

COMPANIES ACT UPDATE – EDITH WILKINS

1. The section of the Companies Act that requires one to approve a director's salary in advance for two years. What happens to variations from this? What was the thought process, if any, of incorporating such a bizarre provision into the Companies Act?
Owner managed companies do not have to approve the remuneration in advance, but all other companies must have it approved by the shareholders 2 years in advance.

If it is not approved as prescribed by the Act, the company is in violation of the Act and may be prosecuted.
2. What are the traditional follow up steps and specific requirements of CIPC subsequent to a report of a material irregularity such as trading whilst insolvent.
The reviewer must send notice to CIPC to inform them of the irregularity and must send a follow up letter to CIPC to inform them if it was in fact an irregularity, if it was resolved or if it was not a material irregularity.
3. IF a subordination of loans is in place from shareholders of the company, are such loans to be disregarded in establishing whether the company is insolvent or not before a material irregularity is reported.
The shareholders loans are debt to the company and must be taken into account.
4. The traditional Registers required by the Companies Act previously used to be manual records kept in books (Hortors stationery). Are Excel spreadsheets equally acceptable? Is there a repository of such registers that can be referred to somewhere?
Combined company registers may be kept as previously done or in electronic format, as long as proper record are kept and backups are made of the electronic versions.
6. Does a Prescribed officer have to formally accept their appointment like Directors do or are they simply automatically covered by the Companies Act by virtue of the position/title within a company.
Public officers must accept their appointment and SARS must be informed who they are. This could be the auditor of the company as well and not necessarily someone employed by the company
7. Can a person providing contract or consulting services due to the absence of a full-time employee for say greater than 3 months in a senior role, be equally liable as a Prescribed officer in terms of the Companies Act by default?
Yes, during his time of office
8. Do you have a check-list other than the mandatory Compliance checklist of items one would attend to, to ensure appropriate compliance/governance?
Unfortunately not, there are too many aspects to take into account

9. Are there any issues in an external person both maintaining the accounting records AND compiling the financial Statements. (this question is asked on the FAS)
Not as far as I know
10. If the Financial statements cannot be compiled within 6 months of the year-end, does one simply notify the tribunal? (which email address?) What are the likely consequences for a company and does this vary depending on their PIS score?
The Act stipulates that AFS must be finalised within 6 months after the year end and the only way to get passed this, is to submit an application to the Tribunal for extension.
All companies must have financial statements, and the PIS will not make a difference,, but is taken into account to establish whether the AFS should be audited or not.
11. What are the various ways if any (other than personal insolvency) that a director can be held to be delinquent?
Serious misconduct, gross abuse of position, gross negligence, wilful misconduct or a breach of trust
12. Are there limitations as to who can issue share certificates of a company and what form they should take? What gives it authentic validity? (Previously share certificates would carry seals)
Once the share certificates are signed by the persons authorised by the Board and shareholding is recorded in the share register, it is valid
- There are no limitation on who may issue share certificates, as long as the required information is reflected as per Sec 50(2)(b)(i)
- (i) the names and addresses of the persons to whom the securities were issued;
 - (ii) the number of securities issued to each of them;
 - (iii) the number of, and prescribed circumstances relating to, any securities—
 - (aa) that have been placed in trust as contemplated in section 40(6)(d); or
 - (bb) whose transfer has been restricted;
 - (iv) in the case of securities contemplated in section 43— (aa) the number of those securities issued and outstanding; or (bb) the names and addresses of the registered owner of the security and any holders of a beneficial interest in the security; and (v) any other prescribed information
15. If a small company wishes to cease trading because it does not make economic sense, do they simply request de-registration from CIPC after settling SARS & other liabilities. If not, is a winding up process an absolute requirement (which would be costly for a company that does not have any funds)
If the company does not have any assets or liabilities, it may be deregistered, but if there are assets and liabilities and it cannot be settled, it must be liquidated.
16. Per inligting verskaf in webinar moet maatskappye wie die FAS indien **NIE** die Compliance Checklist doen, **NET** maatskappye wat hul state convert na XBRL.

“Notice 9 of 2020” bevestig die volgende;

- 3.2 If you have confirmed “no” that your company’s annual financial statements are not audited or independently reviewed you will not be required to complete the Compliance Checklist. An email will be sent to all active directors and to the person who submitted this information confirming this.
- 3.3 If you have confirmed “yes” that your company’s annual financial statements are audited or independently reviewed you must complete the Compliance Checklist.

Ons neem aan dat alle maatskappye wat ‘n Oorsig of Oudit het, die Compliance Checklist moet indien. Dit word nie gedoen volgens wie die FAS/AFS indien?

Korrek

Daar was ook genoem dat indien ‘n antwoord “NO” of “N/A” is op die Checklist, ‘n e-pos aan CoR135.1 gestuur moet word om rede te verskaf. Sal jy asseblief duidlikheid gee in hierdie verband, want daar is heelwat antwoorde op die Compliance Checklist wat “N/A” gemerk word, bv. “section 27, regulation 21”.

Ons neem aan dat indien ‘n maatskappy ‘n rede wil verskaf oor die antwoord, dit in die “comment box” gedoen kan word – vrywillig, dit is nie ‘n vereiste.

- 3.7 The Compliance Checklist now contains a comment box for each question, should companies wish to explain their specific answers given to the CIPC.

Korrek

17. Is there any information or guidance on the appointment of accountants (NOT auditors) as the registered representative / professional for the company?
This is an internal appointment and a resolution must be passed by the directors/shareholders in terms of the Act & the MOI, but it is not registered with CIPC.
18. Where the calculated securities transfer tax due is less than R100, is it still necessary to log the transaction on SARS eFiling eSTT?"
No, but it is good to have the SARS receipt on record
19. Is remuneration to directors treated separately?"
Usually all directors receive the same remuneration, except for the chair and should be treated separately.
20. How do you get a quorum for a round robin resolution/ measure the quorum?"
It is calculated in the same way as if a meeting was held
21. So did I get it right that the director's salary must be approve by a shareholder's resolution?"
Correct
22. does a company need to value their shares before the allocation to the various shareholders?"
Yes. This is the responsibility of the directors, and a third party may be appointed to assist.
23. Do I have it correct: an NGO must still have AGM's if it was registered before 2011
Correct, if the sections were not removed from the Articles of association
24. If a director of an NPC is also a member of management how do the shareholders have to approve the salary?
NPC’s have members instead of shareholders who will take on the same roll and where the NPC has

no members, directors are responsible for approving salaries etc.

25. What is the consequence of an AGM not being held within 6 months?"
Compliance notices issued by CIPC, fines or jail sentence for directors, because they are the responsible people and will be in contravention of the Act if a required AGM is not called for.
26. Can you apply for an extension on the time of the 6 months of the end of the financial year for a SOC."
Yes, by lodgement of an application to the Tribunal
27. RE meetings: we have many clients who are ""one shareholder/same director"" companies and they do not know about meetings and paperwork, etc. So, as part of our working papers we do minutes of an AGM as if they did so and then we list items there for which meetings should have been done and then the director/shareholder signs it. Is this ok?"
This is perfectly fine, we do it as well.
28. "SHARES: what is the difference between par-value and non par value shares?"
Par-value shares were created with a value e.g. R1.00 per share and could be issued at a higher value, and the difference between the par value of the shares and this issue price was the share premium.

No par value shares have no value, but may be issued at a value as well, which is called the "consideration paid" for shares and indicated as stated capital.
29. Payment of shares: must it be a deposit transaction on the company bank statement or can it be part of a loan from shareholder to the company ?"
It can be part of a loan
30. "How long do remaining shareholders have to consider the offer to sell in a private company? ..before selling to others"
There is no prescribed timeframe. The Act says "reasonable time"
31. We are in the process of ""going paperless"". Do we still need to have the original hard copy, e.g. old CK1 or Share Certificates?"
We keep original documents on file and electronic versions thereof. When transfers are done, the original share certificate and original transfer form are the proof of ownership.
32. Cipc search for directors: how can one find out if a person is a director of any other company? Previously able to search on CIPC, but don't see the option any more"
This is done on Bizportal now
33. "Can a CC draft / obtain a ""MOI"
No. A CC is a different type of entity and only companies have MOI's
34. "If a company has been placed in business rescue, can the director submit their resignation directly to CIPC if the secretarial dept of company is no longer operative?"
As long as the documents are signed by the business rescue practitioner, yes
35. Is there a recommended publication for practical guidelines for company secretarial practices, or should one rely on self-education via the CIPC platform?"
Lexis Nexis and Juta has good handbooks to choose from, but also read the Act and Regulations

published on the CIPC website.

36. Are e-mailed minutes just as good/legal as originally signed minutes?"
Yes, but originals must be kept on record with the rest of the company documents
37. Are any companies at all exempt from Compulsory checklist?"
Yes, all companies which are not obliged in terms of the Act or their MOI to be audited
38. If they pay for a share and it is no par value, is it then share premium"
It is stated capital
39. How much of the company act applies to micro businesses?"
All of it, if it is registered as a company.
40. How long is it taking CIPC to deregister a company Normally?"
More or less 3 months
41. "Does Cipc inform SARS when a company is deregistered?"
No, the proof of deregistration must be lodged with SARS once done by CIPC
42. What is the level of automatic interaction between CIPC and SARS...are they integrated in some way?"
When a company is registered, it automatically receives a Tax number from SARS ant that is the only direct inter-action between SARS and CIPC.
43. Client of mine is selling his farm to a company. The company was registered last year with R100 share capital. The value of the assets - land and animals = +/- R4m. 4 shares of R25 each was issued, with this transaction the co bought the shares aback and reissued the shares at R4,0 m to the seller of the farm and a minimal value to the 3 other shareholders. Is it Ok that we just increased the stated capital to R4,0 m and revalued the property and animals at the market value. We are using S42 of the Income Tax Act - Asset for Share Transfer."
Yes, as long as the value of the shares issued to the new shareholder is market-related.
44. "How many years can the same auditor serve in a Body Corporate?"
If it's registered as a company, 5 years
45. "Can the Managing Agent also be the Auditor?"
No
46. "Are sectional title blocks required to be audited necessarily?"
Only as required by the MOI and Companies Act, if it was registered before 1 May 2011 and has the old Articles of Association or if it is a public company.
47. if a private company needs to be audited (Statutory due to PI Score) it should have an audit committee?"
Not a requirement for private companies, but may appoint a committee
48. "what is the risk of a private company that is owned 100% by a Government Entity not converting to a SOC?"
SOC indicates that the majority shareholder is the government and I doubt the government will

engage with a company before proof that SOC is included in the name is provided.

49. Us as accountants do almost everything that is listed as duties of the secretary, does that automatically make us the secretary? And what are our risk for liability in this regard?"
If you do the job you are liable in the same manner as the directors. Auditors must not perform the duties of the company secretary, because the auditor should not be in a consulting position about non-financial matters.
50. Can a director of a company act as its Accounting Officer (the company does not require an audit) ?"
No, the accounting officer should be a person who is not affiliated with the company in any other capacity.
51. It is my understanding that CIPC has ""opened-up"" electronic access to third parties / applications on certain information about companies?"
This would be for that standard information as per the disclosure certificates issued by CIPC.
52. According to my clerk the Compliance Checklist does not pop up when we submit the Annual Return?"
Correct, you have to access the checklist separately, because CIPC builds the different sections on top of each other on the website, which could cause the system to crash.
53. Are reportable irregularities only applicable in the case of companies subject to independent review or audit? How about companies with PIS< 100?"
Only applicable to companies with independent reviews and audit
54. If a business has closed down what is the problem with just letting CIPC deregistering your business?"
The only problem is the outstanding annual duties which could be taken as debt and it is a contravention of the Act if annual duties are not paid
55. "What happens if a Director does not sign letter of consent, however acknowledged they are appointed to the Board. Thereafter they even sign a resolution. Now they say they do not want to sign the letter of consent"
The Act stipulates that a person is a director only once the consent is signed. The resolutions signed be=y him will not be valid.
56. "I think that we have to follow our responsibilities for NOCLAR where we are not performing an independent review or an audit, i.e. report the Non-Compliance with Laws and Regulations to the relevant parties - and this would not necessarily include CIPC...."
Correct