

The CIPC enforcement of the Companies Act (2008)

The CIPC issued a media release ([Media release 2 of 2018](#)) on 31 May 2018 relating to the High Court issuing court orders in favour of the CIPC to impose administrative fines on entities that ignored compliance notices for failing to prepare annual financial statements within 6 months and to lodge the same annual financial statements with the CIPC, where required.

The media release states that:

“CIPC received Reportable Irregularity reports from the Independent Regulatory Board For Auditors (IRBA) as prescribed in Section 45 of the Auditing Profession Act. The companies were reported by their Auditors through the IRBA for failure to comply with Section 30 of the Companies Act 71 of 2008 wherein every company is required to prepare its annual financial statements within six months after the end of its financial year end and file the same AFSs with the regulator where applicable. Compliance Notices were issued by CIPC to the three companies and their directors, but were ignored.”

The court order states that administrative fines must be paid by each company, equal to 10% of their turnover during the period for which the companies were non-compliant.

Companies must take note that from 1 May 2011, the Companies Act No 71 of 2008 (Companies Act) requires annual financial statements to be completed within 6 months (section 30(1)) after year end. If companies are not completing their annual financial statements within the 6 month period they are in breach of the Companies Act. The independent reviewer, where an independent review has been performed or the registered auditor, in the case of an audit must consider their duty to report a reportable irregularity in terms of either the Companies Regulation 2011 section 29(1) or section 45 of the Auditing Professions Act No 26 of 2005¹. Section 33 of the Companies Act also requires companies whose annual financial statements are required to be audited in terms of the Companies Act or Regulations to submit the audited annual financial statements to the CIPC together with their annual return.

The annual financial statements will only be viewed as completed when the annual financial statements meet all the requirements in terms of section 30 of the Companies Act and should include the company secretary certificate and the audit committee report, when applicable, as well as the directors' report and the audit report where a company is audited. The Companies Act is silent on the inclusion of the independent reviewer's report in the annual financial statements. It is SAICA's view that the independent reviewer's report must be included in the annual financial statements.

¹ Refer to the Revised Guide for Registered Auditors: Reportable Irregularities in terms of the Auditing Profession Act. Appendix 7, example 1 deals with the failure to compile annual financial statements within 6 months after year-end.

In enforcing the Companies Act the CIPC follows a process (Annexure 1) set out in the Companies Act. The administrative fine follows the compliance order, which allows companies to correct the non-compliance. The Companies Act does not specify a time period allowed for the correction. If companies do not correct the non-compliance then the CIPC can on application to the court impose an administrative fine not exceeding the greater of 10% of the respondents turnover for the period which the company failed to comply with the compliance notice or the maximum amount prescribed. The maximum administrative fine as contemplated in the Companies Act is R1 million.

In conclusion, all companies need to comply with the Companies Act requirements with effect from 1 May 2011, which includes the requirement to compile annual financial statements within 6 months after year end and where applicable submit the annual financial statements to the CIPC with the annual return. If the annual financial statements are not compiled within the 6 months, the independent reviewer or registered auditor need to consider whether a reportable irregularity need to be reported.

If the CIPC identifies non-compliance neither the application to court nor the imposing if the fine occurs automatically. The CIPC will submit a compliance notice to the company and its directors. If the company and its directors do not comply the CIPC will consider an administrative fine as defined.

Annexure 1
Summary of the enforcement process as set out in the Companies Act,
Sections 168 – 175, 186 and 187

The CIPC has the duty to enforce the Companies Act as one of its objectives in section 186(1)(e) by:

- Ensuring that contraventions of the Act is promptly and properly investigated (section 187(2)(e));
- Issuing and enforcing compliance notices (section 187(2)(g));
- Referring alleged offence to the National Prosecuting Authority (Section 187(2)(h)); and
- Referring matters to a court, and appearing before a court or the Companies Tribunal (section 181(2)(i))

Complaints may be initiated by:

- A person in writing to the Takeover Regulations Panel (Panel) or the CIPC alleging that a person has acted in a manner inconsistent with the Companies Act requirements or that the complainants rights under the Act / company's Memorandum of Incorporation (MOI) / rules has been infringed (section 168(1)) by completing form CoR135.1;
- The CIPC or the Panel on its own motion or on the request of another regulatory authority (section 168(2)).

Once a complaint is received the CIPC or the Panel may issue a notice that it will not investigate the complaint, refer the complainant to the Companies Tribunal or direct an inspector to investigate (section 169).

After receiving the report of the investigator the CIPC or Panel may (section 170):

- Excuse any person as a respondent in the complaint;
- Refer the complaint to the Companies Tribunal, CIPC or Panel;
- Issue a notice of non-referral to the complainant;
- In the case of the CIPC propose that the complainant and affected persons meet with the CIPC or Companies Tribunal with a view to resolve the matter by consent order;
- Commence proceedings in the court;
- Refer the matter to the National Prosecuting Authority; or
- In the case of the CIPC issue a compliance notice in terms of section 171 or the Panel may refer to the Executive Director of the Panel who may issue a compliance notice.

The CIPC or the Executive Director of the Panel may issue a compliance notice to any person if the CIPC or Executive Director believes that the person has contravened this Act or assented to, was implicated in, or directly or indirectly benefited from a contravention of the Act (section 171)

A compliance notice requires the following from the person it was addressed to (section 171(2)):

- cease, correct or reverse any action in contravention of the Act;
- take any action as required by the Act;
- restore assets or their value to a company or other person;
- provide a community service, in the case of a notice issued ; or
- take any other steps reasonably related to the contravention

If the compliance notice has been satisfied the Commission or Executive Director must issue a compliance certificate.

Section 172 allows for an objection to a notice issued and allows for any person issued with a compliance notice to apply to the Companies Tribunal, where notice was issued by the CIPC or the Takeover Special Committee where the notice was issued by the Executive Director to review the notice which may lead to the compliance notice being amended or cancelled.

The Companies Act also allows for a consent order where the parties agreed on the resolution.

If companies do not correct the non-compliance then the CIPC can on application to the court impose an administrative fine not exceeding the greater of 10% of the respondents turnover for the period which the company failed to comply with the compliance notice or the maximum amount of R1 million as prescribed in Regulation 163 in terms of section 175(5). Certain factors need to be considered when determining the amount of an administrative fine (section 176(2)) which is:

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the respondent;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the respondent has co-operated with the Commission or Panel, as the case may be, and the court; and
- whether the respondent has previously been found in contravention of this Act.