to act in the best interest of the company. 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 exceeds his or her powers, the company might be bound by the director's action, but the director can be held personally liable for any loss suffered because of his or her actions.

9.13.7.8 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 standard of conduct in the Act.

9.13.7.9 As mentioned above, the 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 in the matter to be decided on (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.

9.13.7.10 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 people, 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 a person.

9.13.7.11 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 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 below.

#### **Issue for consideration**

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

### **9.13.8 Liability of directors**

**Reference:** Section 77

**Issue:** The Act identifies certain instances where a director (also an alternate director, prescribed officer or member of a board committee or audit committee) will incur liability owing to certain actions taken by the director.

#### **Discussion**

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

9.13.8.2 In terms of the Companies Act, a director, prescribed officer or member of a board committee 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, prescribed officer or member of a board committee of a provision of the Act or the company's MOI.

9.13.8.3 In addition, the 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's 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 gone 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;
- to issue any authorised securities despite knowing that the issue of those securities was not approved in terms of S41;
- 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 Act and the MOI;
- to approve a distribution that was contrary to the requirements of the 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 Act.

9.13.8.4 The Act makes it clear that a director, prescribed officer or member of a board committee 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 Act lapses after three years after the act or omission that gave rise to that liability.

9.13.8.5 The *Centro* case in Australia<sup>10</sup> addressed board responsibilities regarding the review and approval of an entity's financial statements. The judgment firmly places directors as the key people responsible for an entity's financial statements. The judgment details that the approval of the financial report is a key duty of a director and that this duty cannot be effectively delegated to management or auditors.

#### 9.13.9 Insurance for directors and prescribed officers

**Reference:** Sections 78 and 218(2)

**Issue:** Additional insurance in terms of the Act

##### **Discussion**

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

9.13.9.2 Note the inclusion of directors, alternate directors and former directors, prescribed officers and members of board committees or the audit committee in S75 to S78, their potential exposure because of their inclusion and the ability of the company to indemnify and insure prescribed officers and members of board committees.

9.13.9.3 SAICA is of the view that the potential exposure of directors, prescribed officers and members of board committees is increased by S218(2) in particular; it 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."*

9.13.9.4 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

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<sup>10</sup> *Australian Securities and Investments Commission v Healey* [2011] FCA 717 (commonly referred to as the *Centro* case).

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.

9.13.9.5 This last point (dealing with fines incurred by a director) does not apply to a private or personal liability company if there is only one shareholder who is also the only director of 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**

9.13.9.6 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 of this guide

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

#### **Discussion**

10.1.1 Chapter 3 deals with the appointment of an auditor, company secretary and audit committee. The chapter is only applicable in specific circumstances.

#### **Issues for consideration**

10.1.2 The following companies must comply with all the requirements of Chapter 3, i.e. the requirements that pertain to audit, audit committees and company secretaries:

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

10.1.3 In addition to the above, private, personal liability and non-profit companies must comply with the sections of Chapter 3 that 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 7.7 of this guide).



- 10.1.4 In respect of private, personal liability and non-profit companies, the mere fact that a company has voluntarily appointed an audit committee or company secretary does not impose a requirement for such an audit committee or company secretary to comply with the provisions of the Act. A private, personal liability or non-profit company that chooses to appoint an audit committee or company secretary will only be obliged to comply with the requirements of Chapter 3 to the extent that the MOI requires such compliance. 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 requirements of the Act.
- 10.1.5 If a company (other than a public company or SOC) does not include these requirements in its 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 requirements that relate to auditors, audit committees or company secretaries as per Chapter 3 of the Act.

## 10.2 Company secretary

**Reference:** Sections 86 to 89

**Issue:** Appointment of company secretary

### Discussion

- 10.2.1 The provisions that relate to the company secretary are similar to the provisions of the 1973 Act. All public companies or SOCs 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. In such cases, the company secretary would be required to comply with S86(2) regarding having the requisite knowledge of, or experience in, relevant laws and being a permanent resident of the Republic. However, the duties of the company secretary set out in S88 would only apply to the extent that the MOI so provides. Any other company secretary who is not required to be appointed in terms of the Act or the MOI is not required to comply with the provisions of the Act relevant to company secretaries. However, we recommend that such a person should carefully consider the provisions of the Act as they relate to company secretaries when performing their duties.
- 10.2.2 In SAICA's view it will remain possible for one person to be the company secretary for more than one company in multiple unrelated groups, 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.
- 10.2.3 A juristic person or a partnership may be appointed as the company secretary of a company as long as:
- none of the employees of that juristic person (or partners and employees of the partnership) who provides company secretary services is disqualified to be appointed as a director of the company as set out in S69(8) of the Act; and
  - at least one employee of that juristic person (or one partner or employee of the partnership) has the requisite knowledge of or experience in relevant laws and such a person is a permanent resident of the Republic.

- 10.2.4 The Act does not prohibit a director from being appointed as a company secretary. However, section 3.84(j) of the JSE Listings Requirements, advises against this practice. If the company secretary is a director, the board of directors of a listed entity is required to justify how the company is still able to ensure that the company secretary effectively performs the role as the gatekeeper of good governance and how the director has been able to perform and carry out the roles and duties of a company secretary adequately and effectively. It is our view that the company secretary should be independent from the board, since one of the key functions is to provide the board with guidance on its responsibilities, duties and powers and to report to the board any failure by a director to comply with the MOI or the Act. Furthermore, it is our view that a company secretary would generally not be classified as a prescribed officer (see discussion in 9.8.10 of this guide).
- 10.2.5 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;
  - ensuring that a copy of the company's AFS is sent, in accordance with this Act, to every person who is entitled to it;
  - 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).
- 10.2.6 The company secretary's responsibilities as set out in S88, read together with S33(3), imply that the responsibility for compliance with Chapter 2 Part C (S23 – S34), which relates to the transparency, accountability and integrity of companies, and Chapter 3 (S84 – S94), which relates to the enhanced accountability and transparency (if applicable), must be designated to the company secretary, if one is required to be appointed. Our view is that these responsibilities rest with the directors and not the company secretary; the company secretary is merely responsible for guiding the directors as to their responsibilities and determining that the provisions of the Act have been complied with. For example, the responsibilities for preparing AFS, maintaining adequate company records, appointing an auditor, appointing a company secretary and appointing an audit committee clearly rest with the directors.

#### **Issue for consideration**

- 10.2.7 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)). It is important to note that the company secretary is responsible for making

the board aware of all laws that affect the company and not only the requirements of the Act.

## 10.3 Auditor

### 10.3.1 Appointment of the auditor

**Reference:** Sections 60, 61, 90 and 94

**Issue:** Appointment of the auditor

#### **Discussion**

10.3.1.1 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 that relate to the appointment of the auditor. A company that is not required by the Act, the Regulations or its MOI to appoint an auditor, but which voluntarily chooses to do so, will not be required to comply with these requirements. Furthermore, a private, personal liability or non-profit company is not required to appoint an audit committee. Audit committees are only required to be appointed for a private, personal liability or non-profit company if such an appointment is required in terms of the company's MOI (see 10.4.1 of this guide for detailed discussions about the appointment of audit committees).

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

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

10.3.1.4 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.

10.3.1.5 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.

10.3.1.6 As a result, 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. Where a private, personal liability or non-profit company has just one shareholder, a "paper" AGM may replace the traditional AGM, as such companies do not have to comply with the formalities regarding shareholders' meetings in terms of S57(2) of the Act. In any other case, the meeting formality requirements as contained in S59 to S65 of the Act would apply to the company and must be followed. (Refer to 9.6 of this guide for detailed discussions about the AGM.)

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

- 10.3.1.8 Section 90(6) provides that a retiring auditor may be automatically reappointed at an AGM without any resolution being passed, unless:
- (a) the retiring auditor is no longer qualified for appointment, no longer willing to accept the appointment, and has so notified the company, or is required to cease serving as auditor, in terms of S92;
  - (b) an audit committee appointed by the company in terms of the Act objects to the reappointment; or
  - (c) the company has notice of an intended resolution to appoint some other person or people in place of the retiring auditor.
- 10.3.1.9 In our view, despite the Act's allowing for the automatic reappointment of the auditor without passing a resolution, it is advisable for a company to pass a resolution as the appointment of the auditor is an annual appointment.
- 10.3.1.10 Vacancies in the office of auditor should be dealt with in accordance with the procedure outlined in 10.3.3 of this guide. Where the shareholders do not agree with the auditor nominated by the audit committee, a vacancy for the auditor arises. This vacancy should be dealt with in accordance with S91. In this case, the shareholders can appoint a different auditor, but the appointment will only be valid once the audit committee has verified the auditor's independence in terms of S94(9). A vacancy would also arise where the auditor is appointed at the AGM but there is subsequently a disagreement regarding the terms of the engagement and the engagement letter is not signed.
- 10.3.1.11 The Act does not indicate whether the auditor appointed at the AGM is the firm or the individual. Section 44(1) of the APA indicates that, immediately after the appointment of the firm, the firm must take a decision as to the individual registered auditor that is responsible for the audit. However, since S90(6) allows an automatic reappointment at the AGM unless the auditor is required to cease serving in terms of S92, it appears as though the intention of the Act is for the individual auditor to be appointed at the AGM, as only the individual auditor is required to rotate under S92. Section 94 requires the audit committee to consider the independence of the auditor and this consideration should be at a firm and individual level; i.e. the firm may be independent but the individual may not. It is, thus, our view that public companies, SOCs and companies whose MOI requires an audit committee would need to identify and accordingly appoint the individual auditor and audit firm at the AGM. This is necessary in order for the audit committee to discharge its duty of assessing the independence of the auditor (at individual and firm level) and nominating the independent auditor for appointment at the AGM. For private, personal liability and non-profit companies, where there is no requirement for an audit committee, it is not necessary to identify the individual at the AGM, since no requirement is made for the audit committee to consider the independence of the individual; however, we recommend that shareholders identify the individual auditor in any event.

#### **Issues for consideration**

- 10.3.1.12 It may happen that during the year a vacancy arises in the office of an auditor; for example, the firm resigns or a new audit partner must be appointed. Naturally, the

AGM only takes place once a year and may not coincide with such a vacancy. As a result, a different process is followed for the appointment of an auditor.

10.3.1.13 Companies should follow the process outlined below in appointing an auditor, i.e. a new firm or a new audit partner, where such an appointment will take place at the AGM:

- The audit committee identifies the audit firm and/or the individual and considers the independence of the firm and/or the individual and, if satisfied, nominates the firm and/or individual for appointment.
- At the AGM, the shareholders appoint the firm and/or the individual as the auditor and a resolution is passed.
- An engagement letter is signed between the audit firm and the company that identifies the audit firm and the individual auditor.

10.3.1.14 Companies should follow the process outlined below in appointing an auditor, i.e. a new firm and/or a new audit partner, where such an appointment will not take place at the AGM owing to the timing of the AGM and the fact that a vacancy in the office of the auditor exists:

- Within 15 business days of a vacancy, the board identifies the auditor and proposes the auditor to the audit committee.
- The audit committee considers the proposal, including the independence of the firm and/or the individual. The audit committee must respond to the board within 5 business days.
- Within 40 business days of the original vacancy date, the board must appoint the new auditor.
- An engagement letter is signed between the audit firm and the company that identifies the audit firm and the individual auditor.
- It is recommended that at the next AGM, the shareholders ratify the appointment of the firm and/or the individual and a resolution is passed.

10.3.1.15 In respect of a continuing auditor, the following process should be adopted:

- The audit committee considers the independence of the firm and the individual and, if satisfied, nominates the firm and individual for appointment.
- At the AGM, the shareholders appoint the firm and the individual as the auditor. It is recommended that a resolution be passed, although this is not required by the Act.
- It is recommended that an engagement letter be signed between the audit firm and the company, since the appointment of the auditor is an annual appointment. The engagement letter should identify the audit firm and individual auditor.

10.3.1.16 Section 94(9) indicates that the shareholders in the AGM may appoint an auditor other than the one nominated by the audit committee, although the appointment will only be valid if the audit committee is satisfied with the auditor's independence.

10.3.1.17 Private, personal liability or non-profit companies should also follow this process in the appointment of their auditor, except for the nomination by the audit committee if

no audit committee exists. We would advise private, personal liability and non-profit companies to include this process in their MOI.

- 10.3.1.18 The appointment of an auditor must be lodged with the CIPC via the Form CoR44 – *Notice of change in auditor or company secretary* and, if the auditor is a firm, a designated auditor must be identified on the form. The CIPC will not process the appointment of an auditor until the resignation of the previous auditor has been lodged on a CoR44 form. Where a private, personal liability or non-profit company voluntarily elects (i.e. is not required in terms of the Act, Regulations or its MOI) to have its financial statements audited, it is not required to lodge the CoR44 form with the CIPC in terms of S85(3). However, it is recommended that this is done. Failure to lodge the CoR44 form for the appointment of the auditor for any company does not invalidate the auditor's statutory appointment as the lodging of this form is considered to be administrative in nature.
- 10.3.1.19 The Act is not clear about when the appointment of the auditor becomes effective. In other areas of the Act, it specifically mentions the effective date of certain actions; for example, an action is effective on filing of the notice with the CIPC (refer to 3.12 for discussions regarding the filing of forms). Since there is no such indication in respect of the appointment of the auditor, it is our view that the appointment of the auditor becomes effective once the auditor has been appointed at the AGM and the company has agreed to the terms of the engagement with the auditor, as set out in the engagement letter. Where the engagement letter is signed before the AGM is held, it is advisable to include a proviso in the agreement that states that the appointment will only be effective once the auditor is appointed at the AGM or, in the case of a vacancy that occurs partway through the year, once the auditor is appointed by the board. It should be noted that S94(7)(b) requires the audit committee to determine the auditor's terms of engagement. While the fulfilment of this requirement may be evidenced by the signing of the engagement letter, it is not a requirement for the audit committee to sign the engagement letter.
- 10.3.1.20 In terms of S91(1), the resignation of the auditor is effective when the notice is filed. However, the appointment of the auditor is an annual appointment. As a result, it is our view that if the previous auditor has not been reappointed at the AGM, the mere fact that the notice of the previous auditor's resignation has not been filed does not preclude a successor auditor from being appointed at the AGM. Filing the notice would ensure that there would be no question of whether the auditor was automatically reappointed in terms of S90(6).
- 10.3.1.21 Circumstances may arise where the audit committee has not been properly constituted or has not been formed. As per S94(6) of the Act, the board has a responsibility to appoint an audit committee within 40 business days after a vacancy arises. In cases where no audit committee exists or where it has not been properly constituted, we recommend that the shareholders appoint the auditor in the AGM. Within 40 business days the board must ensure that a properly constituted audit committee has been appointed and such a committee immediately considers the independence of the auditor.

## 10.3.2 Independence of the auditor

**Reference:** Section 90(2)

## **Issue:** Auditor independence required

### **Discussion**

10.3.2.1 Section 90(2) of the Act expressly disqualifies an auditor from being appointed to perform an audit if that person provides, or has provided in the last five years, the following prohibited services or functions to the company:

- a director or prescribed officer of the company;
- an employee or consultant who has been engaged for more than one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements;
- a director, officer or employee of the company secretary;
- a person who alone, or with a partner or employees, habitually or regularly performs the duties as accountant or bookkeeper, or performs related secretarial duties.

10.3.2.2 The prohibitions of S90(2) also extend to a person related to any of the people mentioned above. Section 2 of the Act lists the related people for the purposes of the Act. If, for example, a person's spouse is appointed as the company secretary or performs the secretarial work for the company, such a person would be disqualified from being appointed as the auditor.

10.3.2.3 There has been significant debate since the Act came into effect regarding whether S90(2) applies to the firm or the individual auditor. The IRBA and SAICA obtained legal opinions to clarify this interpretation, which indicated that the prohibitions of S90(2) apply to the firm; i.e. the firm may not perform any of the services mentioned in S90(2), otherwise the firm will be disqualified from appointment as the auditor. Furthermore, in the IRBA/SAICA *Guidance on the provision of non-audit services by the auditor of a company (Section 90 of the Companies Act)*<sup>11</sup>, the view is that the "firm" has the same meaning as "network firm" as defined in the IRBA *Rules Regarding Improper Conduct and Code of Professional Conduct for Registered Auditors*. Accordingly, entities associated with an audit firm, for example through common ownership, control or management or the use of a common brand name, will also be prohibited from providing the services to the audit clients of the associated audit firm.

10.3.2.4 The auditor independence provisions in S90(2) of the Act apply to the following categories of companies:

- public companies;
- SOCs;
- 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.

Therefore, a company that voluntarily chooses an audit, and such a requirement is not contained in the MOI of the company, is not bound by S90(2).

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<sup>11</sup> The IRBA/SAICA *Guidance on the provision of non-audit services by the auditor of a company (Section 90 of the Companies Act)* was issued in March 2015 and is available on the SAICA website.

- 10.3.2.5 Further guidance on the interpretation of the types of prohibited services is available in the IRBA/SAICA *Guidance on the provision of non-audit services by the auditor of a company (Section 90 of the Companies Act)*.

### 10.3.3 Resignation of the auditor

**Reference:** Section 91

**Issue:** What process is followed when the auditor resigns?

#### **Discussion**

- 10.3.3.1 Resignation is effective when the notice Form CoR44 is filed. The auditor is required to give the company one month's written notice, unless the board approves a shorter notice period.
- 10.3.3.2 Before filling a vacancy, the board must give the company's audit committee (if the company has an audit committee) the name of at least one registered auditor to be considered for appointment, within 15 business days of the vacancy arising.
- 10.3.3.3 The board may proceed with making an appointment of such a proposed person if within 5 business days after delivering the proposal the audit committee does not give notice in writing to the board rejecting the proposal.
- 10.3.3.4 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.
- 10.3.3.5 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, which gives rise to a vacancy.

#### **Issues for consideration**

- 10.3.3.6 Resignations and vacancies in the office of auditor should be filled in accordance with the requirements of the Act. The appointment of a new auditor will not be processed by the CIPC until the notice of resignation has been lodged with the CIPC on the CoR44 form. The Act is explicit that the resignation of the auditor becomes effective on the filing of the CoR44 form, unlike the appointment of the auditor, on which the Act is silent (see 10.3.1.18 of this guide for discussions about when the appointment of the auditor becomes effective). However, the appointment of the auditor is an annual appointment and accordingly the fact that the company has not filed the notice of resignation does not impede the appointment of a new audit firm and/or individual auditor. It should also be noted that the board may remove an auditor in terms of S89(2), read with S91(6).
- 10.3.3.7 The CoR44 – *Notice of change of auditor or company secretary* must be signed by a representative of the company. Where the company is not willing to accept the resignation of the auditor and file the notice, the auditor should notify the client and the CIPC 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 must ensure that they deliver the resignation letter to the client and CIPC and that they keep proof of the resignation and delivery (the auditor cannot file the notice; this must be carried out by the company).

#### 10.3.4 **Resignation of the auditor where the auditor performs an independent review**

**Reference:** Section 89

**Issue:** Is the auditor required to resign as the auditor when the auditor is not required to perform an audit and instead performs an independent review?

##### **Discussion**

- 10.3.4.1 Where the auditor is appointed as the auditor of a company, such an appointment is lodged with the CIPC via Form CoR44. No similar form is required for appointment as an independent reviewer. Accordingly, when the auditor no longer performs an audit because the company qualifies for an independent review, no mechanism exists at the CIPC to record such a change, i.e. to amend the status from “auditor” to “independent reviewer”. The CIPC has indicated that it does not require the notification of the independent reviewer, since it is not of public interest. Accordingly, the CIPC has indicated that in circumstances where the auditor is no longer required to audit and will perform an independent review instead, the auditor should resign. This resignation would also be lodged on Form CoR44.

#### 10.3.5 **Rotation of auditors**

**Reference:** Section 92

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

##### **Discussion**

- 10.3.5.1 The auditor rotation provisions in S92 of the Act apply to the following categories of companies:
- public companies;
  - SOCs;
  - 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.

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

##### **Discussion**

- 10.3.5.2 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.
- 10.3.5.3 The transitional arrangements in Schedule 5 item 7(11) to 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 general view is that the five years applies to financial year ends. As a result, the effect of the transitional provision is that a designated auditor (the individual) needs to rotate off a particular audit only

after auditing five consecutive financial years ends 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. For example:

- An individual has served as the auditor of a company with a February year end for many years before the Effective Date of the Act, i.e. 1 May 2011. This individual would be required to rotate after completing the February 2016 year-end audit.
- An individual was appointed after 1 May 2011 in respect of a December 2011 year-end audit. This individual may serve five financial year ends; i.e. the individual would be required to rotate after completing the December 2015 year-end audit.
- A company amends its year end from February 2014 to December 2014 and the individual has served as the auditor since the February 2013 year end. This individual would be required to rotate after completing the December 2016 year-end audit.

10.3.5.4 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. For example, an individual who has served as the auditor for three financial years from February 2012 to February 2014 and takes maternity leave in respect of the February 2015 financial year end is not permitted to serve the client until the expiry of two years – the individual may only be appointed as the auditor for the February 2017 year-end audit.

10.3.5.5 In some cases the auditor might be required to sign off on five years of AFS during one year owing to the company not having prepared audited financial statements during the previous five years. Where the auditor signs off on these AFS, the auditor would have to rotate off as they would have acted as the auditor for five financial year ends.

10.3.5.6 Accordingly, when applying the rotation requirements of S92, the auditor should rotate at the *earlier* of:

- having signed the audit report for five financial years; and
- having served as the auditor for the duration of five financial years.

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

10.3.5.8 It is SAICA's view that this applies to the individual designated auditors that need to manage the rotation and that the section does not apply to audit firm rotation.

10.3.5.9 Companies may be in the situation that the requirement to be audited changes over time; e.g., a company's PI Score is 200 and the AFS were independently compiled and a voluntary audit in terms of a shareholders' decision was performed for 4 years, the AFS are then internally compiled in year 5 and an audit is now required in terms

of the Act. The question arises on whether the same auditor / audit firm can perform the audit.

10.3.5.10 It is SAICA's view that the company should consider sections 90–93 when appointing the auditor. The same auditor would be disqualified from being appointed as the auditor as section 92 states that the same individual may not serve as the auditor / designated auditor for more than 5 consecutive financial years. The auditor in the example in 10.3.5.9 can therefore be auditor for one financial year, after which the individual auditor needs to rotate off.

10.3.5.11 This interpretation is not viewed as being retrospective in application but rather applying the Act at a point in time. Therefore, as soon as the Act applies to the appointment of the auditor then the company should consider the requirements of sections 90–93 to determine whether the auditor / audit firm can be appointed as the auditor. This would require the auditor to consider the period served as auditor prior to the change in the requirement to be audited. If there is no requirement in terms of the Act or the MOI for the company to be audited then sections 90–92 does not apply to the appointment of the auditor. This would support the independence requirements expected of the auditor in terms of the Act.

### 10.3.6 Rights and restricted functions of auditors

**Reference:** Section 93

**Issue:** What are the rights of the auditor?

#### **Discussion**

10.3.6.1 The Act specifies that the auditor has an unlimited right of access to the following:

- the accounting records and all books and documents of the company;
- the current and former financial statements of any subsidiary of the company; and
- any information and explanations from the directors and prescribed officers of the company and its subsidiaries.

10.3.6.2 The auditor is also entitled to attend any shareholders' meeting, to receive all notices that relate to a shareholders' meeting and to be heard at the shareholders' meeting.

#### **Issue for consideration**

The auditor of the holding company has unlimited access to the financial statements of the subsidiaries and any information or explanations from the directors and prescribed officers, but does not have automatic right of access to the underlying accounting *records, books and documents* of the subsidiaries. Accordingly, if a holding company auditor is not provided with access to the information of a subsidiary where such information is necessary to support the audit opinion on the AFS of the group, the auditor may be required to modify their audit opinion based on a limitation of scope.

## 10.4 Audit committees

### 10.4.1 Appointment of the audit committee

**Reference:** Section 94(2) and 94(6)

**Issue:** Appointment of the audit committee by shareholders

**Discussion**

- 10.4.1.1 Only public companies and SOCs are required to appoint an audit committee in terms of the Act. Any other company whose MOI requires the appointment of an audit committee is only required to comply with the Act to the extent set out by the MOI. For example, the MOI may require that the appointment of the audit committee and its membership must comply with the provisions of the Act, in which case compliance with the Act is required. However, if the MOI is silent on this and does not make any reference to the Act, no requirement exists for the audit committee to comply with the Act.
- 10.4.1.2 The audit committee must be appointed by the shareholders at every AGM. This means that the appointment of the audit committee becomes an annual event.
- 10.4.1.3 If there is a vacancy on the audit committee, the board is required to fill the vacancy within 40 business days. It is our view that this envisages circumstances where a vacancy exists on the audit committee, and the AGM will not be held within the next 40 business days. Accordingly, the board would appoint suitable audit committee members to fill the vacancy, and it is recommended that such appointment be ratified by the shareholders at the next AGM.
- 10.4.1.4 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 the audit committee as required by the Act. In such cases, the audit committee of the other company is required to consider every company falling within their mandate in terms of the Act and ensure that they have discharged all of their responsibilities set out in the Act in respect of each company. For example, it is inappropriate for an audit committee to exist at a holding company level that is responsible for performing the functions of an audit committee for all qualifying entities within the group, yet such an audit committee does not consider any matters required by the Act in relation to the qualifying subsidiary companies. It should also be noted that the other company would be a company as defined in the Act and thus must be a South African company. Accordingly, where a subsidiary company has a foreign holding company, that foreign company's audit committee would not be able to perform the function of the audit committee for the subsidiary company in terms of the Act.

**10.4.2 Audit committees – membership**

**Reference:** Section 94(4), section 94(5) and Regulation 42

**Issue:** Requirements for membership of the audit committee

**Discussion**

- 10.4.2.1 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 interrelated 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.

10.4.2.2 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.

10.4.2.3 Section 94(2) requires a minimum of three members and therefore the audit committee can consist of as many members as the company wishes to appoint. However, each member must meet the criteria set out above and must be a director of the company. The audit committee would, of course, be entitled to utilise advisors and obtain assistance from other people inside and outside of the company. The audit committee may also invite knowledgeable people to attend its meetings. However, the formally appointed members of the audit committee entitled to vote and fulfil the functions of the audit committee will have to meet the criteria (non-executive independent directors) in accordance with the prescribed requirements.

#### **Issues for consideration**

10.4.2.4 Any company that is required to have an audit committee will need to consider the membership criteria discussed above to ensure compliance with the requirements of the Act. Furthermore, audit committees should periodically review their composition and membership to confirm that they encompass the knowledge and experience required by Regulation 42.

10.4.2.5 Also refer to the discussion of S94 below regarding shareholders as members of the audit committee.

10.4.2.6 Where the audit committee of a company also performs the functions for a subsidiary company (see discussion in 10.4.1.4 of this guide), the Act does not indicate that the members of the audit committee should meet the membership requirements in terms of the Act and Regulations in relation to both the company and the subsidiary company. However, it is encouraged by SAICA that the audit committee complies with the membership requirements in relation to both the holding company and all subsidiary companies for whom the audit committee is performing a function, in order to achieve optimal efficacy of the committee, which is a view supported by King IV.

10.4.2.7 Should the company appoint an audit committee with people other than those prescribed, it would not be an audit committee as required by the Act. As a result, any functions undertaken by a non-compliant (that is an "improperly constituted") audit committee will not have been performed by the audit committee. As shareholders appoint the audit committee, they should consider the risk of having

an audit committee that is not properly constituted. However, the board of directors should also remember that it has a responsibility to fill a vacancy within 40 days. A discussion about the impact of an improperly constituted audit committee is contained in 10.4.15 of this guide.

### 10.4.3 Shareholders as members of the audit committee

**Reference:** Section 94(4)

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

#### **Discussion**

- 10.4.3.1 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 meets the criteria discussed above. However, in line with the recommended practices set out in King IV, the appointment of shareholders to the audit committee should be carefully considered, specifically with regard to the independence requirement of the audit committee. A judgement on the effect of the shareholding or other relationship is required in order to establish the likely factual impact on the independence of a particular person.

#### **Issue for consideration**

- 10.4.3.2 Consideration should be given as to whether the shareholder meets the criteria in S94(4) to be a member of an audit committee; however, it is generally not recommended based on the recommended practices set out in King IV.

### 10.4.4 Audit committee duties

**Reference:** Section 94(7) and (10)

**Issue:** What are the minimum duties of the audit committee as prescribed by the Act?

#### **Discussion**

- 10.4.4.1 The audit committee has the duty to:
- nominate for appointment as auditor of the company a registered auditor who, in the opinion of the audit committee, is independent of the company;
  - determine the fees to be paid to the auditor and the auditor's terms of engagement;
  - ensure that the appointment made by the audit committee complies with the requirements of the Act and any other legislation related to the appointment of auditors;
  - determine the nature and extent of any non-audit services that the auditor may provide (or must not provide) to the company or a related company;
  - pre-approve any proposed agreement with the auditor for the provision of non-audit services to the company;
  - prepare a report (which is to be included in the AFS of the company):
    - describing how the audit committee carried out its functions;

- stating whether the audit committee is satisfied with the auditor's independence; and
  - commenting in any way the committee considers appropriate on the financial statements, the accounting practices and the internal financial control of the company;
  - receive and deal appropriately with concerns or complaints that relate to:
    - the accounting practices and internal audit of the company;
    - the content or auditing of the company's financial statements;
    - the internal financial control of the company; or
    - any related matter;
  - make submissions to the board on any matter concerning the company's accounting policies, financial control, records and reporting; and
  - perform such other oversight functions as may be determined by the board.
- 10.4.4.2 Neither the appointment nor the duties of an audit committee reduce the functions and duties of the board of directors of the company, except with respect to the appointment, fees and terms of engagement of the auditor.

#### **Issues for consideration**

- 10.4.4.3 Consideration should be given as to whether the audit committee charter currently reflects all the duties set out above.
- 10.4.4.4 The audit committee is required to report on how it has carried out its functions and must provide commentary on the accounting practices and internal control. As a result, an expectation exists that the audit committee must take steps and actions to be able to provide such commentary, and therefore the committee should consider whether an internal audit function is required in order to assist it with discharging such responsibilities.
- 10.4.4.5 In circumstances where an audit committee performs the function of audit committee for other entities in the group, the above duties would need to be fulfilled in respect of each company within that audit committee's mandate. For example, the audit committee would be required to include a report in each company's AFS regarding how it has carried out its functions and to provide commentary on the accounting practices and internal control of that company. It is recommended that a table be included in the audit committee's performance evaluation that identifies each subsidiary for which it also performs the functions of an audit committee and considers how it has discharged its duties in relation to each of those subsidiaries.

#### **10.4.5 Different legislative requirements**

**Reference:** Section 94 and section 5

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

**Discussion**

- 10.4.5.1 Section 94 of the Act applies concurrently with the requirements of S64 of the Banks Act of 1990. 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 that is also subject to the requirements of S64 of the Banks Act.
- 10.4.5.2 Refer also to the discussion of S5 of the Act in 3.2 of this guide.

**Issue for consideration**

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

**10.4.6 Non-audit services provided (or should it be non-assurance services?)**

**Reference:** Section 94(7)

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

**Discussion**

- 10.4.6.1 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 and a review opinion on interim financial information and, where applicable, to carry out other matters consequential to the audit appointment and that arise from statute. These matters include reporting to a regulatory body, such as the capital adequacy (Basel II) reports issued by an auditor of a registered bank in terms of the Banks Act. Accordingly, the term “non-audit services” refers to any services performed that do not fall within the meaning of “audit services”. If the auditor intends to perform “non-audit” services for the company, the auditor should clearly set out such services in a document and obtain pre-approval from the audit committee for the performance of these services, prior to the conclusion of a formal contract with the company in this regard.
- 10.4.6.2 As the audit committee determines the audit fee and its terms, and also the nature and extent of any non-audit services, and, as both are ordinarily the subject of an engagement letter, little risk should arise 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 the service.

**Issue for consideration**

- 10.4.6.3 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 not independent. Care should therefore be taken to ensure that any non-audit services are pre-approved by the audit committee before these services are rendered to the company. The prohibited services set out in S90(2) should be thoroughly considered. Furthermore, Section 290 of the Code should also be considered where auditors provide other services, as independence and safeguards to independence are addressed.



## 10.4.7 Pre-approval of agreements

**Reference:** Section 94(7)

**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

- 10.4.7.1 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 that have similar provisions. On this basis, it is possible for a master service agreement to be in place governing the auditor’s provision of *non-audit services*, provided that 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 that can be provided and the extent of these services, all of 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.

### Issue for consideration

- 10.4.7.2 Every company should ensure that engagement letters deal with “typical non-audit services” provided by the auditor 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 of these agreements 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 for discharging 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 for discharging 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 that 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(7)

**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**

- 10.4.9.1 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.
- 10.4.9.2 However, the audit committee is 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 can 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.
- 10.4.9.3 The audit committee may utilise advisors in the execution of its functions and may invite such advisors to attend its meetings.

**10.4.10 Reliance of audit committees on other processes**

**Reference:** Section 94(7)

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

**Discussion**

- 10.4.10.1 An audit committee can establish, or require the company to establish, processes that support its activities. The audit committee should, however, be satisfied that the objectives of the Act and its statutory duties are not frustrated through the process of implementation.
- 10.4.10.2 For example, if the audit committee process for agreeing on 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.
- 10.4.10.3 However, if the audit committee process allowed for management and the auditor 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.
- 10.4.10.4 This acceptable process may be achieved through various processes, one of which might be:
- the auditor and management meet to discuss business and identify risks;
  - the auditor 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;

- the auditor presents a fee budget to the audit committee with management's comments and suggestions for change noted.

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

#### **Issue for consideration**

10.4.10.6 Care should be taken in establishing any process to ensure that the process itself does not interfere with, 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 a 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 Evaluation of the independence of the auditor**

**Reference:** Section 94(8)

**Issue:** The Act indicates that the audit committee must consider the independence of the auditor and includes a reference to any other company within the group. Does this mean that the audit committee has to consider the independence of all the auditors of the companies within the group?

#### **Discussion**

Section 94(8) of the Act states that in considering whether the auditor is independent of a company, the audit committee must ascertain or consider certain matters in relation to the company and, if the company is a member of a group of companies, any other company within that group. It is clear that, when considering other group companies, non-audit services that the auditor has performed to such other group companies impact the independence of the auditor in relation to the company being evaluated. The audit committee of a company is not required to evaluate the independence of the auditors of the other group companies, unless that audit committee performs the function of audit committee for those other group companies. Naturally, in the case of a group audit, when evaluating the independence of the auditor of the group holding company, the audit committee would take into consideration whether the auditors of the components are independent, since the independence of such components could affect the group.

#### 10.4.13 **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. The provision of any non-audit services without pre-approval should be avoided.

#### 10.4.14 **Audit committee report in annual financial statements**

**Reference:** Sections 1, 29, 30 and 94

**Issue:** Where in the AFS should the audit committee report be included?

##### 10.4.14.1 **Discussion**

- AFS are included in the definition of financial statements.
- Whereas the 1973 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.

##### **Issue for consideration**

10.4.14.2 To ensure compliance with S94 of the Act, the audit committee report should be included in the AFS (i.e. if the company issues an Annual Report that includes the AFS, the audit committee report should be placed in the AFS section of the said report).

#### 10.4.15 **Impact of an improperly constituted audit committee**

**Reference:** Sections 94 and 218(1)

**Issue:** What is the impact of not having an audit committee or having an improperly constituted audit committee?

##### **Discussion**

The impact on a company that is required to have an audit committee in terms of the Act or the MOI of the company but does not have an audit committee, or its audit committee is not properly constituted, should be assessed in terms of the duties of the audit committee. Any functions undertaken by an improperly constituted audit committee will not be seen to have been performed by that audit committee.

The board of the company may be able to perform some of the functions of the audit committee; however, the Act poses restrictions on which duties the board may perform. S94(10) restricts the board from taking on the duties of the audit committee that relate to the appointment, fees and terms of engagement of the auditor. Accordingly, the board will only be able to remedy the situation by appointing a properly constituted audit committee.

It is questionable whether the appointment of the auditor would be valid if a properly constituted audit committee was not involved in the auditor's appointment as required by the Act. Accordingly, members are urged to seek legal advice in this regard.

It is also important to note that the responsibility to appoint a properly constituted audit committee lies with the company; thus, the company would be liable for such non-compliance, and not the auditor. Such liability may be extended to the directors in light of their responsibility to appoint an audit committee, where the shareholders have failed to do so. However, it would be advisable for the auditor to seek legal advice in such a situation.

It may be questionable whether the auditor will be able to perform non-audit services for a company in the absence of a properly constituted audit committee. Practically, it would be difficult in such a circumstance for a company to demonstrate that it has a sufficiently independent and skilled committee that will be able to determine the nature and extent of non-audit services and pre-approve these services.

Included in the duties of the audit committee is the responsibility of receiving and dealing with any internal or external concerns or complaints that relate to accounting practices, internal audit, content or external audit of the financial statements, internal financial controls or any related matter. In the absence of the audit committee, the board would need to consider how it would discharge this duty. From the shareholders' perspective, it would be important to consider the risk of not having a suitably qualified and independent committee to deal with these issues.

#### **10.4.16 Role of audit committees in business rescue, liquidation or curatorship**

**Reference:** Sections 137, 140 and 142

**Issue:** What is the role of the audit committee during a company's business rescue proceedings?

##### **Discussion**

When a company is placed in business rescue, the directors of the company remain the directors. However, the powers and functions of the directors are subject to the authority of the business rescue practitioner. In terms of S140, the business rescue practitioner has full management control of the company in substitution for its board and pre-existing management and may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company.

Accordingly, the functions and duties of the audit committee would exist only to the extent that the business rescue practitioner provided the audit committee with this authority.

The Act requires directors of a company to co-operate with and assist the practitioner. As members of the audit committee are directors, this should be borne in mind as the Act empowers the business rescue practitioner to remove a director who fails to comply with the requirements applicable to them in terms of Chapter 6 of the Act or impedes the practitioner from performing his or her duties.

**Reference:** Section 80(8)

**Issue:** What is the role of the audit committee during a company's liquidation proceedings?

##### **Discussion**

When a company is being voluntarily wound up, all powers of the company's directors cease except to the extent specifically authorised by the liquidator, shareholders in a general meeting (if winding-up is carried out by the company) or creditors (if the winding-up is carried out by the creditors). As the members of the audit committee are directors, their powers will be restricted accordingly.

**Reference:** Section 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001

**Issue:** What is the role of the audit committee when a company is placed under curatorship?

### Discussion

In terms of S5 of the Financial Institutions (Protection of Funds) Act, the registrar may apply to the court for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution as defined.

Section 5(5) of the aforementioned Act states that the court may, for the purpose of the appointment of the curator, make an order with regard to powers and duties of the curator. Accordingly, it would appear that such order would need to be considered when contemplating the role of the directors (and consequently the audit committee) during a company's curatorship. It is recommended that a company seeks legal advice as to the role of the audit committee in such a situation.

## 11 Existing share incentive scheme

### 11.1 Use of a trust for a share scheme

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

11.1.1 In section 95(1)(c) 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."*

11.1.2 Employee share schemes as defined above are excluded from a number of onerous requirements in terms of the Act. They are also exempted from the definition of offers to the public, if they comply with the exemption requirements of S97, for example the requirement to obtain a special resolution prior to granting financial assistance. (See S44 and S45. Note, however, that the other requirements in S44 and S45 would still have to be met, even if a qualifying employee share scheme exists.)

- 11.1.3 However, the definition is problematic in that it will only apply to schemes that provide for the issuing of shares or the granting of options (in other words, not to schemes that involve the purchase of shares on the market).
- 11.1.4 “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.
- 11.1.5 An employee share scheme will only qualify for the applicable exemptions if a number of requirements are met, which include a statement in the AFS of the number of specified shares that has been allotted during the relevant financial year in terms of the scheme.
- 11.1.6 A trust is no longer required for a company to qualify for the share scheme exemption, but may be used.
- 11.1.7 Other requirements related to the compliance officer and his duties (S97) appear similar to S144A of the 1973 Act. (Note that the compliance officer referred to in S97 has certain responsibilities in respect of the share scheme. The term “compliance officer” in this context does not refer to a general compliance function in the company.)

#### **Issues for consideration**

- 11.1.8 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.
- 11.1.9 The compliance officers 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, should take 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.
- 11.1.10 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.

## **11.2 Effect of solvency and liquidity test**

**Reference:** Sections 4, 44, 45 and 46

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

#### **Discussion**

- 11.2.1 The solvency and liquidity test will remain an important consideration for all aspects associated with employee share schemes.



- 11.2.2 Regardless of whether the company's employee share scheme meets the definition of "employee share scheme" in the Act, the following sections potentially require the directors to apply the solvency and liquidity test at the initiation of or during the course of the relevant scheme:
- Section 44: Section 44 will apply if the company is to provide financial assistance to any person for the purpose of, or in connection with, the subscription of any option, or any securities, issued or to be issued by the company or a related or interrelated company, or for the purchase of any securities of the company or a related or interrelated company. In other words, the requirements contemplated in S44 (including the solvency and liquidity test) apply to any financial assistance provided in respect of the issue *or* secondary trading of the company's securities.
  - Section 45: To the extent that the share scheme itself, or any aspect of the implementation of the share scheme, could be seen as "financial assistance" to either a director or related or interrelated company, the board will be required to apply the solvency and liquidity test (and meet the other requirements of S45).
  - Section 46: Any distribution by a company to shareholders (including dividend distributions and the buy-back of shares) will be subject to the solvency and liquidity test.
- 11.2.3 We suggest that share schemes contain a catch-all provision that 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.
- 11.2.4 Directors are, immediately as from the Effective Date, obliged to perform the solvency and liquidity test for the prescribed transactions.

#### **Issues for consideration**

- 11.2.5 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 if the company does not meet the solvency and liquidity test when the obligation arises.
- 11.2.6 Boards should be careful to ensure that the solvency and liquidity test is applied in all instances required by the Act.

### **11.3 Flexibility around issue of shares**

**Reference:** Sections 36, 37 and 40

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

#### **Discussion**

- 11.3.1 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)).



- 11.3.2 Section 37(5)(b) states that a class of shares can be redeemable, subject to the requirements of sections 46 and 48 or convertible as stated in the MOI. Section 37(5)(c) also entitles the shareholders to distributions calculated in any manner, but including dividends that may be cumulative, non-cumulative, or partially cumulative, subject to the requirements of sections 46 and 47. Redeemable preference shares are therefore classified as a class of shares and a distribution on redeemable preference shares would be subject to the requirements of section 46.
- 11.3.3 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)).
- 11.3.4 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 even though they have not been fully paid for (see S40(5); the issue of shares in this instance will be subject to certain conditions).

#### **Issues for consideration**

- 11.3.5 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.
- 11.3.6 It may be possible for the company to provide employee share incentives outside of the “traditional” share schemes.

## **12 Appointment of a compliance officer for an employee share scheme**

**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**

- 12.1 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.
- 12.2 The compliance officer must provide a written statement to any employee who receives an offer of specified shares in terms of that employee scheme. The statement must set out full particulars of the nature of the transaction, which include the risks associated with it; information related 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 have occurred in respect of any of the aforementioned information provided.
- 12.3 The compliance officer must ensure that copies of the documents containing the above information are filed with the CIPC within 20 business days after the employee share scheme has been established. The compliance officer must also file a certificate within 60 business days after the end of each financial year, which

certifies that he or she has complied with the obligations in terms of this section during the past financial year.

- 12.4 For the purpose of filing the required documents with the Commission, forms CoR46.1 and CoR46.2 must be completed and filed with the Commission.

### **Issues for consideration**

#### ***Duties of the compliance officer***

- 12.5 Forms CoR46.1 and CoR46.2, 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 CoR46.1 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.
- 12.6 It is submitted that the compliance officer should perform appropriate monitoring procedures for 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 CoR46.1 should be the co-signature of management and the compliance officer.

#### ***Invoking the exemptions***

- 12.7 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.
- 12.8 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.
- 12.9 It is submitted that a special resolution is still required in all cases where the MOI of a company so requires. The memorandum may not, however, 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, Sections 133 and 136

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

#### Discussion

- 13.1.1 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) potentially have a severe impact on the company, in particular where major suppliers or customers are placed under business rescue.
- 13.1.2 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 people of their intention to commence such proceedings. However, it has to be noted that should the third party fail to comply with this obligation there may be little that the company can do about it.

#### Issues for consideration

- 13.1.3 We suggest 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.
- 13.1.4 We suggest a review of all major contract and existing suretyships and guarantees.
- 13.1.5 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 a company is financially distressed

#### Discussion

- 13.2.1 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

- 13.2.2 We suggest that the board of the company considers implementation of mechanisms to consider whether the company is “financially distressed” as defined in S128(1)(f). The board can possibly consider contingency plans if it concludes that the company is financially distressed.

### 13.3 What is the definition of “financially distressed”?

**Reference:** Sections 128(1)(f), 5(1) and 7

**Issue:** Definition of financially distressed

#### Discussion

- 13.3.1 The Companies Act defines “financially distressed” in S128(f) to mean that it appears to be:
- i. reasonably unlikely that the company will be able to pay all its debts as they fall due and payable within the immediately ensuing six months; or
  - ii. reasonably likely that the company will become insolvent within the immediately ensuing six months.
- 13.3.2 The first part of the test seems clear. A company will be in distress if a reasonable likelihood exists that the company may reach a position within the next six months where it will no longer be able to pay its debt as it becomes due and payable. “Reasonable likelihood” implies that there must be a rational basis for the conclusion that the company may not be able to pay its debt within the next six months. This conclusion amounts to an educated prediction, based on the current financial position of the company and considering all relevant factors that may affect the company’s liquidity in the foreseeable future.
- 13.3.3 The second part of the financial distress query deals with insolvency, and here the question often arises as to whether this refers to factual (technical) insolvency or commercial insolvency. There are conflicting views. Some argue that because part (i) clearly deals with commercial insolvency, part (ii) must deal with factual insolvency (i.e. a balance sheet test). In terms of this approach, a company is regarded as technically insolvent (and thus financially distressed) if the liabilities of the company exceed the assets. This approach does not take into account subordination agreements or any other management action. On the other hand, others believe that one must consider the definition in conjunction with the definition of business rescue and the objectives of the Act that pertain to business rescue.
- 13.3.4 Section 5(1) of the Act requires that the Act must be interpreted and applied in a manner that gives effect to the purposes set out in S7. As such, when interpreting these particular provisions one needs to consider the purpose of the Act in this regard, which is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders. In turn, “rescuing the company” means achieving the goals set out in the definition of “business rescue”. Business rescue is defined in S28(1)(b) as “*proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:*

- (i) *the temporary supervision of the company, and of the management of its affairs, business and property;*
- (ii) *a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*
- (iii) *the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company."*

- 13.3.5 It should be clear from the above that business rescue is meant to be employed only where a company requires "rehabilitation" and where there is a need to "rescue" the company. If the purpose of the Act and the purpose of business rescue are considered, it seems unlikely that a company that is factually insolvent, but still able to service its debt, can be regarded as "failing" or financially distressed.
- 13.3.6 If this approach is accepted, part (ii) of the financial distress test should consider the complete financial position of the company rather than merely pure technical insolvency. In order to adhere to the purpose of the Act, and in light of the definition of business rescue, one must consider the complete financial position of the company when determining whether there is a "reasonable" likelihood that the company will be insolvent within six months. In terms of this approach, a company will only be regarded as in "financial distress" where it is insolvent even after all other circumstances have been considered, including considering alternative fair values of the assets and liabilities; factoring in reasonably foreseeable assets and liabilities, as per the solvency and liquidity test in S4; and considering any other proposed measures taken by management such as subordination agreements, recapitalisation or letters of support. This approach was confirmed in a recent Supreme Court decision in the United Kingdom (see *BNY Corporate Trustee Services Ltd v Eurosail* [2013] UKSC 28), where the court found that the "balance sheet" test for insolvency must take account of the wider commercial context, and that courts must look beyond the assets and liabilities used to prepare a company's statutory accounts when deciding whether or not a company is "balance sheet" insolvent.
- 13.3.7 By employing the narrower definition of "financial distress" (i.e. using the factual insolvency test, which excludes subordination agreements and other management actions), one arrives at an answer that may not serve the best interests of affected parties (shareholders, creditors and employees). There is very little point in writing to affected parties, informing them that the company is financially distressed when it is in fact perfectly able to continue to do business. Furthermore, start-up companies are generally factually insolvent in the first few years of trading and applying the narrower definition would impair their continued existence. This approach does not support the purpose of the Act, which also purports to promote the economic development of South Africa, entrepreneurship, investment and innovation, and may have a detrimental effect on both the company and its stakeholders.

## 13.4 Supreme Court ruling on meaning of “solvent”

Reference: *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA)

**Issue:** Supreme Court ruling on the term “solvent”

### Discussion

- 13.4.1 In *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA), the Supreme Court of Appeal looked at the meaning of the term “solvent” with respect to the interpretation of S79 to S81 of the Act (winding-up of solvent companies). Although the judgment was given with specific reference to these particular sections, one may ask whether the court will follow a similar thought process (and perhaps reach a similar conclusion) with respect to the meaning of the terms “solvent” and “insolvent” used elsewhere in the Act.
- 13.4.2 The court explained the difference between factual solvency (where on the balance sheet the assets exceed the liabilities) and commercial solvency (where the company is able to pay its debts), and confirmed that the principle that a company’s commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law that has served us well through the passage of time. The court continues to state: “[W]ere the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the new Act, set out in s 7(l) thereof.”
- 13.4.3 The court further stated that: “it must be presumed that the legislature deliberately refrained from defining ‘solvency’. It must have done so with a view to ensuring that the well-oiled machinery of the courts in matters of company liquidations should not stall. The legislature must have been content that prevailing judicial interpretations of solvency and insolvency respectively should continue to have effect. The meaning of those terms must be one that leads to a sensible and business-like result.”
- 13.4.4 The court explained the interrelation between the Act and S344 and S345 of the 1973 Act, which address the circumstances in which a company may be wound up and in which a company is deemed unable to pay its debts, and concluded that S345 should be used to determine whether or not a company is “insolvent” for purposes of S79 of the Act. The deeming provisions concerning the inability to pay its debts, contained in S345 of the 1973 Act may be used to establish the insolvency of a company.

### Issue for consideration

- 13.4.5 If one assumes that the court will follow similar reasoning when interpreting the meaning of the word “insolvent” in the definition of financial distress in S128(f), it would confirm the view above that the legislature intended that business rescue be applied in instances where a reasonable likelihood exists that a company may be commercially insolvent (unable to pay its debt) within the immediately ensuing six months and, as such, business rescue can be used to rescue or rehabilitate the failing company (as per S7).

## 13.5 Solvency and liquidity test

**Reference:** Sections 128, 4, 22, 77, 128(1)(a) and (f), and 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 4.2 of this guide.

## 14 Whistle blowers

**Reference:** Section 159

**Issue:** Protection of whistle blowers

### Discussion

- 14.1 The Protected Disclosures Act 26 of 2000 provides protection to an employee who discloses information under that Act as prescribed. The 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.
- 14.2 Section 159 offers qualified privilege in respect of the disclosure and immunity from any civil, criminal or administrative liability for that disclosure.
- 14.3 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 Takeover Regulation Panel, a regulatory authority, an exchange, a legal advisor, a director, a prescribed officer, a company secretary, an auditor, a person performing the function of internal audit, the board or a 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 in the Promotion of Equality and Prevention of Unfair Discrimination Act 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.
- 14.4 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 because of threats posed in consequence of the disclosure.
- 14.5 A public company or an SOC 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 people contemplated above.

#### **Issues for consideration**

- 14.6 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 companies and SOC's 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.
- 14.7 The privilege is furthermore dependent on full compliance with the requirements as outlined above. Failure to comply with the onerous requirements listed in S59(3) by a whistle blower 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 98 of 1978, Designs Act 195 of 1993 and the Merchandise Marks Act 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 take 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 to 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 because 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 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 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 and 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 for 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 or prescribed officer of the company or related or interrelated 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 MOI, 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 of 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%. There must always be a margin of at least 10% between the highest requirement for an ordinary resolution and the lowest established requirement for approval for a special resolution.
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). There must always be a margin of at least 10% between the highest

		requirement for an ordinary resolution and the lowest established requirement for approval of a special resolution.
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 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 – <ul style="list-style-type: none"> <li>the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the MOI;</li> <li>a person to be an <i>ex officio</i> director of the company because of that person's holding some other office, title, designation or similar status, subject to S66(5)(a);</li> <li>the appointment or election of one or more persons as alternate directors of the company.</li> </ul>
40.	66(4)(a)(ii), read with 66(5)(b)(i)	unless the MOI provides otherwise a person who holds office or acts in the capacity of an <i>ex officio</i> 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 is 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)	<p>unless the MOI provides otherwise:</p> <ul style="list-style-type: none"> <li>• 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;</li> <li>• a majority of directors must be present at a meeting before a vote may be called;</li> <li>• each director has one vote on a matter before the board;</li> <li>• a majority of the votes cast on a resolution is sufficient to approve that resolution;</li> <li>• 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.</li> </ul>
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 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 subitem (3), and this Act, the binding provision prevails; or (iii) a provision of an agreement contemplated in subitem (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 the Memorandum of Incorporation**

### **Considerations relating to the content of the MOI and shareholders' agreements**

- **Each of the considerations below would be affected by:**
  - 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 that are not in the MOI**
  - If the provisions in the shareholders' agreement relate to alterable provisions of the Act, these matters will also need to be addressed in the MOI. (It appears from the wording of the Act that an alterable provision cannot be altered by way of a shareholders' agreement, but only by way of the MOI (see S15(2)).)
  - If the provisions of the shareholders' agreement differ from the content of the MOI, the provisions of the MOI will take precedence. Therefore, if the parties' true intention is reflected in the shareholders' agreement, the MOI will need to be updated to align with the shareholders' agreement.
  - Other than in respect of:
    - alterable provisions;
    - preventing a conflict between the MOI and the shareholders' agreement; or
    - regulating matters that are required, by the Act, to be regulated by way of the MOI,no general requirement exists that the provisions of the shareholders' agreement must be mirrored in the MOI.
- **Consider the parties' intention in relation to voting percentages 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 higher voting thresholds, which are relevant for fundamental transactions (S115).

Note that, as indicated above, to the extent that the parties wish to adjust the voting percentages required for shareholders' resolutions (i.e. to alter an alterable provision), this must be achieved by way of the MOI (or both the MOI and the shareholders' agreement) as alterable provisions can only be altered by the company's MOI.
- **Consider minority protection (in light of the provisions 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.



- In order to address the above risk, the MOI can, for example, stipulate that ratification of a contravention of the MOI can only be achieved if all shareholders vote in favour of such a ratification (in other words, increasing the 75% vote required by the Act).
- **Consider whether restrictions are required, and the extent of the 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 that are binding on the company and shareholders.

**Note, however, that the powers contemplated above are all in any event subject to the standard of conduct, including fiduciary duties and prescribed liability of directors (see S75 to S78).**

- **Consider including deadlock resolution provisions**

If the shareholders or directors are deadlocked, such a deadlock will typically be detrimental to the interests of the company and may be grounds for the winding-up of that company (S81). Consideration should therefore be given to including a deadlock resolution mechanism in the MOI.

- **Consider appropriate limitations on the statutory pre-emptive right**

The statutory pre-emptive right applies equally to the issue of 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 (ordinary) shares, unless the statutory pre-emptive right is amended by the MOI.

- **Consider restricting the issue of debt instruments (S43)**

The Act states that debt instruments can be issued unless prohibited by the MOI. Companies should consider whether they would want the issue of debt instruments prohibited or only allowed under circumstance set out in the MOI.

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

Particularly in the case of private companies, it may be important for all involved to understand who the shareholders are and to simplify the administration around shareholders.

- **Consider appropriate voting rights of directors**

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

- **Written (round robin) resolutions**

#### *Directors*

The Act provides that a majority of directors may pass a written (round robin) resolution, unless the MOI provides otherwise (S74). (If the company has not updated its Articles since the

Effective Date of the Act, it is likely that the MOI may require 100% assent, which may be unnecessarily restrictive.)

### *Shareholders*

Consider whether for any matters it should be stipulated that shareholders may only decide on these matters in a meeting and that these matters may not be dealt with by way of a written resolution.

- **Quorum**

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

Consider including additional requirements in respect of meeting quorums; for example, that a specific shareholder must be present at a meeting before a matter can be considered.

- **General meetings**

Consider whether the company should be compelled, by way of its MOI, to hold annual general meetings (AGMs). In terms of the Act, only public companies are legally obliged to hold AGMs.

It is important to note, however, that certain matters that relate to private companies can only be dealt with at an AGM; for example:

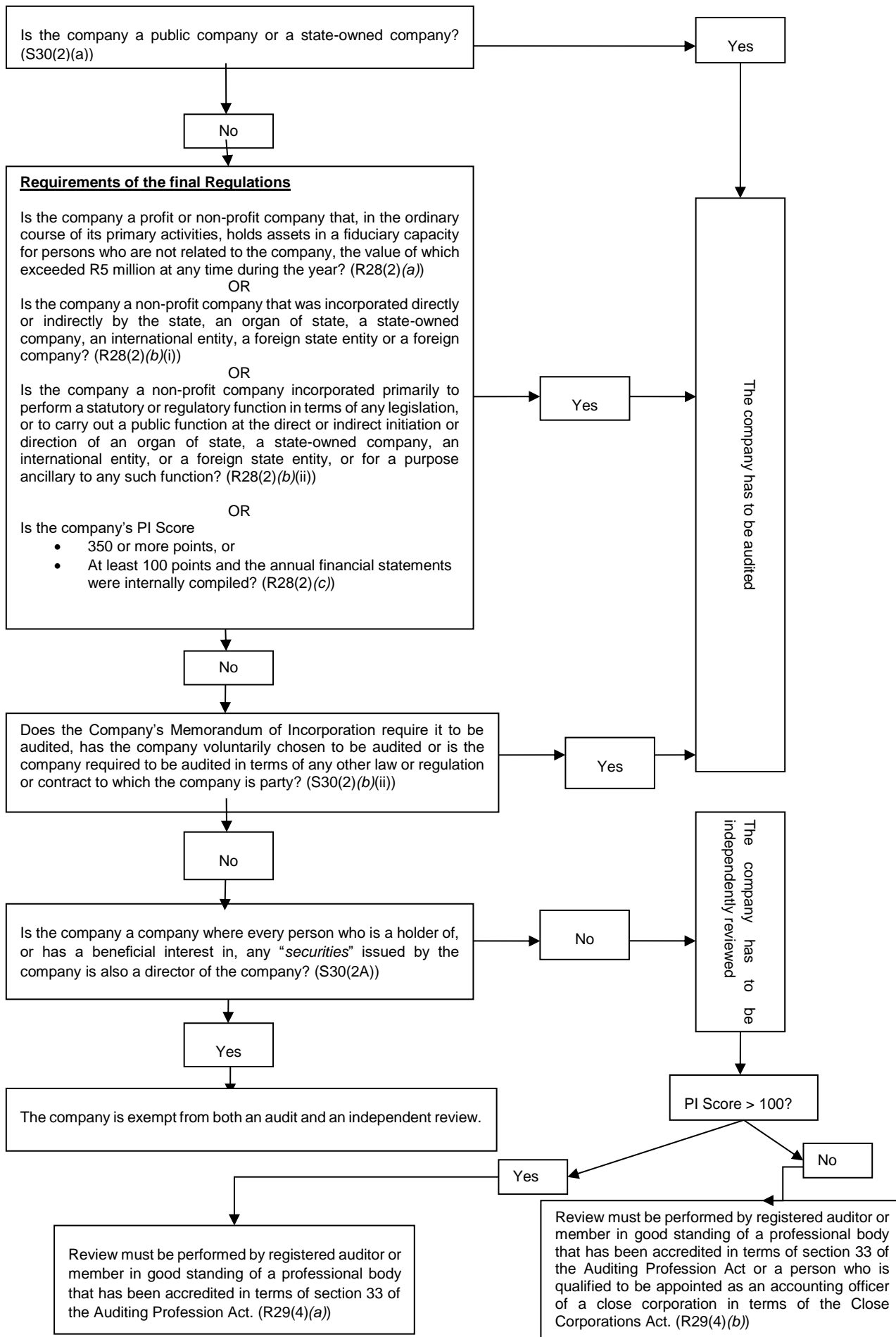
- annual financial statements (AFS) must be presented to shareholders at a shareholders' meeting; and
- the appointment of the company's auditor must be made at an AGM (S90).

Whether a private company is compelled by its MOI to hold an AGM or not, it may in any event be good governance practice for the company to have an AGM in order to ensure that the company's shareholder resolutions related to S44 and S45 (financial assistance) and S66(9) are renewed as appropriate.

- **Audit**

If a company does not meet the Act's requirements that compel it to audit its AFS, the directors of the company may still appoint an auditor (e.g. conduct a voluntary audit). In addition to these scenarios, the MOI may require the company to audit its AFS, in which event the directors will be obliged to appoint an auditor, even where the company does not meet the audit criteria contemplated in the Act. (If the company's MOI has not been updated since the Effective Date of the Act, it is likely that the MOI will require the company to audit its AFS, with the result that the company will not have the option to conduct an independent review.)

**Annexure C – Decision tree on requirements relating to audit,  
independent review or exemption from assurance**



## Annexure D – Audit, review and reporting standards

### Calculation of the public interest score

A company should calculate its public interest score (PI Score), for the financial year in question, in order to ascertain whether –

- the company requires an audit or independent review; and
- which financial reporting standard (FRS) should be applied.

A company's PI 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 have a beneficial interest directly or indirectly 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.

#### *Employees*

- When performing the calculation, "employee" has the meaning set out in the Labour Relations Act 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 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*

- “Third party liabilities” is not defined in the Act. The following practical issues need to be considered:
  - items should meet the definition of a “liability” and involve a “third party”;
  - it is proposed that liabilities (including subordinated loans) relating to direct shareholders are seen to be with a directly related party of the company and should be excluded from the PI Score calculation;
  - loans from directors should be excluded from the PI Score calculation;
  - provisions recognised in terms of the prescribed FRS should be included only if reasonably deemed to be payable and the third party can be clearly identified (for example, deferred tax would be excluded);
  - when calculating the PI 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 PI Score. For example, intercompany creditors should be included in the calculation.

#### **NOTE**

If it is not clear whether a liability should be included as a third-party liability, the more conservative approach would be to include the liability in the calculation.

#### *Beneficial interest in the company’s securities*

- For the purposes of the PI Score calculation, “beneficial interest” is defined as follows:
 

*“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 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 to have 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 PI Score, as these individuals could be seen as having an indirect interest through its shareholding in the subsidiary.

SAICA is of the view that the shareholders of a holding company do not have the right or entitlement to distributions of the subsidiary. Neither do they have the right to dispose of securities of the subsidiary directly or to direct the voting in respect of these securities. This means that they should not be regarded as having a beneficial interest. The holding company's shareholders should therefore be excluded from the calculation of the PI Score, unless an agreement or similar instrument is in place that "creates" beneficial ownership in respect of the subsidiaries' shares.

With regard to calculating the beneficial interest in a company whose securities are held by a trust, the CIPC non-binding opinion, dated 30 June 2011, has expressed the view that the individual beneficiaries of the trust should be counted as the individual beneficial interest holders. (This may depend, however, on the specific provisions of the relevant trust deed.)

#### Turnover

- "Turnover" is defined in Regulation 164(4) as follows:

*"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..."*

Regulation 164(1) states:

*"For purposes of section 175 of the Act, the assets and turnover of a company at any particular time must be calculated in accordance with –*

- (a) the financial reporting standards applicable to that company, as set out in regulation 27; or*
- (b) SA GAAP, as defined in regulation 26(1)(f), in the case of a company in respect of which no financial reporting standards have been prescribed."*

While Regulation 164 defines the term "turnover", it states that this definition is only provided for the purpose of the calculation of administrative fines and is not extended for use in calculation of the PI Score.

The definition provided is, however, the same as the previous definition provided for "revenue" in the prescribed FRS, whereas "turnover" is not defined in the FRS. The revenue definition in IFRS 15 has however been amended and now states that revenue is "Income arising in the course of an entity's ordinary activities". 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 as defined in the FRS, generated by a company for the calculation of the PI Score, as this definition is more in line with the guidance provided in Regulation 164.

#### *Timing of the calculation of the public interest score*

Regulation 26 requires every company to calculate its PI 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 it is discovered that a company is required to be audited in terms of its PI Score calculated at the end of the financial year without any preparation in this regard, 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 PI 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 PI Score.

Management can also consider calculating an indicative PI Score, based on the forecasted financial results of the company, to ensure that a likely result of the calculation is appropriately planned for.

The PI 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 FRS should be applied. In terms of the Act, the PI Score, which determines the audit/independent review requirements, should reflect the results of a company after the audit adjustments are processed and, therefore, could impact on the requirement to be independently reviewed or audited.

Again, management should consider whether a company is close to a relevant threshold (that is 100 or 350) and consider implementing a conservative approach (based on the assumption that the company will exceed the threshold) in advance.

#### *Significance of the 100/350 threshold*

It bears emphasising that the audit threshold is a PI Score of 100. Only if the financial statements are “independently compiled and reported” does the audit threshold increase to 350.

In order to be independently compiled and reported, the financial statements must be prepared by an independent accounting professional (IAP) as defined in Regulation 26. The definition of “independent accounting professional”, in our view, excludes all people who are employed by the company or the group. Therefore, the higher threshold of 350 will only apply if the company’s financial statements are prepared by someone who is truly independent of (external to) the company.



**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 close corporations)**

The following tables summarise the requirements of Regulation 27, which deals with the prescribed FRS, 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
PI Score	Public interest score as calculated in terms of Regulation 26

*Table 5: Financial reporting standards applicable to public and state-owned companies*

Type of company	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*

		Non-owner Managed		Owner Managed**	
Financial statements compiled:		Internally	Independently	Internally	Independently
PI Score 350+	Audit/IR	Audit	Audit	Audit	Audit
	FRS	IFRS or IFRS for SMEs*	IFRS or IFRS for SMEs*	IFRS or IFRS for SMEs*	IFRS or IFRS for SMEs*
PI Score 100–349	Audit/IR	Audit	IR	Audit	No Audit or IR
	FRS	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
PI Score <100	Audit/IR	IR	IR	No Audit or IR	No Audit or IR
	FRS	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

\*Subject to meeting the scoping restrictions of the standard.

\*\*The term “owner managed” refers to those companies that qualify for the exemption from independent review in terms of S30(2A) of the Act. Essentially, if all the shareholders are also directors, companies that are not subject to an audit (and would therefore have their financial statements reviewed) are therefore not required to conduct an independent review.

*Table 7: Financial reporting standards applicable to non-profit companies*

	Non-owner Managed	Owner Managed**
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Financial statements compiled:		Internally	Independently	Internally	Independently
PI Score 350+	Audit/IR	Audit	Audit	Audit	Audit
	FRS	IFRS or IFRS for SMEs*	IFRS or IFRS for SMEs*	IFRS or IFRS for SMEs*	IFRS or IFRS for SMEs*
PI Score 100-349	Audit/IR	Audit	IR	Audit	No Audit or IR
	FRS	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
PI Score <100	Audit/IR	IR	IR	No Audit or IR	No Audit or IR
	FRS	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

\*Subject to meeting the scoping restrictions of the standard

\*\*The term "owner managed" refers to those companies that qualify for the exemption from independent review in terms of S30(2A) of the Act. (In the case of non-profit companies, it would be less common for all the members also to be directors than is the case in respect of profit companies.)

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 of 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 FRS that should be applied in terms of the tables above. It should also be considered that to be able to express an audit opinion on the AFS, those statements must be prepared in accordance with a recognised framework. Therefore, the AFS cannot be prepared based on FRS as determined by the company, in the case of a company that will be audited.

Additionally, Regulation 26 provides the following definitions that should be applied in conjunction with Regulation 27 when determining the FRS to 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."***

SA GAAP may only be used for financial reporting periods ending on or before 1 December 2012 (i.e. SA GAAP was withdrawn for financial years commencing on or after 1 December 2012).

### **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, which 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 IAP.

### **Solution**

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

23 points for turnover

89.25 points for the average number of employees  $((89 \times 11 \text{ months} + 92 \times 1 \text{ month}) / 12 \text{ months})$

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

3 points for the shareholders

= PI Score of 129.25

- **Step 2 Audit or review**

The PI 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 IAP, an independent review is required to be performed by a member of SAICA or a registered auditor with the IRBA.

- **Step 3 Financial reporting standard**

The PI 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 and IFRS for SMEs (as SA GAAP has been withdrawn). Before IFRS for SMEs can be applied, the company should first meet the scoping 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
Definition	<p>“<b>special resolution</b>’ means –</p> <p>(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) –</p> <p>(i) at a shareholders meeting; or</p> <p>(ii) by holders of the company’s securities acting other than at a meeting, as contemplated in section 60”;</p>	Definition	<p>“<b>special resolution</b>’ – a resolution as contemplated in section 65(9) of the Act or in terms of the relevant company’s MOI, which special resolution may, for purposes of the Listings Requirements, be passed only with the support of at least 75 per cent of the votes cast by all equity securities holders present in person, or represented by proxy, at the general meeting / annual general meeting convened to approve such resolution”</p>
Section 11(1)(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 6 6.2(b)	A name of a company may not be a registration number.
Section 15(3)	<p>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 –</p> <p>(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</p> <p>(b) filing a copy of those rules.</p>	Schedule 10 10.4	<p>Rules</p> <p>The directors’ power to make rules as contemplated in section 15(3) of the Act must be prohibited.</p>
Section 20(2) and (6)	<p>“<b>Validity of company actions</b></p> <p>(2) If a company’s Memorandum of Incorporation limits, restricts or qualifies the purposes, powers or activities of that company, or limits the authority of the directors to perform an act on behalf of the company, the shareholders, by special resolution, may ratify any action by the company or the directors that is inconsistent with any such limit, restriction or qualification, subject to subsection (3).</p> <p>(6) Each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to</p>	Schedule 10 10.3	<p>“<b>Ratification of <i>ultra vires</i> acts</b></p> <p>The proposal of any resolution to shareholders in terms of section 20(2) and 20(6) of the Act must be prohibited in the event that such a resolution would lead to the ratification of an act that is contrary to the Listings Requirements; unless otherwise agreed with the JSE.”</p>

	gross negligence causes the company to do anything inconsistent with – (a) this Act; or (b) a limitation, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (2).”		
Section 29(3) and (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 form and content requirements for summaries contemplated in subsection (3).	Section 3.21(c)	“Although the audit report of the auditor on the annual financial statements need not be included in the abridged report (or in any summary of the audited annual financial statements that the issuer chooses to produce), the name of the auditor must be included and, if such report is a modified auditor’s report, details of the nature of such modification shall also be stated therein. If the audit report is not modified then a statement to this effect must be included in the report. There is no obligation to obtain a separate audit report on the abridged report itself (or any other summary of audited annual financial statements). Where the abridged report itself is not audited the following statement must be included in the abridged report (or any other summary of audited annual financial statements): ‘This abridged report is extracted from audited information, but is not itself audited.’ In addition a statement must be included in the abridged report (or any other summary of audited annual financial statements) that the directors take full responsibility for the preparation of the abridged report and that the financial information has been correctly extracted from the underlying annual financial statements.”
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	Section 4.17	<b>“Transferability of securities</b> 4.17 As provided for in Schedule 10 paragraph 2 the securities for which listing is

	<p>until a date after the time that 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 –</p> <p>(a) the consideration for those shares is regarded as having been received by the company at any time only to the extent –</p> <p>(i) that the value of the consideration for any of those shares has been realised by the company; or</p> <p>(ii) that the subscribing party to the agreement has fulfilled its obligation in terms of the agreement.</p>		<p>sought must be fully paid up and, unless otherwise required by statute or at the discretion of the JSE (taking into account the objects of the FMA), be freely transferable.</p> <p>Notwithstanding the provisions of Section 40(5) of the Act, the JSE will not list shares that are not fully paid for upon listing. An applicant issuer that is proposing any form of restricted transferability must consult the JSE at an early stage in order to discuss the details of the restriction and must further obtain a ruling from the JSE whether it will apply its discretion.”</p>
Section 47	<p><b>“Capitalisation shares</b></p> <p>(1) Except to the extent that a company’s Memorandum of Incorporation provides otherwise –</p> <p>(a) 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;</p> <p>(b) shares of one class may be issued as a capitalisation share in respect of shares of another class; and</p> <p>(c) subject to subsection (2), when resolving to award a capitalisation share, the board may at the same time resolve to permit any shareholder entitled to receive such an award to elect instead to receive a cash payment, at a value determined by the board.</p> <p>(2) The board of a company may not resolve to offer a cash payment in lieu of awarding a capitalisation share, as contemplated in subsection (1)(c), unless the board –</p> <p>(a) has considered the solvency and liquidity test, as required by section 46, on the assumption that every such shareholder would elect to receive cash; and</p> <p>(b) is satisfied that the company would satisfy the solvency and liquidity test immediately upon the completion of the distribution.”</p>	Schedule 10 10.6	<p><b>“Capitalisation issues</b></p> <p>Any capitalisation issue by an applicant issuer must at least be subject to the fulfilment of the requirements set out in Section 47 of the Act. The applicant issuer’s MOI may not call for any less stringent requirements.”</p>

Section 56(4)	<p><b>“Beneficial interest in securities</b></p> <p>(4) The information required in terms of subsection (3) must –</p> <p>(a) be disclosed in writing to the company within five business days after the end of every month during which a change has occurred in the information contemplated in subsection (3), or more promptly or frequently to the extent so provided by the requirements of a central securities depository; and</p> <p>(b) otherwise be provided on payment of a prescribed fee charged by the registered holder of securities.”</p>	Section 3.83(a)	<p><b>“Disclosure of beneficial interests in securities</b></p> <p>3.83(a) Issuers must establish and maintain a register of the disclosures made in terms of Section 56 of the Act. Furthermore, the issuer is to publish the beneficial interests of directors and major shareholders in its annual financial statements as required by paragraphs 8.63(c) and (e).”</p>
Section 60	<p><b>“60. Shareholders acting other than at meeting</b></p> <p>(1) A resolution that could be voted on at a shareholders meeting may instead be –</p> <p>(a) submitted for consideration to the shareholders entitled to exercise voting rights in relation to the resolution; and</p> <p>(b) voted on in writing by shareholders entitled to exercise voting rights in relation to the resolution within 20 business days after the resolution was submitted to them.</p> <p>(2) A resolution contemplated in subsection (1) –</p> <p>(a) 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; and</p> <p>(b) if adopted, has the same effect as if it had been approved by voting at a meeting.</p> <p>(3) An election of a director that could be conducted at a shareholders meeting may instead be conducted by written polling of all of the shareholders entitled to exercise voting rights in relation to the election of that director.</p> <p>(4) Within 10 business days after adopting a resolution, or conducting an election of directors, in terms of this section, the company must deliver a statement</p>	Schedule 10 10.11(c) and 10.11(h)	<p><b>“10.11 Resolutions and meetings</b></p> <p>(c) Subject to paragraph 10.11(h) below, all shareholder meetings convened in terms of the Listings Requirements must be held ‘in person’ and may not be held by means of a written resolution as is contemplated in Section 60 of the Act.</p> <p>...</p> <p><b>(h) Written resolutions:</b></p> <p>(i) Main Board: Subject to the provisions of the MOI of the applicant issuer and the Act, the following resolutions may be proposed as written resolutions in accordance with Section 60 of the Act:</p> <ol style="list-style-type: none"> <li>1 change of name;</li> <li>2 odd lot offers;</li> <li>3 increase in authorised share capital; and</li> <li>4 approval of amendments to the MOI.</li> </ol> <p>(ii) AltX: Subject to the provisions of the MOI of the applicant issuer and the Act, all resolutions pursuant to the Listings Requirements may be proposed as written resolutions in accordance with Section 60 of the Act.”</p>

	<p>describing the results of the vote, consent process, or election to every shareholder who was entitled to vote on or consent to the resolution, or vote in the election of the director, as the case may be.</p> <p>(5) For greater certainty, any business of a company that is required by this Act or the company's Memorandum of Incorporation to be conducted at an annual general meeting of the company, may not be conducted in the manner contemplated in this section."</p>		
Section 62(1) and (2)	<p><b>"Notice of meetings</b></p> <p>(1) The company must deliver a notice of each shareholders meeting in the prescribed manner and form to all of the shareholders of the company as of the record date for the meeting, at least –</p> <p>(a) 15 business days before the meeting is to begin, in the case of a public company or a non-profit company that has voting members; or</p> <p>(b) 10 business days before the meeting is to begin, in any other case.</p> <p>(2) A company's Memorandum of Incorporation may provide for longer or shorter minimum notice periods than required by subsection (1)."</p>	Schedule 10 10.11(a) and (b)	<p>"(a) The notice periods referred to in this paragraph 10.11(a) and paragraph 10.11(b) below are not applicable where the company adheres to Section 62(2A) of the Act. The passing of a special resolution is to be subject to the approval of at least 75% of the votes cast by all equity securities holders present in person, or represented by proxy, at the general meeting / annual general meeting convened to approve such resolution and must be subject to a minimum notice period of 15 business days.</p> <p>(b) An ordinary resolution is to be subject to a minimum notice period of 15 business days."</p>
Section 64(2)	<p><b>"Meeting quorum and adjournment</b></p> <p>(2) A company's Memorandum of Incorporation may specify a lower or higher percentage in place of the 25% required in either or both of subsection (1)(a) or (b)."</p>	Schedule 10 10.11(g)	<p>"(g) The quorum at a general meeting must be at least three shareholders entitled to attend and vote thereat. In addition, the quorum requirements provided for in Section 64(1) of the Act may not be lower than 25% in respect of the meeting. Once a quorum has been established, all the shareholders of the quorum must be present at the meeting to hear any matter that must be considered at the meeting."</p>
Section 66(2)	<p><b>"Board, directors and prescribed officers</b></p> <p>(2) The board of a company must comprise –</p> <p>(a) in the case of a private company, or a personal liability</p>	Schedule 10 10.16(a)	<p><b>"Directors</b></p> <p>(a) The minimum number of directors shall be four."</p>



	<p>company, at least one director; or (b) in the case of a public company, or a non-profit company, at least three directors, in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of this Act or its Memorandum of Incorporation, to appoint an audit committee, or a social and ethics committee as contemplated in section 72(4)."</p>		
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**Note:** The above is not an exhaustive list of all the differences between the Companies Act and the JSE Listings Requirements (Service Issue 26).

## **Annexure F – UN Global Compact**

The following is an extract from the United Nations Global Compact website pertaining to the 10 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/](http://www.unglobalcompact.org/)

## Annexure G – Comparison of forms

### *Comparison of forms in terms of Companies Act 61 of 1973, and Companies Act 71 of 2008*

Companies Act 61 of 1973		Companies Act 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 CM44C 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 CM44A 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 Section 21 company	CoR14.3	Registration Certificate

Companies Act 61 of 1973		Companies Act 71 of 2008	
Form number	Description	Form number	Description
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	CoR15.1D	Memorandum of Incorporation – Long Standard form for Non Profit Companies without members
CM4B	Association clause	CoR15.1E	Memorandum of Incorporation – Long Standard form for Non Profit Companies with members
CM44	Articles of association of a company having a share capital adopting schedule 1		
CM44C	Signatories to articles of association		
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 / payments to shareholders		No new prescribed form
CM15	Return of allotment of shares		No new prescribed form
CM16	Return of allotment which has become void		No new prescribed form

Companies Act 61 of 1973		Companies Act 71 of 2008	
Form number	Description	Form number	Description
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, sections 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
CM29	Contents of register of directors, auditors and officers	CoR39	Notice of Change of Directors
CM29	Contents of register of directors, auditors and 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		No new prescribed form

Companies Act 61 of 1973		Companies Act 71 of 2008	
Form number	Description	Form number	Description
	or resignation by auditor or removal of auditor		
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 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 applies, the form will still apply – Companies Act, 2008 Schedule 5, item 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

Companies Act 61 of 1973		Companies Act 71 of 2008	
Form number	Description	Form number	Description
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 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
CM50	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
CM52	Granting of exemption from lodging annual financial statements of a subsidiary		No new prescribed form

## Annexure H – List of prescribed forms

Form number	Description
CoR9.3	Notice Requiring Further Particulars (Name Reservation), 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 Names 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 (Transfer registration of foreign company)
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
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



Form number	Description
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 or disposal 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 – <b>Note: Form not yet active</b>
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
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)

<b>Form number</b>	<b>Description</b>
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

All company forms can be accessed on the following website:

<http://www.cipc.co.za/index.php/forms-and-fe/companies/>

## Annexure I – List of special resolutions required

Section number	Section heading	Resolution and test required	File with the CIPC (Yes/No)	Form
Section 13(6)	Transfer of the registration of a foreign company to South Africa	“Equivalent” of a special resolution by shareholders is required if the country of origin does not have another mechanism for the shareholders of the company to approve the transfer of the registration of the company	Yes – file per Regulation 17(1)(d)	CoR17.1
Section 16(1)(c)	Notice of Amendment to the Memorandum of Incorporation <ul style="list-style-type: none"> <li>• New MOI</li> <li>• Name change</li> <li>• Delete/alter/ replace provisions</li> <li>• New provisions</li> <li>• Alterations</li> </ul>	Special resolution of the company setting out the amendment to the Memorandum of Incorporation	Yes – file per Regulation 15(2)(c)	CoR15.2
Section 18 (1)(b)	Authenticity of versions of MOI	Special resolution at shareholders’ meeting  Ratification of a consolidated version of the MOI	No	
Section 20(2)	Validity of company actions	Special resolution by shareholders  Ratification of actions above the directors’ authority	No	
Section 36(2)(a)	Authorisation and classification of shares;  Number of authorised shares of each class; preferences, rights and limitations and other terms associated with each class of shares	Special resolution by shareholders. (note, however, that the board may also take these actions, without a special resolution, unless prohibited by the MOI)	Yes – filed notice of amendment of MOI as per Regulation 15(2)(c)	CoR15.2
Section 41(1)	Shareholder approval for issuing shares in certain cases, for	Special resolution by shareholders	No	

	example to directors and related companies	Approval of issue of shares or grant of rights		
Section 41(3)	Shareholders' approval – 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 per cent of the voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions.	Special resolution by shareholders	No	
Section 44(3)(a)(ii)	Financial assistance for subscription of securities	Special resolution by shareholders within previous two years	No	
Section 45(3)(a)(ii)	Financial assistance to directors and related third parties	Special resolution by shareholders within previous two years	No	
Section 48(8)(a)	Company or subsidiary acquiring company's shares from a director, prescribed officer, or related persons	Special resolution by shareholders	No	
Section 66(9)	Board, directors and prescribed officers	Special resolution by shareholders'  Payment of remuneration approved by special resolution within two years	No	
Section 80 and Regulation 40(1)	Notice of resolution to wind-up solvent company	Special resolution by shareholders for voluntary winding-up	Yes, filed as per section 80(2) and Regulation 40(1)	CoR40.1
Section 81(1)(a)(i)	Winding-up by court order	Special resolution by shareholders	No	
Section 82(5)	Deregistration, special resolution to transfer registration	Special resolution by shareholders	Yes, filed per Regulation 40(8)(a)	CoR40.2

Section 115(2)	Required approvals for fundamental transactions	Special resolution in terms of section 115(2)	No	
Section 164 (9)(c)	Revoking a previously adopted resolution that gave rise to appraisal rights in terms of S164	Special resolution by shareholders	No	
Schedule 5 item 6  Regulation 31(6) and 31(8)(b)	Notice to convert par value shares	Special resolution by shareholders  Approval of any fundamental transaction	Yes, file with the CIPC and SARS per Regulation 31(8)(b)	CoR31

Note that the MOI of a company or the JSE Listings Requirements may stipulate further matters that require special resolutions.

**Matters requiring an Ordinary Resolution in terms of the Act**

<b>COMPANIES ACT, 2008</b>	
<b>Section</b>	<b>Description</b>
66(4)	Electing at least 50% of the directors and at least 50% of the alternate directors.
71(1)	Removing directors.
75(3)	Approving contract in which a director has a personal financial interest, where there is only one director.
75(7)	Approving a contract in which a director has not made prior disclosure of a personal financial interest.
80(5) and (6)	Giving certain directions to a liquidator in a voluntary winding-up of a solvent company.
90(1)	Appointing auditors, where the company is required to be audited.
94(2)	Appointing an audit committee if the company is required in terms of the Act to have an audit committee.
103(2)	Varying an agreement attached to a prospectus.
152(3)	Approving a business rescue plan to the extent that such a plan alters the rights of the shareholders.

Note that the MOI of a company or the JSE Listings Requirements may stipulate further matters that require ordinary resolutions.