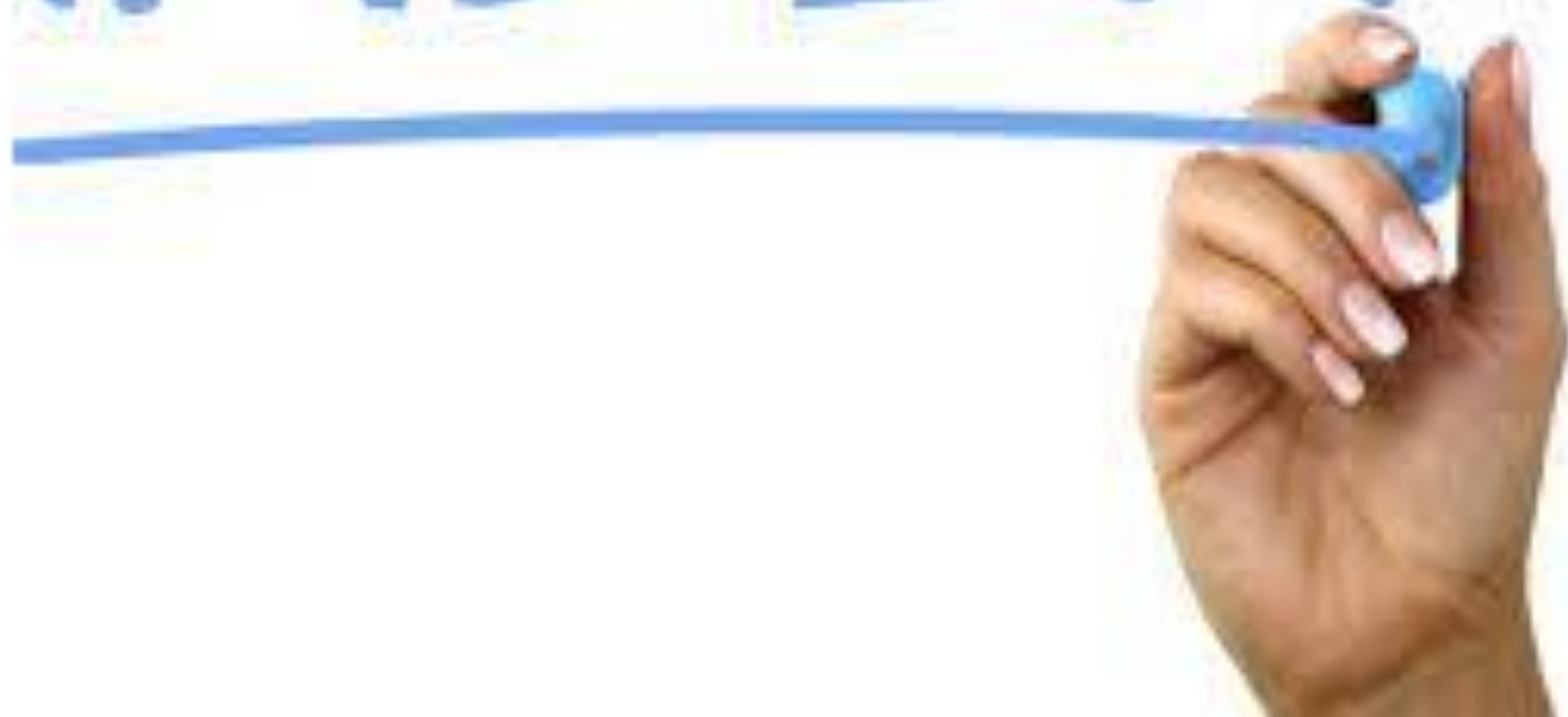


OVERVIEW OF THE COMPANIES ACT

Presenter: Edith Wilkins

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CIPC

CIPC

- CIPC is the Companies and Intellectual Property Commission and is part of the Department of Trade and Industry.
- The Commission was established by the Companies Act, 2008 (Act No. 71 of 2008) as a juristic person outside the public service to function as an organ of state within the public administration.
- CIPC was created from the merger of CIPRO (Companies and Intellectual Property Registration Office) OCIPE which was the Office of Company and Intellectual Property Enforcement that dealt with registration of Trademarks, Patents, logos.
- CIPC followed in the footsteps of CIPRO, by delivering the same poor service if not worse than before May 2011.
- CIPC was described as "groaning under its own burden of registration under the Companies Act" and was characterized by administrative failures.
- Their website was dysfunctional and thought to have no security measures to protect confidential information.

CIPC (cont.)

- Since the new Companies Act came into effect in 2011, it has been quite a struggle for all of us. There has been endless problems with the system and after 10 years, it seems that the system is not yet complete.
- Communication with CIPC was always a huge issue which caused many headaches, but enquiry section on the website seems to be functioning efficiently.
- CIPC staff also seem to be better prepared and educated with regards to perusal and registration of documents, but there are still a few hick-ups which require attention.
- In my opinion Adv Rory Volders' appointed as Commissioner was the best thing that could happen, as also proven by the 5-year clean audit report achieved and is something to be proud of.

CIPC (cont.)

- Adv Voller and his team is the proud holders of the innovation award received from the Centre for Science and Innovation, which includes all levels of government.
- CIPC also won an international award from the Corporate Registers Forum, for the AFS iXBRL roll-out .
- CIPC is also continuously upgrading their electronic system in an attempt to make our work easier, but it is not always without difficulty.
- Everyone dealing with Company Secretarial Duties, especially when dealing with shares, can confirm that you must have lots of patience, dedication and determination when dealing with CIPC

CIPC (cont.)

➤ Recent changes:

- The enterprise search function was moved to Bizportal
- Companies and name reservations can be done on the Bizportal system, but so far, we were unable to retrieve full sets of company documents after registration
- If name reservations was approved through Bizportal, you must register your company through Bizportal as well.
- All files are being moved to a new service provider again and it's almost impossible to get copies of documents.

1. Introduction to the Companies Act, no 71 of 2008

1. The Companies Act no 71 of 2008

- New provisions, new requirements
- Modernised and simplified
- Drafted in plain language
- Fewer and simplified statutory forms
- Different government governance and financial reporting requirements for smaller and bigger companies
- Stricter provisions for directors' common law duties
- High premium on directors' skills and knowledge as well as personal liability
- Better protection for minority shareholders

2. Purpose of the Companies Act, no 71 of 2008

2. Purpose of the Companies Act (*Section 7*)

- Compliance with the South African Bill of Rights
- Encourage entrepreneurship
- Achieving economic and social benefits
- Provisions for Non-profit companies to enhance their capacity to perform their function
- Provide for efficient rescue and recovery of financial distressed companies (*Business rescue*)
- Creating flexibility and simplicity in the formation and maintenance of companies
- Encourage efficient and responsible management of companies
- Provide a predictable and effective environment for the efficient regulation of companies (*CIPC*)

3. Regulation of the Companies Act, no 71 of 2008

3. Regulation of the Act

- CIPC is responsible for:

- Registration of Companies, Co-operatives, trademarks, patents, designs and copyright (Intellectual Property Rights) and maintenance thereof

- Disclosure of Information on its records

- The promotion of education- and understanding of Company and Intellectual Property Law

- To ensure compliance with applicable laws

- Enforcement of relevant laws

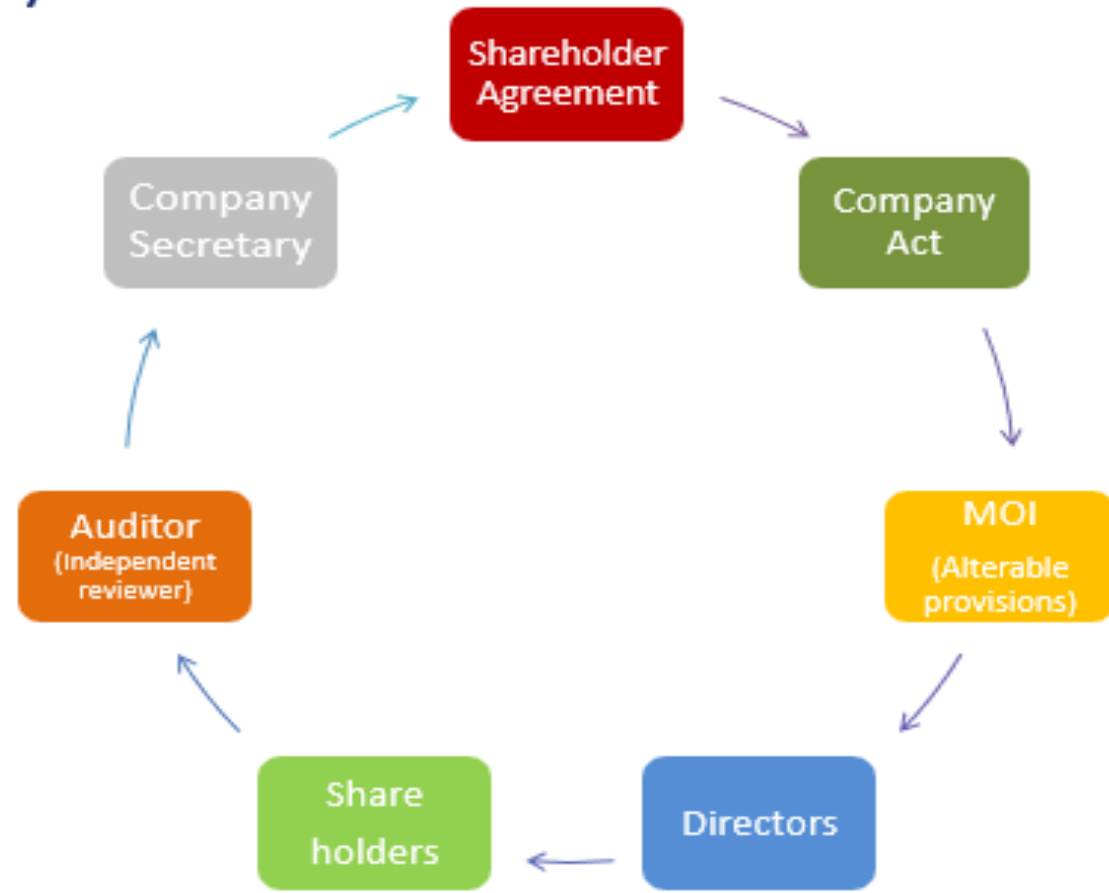
- To monitor compliance with, and violation of financial reporting standards, and to make recommendations thereon to the Financial Reporting Standards Council (FRSC)

- Approval/granting of Business rescue practitioner licenses

- Research on matters of national policy relating to company and intellectual property law.

4. Company structure

4. Company structure



5. Location of company records

5. Location of company records

(Section 25, Regulation 22)

- Must be in RSA
 - Notice to be filed with CIPC only if company records are located at any other location than the registered address of the company
 - Notice to be filed with CIPC if company records are moved to a new location
- ❖ CoR22 filed with CIPC

6. Stakeholder roles, responsibilities & liabilities

6. Stakeholder roles, responsibilities & liabilities

6.1 . Security Holders

▪ Shareholders and restriction of shares

- Private companies are no longer restricted to 50 shareholders.
- Private companies are restricted in share transfers.
- MOI must set out at least one class of shares, the number of shares authorised.
- If more than one class of shares issued, distinguishing destination of each class must be set out and the preferences, rights and limitation of that class stated in the MOI.
- MOI may authorise a stated number of unclassified shares, without specifying preferences or limitations which will be subject to classification by the Board.

■ Requirement for Shareholders' Meetings

■ Notice periods

Private companies – 10 business days

Non-profit, State Owned and Public – 15 business days

Notice may only be waived if 100% of shareholders are present

❖ *MOI may provide for longer or shorter periods*

■ Quorum

At least 25% of the voting rights, present in person or by proxy.

If a company has more than 2 shareholders, but less than 12, at least three shareholders.

After a quorum has been established for a meeting to start, the meeting may continue if one person with voting rights remain present

■ Requirements for Shareholder Meetings (Cont.)

- Special resolution approval: 75% of voting rights present at the meeting, in person or by proxy.
- Ordinary resolutions approval: More than 50% of voting rights present, in person or by proxy.
- For record purposes, all special resolutions should be lodged with CIPC.
- Special resolutions not to be lodged with CIPC, may be lodged with a covering letter, requesting them to file the resolution, but CIPC will not provide confirmation.
- All special and ordinary shareholders' resolutions may be adopted by way of a round robin resolution.
- Business to be dealt with at an AGM, may not be conducted by way of a round robin resolution.

■ **Special and Ordinary Shareholder Resolutions**

A special resolution is required to:

- **Amend the Company's Memorandum of Incorporation**
 - Classification of unclassified shares, re-classification, decrease or increase of shares and determining the preferences or other terms of shares that have been authorized, but not issued, may be approved by the Board

❖ *File with CIPC*
- **Ratify a consolidated revision of the Company's MOI**
 - At any time after amendments to the MOI have been filed with CIPC, one or more translations in any of the official languages of the RSA may be filed.

❖ *File with CIPC*

■ Special and Ordinary Shareholder Resolutions (Cont.)

- The Commission may require the company to file a consolidated revision of its MOI

❖ *File with CIPC*

- Ratify actions by the company or directors in excess of their authority
 - May not be ratified if in contravention of the Act.
 - Issuing of shares in excess of the authorised shares, may be retroactively authorised by a special shareholders' meeting, within 60 days after the date on which the shares were issued.

❖ *File with CIPC*

■ **Special and Ordinary Shareholder Resolutions (Cont.)**

• **Approve an issue of shares as contemplated in Sec 41(1)**

- Issue of shares or securities convertible into shares to a director, future director, prescribed officer or a person related or inter-related to the company or to a director or a nominee of any of the aforementioned, must be approved by special resolution.
- Ordinary resolution in the normal practice of issuing shares to all shareholders.

❖ *Not to be filed with CIPC*

- **Special and Ordinary Shareholder Resolutions (Cont.)**

Issue of shares, securities convertible into stock or rights exercisable, of any class of shares to be issued, when equal or exceeding 30 percent of the voting power immediately before transaction or series of transactions, before the issue, requires shareholders' approval.

❖ *(Not to be filed with CIPC)*

- **Authorise the Board to grant financial assistance in terms of Sec 44(3) or 45(3)**

Pursuant to a special resolution of shareholders adopted within the previous two years for a specific recipient, or generally, except for financial assistance pursuant to an employee share scheme.

❖ *Not to be filed with CIPC*

■ **Special and Ordinary Shareholder Resolutions (Cont.)**

- **Approve a decision of the board for re-acquisition of shares (Sec 48)**

- Can be a Board Resolution unless:

- ☐ Shares are to be acquired from a director, prescribed officer, person related to a director or prescribed officer of the company; and

- ☐ The acquisition, considered alone, or together with other transactions in an integrated series of transactions, involves the acquisition by the company of more than 5% of the issued shares of any particular class of company's shares.

❖ *Not to be filed with CIPC*

- **Special and Ordinary Shareholder Resolutions (Cont.)**
 - **Compensation to directors of a profit company**
 - To be paid only in accordance with a special resolution approved by the shareholders, within the previous two years.
 - Directors of non-profit companies are not allowed to receive director's remuneration.
 - ❖ *Not to be filed with CIPC*
 - **Approve an application to transfer registration of the company to foreign jurisdiction**
 - ❖ *File with CIPC*

- **Special and Ordinary Shareholder Resolutions (Cont.)**
 - **Approve any proposed fundamental transaction**
 - Can be opposed by at least 15% of the voting rights present at the meeting and voted against the resolution.
 - ❖ *File with CIPC*
 - **Approve the voluntary winding up of a company**
 - ❖ *File with CIPC*
 - **Approve an application for winding up by creditors**
 - ❖ *File with CIPC*
 - **To revoke a special resolution**
 - ❖ *File with CIPC)*

- **Special and Ordinary Shareholder Resolutions (Cont.)**
 - **Ordinary shareholders' resolutions**
 - Election of director/s
 - Removal of director (can also be a shareholders' resolution)
 - Appointment of auditors
 - Appointment of Audit Committee (if required)
 - Approval of company rules
 - MOI may require shareholder approval for any matter not required by the Act

Note

Shareholders' meetings must be called by the board if demanded by at least 10% of the voting rights

■ **Annual General Meetings and General Meetings**

- It is no longer a requirement for private and non-profit companies to hold an Annual General Meeting (AGM).
- Companies registered prior to 1 May 2011 still need to have an AGM, unless the company accepted a new MOI.
- AGM must be held within 6 months after the end of the financial year.
- General meetings may be held at any time and as often as the company deems fit.

■ Share Issues and Transfers

- **Issue of Shares**

- Directors have the power to issue shares, to the extent that the MOI allows it.
- Share issues are no longer registered with CIPC. Proper record keeping is therefore important.
- A share certificate must be certified by the Reserve Bank, if the holder is a non-resident of the RSA and in the case of a public company.
- Share certificates to be signed by two directors.
- A share certificate must only be issued once all the shares have been paid in full.
- Par-value shares authorized, but not issued, may still be issued.

■ Share Issue and Transfers (Cont.)

- **Transfer of Shares**

- In a private company, if a shareholder wants to sell his shares, the remaining shareholders have the first right to take up the shares.
- STT has to be paid to SARS, within 2 months of the transfer date.
- An agreement for the transfer of shares is sufficient in the new Act.
- The agreement must state the name of the transferee, amount of shares and the compensation paid for each share.

6.2 Directors

■ Director Meetings and Resolutions (Cont.)

- **Composition of the Board**

- **Executive director**
Fully employed by the company.
- **Non-Executive director**
Not involved in the day to day running of the business.
- All directors, notwithstanding their title, carries the same personal liability.

■ **Board Meetings and Resolutions**

- The Board may determine the form and time for giving notice.
- More than 50% of directors must be present before a vote may be called at a meeting.
- More than 50% of directors present must approve.

■ Director Meetings and Resolutions

- **Requirements for minimum directors**
 - Private company - minimum 1 director
 - Non-profit, Public and State-Owned – 3 directors
- **Composition of a board**
 - ***Ex Officio* director**

MOI may provide that a person appointed in consequence of him holding some other office has the same powers as any other director, unless altered in the MOI.
 - **Alternate director**

Appointed as substitution for a specific director and may only vote on matters at a board meeting in absence of the director.

■ **Director Meetings and Resolutions (Cont.)**

- The Act does not stipulate how many board meetings should be held annually.
- Board meetings may be conducted by electronic communication, or by way of a round robin resolution.
- A resolution adopted by the board must be minuted, dated and sequentially numbered; and is effective of the date of the resolution, unless stated otherwise.
- If a director has a personal financial interest in respect of a matter to be considered at the meeting, he must disclose his interest and the nature thereof, before the matter is considered.

■ **Director Meetings and Resolutions (Cont.)**

- After the disclosure, he must leave the meeting and may not take part in the consideration of the matter.
- A director attending a meeting, who abstained from voting on a certain matter, will be equally liable with the other directors who voted in favour of that matter.

■ Director Meetings and Resolutions (Cont.)

- **Appointment of directors**

- Board may elect a director to fill any vacancy.
- Shareholders must elect at least 50% of the Board.
- An elected director must confirm his acceptance to serve as a director in writing.
- He must provide the company with a list of all other companies on which he serves as a director.
- Section 69(8) gives a clear indication of persons disqualified to become directors.
- In addition, a company may set minimum qualifications to be met by directors.
- *Note:* If a company only has one director, both directors (new and resigning) have to sign the CoR39.
- Mandate to person lodging CoR39 to be signed by all directors.
- Documents for lodgement

■ **Director Meetings and Resolutions (Cont.)**

- **Resignation of directors**

- A director must inform a company of his resignation in writing, stating the effective resignation date.
- An alternate director automatically ceases to be a director if the director he acts for, resigns from office.

- **Removal of directors**

- The board may remove a director if he has become disqualified, incapacitated and unlikely to regain his capacity and has neglected his duties as a director.
- The director in question must be given a reasonable time to make a presentation to the board.
- Director may not be removed by way of a round robin resolution.

6.3. Auditors

▪ Appointment of auditor

- It is not compulsory for a private or non-profit company to appoint an auditor.
- It is compulsory to audit a company's financial statements, if:
 - the public interest score exceeds 350 points; or
 - the public interest score exceeds 100 points, if the financial statements were, for a specific year, compiled internally.
- The auditor must be independent and not be a director, employee or regularly performed the duties of accountant for the five financial years immediately preceding the date of appointment.

6.3 Auditors (Cont.)

▪ Rotation of Auditors

- The same auditor may not serve as the auditor of a company for more than five consecutive financial years.
- The same audit company may however do the financial statements, but the individual auditors have to rotate.

■ **Accounting Records**

- Accounting records must be kept at, or be accessible from, the registered office of the company.
- A person who holds beneficial interest in any securities, is entitled to receive without charge, a copy of the financial statements.
- The following accounting records must be kept for a period of at least seven years:
 - Reports presented at AGM meetings, in written form or electronically
 - Annual Financial Statements, after the statements were issued
 - Accounting records, after completion

6.4 Committees

▪ Audit Committee

- Private and non-profit companies are not required to appoint an audit committee, unless required to have its financial statements audited every year (public interest score).
- If required to do so, every member of the audit committee must be a director of the company.
- May not be involved in the day to day management of the company's business for at least one financial year; prescribed officer or full time employee or officer of the company for the previous 3 years; a material supplier or customer of the company or be related or inter-related to any of the above.
- *Regulation 24* – at least one third of the audit committee must have academic qualifications relating to that field.

■ **Committees (Cont.)**

- **Social and Ethics Committee**

- Private and non-profit companies are not required to appoint a social and ethics committee.
- However, if the company scored above 500 points in terms of its' public interest score, the company will be required to appoint a social and ethics committee.
- A company may apply for exemption to appoint such committee.

- **Owner managed companies**

- No additional requirements set out in the Act for owner managed companies.

7. The Public Officer

7. Public Officer

- A company is required to appoint a Public Officer within one month after the company begins to carry on business.
- The Public Officer must be a natural person and a resident in the RSA.
- A company must notify SARS within 14 days if a new Public Officer is appointed.
- The appointment of a Public Officer is not registered with CIPC.
- A Public Officer will be held liable in his personal capacity, if any information provided to SARS and signed by him, proves to be false.

8. The Company Secretary

8. The Company Secretary

- Company Statutory duties have always been, but especially in the new Act, a very important part of a company's administration.
- Many documents, for instance for the issue of shares and certain special resolutions, will not be registered with CIPC. It will thus be the duty of the Company Secretary to keep proper record of this.
- The Act requires directors to have the skills and experience to manage and administer their companies. Not many directors are well informed on the company secretarial duties of their companies.
- In the light of the above, CIPC will in future solely act as an administration office and documents will not be screened as previously. It would thus be the duty of the person responsible for Company Statutory work to ensure that all documents will be done according to the Act and alterable provisions of the MOI.
- Proper minutes will be of utmost importance.

8. The Company Secretary (Cont.)

▪ Appointment of Company Secretary

- A private and non-profit company do not need to appoint a company secretary.
- Regulation 38 specifically points out that any person involved in the management or administration of a company, is deemed to be a designated officer of the company.
- It can therefore be accepted that the person responsible for company statutory work will be a designated officer of the company and will have equal liabilities as the directors.

8. The Company Secretary (Cont.)

▪ Duties of the Company Secretary

- Providing directors with their duties, responsibilities and powers.
- Making directors aware of any relevant law affecting the company.
- Reporting to the board any failure on the part of the company or directors.
- Ensuring that minutes of all meetings are properly recorded.
- Ensure that a copy of the financial statements are sent to every person entitled thereto.
- Take responsibility for payment of annual duties.

8. The Company Secretary (Cont.)

- **Statutory records**

Copy of MOI and any amendments thereto as well as any rules of the company.

- A company register that include record of:

- Directors
- Company secretary and auditor (if any)
- Shareholders and description of shares
- Registered address
- Any changes concerning directors, share capital, special resolutions, conditions that were altered in the MOI

8. The Company Secretary (Cont.)

- **The following statutory records must be kept for a period of seven years:**
 - Record of directors including: Full names, ID no (Copy of ID), address, written consent to act as director and resignation or retirement, after the director ceased to be a director
 - Reports presented at AGM meetings, in written form or electronically
 - Annual Financial Statements, after the statements were issued
 - Accounting records, after finalisation

8. The Company Secretary (Cont.)

- **Address where Company Statutory records are kept**
 - The registered address of a company might differ from the place where company records are kept. CIPC must be informed within 10 working days. (*Examples Annexure*)
- **Access to Company records**
 - A person who does not hold a beneficial interest in any securities, has the right to inspect, at a minimum charge of R100.00:
 - The MOI;
 - Record of directors;
 - Reports of annual meetings and financial statements;
 - Notices and minutes of shareholders' meetings; and
 - The security register
- No person, including shareholders, has the right to inspect the minutes and records of directors meetings, unless otherwise stated in the MOI.

9. Annual duties

9. Annual Duties

▪ Information required:

- Main business; Turnover on last financial statements; Name and Number of entity; Tel and e-mail address of company/CC.
- Confirmation of directors; members; Registered office; Auditors; Company Secretary; Location of records; Tel and e-mail address of company/CC.
- If data of above differs from CIPC, documents should be lodged with CIPC to register the corrections.
- Payment of annual duties will not be accepted the following year, unless the data has been corrected with CIPC.

9. Annual Duties (Cont.)

- **Fee and penalty table:**

- Close Corporations:

Annual Turnover	Annual duties	Penalty
0 – R50 million	R 100,00	R 150,00
Above R50 million	R 4 000,00	R 150,00

- Companies

Annual Turnover	Annual duties	Penalty
Less than R1 million	R 100,00	R 50,00
R1 – R10 million	R 450,00	R 150.00
R10 – R20 million	R 2 000,00	R 500,00
Above R25 million	R 3 000,00	R 1 000,00

- AFS/FAS
- Compliance checklist

QUESTIONS



Thank you