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BASS GORDON GHF

CHARTERED ACCOUNTANTS (SA)

COMPANIES ACT NO.71 OF 2008

Incorporating:

The Companies Amendment Act, No. 3 of 2011
Companies Regulations, 2011

SUCCINCT SUMMARY OF PROVISIONS

ABOUT THIS GUIDE

We have compiled this guide based on the needs of our wide spectrum of clients and have concentrated on those provisions that we feel would be important to you as our client.

This guide offers an easy to follow summary with quick reference points as to what steps the directors and owners of companies need to take and how we can assist them in simplifying these onerous tasks. For those brave enough to venture into the Act itself and wanting to learn more, we have provided you with a reference to applicable sections of the Act in each instance.

The guide has been compiled based on our understanding and interpretation of the provisions contained in the Companies Act No. 71 of 2008, the Companies Amendment Act, No. 3 of 2011 and the Companies Regulations, 2011 and is by no means a comprehensive summary of all the provisions of the aforementioned Acts & Regulations.

Nothing in this document should be construed as professional advice. Professional advice should be sought before taking action based on any information contained in this document.

THE NEW COMPANIES ACT HAS CHANGED SIGNIFICANTLY FROM THE PREVIOUS ACT AND IMPOSES SIGNIFICANT POWERS, DUTIES AND LIABILITIES ON DIRECTORS OF COMPANIES. DIRECTORS SHOULD THEREFORE TAKE NOTE OF THE CONTENTS OF THIS DOCUMENT TO ENSURE THAT THEY DO NOT INCUR PERSONAL LIABILITY DURING THE DAY-TO-DAY RUNNING OF A COMPANY.
DIRECTORS SHOULD ALSO NOTE THAT IT IS IMPORTANT TO RECORD ALL DECISIONS AND REASONING BEHIND DECISIONS IN WRITING TO PREVENT FUTURE CONFUSION.

We invite you to approach us with any questions that you may have after reading through this guide in order to assist you in complying with the provisions of this New Act.

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EFFECTIVE DATE & IMMEDIATE EFFECTS

Read more:
Paragraph 6(2) & 2(7) of the 5th Schedule to the Act
Section 35(6) of the Act

Effective date: **1 May 2011**

Immediate effects:

- Existing companies continue to exist and are bound by the New Act to the extent set out in this guide, but as a general rule:
    - Year-ends ending after 30 April 2011 need to apply the New Act in determining their audit and review requirements.
    - Year-ends ending before 30 April 2011 still fall under the Old Act.
- Shares in issue in existing companies retain their rights as set out in the previous Act to the extent that it complies with the New Act.
- Any corporate statutory documentation submitted to CIPRO on/before 30 April 2011 will be dealt with in terms of the Old Act.
- Any existing close corporations continue to exist and are governed by the 3rd schedule to the Act which encompasses the old Close Corporations Act.

What you need to do?
Read through this guide to get a basic understanding of the implications of the new Companies Act to your business.

How can we assist you?
Any questions can be referred to the Partners of MGI Bass Gordon GHF or one of the following individuals:
Consulting: Cecilia Stassen
(Cecilia.stassen@bassgordon.co.za or 021 405 8551)
Company Secretarial: Julie Clacher or Nazli Karriem
(Julie.clacher@bassgordon.co.za or 021 405 8603)
(Nazli.karriem@bassgordon.co.za or 021 405 8545)

CHANGES TO CIPRO

Read more:
www.cipc.gov.za

The Companies & Intellectual Property Registration Office (CIPRO) and the Office of Companies and Intellectual Property Enforcement (OCIPE) have amalgamated and will be known in future as the Companies & Intellectual Property Commission (CIPC) or 'the Commission'.

The changeover from CIPRO to CIPC has not been a smooth transition. Currently, we are still awaiting more clarity on various issues as well as the finalisation of the new corporate statutory forms. The forms have been made available to the Public.

"Old CIPRO" documents lodged on/before 30 April 2011 are still in the process of registration as a huge back-log is being processed.

A new website has also been launched and numerous technical difficulties are being encountered. CIPC are faced with the possibility of having to redesign the new website as it currently is unable to satisfy consumer needs.

RETENTION OF DOCUMENTATION

Read more:
Section 24 of the Act

All company documentation needs to be retained for **seven** years as opposed to the previous requirement of a five year retention period.

Any documentation destroyed before 1 May 2011 in terms of the previous five year retention period will not constitute a contravention of the New Act.

What you need to do?
Ensure that no company documentation within the seven year period is destroyed subsequent to 1 May 2011.

CLOSE CORPORATIONS

Read more:
2nd & 3rd Schedules to the Act

- Existing close corporations can continue to exist indefinitely or can be converted to companies if the members determine that it is in their interest to convert to a company.
- No new close corporations can be established.
- Deregistered close corporations will still be able to be restored even after the effective date of the New Act.
- Close corporations will need to calculate their Public Interest Score and determine whether the entity needs an audit or review, as well as, determine which accounting framework to apply. (Click here for a flowchart to determine the above.)

What you need to do?
Determine the close corporation's Public Interest Score and resulting compliance requirements for the business by reviewing the flowchart mentioned above.

How can we assist you?
Contact our Company Secretarial department to assist you with converting your close corporation, if needed.
Contact us to assist you with calculating the close corporation's Public Interest Score, determining which compliance requirements are applicable to the business, as well as, assisting you with the compliance of these requirements.

CATEGORIES OF COMPANIES

Read more:
Section 8 of the Act

The following types of companies are provided for in the Act:

- Profit companies
    - State owned
    - Private company (defined as:)
        - Not state owned
        - Memorandum of Incorporation contains the following provisions:
            - Prohibition of offering securities to the public; and
            - Restrictions for the transferability of its securities.
    - Personal liability company (defined as:)
        - A company meeting the requirements of a private company;
        - A company where the Memorandum of Incorporation states that it is a personal liability company.
    - A public company in every other case
- Non-Profit companies

What you need to do?
Ensure that the company's Memorandum of Incorporation contains the necessary provisions/ restrictions as mentioned above. This is especially important for private companies as they need to ensure they are not unwittingly classified as public companies which have much stricter compliance requirements.

How can we assist you?
Contact our Company Secretarial department to assist you in updating your Memorandum of Incorporation.

COMPANY NAMES

Read more:
Section 11 & 14(2)(b)(i) of the Act

Company names have to bear reference to the type of company it is incorporated as, by adding the following letters/abbreviations to the end of their names:

- Personal Liability Company – Inc
- Private Company – (Pty) Ltd
- Public Company – Ltd
- State Owned Company – SOC
- Non-Profit Company – NPC

Where the company's Memorandum of Incorporation includes restrictive provisions with reference to changes to the Memorandum of Incorporation, the additional letters '**RF**' (Ring-fenced) needs to be added at the end of the company name.

What you need to do?
Where necessary (e.g. non-profit companies), update the company's Memorandum of Incorporation within the next 2 years to provide for the above-mentioned provisions.
Immediately update all company stationery to include the new abbreviations since the Act deems the company to have changed its Memorandum of Incorporation with relation to its name with effect 1 May 2011.

How can we assist you?
Contact our Company Secretarial department to assist you with changes to your Memorandum of Incorporation.

RIGHT TO INCORPORATE & LEGAL STATUS OF COMPANIES

Read more:
Section 13 and 19 of the Act

Who may incorporate a company?

- 1 or more persons may incorporate a profit company
- 3 or more non-related persons may incorporate a non-profit company

Non-profit companies no longer require members, only directors.

What am I deemed to know about a company when dealing with it?

No person is regarded as having knowledge of the contents of any company document merely because the document is/was:

- Filed
- Accessible

This provision does not apply if the company name ends in RF or to the directors or past directors of a personal liability company.

What you need to do?
Non-profit companies can decide whether they would like to make use of the reduced requirements and only appoint directors.

How can we assist you?
Contact our Company Secretarial department to assist you with any changes in membership or directors of a company.

VALIDITY OF COMPANY ACTIONS

Read more:
Section 20 of the Act

No action of a company is void only by reason that:

- The actions are prohibited/limited by the Memorandum of Incorporation; or
- Because of a limitation on the directors which resulted in them not having the authority to act.

Where the Memorandum of Incorporation limits the authority of directors & the directors act outside of the scope of their authority:

- The agreement is not void.
- The shareholders can ratify (approve retrospectively) any action by way of a special resolution.
- Unless the action/agreement was/is in contravention of this Act, in which case it is void.

(Where the decision is ratified, the directors cannot be held personally liable for any loss suffered – accordingly, the rights of a minority shareholder opposing the ratification may be infringed.)

Each shareholder has a claim for damages against the person who -

- Fraudulently; or
- Through gross negligence

caused the company to do something inconsistent with the Act.

A person dealing with a company in good faith is entitled to presume that the company has complied with the Act, its Memorandum of Incorporation and Rules of the company, unless the person knew or reasonably ought to have known of the failure to comply.

What you need to do?
Take note of this provision and its potential consequences, as well as, the duties of directors and liability of directors as it may have a severe impact on the personal liability of a director where he fails to adhere to these provisions.

Minority shareholders of a company need to take note of this provision when negotiating a new Memorandum of Incorporation. Consider whether the Memorandum of Incorporation needs to provide that shareholders should not vote to pass such a special resolution as mentioned above. This amendment to the Memorandum of Incorporation will mitigate the unfairness to the minority shareholder.

How can we assist you?
Contact our Company Secretarial or Consulting departments to assist you with changes to your Memorandum of Incorporation or advise you on negotiating a new Memorandum of Incorporation.

RELATED PERSONS, INTER-RELATED PERSONS & CONTROL

Read more:
Section 2 of the Act – very important to read and understand

The definitions of what constitutes related persons and control has changed. Briefly, the following constitutes related parties:

- Individual related to individual if they are –
    - Married or live together in a relationship similar to marriage; or
    - Separated by no more than 2 degrees of consanguinity or affinity.
- Individual related to a juristic person if –
    - They directly or indirectly control the juristic person.
- Juristic person related to another juristic person if –
    - Either directly or indirectly controls the other; or
    - Either is a subsidiary of the other; or
    - A person[1] directly or indirectly controls each of them.

Control is further defined in subsection (2) of this section.

What you need to do?
Evaluate each juristic person or individual that could be related to the company to ensure that all related and inter-related persons are identified for the purposes of the provisions contained in this Act.

How can we assist you?
Contact us to assist you in identifying the implications surrounding related and inter-related relationships to your entity in terms of the New Act.

[1] A person includes a juristic person

PRESCRIBED OFFICER

Read more:
Section 1 of the Act

Who is a prescribed officer?

- This person is not a director of the company,
- He holds an office within the company,
- Exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company, and
- 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.

This may be one of the most significant changes in the New Act since prescribed officers (i.e. CEO's, CFO's, Financial managers etc) will now have the same duties and liabilities of directors and also need to meet the eligibility requirements for directors. (Click here to continue to the section on directors.)

What you need to do?
Identify the prescribed officers in your company.
Evaluate their eligibility in terms of the Act.
Communicate to these individuals that they now have increased responsibility, duties and liability in terms of the Act.

ALTERABLE & UNALTERABLE PROVISIONS

Read more:
Section 1 & 65(12) of the Act

What is an alterable provision?

It is any provision in the Act that can be altered by the Memorandum of Incorporation of the company.

What is an unalterable provision?

It is any provision in the Act that does not **expressly** contemplate that its effects may be -

- Negated, Restricted, Limited, Qualified, Extended; or
- Otherwise altered

in substance or effect by the Memorandum of Incorporation of the company.

Unalterable provisions can, however, be made subject to a special resolution in terms of section 65(12) of the Act. Such a provision for a special resolution will have to be contained in the Memorandum of Incorporation of the company.

What you need to do?
Educate yourself on which provisions are alterable and which not in order to enable you to decide what provisions and amendments needs to be contained in the company's new Memorandum of Incorporation.

How can we assist you?
Contact our Company Secretarial department, who in consultation with a partner, the Consulting department and yourself, can assist you in drafting a new Memorandum of Incorporation which best suits the needs of your company and its shareholders.

SOLVENCY & LIQUIDITY TEST

Read more:
Section 4 of the Act

How does the company satisfy the test?

When, considering all reasonably foreseeable financial circumstances of the company at that time:

- The aggregate assets of the company, fairly valued, is equal to or greater than the aggregate liabilities of the company, fairly valued (this will include any reasonably foreseeable contingent asset or liability); and
- The company appears to be able to pay its debts as they become due in the ordinary course of business for a period of 12 months from the date when:
    - The test was considered; or
    - Any distribution made by the company.

What financial information do you need to consider & what must the decision be based on?

- Accounting records, and/or
- Annual financial statements

(both of which are defined in the Act).

What you need to do?
As a director you need to understand this test and be able to apply it since it is required for the authorisation of various transactions of the company.

MEMORANDUM OF INCORPORATION, SHAREHOLDERS AGREEMENTS & RULES OF THE COMPANY

Read more:
Section 15 & 16 of the Act

Memorandum of Incorporation

- This document will replace the old Memorandum and Articles of Association of existing companies.
- Each provision in the Memorandum of Incorporation needs to be consistent with the Act (any provision is void to the extent that it contravenes or is inconsistent with the Act).
- It may include provisions not addressed in the Act.
- It may alter an alterable provision.
- It can make any other matter subject to special resolution.
- It may prohibit the alteration of any part of the Memorandum of Incorporation itself.
- The company has 2 years in which to change its Memorandum and Articles of Association to a Memorandum of Incorporation.
    - During the 2 year grace period the current Memorandum and Articles of Association of the company will prevail where it is in conflict with the Act.
    - Changes can be made to the Memorandum and Articles of Association during the 2 years without the 2 year grace period falling away (as is the case with shareholders' agreements discussed below).
    - At the end of the 2 year period, any provision in conflict with the Act will be void.

Shareholders' agreements

- Existing shareholders' agreements:
  - Will have the same force and effect for 2 years commencing 1 May 2011.
  - ***HOWEVER**, if **ANYTHING** is changed in the shareholders' agreement within the 2 year grace period, the rest of the grace period falls away and the agreement will have no force or effect (i.e. void) to the extent that is in conflict with the Act or the Memorandum of Incorporation of the company.*
- New shareholders' agreements:
  - At any stage after 1 May 2011, when 2 or more shareholders sign any agreement it becomes a shareholders' agreement
    - This includes any loan agreement, service agreement, etc
    - The agreement will have to be in line with the Act and the company's Memorandum of Incorporation.

Rules of a Company

- This is a new provision in the Act which allows the board of directors of a company to make rules regarding nearly any matter to do with the governance of the company.
- Rules created by the company must be consistent with the Act and will be void to the extent that it contravenes or is inconsistent with the Act.
- Rules are binding in the interim until the next shareholders meeting at which they will be ratified (retrospectively approved).
- Rules are binding on a permanent basis if ratified at a shareholders meeting by way of an ordinary resolution.

Binding power

The Memorandum of Incorporation and Rules of the company is binding between:

- The Company and its shareholders.
- Shareholders.
- The company and its directors.
- The company and its prescribed officers.
- The company and its audit committee.

Other provisions

- Where the Memorandum of Incorporation or shareholders' agreement does not deal with something contained in the Act, the Act prevails.
- Any lock-in provision for a shareholder contained in an existing shareholders' agreement will only apply for the next 2 years. After the grace period it will fall away as such provisions are in conflict with the Act. In accordance with the Act the shareholder can then demand to be bought out immediately.

DESPITE THE ABOVE:

The following provisions of the New Act **WILL** apply despite what is contained in the company's current Memorandum and Articles of Association or shareholders' agreement:

- Duties, conduct and liability of directors.
- Rights of a shareholder to receive any notice or have access to any information.

- Meetings of shareholders and directors and requirements for the adoption of resolutions.
- Provisions around fundamental transactions (e.g. the sale of the major part of a company's assets).

What you need to do?
Do not change any part of an existing shareholders agreement until such time as the new Memorandum of Incorporation for the company is finalised.

Combine the current shareholders agreement and the current Memorandum and Articles of Association into a new Memorandum of Incorporation of the company within the next 2 years.

Ensure that the new Memorandum of Incorporation clearly set out the provisions/limitations applicable to the board of directors for making rules to which the company is bound.

How can we assist you?
Contact our Company Secretarial department, who in consultation with a partner, the Consulting department and yourself, can assist you in drafting a new Memorandum of Incorporation which best suits the needs of your company and its shareholders.

RECKLESS TRADING PROHIBITION

Read more:
Section 22 of the Act, read together with Chapter 6 of the Act.

A company may not -

- Carry on its business recklessly;
- With gross negligence;
- With the intent to defraud any person; or
- For any fraudulent purpose.

As long as a company is commercially solvent it is not deemed to contravene this section. Commercially solvent means that the company can prove that it can pay its debts for the next 6 months.

The CIPC can request the company to prove that it is commercially solvent, failing which, the CIPC can order the company to stop trading.

What you need to do?
Evaluate this section together with the requirements regarding a financially distressed company to ensure that the company does not fall foul of the requirements contained in these sections.

ANNUAL FINANCIAL STATEMENTS, FINANCIAL STATEMENTS AND SUMMARY OF FINANCIAL INFORMATION

Read more:
Section 29, 30 and 66(9) of the Act
Refer to Regulation 25 and Section 27 & 28 of the Act which sets out the detail of the accounting records to be kept by the company

Annual financial statements

- Need to be issued within 6 months of the company's year-end; and
- Must disclose the remuneration, per individual for each
    - Director; and
    - Prescribed officer.

NOTE: Remuneration paid to directors now requires a special resolution approved by the shareholders within the previous 2 years.

Financial statements or summary of financial information

- Need to indicate on the 1st page of the document
    - Whether it was audited, reviewed or none, and
    - The name and designation of the individual who prepared, or supervised the preparation of, the information or financial statements.
- The documents may not be false or misleading in any material aspect
    - Any person party to such a false/misleading aspect is guilty of an offence in terms of the Act.

What you need to do?

The shareholders need to pass a special resolution which authorises the remuneration payable to each director before their next salary is paid. The resolution can address remuneration payable for the following 2 years or a shorter period if preferred.

How can we assist you?

Contact our Company Secretarial department to assist you in drafting and passing a special resolution in accordance with the requirements set out in the Act.

SHARES

Read more:
Section 35 & 38 of the Act
Regulation 31
Paragraph 6 of the 5th Schedule to the Act

Shares

- Shares no longer have a nominal/par value.
- A pre-existing company may not authorise any new par value shares or shares having a nominal value.
- Existing par value shares in issue will continue to exist.
- The board of directors may issue shares by passing a board resolution (this provision can be made subject to a special resolution via a clause in the Memorandum of Incorporation).
- The Memorandum of Incorporation must set out the following for each class of shares -
    - Their designation;
    - The rights and limitations attached to the shares; and
    - The redemption or conversion options available.

Preference shares

- The Memorandum of Incorporation must list all provisions and rights attached to preference shares in issue.

Share premium

- The New Act makes no reference to share premium.
- The Old Act limited the use of share premium, but now the company may apply in any way it sees fit.

Issuing of shares

Where a share issue does not comply with all the requirements set out in the Act and does not have the proper authorisation (and no retrospective authorisation was adopted and put to vote):

- The share issue is a nullity (to the extent that it exceeds authorisation);
- The company must return the fair value of the consideration paid for the shares to the shareholder;
- The shareholder needs to return any dividends;
- The share certificates are nullified; and
- The directors are liable for any loss suffered by any party to the transaction.

What you need to do?
Perform a due diligence exercise when the company issues shares or shares are issued to you or the company to ensure that all requirements for the issue have been complied with.

How can we assist you?
Contact our Company Secretarial department when issuing or authorising any new shares to ensure that you comply with the various requirements contained in the New Act.

FINANCIAL ASSISTANCE FOR SUBSCRIPTION OF SECURITIES

Read more:
Section 44 of the Act

- The Memorandum of Incorporation must provide for the company to provide financial assistance for the subscription of its securities.
- This section applies to financial assistance by way of loan, guarantee or provision of security to purchase any securities of the company or related or inter-related company.
- The board may not authorise financial assistance unless it is -
  - Pursuant to an employee share scheme;
  - Pursuant to a special resolution of shareholders adopted within the past two years; and
  - The board is satisfied that the company has satisfied the Solvency & Liquidity Test and that the terms of the financial assistance are fair & reasonable.

If the above provisions are not complied with the transaction is void and the directors can be held liable for any loss suffered.

What you need to do?
Update your Memorandum of Incorporation to include the necessary provisions required by this section.
Pass a special resolution to authorise the specified recipient or category of recipients.

How can we assist you?
Contact our Company Secretarial department to assist you with changes to the company's Memorandum of Incorporation or to draft a special resolution.

COMPANY DISTRIBUTIONS & SHARE REPURCHASES

Read more:
Section 46 & 48 of the Act
Paragraph 7(6) of the 5th Schedule to the Act

What is a distribution?

- All payments pursuant to holding shares;
- Dividends;
- Incurrence of debt/an obligation by a company OR waiver by a company of any debt for the benefit of -
    - A shareholder; or
    - Another company within the same group; and
- Any payment between fellow subsidiaries in the scope of section 46.

Requirements for a distribution

- Authorisation by the board of directors, and
- A board resolution passed to confirm that they have applied the Solvency & Liquidity test and that the company will satisfy the test immediately after the distribution.

NOTES

- A director will incur a personal liability if the above requirements are not met before distribution.
- Any distribution approved before 1 May 2011, but not yet implemented, will need to comply with the provisions of the New Act.

Requirements for a share repurchase

- The requirements of a distribution need to be met.
- The repurchase can be done upon board decision (but a special resolution is needed if acquired from a director, prescribed officer or related party).

Where more than 5% of the shares in issue are repurchased, extra requirements are imposed and provision is made for the reversal of the share repurchase if all requirements are not met.

What you need to do?
Review any distributions approved before 1 May 2011 to ensure that none of them need to comply with the New Act.

How can we assist you?
The Consulting or Company Secretarial department can assist with a share repurchase to ensure that the necessary documentation is completed and that the company has adhered to the requirements for the transaction, especially in instances where more than 5% of the shares in issue are repurchased.

BOARD OF DIRECTORS: POWERS

Read more:
Section 74 of the Act

With effect from 1 May 2011 the board of directors has the power to make, amend and repeal any company rules relating to matters concerning the governance of the company and not addressed in the Memorandum of Incorporation.

- This power can only be limited by amending the Memorandum of Incorporation of the company.
- Shareholders cannot stop the effects of the rule once it is made, even if it is not ratified at the next shareholders' meeting, the rule exists and has effect in the interim.

The board has the authority to exercise all of the powers and perform any of the functions of the company.

- Again the extent of the powers can only be limited by amending the Memorandum of Incorporation

What you need to do?
Where you need the power of the board of directors to be limited, amend the company's Memorandum of Incorporation as soon as possible.

How can we assist you?
Our Company Secretarial department in consultation with the partner, the Consulting department and yourself, can assist you with the redrafting of your Memorandum of Incorporation.

BOARD OF DIRECTORS & PRESCRIBED OFFICERS: INELIGIBILITY & DISQUALIFICATION

Read more:
Section 69 of the Act

NOTE: The term DIRECTOR in this section and the following 4 sections refers to and are interchangeable with:

- **The directors of the company;**
- **The prescribed officers of the company;**
- **A member of any committee or board of the company;**
- **A member of the audit committee.**

When will a person be ineligible or disqualified to hold a position of director?

- If the person is a juristic person;
- If they are an unemancipated minor;
- If they do not satisfy the required qualifications as set out in the company's Memorandum of Incorporation;
- If the court has prohibited the person to serve in such a position;
- If the person is an unrehabilitated insolvent;
- If the person has previously been removed from an office of trust on the grounds of misconduct involving dishonesty;
- If the person has previously been convicted and imprisoned or fined for theft, fraud, forgery, purgery or a company Act contravention.

Once a person becomes ineligible to hold the position based on the criteria above, he immediately ceases to hold that position.

What you need to do?
Evaluate all individuals holding positions as set out above against the criteria above to ensure that they are allowed to hold their position in terms of the New Act.

Any vacancy in the position of director on or after 1 May 2011 needs to be filled in accordance with the provisions and requirements of the New Act.

NOTE: The documents need to be submitted to CIPC within 10 working days of the effective date of director change. These cannot be backdated.

How can we assist you?
We are able to assist you in appointing and resigning directors of the company.

BOARD OF DIRECTORS & PRESCRIBED OFFICERS: PERSONAL FINANCIAL INTEREST

Read more:
Section 75 of the Act

Any director or related person to the director that has a personal financial interest in respect of a matter to be considered at a meeting of the board -

- Must disclose the interest before the matter is considered;
- Must disclose any material information;
- May disclose any observations or pertinent insight if requested by other directors;
- Must leave the meeting before the matter is considered;
- Must not take part in the consideration of the matter; and
- Must not execute any document on behalf of the company in relation to the matter.

It is no longer sufficient to make a general disclosure of financial interest.

Where a matter was approved by the board without the proper disclosure by the director -

- The matter needs to be ratified via an ordinary resolution of the shareholders; or
- Declared valid by a court.

What you need to do?
Ensure that the directors and prescribed officers of the company are aware of their duty to disclose financial interest.

BOARD OF DIRECTORS & PRESCRIBED OFFICERS: STANDARDS OF CONDUCT

Read more:
Section 76 of the Act

A director must:

- NOT use his/her position or any information obtained while acting in his/her position to gain an advantage or knowingly cause harm to the company;
- Communicate to the board at the earliest practicable opportunity any information that comes to his/her attention unless it is immaterial or generally available to the public;
- Have certain minimum skills; and
- Exercise his/her powers and perform his/her functions -
    - In good faith and for a proper purpose;
    - In the best interest of the company; and
    - With a degree of care, skill and diligence that may reasonably be expected of a person.

Directors are deemed to have complied with the above if:

- They have taken reasonably diligent steps to become informed about a matter at hand;
- Have no material personal financial interest in the matter or have properly disclosed their interest; and
- Made a decision while having a rational basis for believing that the decision was in the best interest of the company.

Directors are allowed to rely on the following information/documentation in performing their duties:

- Performance by employees, legal counsel, accountants and other professional persons retained; and
- Information, opinions, recommendations and reports or statements, including financial data obtained from the above persons.

What you need to do?
Ensure that the directors of your company are aware of their duties and requirements for proper conduct.

How can we assist you?
The Consulting department can advise you regarding the duties and liability of directors in more detail.

BOARD OF DIRECTORS & PRESCRIBED OFFICERS: LIABILITY

Read more:
Section 77 of the Act
Section 218 of the Act – very important

A director is liable for:

- Any breach of fiduciary duty;
- Losses, damages or costs resulting from -
    - Acting without the necessary authority; and
    - Agreeing to the company carrying on business in a situation in which it is insolvent, trading recklessly, grossly negligent or acting fraudulently;
- Signing or consenting to the publication of financial statements which contain an untrue statement;
- Knowingly consenting to the issue of shares which have not been authorised;
- Granting unauthorised options;
- Agreeing to the granting of financial assistance to directors or other parties when such assistance is not in accordance with the requirements; and
- Knowingly failing to vote against a share purchase that did not accord with the legislative requirements.

What you need to do?
Ensure that the directors of your company or you, yourself as a director, are aware of the possible liability that can be incurred in the day-to-day running of the company.

How can we assist you?
The Consulting department can advise you regarding the duties and liability of directors in more detail.

BOARD OF DIRECTORS & PRESCRIBED OFFICERS: LOANS & OTHER FINANCIAL ASSISTANCE

Read more:
Section 45 of the Act

A board may authorise financial assistance to a director of the company, related company or inter-related company-

- Unless the Memorandum of Incorporation prohibits the board from doing so;
- Only if a special resolution was adopted within the previous 2 years; and
- The board is satisfied that the company satisfies the Solvency & Liquidity test

If the requirements above are not properly followed, the assistance is void and the directors can be held personally liable for any loss suffered.

Any loan approved before 1 May 2011, but not yet implemented/paid must now comply with the requirements contained in the New Act.

Loans in existence on 1 May 2011 can continue to exist, but any addition to such loans or new loans will need to comply with the requirements of this section.

What you need to do?
Ensure that a special resolution authorising financial assistance is passed before any adjustments to existing loans are made or any new loans issued.

How can we assist you?
A Partner, the Company Secretarial or Consulting department can advise you on the requirements for the special resolution.

PUBLIC INTEREST SCORE

Read more:
Regulation 26

The score is calculated by allocating points to the company (which includes a close corporation) based on the following:

- A number of points equal to the average number of employees of the company during the financial year (this includes seasonal workers), and
- 1 point for every R1 million (or portion thereof) of third party liabilities of the company at the financial year end, and
- 1 point for every R1 million (or portion thereof) of 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 direct or indirect beneficial interest in any of the company's issued securities.

What you need to do?
Calculate the company's Public Interest Score to ensure that it complies with the necessary audit, review and financial reporting requirements.

How can we assist you?
Contact our Consulting department to assist you in calculating the company's Public Interest Score.

REQUIREMENT TO AUDIT

Read more:
Regulation 28
Section 90 to 93 of the Act – very important to go through these sections if your company is liable for an audit.

The following companies require an audit:

- Public companies,
- State owned companies,
- Any company that holds assets in excess of R5 million at any point during the year in a fiduciary capacity for persons who are not related to the company, and
- Any other company whose Public Interest Score is:
    - More than 350, or
    - At least 100 if its annual financial statements are internally compiled.

In each of the above cases a *statutory audit* is conducted and the requirements of Section 90 to 93 of the Act need to be complied with.

Companies are allowed to *elect* to have an audit by:

- Including the requirement in the company's Memorandum of Incorporation (again compliance with Section 90 to 93 is required), or
- Passing a shareholders' resolution (compliance with section 90 to 93 is not required), or
- Board decision (compliance with section 90 to 93 is not required).

In the last two options it may be worthwhile for the company to create a rule that deals with the requirements surrounding the recommendation, approval, dismissal and rights and obligations of the auditor since section 90 to 93 of the Act in not applicable.

A person is disqualified from auditing the financial statements if he/she was involved in the compilation of the financial statements.

Exemption from audit

Companies in which every person who holds the securities of the company is also a director of the company (i.e. owner managed companies) are exempted from requiring an audit in certain circumstances.

What you need to do?
Determine whether the company requires a statutory audit or whether the company would prefer to be audited voluntarily.

How can we assist you?
Performing the audit.
Ensuring that the company adheres to the requirements of section 90 to 93 where applicable.

REQUIREMENT TO REVIEW

Read more:
Regulation 29

Who can perform a review?

- A registered auditor if the Public Interest Score for the year was at least 100.
- A registered auditor or accounting officer (as defined in the Close Corporations Act) if the Public Interest Score for the year was less than 100.
- A review may not be carried out by an accounting professional who was involved in the preparation of the annual financial statements.

Again, it may be worthwhile for the company to create a rule that deals with the requirements surrounding the recommendation, approval, dismissal and rights and obligations of the person responsible for the review since the Act does not cater for these provisions.

What you need to do?
Evaluate whether the company's financials will be subject to review.
Evaluate the necessity of creating a company rule to regulate the reviews.

How can we assist you?
Determining the governance requirements of the company.
Drafting a company rule and assist with the procedures surrounding the authorisation thereof.

FLOWCHART: WHO IS AUDITED AND WHO REVIEWED

<table>
<tr><th colspan="5">Company type and Public Interest Score</th><th>Financial reporting framework</th><th>Attestation</th><th>By whom</th></tr>
<tr><td rowspan="8">Profit companies</td><td rowspan="4">Private company, but some shareholders are not directors</td><td colspan="3">Score greater than 350</td><td>IFRS or
IFRS for SMEs</td><td>Audit</td><td>Registered auditor</td></tr>
<tr><td rowspan="2">Between 100 & 350</td><td colspan="2">AFS independently compiled</td><td rowspan="3">IFRS or
IFRS for SMEs or
SA GAAP</td><td>Independent review</td><td>Registered auditor or member or other IRBA accredited body</td></tr>
<tr><td colspan="2">AFS internally compiled</td><td>Audit</td><td>Registered auditor</td></tr>
<tr><td rowspan="2">Less than 100</td><td colspan="2">AFS independently compiled</td><td rowspan="2">Independent review</td><td rowspan="2">Registered auditor or member or other IRBA accredited body</td></tr>
<tr><td colspan="2">AFS internally compiled</td><td>No prescribed framework</td></tr>
<tr><td rowspan="4">Owner managed</td><td colspan="3">Score greater than 350</td><td>IFRS or
IFRS for SMEs</td><td rowspan="2">Audit</td><td rowspan="2">Registered auditor</td></tr>
<tr><td rowspan="3">Score less than 350</td><td rowspan="2">AFS internally compiled</td><td>Score 100 – 350</td><td>IFRS or
IFRS for SMEs or
SA GAAP</td></tr>
<tr><td>Score less than 100</td><td>No prescribed framework</td><td colspan="2" rowspan="2">No requirements</td></tr>
<tr><td colspan="2">AFS independently compiled</td><td>IFRS or
IFRS for SMEs or
SA GAAP</td></tr>
<tr><td rowspan="5">Non-profit companies</td><td colspan="4">Score greater than 350</td><td>IFRS or
IFRS for SMEs</td><td>Audit</td><td>Registered auditor</td></tr>
<tr><td rowspan="2">Score between 100 & 350</td><td colspan="3">AFS independently compiled</td><td rowspan="3">IFRS or
IFRS for SMEs or
SA GAAP</td><td>Independent review</td><td>Registered auditor or member or other IRBA accredited body</td></tr>
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<tr><td colspan="3">AFS internally compiled</td><td>No prescribed framework</td></tr>
</table>

ANNUAL RETURNS

Read more:
Regulation 30

Each company needs to submit an annual return 30 business days from the anniversary of the registration date of the company. This now includes close corporations, non-profit companies, external companies and domesticated companies.

- Companies required to have their financial statements audited, must file a copy of the latest audited financial statements.
- Companies voluntarily choosing to have their financial statements audited can elect to file a copy of those audited financial statements, or an independently reviewed financial statement, or to file a document called a Financial Accountability Supplement.
- All other companies must file a Financial Accountability Supplement.

Annual Return Fees

Annual Turnover	Filing within 30 business days after anniversary	Filing more than 30 business days after anniversary
Less than R1 million	R100	R150
R1 million but less than R10 million	R450	R600
R10 million but less than R25 million	R2000	R2500
R25 million or more	R3000	R4000

How can we assist you?
The Company Secretarial department can assist you with the lodging of annual returns.

SOCIAL & ETHICS COMMITTEE

Read more:
Regulation 43

The following companies require a Social and Ethics committee:

- A public company, and
- Any other company that has in any two of the previous five years scored above 500 points on the Public Interest Score calculation.

What you need to do?
Calculate the company's Public Interest Score to evaluate the need of a Social & Ethics committee.

How can we assist you?
We are able to assist you with the following:
- ***Evaluating the need for a Social & Ethics committee;***
- ***Advising you on the compilation of the committee; and***
- ***Advising you on the requirements for and mandate of the committee.***

DISPOSALS OF ALL OR GREATER PART OF ASSETS

Read more:
Section 112 of the Act

Requirements for the decision:

- A special resolution needs to be passed approving the disposal;
- A summary of the terms for the disposal needs to be provided to the shareholders;
- All requirements as set out in section 115 need to be met; and
- All shareholders need to be advised of their rights in terms of section 164 which offers recourse for shareholders not in agreement with the decision to dispose.

What is seen as the all or greater part of the assets?

- In the case of assets – more than 50% of the gross assets fairly valued, irrespective of liabilities.

What you need to do?
Ensure that decisions to dispose of assets comply with the necessary requirements.

How can we assist you?
We are able to advise you of the requirements in terms of this section to ensure compliance.

FINANCIAL DISTRESS

Read more:
Section 129 of the Act
Chapter 6 of the Act – business rescue & compromise with creditors

A company is financially distressed if it:

- Appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due within the next 6 months;
- Appears to be reasonably likely that the company will become insolvent in the next 6 months; or
- Is technically insolvent[2].

Note that a subordination agreement does not make the company technically solvent; it only mitigates the risk for the directors to be seen as trading recklessly.

The board has a duty to notify each of the below-mentioned affected persons that the company is financially distressed and whether it will begin with the process of business rescue.

- Creditors;
- Shareholders;
- Trade Unions; and
- Employees.

[2] Technically insolvent means the assets of the company, fairly valued, exceed the liabilities of the company, fairly valued, i.e. the company has a retained loss.

What you need to do?
Where the company has a retained loss, evaluate whether a notice as contemplated in this section is necessary and whether the company could benefit from, or is required to, enter the business rescue program.

How can we assist you?
We are able to assist you with evaluating the financial needs of the company and the necessity of business rescue proceedings.

ANTI-AVOIDANCE

Read more:
Section 6 of the Act

A court may declare any

- Agreement;
- Transaction;
- Arrangement;
- Resolution;
- Provision in the Memorandum of Incorporation; or
- Company Rule

To be primarily or substantially intended to defeat or reduces the effect of a prohibition or requirement of any unalterable provision; or

To be void to the extent that it defeats or reduce the effect of a prohibition or requirement of any unalterable provision.

What you need to do?
Ensure that any of the above-mentioned documents prepared and undersigned by a representative of the company adheres to the provisions of the Companies Act.
Ensure that the company's Memorandum of Incorporation is updated to adhere to the New Act within the 2 year window period.

How can we assist you?
Contact our Company Secretarial or Consulting departments if you have any reservations relating to the validity of a proposed document.

ADMINISTRATIVE FINES

Read more:
Section 175 of the Act

Levied for the failure to comply with a compliance notice issued by CIPC.

If the company breaches any provision of the Act:

- The CIPC can order it to stop trading.
- The directors will be held personally liable for any loss suffered.
- If notice is not adhered to the CIPC can impose a fine.

Value of the fine is -

The greater of:

- 10% of the turnover; or
- R1 million

IMPORTANT DEFINITIONS

Read more:
Section 1 of the Act

Know, ***knowingly*** or ***knows*** when used with respect to a person or matter means a person who:

- Had actual knowledge of that matter, or
- Was in a position in which the person reasonably ought to have –
    - Had actual knowledge;
    - Investigated the matter to an extent that would have provided the person with actual knowledge; or
    - Taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.

Ordinary resolution

- Resolution adopted at a shareholders' meeting with the support of more than 50% of the voting rights exercised.

Special resolution

- Resolution adopted at a shareholders' meeting with the support of more than 75% of the voting rights exercised.